ASSESSING TREATY PERFORMANCE IN CHINA

Trade and Human Rights

Pitman B. Potter

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Preface

This book presents research conducted over seven years as part of the Asia Pacific Dispute Resolution (APDR) project at the University of British Columbia. The project examined normative and operational aspects of international trade and human rights performance in China, Japan, and Canada, by reference to the paradigms of *selective adaptation* and *institutional capacity.* Project results have been published in a range of academic and policy journals as well as edited and single-author volumes published in each of the three economies under study. This volume focuses on China's performance with respect to international standards on trade and human rights. China's accession to the World Trade Organization is discussed to provide context for emerging legal regimes on contracts and property. Its performance vis-à-vis international human rights standards is examined by reference to issues of sustainability and social justice. Our hope is that through this volume and other publications supported by the APDR project, dilemmas of trade and human rights performance in cross-cultural and comparative contexts may be better understood.

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Introduction

Current conditions of globalization have heightened the need for cross-cultural analysis of legal performance on international trade and human rights standards.[1] As recent expressions of globalization have brought about closer and more frequent contact among states and societies of the Asia-Pacific region, cross-cultural dimensions of legal interaction have become increasingly important. Dilemmas surrounding treaty behaviour in a multi-cultural context are emblematic of the challenges facing efforts to build unified standards for the rule of law. Many states and societies in the Asia-Pacific have resisted uncritical acceptance of liberal models for regulating trade and human rights, as indicated by the growing variation in interpretation of trade liberalization principles associated with the Asia-Pacific Economic Cooperation (APEC) and the World Trade Organization (WTO), and by tensions over policies and doctrines associated with the Bangkok and Vienna declarations on human rights.[2] Trade disputes have challenged cooperative economic relations, while human rights disputes have clouded a range of otherwise constructive bilateral and multilateral relationships.[3] Preventing these kinds of disputes where possible and managing them when necessary will require better understanding of the dynamics of treaty performance on trade and human rights.

Examining Treaty Performance

This study focuses on treaty performance as an alternative to treaty compliance in understanding international legal behaviour. While discourses of treaty compliance offer important and essential insights,[4] our alternative focus on treaty performance involves an assessment of local normative and operational conditions affecting legal behaviour with respect to treaty standards. This confronts tensions between international standards and local behaviour. The process of globalization has, on the one hand, appeared to usher in a trend toward convergence among national legal systems toward liberal imperatives of efficiency and autonomy.[5] International treaty discourse tends to examine and promote local application of international (often purportedly universal) standards.[6] However, local legal performance reveals the resiliency of local norms and practices – legal culture remains bound to the priorities of the local even as institutional arrangements converge on non-local models.[7]

Local performance of international standards also involves responses to complexity. Although the complexity of advanced systems may encourage functional specialization and the potential for efficiencies and reduced transaction costs,[8] it can also lead to disassociation and alienation among members of increasingly complex communities. As the complexities of socio-economic and political relations exceed the expectations and limits of common understanding, individuals and groups may experience disorientation as they struggle to relate to the increasingly complex systems in which they are participants. For individuals, alienation from socio-economic and political complexity may induce greater reliance on personal trust relationships, which themselves may come to be replaced by institutionalized relationships as informal kinship or personal ties become inadequate to manage complexity.[9] Systems of formal juristic rules and procedures become desirable when social relationships (including economic and political relationships) become so complex that shared norms, values, and language cannot be assumed, and the subjectivity and informality of social relations give way to the objectivity and formalism of legal relations.[10] Gradual formalization of behavioural standards from custom, to norm, and to law, for example, suggests a process of bringing order to conditions of increased complexity.[11] Religion can play a similar role,[12] as during the so-called Axial Age (1600 to 900 BCE), when monotheistic religions offered a response to social alienation driven by new complexities associated with technological changes in transportation and weaponry.[13] Marx's classic dictum on economic alienation in the context of the Industrial Revolution was

yet another reminder of the impact of increasingly complex economic conditions and the role of law and religion in attempting to bring order to such complexity.[14] Just as legal rules add predictability to increasingly complex economic and socio-cultural relationships, so too do religious precepts purport to offer clarity and meaning to such relationships. Thus, the emergence of institutional systems of order such as law and religion may be attributable in part to the search for order in increasingly complex circumstances.

As the dynamic of complexity and alienation contributes to institutional change, new patterns of privilege and interest also emerge. For some, these developments are welcome. The institutional and terminological requirements of formal law and religion, for example, may give rise to communities of specialized knowledge, which promote, operate, and benefit from such systems.[15] But for those lacking the specialized knowledge or beliefs that would enable them to rely on law and/or religion to lend meaning to increasingly complex environments, the sense of alienation may become even more profound. Hence, even as they appear to resolve the challenges of complexity, new systems of order may create new conditions for alienation, responses to which will depend in part on conditions of contending social groups working to maintain or change any particular status quo. We might describe this contentious process as involving transitions from complexity to alienation to resolution, and then to renewed complexity.

Complexity and alienation help explain the spread of globalized standards of legal behaviour. Under current conditions of globalization, we find new conditions of complexity in an ever-widening array of socio-economic and political relationships. The economic crises of the past few decades (including the Asian financial crisis of 1997 and continuing through the 2008-09 global recession) may be viewed as cases where factors of complexity have outstripped efforts at stability and order. Not surprisingly, we see efforts to bring greater formality to legal regulation, with renewed efforts to establish global standards for economic and social behaviour.[16] Yet the very complexity of international legal regimes may engender in states and local communities a sense of alienation from what are presented by hegemonic powers as universal norms and practices. Among both advanced and developing economies, we also see profound alienation from a world political economy that appears incapable of bringing stability and predictability to economic and social life.[17] Global standards become contested domains as members of society resist forms of legal regulation that appear incompatible with local norms and operational practices.[18] The failure of the Doha development round of the WTO and the ongoing

debates over agricultural subsidies and the global food system, as well as disagreements over strategies for managing climate change, are but a few examples.[19]

The dynamic of complexity and alienation also helps explain the development of legal institutions in China. Following the civil war and the seizure of political power by the Communist Party of China (CPC) in 1949, efforts such as the 1954 Constitution suggested an effort to formalize governance standards. Similarly, after the Cultural Revolution (1966-76), calls for a program of legal reform suggested an effort at greater formalization of rule in response to disorder. Yet during both of these periods, formalization itself also invited reliance on informal mechanisms such as the "letters and visits" petition system and the people's mediation dispute resolution system. The tension over formalization as a response to complexity continues today, with proposals emerging to replace the letters and visits system with formal litigation procedures and to reduce reliance on mediation, even as parallel efforts are made to preserve informal alternatives.[20]

Whether in China or more generally, the interplay of complexity and alienation appears to inform legal system development and the reception of international treaty standards. Even while international trade and human rights standards may promote consistency in response to complexity, these measures may themselves lead to alienation locally, to the extent that their (increasingly complex) content and processes defy local understanding and acceptance. As will be discussed in the chapters that follow, reception of international trade and human rights standards in China reflects China's increased participation in the world political economy even as conceptual and operational conflicts engender resistance. Understanding the effects of complexity/alienation dynamics on reception and resistance in China's engagement with international trade and human rights standards requires attention to local socio-cultural, economic, and political conditions for legal behaviour. These conditions present broad contours of legal performance in relation to treaties, what we call "treaty performance."

Treaty performance applies socio-legal perspectives on local reception and legal transplants[21] to the treaty focus of public international law studies. Whereas treaty compliance involves the fulfillment by states of specific treaty obligations,[22] treaty performance points to more general conditions of legal behaviour in relation to treaty standards. In contrast to issues of state intentionality and enforcement that inform treaty compliance analysis, assessing treaty performance involves broader questions around whether and how local legal practices reflect ideals and processes expressed through

treaty standards.[23] While compliance analysis involves comparisons of state behaviour with the legal requirements of specific treaty texts and interpretation,[24] assessment of treaty performance focuses on local legal behaviour in light of normative and operational comparisons with international standards.

Treaty performance is not unrelated to legal conclusions about compliance, but allows for an alternative assessment of legal behaviour in relation to treaty standards. For example, state conduct on a wide array of legal and policy issues involving trade and human rights may well be deemed "compliant" with the technical requirements of international treaties (or at least not "out of compliance") even when performance by the state in question falls short of treaty ideals. For example, processes for government procurement that favour local businesses over their international competitors may fall short of expectations of trade partners and private actors, even if they meet the compliance requirements of the Government Procurement Agreement (GPA).[25] As well, where a state declines to ratify a particular treaty or files reservations about the application of certain of its provisions, the state's performance may be considered to be technically in compliance, even if at variance with expectations about the treaty standards in question.[26] China's continued denial of rights to collective bargaining and independent labour unions,[27] for example, may fall short of expectations on labour relations under the International Labour Organization (ILO) treaty regime, but since China has not signed the ILO conventions on these issues and has issued reservations about them in other treaties, China's behaviour may not be deemed out of compliance. Thus, our focus on treaty performance permits a more expansive analysis of legal behaviour with respect to treaty standards, and can also support assessments of technical compliance.

The distinction between compliance and performance becomes particularly acute where local norms and operational arrangements stand in contrast to those informing international treaties. These tensions come into sharp relief against the background of globalization, where power imbalances between developed and developing economies have fostered the dissemination of trade and human rights standards associated with North America and Europe, even as resilient local norms and operational practices elsewhere remain resistant to change. Understanding the normative and operational dimensions of local treaty performance can supplement rules-based approaches to compliance with more pluralistic interpretations grounded in systemic analysis of local conditions.[28] This is not to suggest that treaty performance should replace compliance altogether as a focus for

study of treaty practice and policy. Rather, analysis of treaty performance provides additional perspectives and insights that can make managing and forecasting treaty compliance more effective. Leaving aside the question of whether attending to treaty performance challenges the hegemony of treaty compliance as the focus of international legal analysis, and whether this is desirable as a policy matter, the reality of international practice suggests that treaty performance remains an integral component of international legal behaviour.

With due regard to the limits of grand theory,[29] our efforts to build understanding of treaty performance in cross-cultural contexts requires a comprehensive approach that includes attention to normative and operational dynamics. Building upon existing paradigms associated with institutional performance,[30] cultural determinism,[31] and behavioural law and economics[32] that are often used to explain cross-cultural legal relationships, we may also move beyond the limits of these frameworks. In contrast to expectations about convergence that suggest development toward a globally unified system of institutional practices,[33] treaty performance may be seen as a product of local normative and operational factors. These may be understood by reference to the dynamics of selective adaptation and institutional capacity.[34] Normative dynamics of *selective adaptation* help to explain variations in performance of non-local standards by reference to different levels of normative consensus. Operational dynamics of *institutional capacity* help to explain variations in local implementation of non-local rule regimes by reference to structural conditions of implementing agencies. In terms of factor analysis, treaty performance may be seen as a function of selective adaption and institutional capacity ($T = SA \times IC$). As discussed in the following sections, each of the paradigms of selective adaptation and institutional capacity has a number of internal elements, which illuminate further the conditions of local treaty performance.

Normative Dynamics of Treaty Performance: From Mimesis to Selective Adaptation

Under conditions where global regulatory standards are indefinite, local interpretation becomes a practical reality for treaty performance. Local socialization of global standards appears to proceed from dynamics of "mimesis" that presuppose an imperative of reflexive imitation between individuals and groups, and even states and economies.[35] Thus, emerging economies exploring the conditions for participation in global legal regimes may engage in mimesis of the forms and structures associated with such regimes.[36] Our research builds on these perspectives, but suggests that

normative interaction in relation to treaty standards is informed by local mediative processes that we term "selective adaptation." In the absence of normative consensus between individual countries and the global legal system and political economy, selective adaptation suggests a spectrum of possibilities for implementation of non-local standards, based on varying degrees of conformity among local and non-local norms. Augmenting perspectives on "socialization" and "legal transplants" that focus on local internalization of international beliefs and practices,[37] selective adaptation seeks to explain a range of localized responses to external regulatory standards by reference to preconditions grounded in local norms.

Whereas "mimesis" suggests dynamics and consequences of imitation, selective adaptation reveals the fundamental role of normative intermediation that determines the scope for imitation. Selective adaptation involves the processes by which implementation of non-local rule regimes is mediated by the influence of local norms.[38] Selective adaptation is made possible by the role of "interpretive communities" in the reception of international rule regimes.[39] In the course of this process, these interpretive communities express their own normative preferences, and in so doing selectively adapt non-local standards to local conditions. Whether in response to International Monetary Fund (IMF) funding requirements,[40] US nuclear security mandates,[41] or UN human rights requirements,[42] interpretive communities of the Asia-Pacific engage – sometimes wilfully, often unconsciously – in selective adaptation as a coping strategy for balancing local needs with the requirements of performance with practice rules imposed from outside, by interpreting these non-local rules in terms of local norms. In China, for example, government officials, socio-economic and professional elites, and other privileged groups exercise authority of political position, specialized knowledge, and/or socio-economic status to interpret non-local standards for application locally.[43]

Although local performance of trade and human rights treaty standards involves common elements of culture, politics, and socio-economic relations, there are also important differences. Generally speaking, trade performance involves relations between organized state and non-state actors that, although subject to asymmetries of resources and information, nonetheless operate in a broadly consensual system of standards and institutions. Human rights performance, by contrast, often involves tensions between states and their agencies (and collaborative organizations and interests), on the one hand, and individuals and groups in society that often lack organization, status, and resources, on the other. Power disparities abound in

human rights performance, more so than in trade performance. As well, assumptions about the universality of economic interests often marginalize the role of culture in trade disputes, whereas human rights disputes often involve issues of cultural difference more directly. The general consensus on the applicability of textual sources of trade standards – primarily those associated with the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) – also contrasts with disputes over international human rights texts and standards. Contested application of different human rights standards stemming from the differing normative priorities in, for example, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) often leads to disagreement over which texts and standards are most authoritative.

The normative dimensions examined in this volume focus on local legal performance in China with respect to international trade and human rights standards. The dominant practice standards for international trade are taken from the GATT/WTO system, while human rights standards are derived primarily from the Universal Declaration of Human Rights and the associated International Covenants on political and civil, and economic, social, and cultural rights. Although the origins of these standards vary, they have all been disseminated internationally through the dynamics of globalization, thus providing the opportunity for selective adaptation locally.

Elements of Selective Adaptation

Selective adaptation of international trade and human rights standards involves both conscious and unconscious processes. The relationship between these is revealed through the component elements of perception, complementarity, and legitimacy.[44] *Perception* is a largely unconscious process by which members of interpretive communities encounter, interrogate, and interpret non-local and local standards by reference to their own existing psychological and socio-cultural norms.[45] For example, perception will affect the ways in which a community of legal specialists charged with preparing regulations on judicial review of administrative action, for example, interpret models of judicial review in other countries. Perceptions about the purpose, content, and effect of foreign and local institutional arrangements affect the processes and results of selective adaptation. For example, even where local institutional arrangements for political, social, and economic relations appear to have followed international models and operational

forms, local interpretation of international trade and human rights standards will likely hinge on the content and accuracy of perceptions about such non-local institutional rules and practices. Perceptions about the norms that inform local systems are also important. Thus, perception of what is required by WTO disciplines on transparency and rule of law vary across (and within) different societies, ranging from simple commitments to publish formal laws and regulations, to more expansive notions about participation in rule making and the need for appeals processes to restrain state regulatory oversight.[46] Similarly, perceptions about the requirements of the ICESCR regarding rights to health can be expected to vary across the boundaries of states and cultural systems.

Drawn from principles of nuclear physics, *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.[47] Complementarity describes the structural and substantive relationships between local and non-local standards and norms. Complementarity may influence the extent to which norms and practices of local cultural communities can engage in mutually effective ways with institutional rules and processes associated with outside systems. Complementarity may inform the relationship between local accommodation and resistance to international standards on trade and human rights in light of local conditions, needs, and values. Thus, the local effects of WTO processes for trade dispute resolution, for example, will depend in part on whether processes privileging consensual or compulsory mechanisms are either more or less complementary to local dispute resolution systems.[48] Similarly, local application of ILO standards on labour relations, for example, can be understood in light of complementarity with local labour rights regimes.[49]

Legitimacy involves largely unconscious processes of receiving and accepting claims to authority for local and non-local standards, as well as conscious responses by the interpretive communities involved in engaging with local and non-local standards.[50] Legitimacy describes the extent of local community support for the purposes and consequences of engagement with non-local standards. Legitimacy also involves the ways in which interpretive communities consciously respond to these circumstances. Although the forms and requirements of legitimacy may vary, it remains essential to the effectiveness of selectively adapted governance practices.

Whether viewed in terms of pragmatic assessments of the benefits conferred by particular institutional systems, conformity with moral values, or the rational acceptance of the authority of specific regulatory arrangements,[51] legitimacy is an essential element of legal behaviour and treaty performance. Legitimacy may derive from any variety of factors, including patterns of socio-cultural relations, ideology, or local socio-economic or political interest. Nationalism, for example, has been identified as a key ideological element that lends legitimacy and effectiveness to capitalist economic growth,[52] and is no less relevant under conditions of globalization that support policies of market transition.[53]

Legitimacy may play a significant role in local implementation of trade disciplines on national treatment or intellectual property, where external pressures for market access or protection of ideas may be seen locally as intrusions on sovereignty and local autonomy. Legitimacy also plays a role in local acceptance of international human rights standards – both in terms of the substantive standards themselves and with regard to the process for entrenching substantive standards as international obligations. Thus, legitimacy of international trade and human rights standards will likely depend on the legitimacy accorded both the processes and content of the standards themselves and the responses of the local interpretive community to interpretation and application. For example, in the context of WTO accession, use of the trade policy term "concession" was particularly sensitive in China in light of a long history of foreign-owned factories operating out of semi-colonial "concessions" in China.[54] Similarly, human rights treaties drafted without China's participation are seen as imposed and having weak legitimacy.[55] Orthodox perspectives requiring international treaty standards to be incorporated into domestic legislation reflect approaches to legitimacy that challenge the self-enforcing character of international law.[56]

A Model for Applying Selective Adaptation

Thus, perception, complementarity, and legitimacy all affect the potential for integrating trade standards at the local level. We may conceive of selective adaptation by reference to the following formula:[57]

$$SA = \frac{\text{Rule Regime}}{(N = Nf \text{ var. } Nl) \times [(P = Pf \text{ var. } Pl) + (C = Of \text{ var. } Ol) + Jn]}$$

Selective adaptation (*SA*) may be seen as a function of a particular rule regime in light of the relationship between local and foreign norms (*Nl* and

Nf) attached to particular rule regimes, as affected by factors of local *perception* (*P*) concerning foreign (*Pf*) and local (*Pl*) norms; the extent of *complementarity* (*C*) between foreign (*Of*) and local (*Ol*) norms; and the broader question of *legitimacy* (*J*). The rule/norm relationship is thus defined as one between a rule regime disseminated through processes of globalization, as qualified by the possibility of normative difference between the global and the local, which in turn is affected by factors of perception, complementarity, and legitimacy.

Operational Perspectives on Treaty Performance: The Role of Institutional Capacity

Treaty performance also involves operational dynamics linked with structural and organizational dimensions of implementing agencies. Even in circumstances where normative tensions illuminated through selective adaptation are absent, treaty performance depends on the capacity of implementing agencies to carry out performance and enforcement responsibilities. "Institutional capacity" refers to the ability of institutions to perform their assigned tasks in the context of local socio-economic and political conditions.[58] Studying local performance of international trade and human rights standards challenges assumptions and expectations about institutional behaviour. European and North American perspectives often assume the centrality of institutions in economic and political performance. The record in China suggests otherwise, however. Observers of China's evolving property law regime, for example, have pointed out the enduring mystery of how China has managed to achieve impressive rates of economic growth over more than three decades without an institutionalized system of property rights.[59] Other scholars have asked similar questions about the stability of the political and socio-economic systems.[60] At the end of the day, we may be forced to recognize that institutions (particularly legal institutions) play a substantively different role in China than in Europe and North America. Although the interplay of legal institutions and economic performance remains central to the success of China's development agenda, the Communist Party's domination of the regulatory process and the separation of nominal governance authority from practical political and economic power challenge the ability of formal institutions to manage the complexities of socio-economic and political change.

Questions about institutional and organizational performance have been examined from a variety of relational perspectives that focus on issues of responsibility between organizations and their constituencies; efficiency in performance and the use of resources; and accountability to varying sources

of authority.[61] Functional perspectives have also been explored, in such areas as access to information; effectiveness and methods of communication; organizational symmetry; and the ability to enforce rules and directives.[62] However useful these approaches may be, actual institutional performance remains contingent on domestic political and socio-economic conditions,[63] a fact that invites examination of other dimensions of institutional capacity.

In the case of China, for example, local conditions of rapid socio-economic and political transformation pose particular challenges for institutional capacity. During the post-Mao period, as a component of a new approach to building regime legitimacy, the government offered what amounted to a trade-off of greater autonomy in local socio-economic relations for political loyalty. Individuals and groups were granted limited socio-economic freedoms in exchange for continued political subservience. With official acceptance of the decline of class struggle, the regime turned its attention away from managing social behaviour and more toward supporting economic growth. The gradual loosening of social and economic restraints presented the regime with new challenges of maintaining political control while still presenting a broad image of tolerance aimed at building legitimacy. Under such circumstances, regulatory institutions operate in an environment of changing contexts and priorities. No longer is the government focused on directing economic behaviour to meet the imperatives of state planning, and on managing social relations to satisfy the requirements of revolutionary transformation; instead, it aims to facilitate broader socio-economic autonomy that is still subject to political oversight. Yet the policy consensus concerning specific dimensions of this transformation remains weak, and so institutional capacity may depend on the more fundamental conditions of identity and perspective.[64]

Elements of Institutional Capacity

In China, particular challenges of institutional capacity invite attention to operational questions of institutional purpose, location, orientation, and cohesion. *Institutional purpose* concerns the way in which the goals of institutions reflect material and ideological contexts; the availability and nature of financial, human, and other resources; and the various limitations that attend institutional performance. Institutional purpose plays a significant role in determining the capacity of institutions to respond to socio-economic change. In an environment of formalism that conflates policy ideals with the

interpretation and enforcement of law, China's legal institutions function largely according to policy priorities imposed upon them by the Party regime.[65] Just as China's political reform has been driven by policy goals of social stability and the need to preserve the Communist Party's monopoly on power, so too has legal reform been driven largely by policy imperatives centred on economic growth aimed at building Party legitimacy. Indeed, the continued importance of the state sector in China's economic policies and practices has been seen as a significant challenge to the full development of a market economy.[66] The "relative autonomy" ascribed to legal institutions in the European and North American traditions may be even more limited in the case of legal reform in China.[67] Thus, the capacity of China's legal institutions reflects the extent of commonality of purpose between legal norms and processes and the policy imperatives of the Chinese government. Problems arise when policy is unclear or in conflict with the requirements for the rule of law. As indicated by the near paralysis that grips institutional decision making in anticipation of major Party congresses – the recent Eighteenth CPC National Congress is but one example[68] – contention on any of the myriad questions that inform purpose and policy may delay communication of policy mandates and impede the responsiveness of legal institutions to carry them out. More seriously, where the requirements of regime policies subvert the requirements of legal rule, as in cases involving the rights of criminal defendants or labour relations,[69] the capacity of legal institutions suffers.

Institutional capacity also depends on issues of *institutional location,* particularly the question of balancing central authority with decentralization of social and economic development initiatives.[70] China has a long tradition of tension between local and central authorities and among the regions. Under Deng Xiaoping, however, social and economic development depended to a significant degree on local initiative.[71] Agricultural reforms in Sichuan and Anhui provinces, for example, paved the way for national policies on household farming.[72] In Guangdong and Fujian provinces, local initiatives supported the development of special economic zones and expanded foreign trade links.[73] The practical divisions of power and authority between local and central government departments permit an interplay of power and politics that echoes practices of federalism.[74] Yet the PRC Constitution provides that China is a unitary rather than a federal state that, while nominally encouraging local initiative, still subjects local authorities to the unified leadership of the central government.[75] And while scholarly

discourses have increasingly come to accept the application of federalist principles to China's circumstances,[76] the orientation toward central authority as a model for local legislative best practices continues.[77] In the bargaining process that accompanies the allocation of resources and the distribution of costs and benefits of policy initiatives,[78] formalistic requirements of submission to the unified state limit the flexibility of local officials. Rigid adherence to contested ideals of unitary authority also limits the ability of legal institutions at both the local and national level to exercise even limited autonomy in support of predictability and stability in socio-economic and political relations. As a result, the institutional capacity of the legal system more broadly suffers.

Institutional capacity also depends on *institutional orientation.* Orientation refers to the priorities and habitual practices that inform institutional performance. For legal institutions in China, orientation involves particularly the tension between formal and informal modes of operation. Much has been written on the role of informal networks as vehicles for socio-economic regulation.[79] *Guanxi* (generally translated as "relationship[s]") in China is often seen as operating in juxtaposition to the role of law and legal institutions,[80] reflecting perceptions about the weakness of institutions in managing social, economic, and political relations and allocating resources.[81] Thus, *guanxi* may serve as a substitute for the norms and processes associated with formal institutions, permitting more flexible responses to increasingly complex social, economic, and political relations. The resiliency of informal relational networks has called attention to the potential re-emergence of civil society dynamics in China.[82] However, the potential role of informal institutions is challenged by the regime's continued insistence on maintaining formal systems to defend ideological orthodoxy and enforce political loyalty.[83] The tension between the regime's statist ethic of institutional formalism and the pervasive informal arrangements at the local level tends to divert resources from institutional performance and undermines institutional capacity.

Finally, institutional capacity depends on issues of *institutional cohesion,* involving the willingness of individuals within institutions to comply with edicts from organizational and extra-organizational leaders, and to enforce institutional goals. Institutional cohesion involves the degree of commonality among individual members of organizations in the recognition and enforcement of rules and standards.[84] Conflicts arise when the imperatives of particular organizations differ from those of the individuals within these

organizations – such as where policy goals that drive organizational priorities require subordination of the parochial interests of individual officials. In China, anti-corruption campaigns are essentially attempts to promote bureaucratic reform by disciplining and subordinating the personal goals of individual officials to the organizational priorities of institutions.[85] Rule-of-law systems to combat corruption have been uneven, and the Party's disciplinary system has been of uncertain effect in deterring violations, even in legal institutions.[86] Although the decision of the Sixteenth CPC National Congress to invite capitalists into the Party was intended to strengthen corruption control through the Party's disciplinary system, problems of cohesion continue to challenge institutional capacity.[87] The recent purge of former Chongqing Party Secretary Bo Xilai for violations of Party discipline underscored both the regime's determination to use Party disciplinary systems to punish corruption and questions about their effectiveness.[88]

A Model for Applying Institutional Capacity

Examined with reference to factor analysis, institutional capacity can be expressed through the following formula:[89]

$$IC = \frac{\text{Institutional Goal}}{\left(U = \frac{1}{1-u}\right)(S = Sn)(A = Ar \text{ var. } As)\left(D = \frac{1}{1-a}\right)}$$

Thus institutional capacity (IC) may be seen as a function of a particular institutional goal being affected by factors of institutional *purpose* (*U*) concerning the institutional goal; the effects of *location* (*S*) on understanding of the institutional goal; the effects of formal and informal *orientation* (*Ar* and *As*) regarding how the goal is to be pursued; and the extent of institutional *cohesion* (*D*) in organizational structure and behaviour.

Whereas selective adaptation addresses the relationship between rule regimes and underlying norms, institutional capacity addresses the functioning of implementing institutions even in the absence of normative conflict. Institutional capacity helps build an understanding of operational relationships among regulatory institutions as an indicator of legal performance of non-local rule regimes. It helps build an understanding of local performance with respect to international standards, even where acceptance of such standards and assimilation of their underlying norms are relatively coterminous. Finally, institutional capacity helps build an understanding of

performance of international standards as more than simply a matter of political will, but also a matter of structural relationships among regulatory institutions. In the cross-cultural context of globalization, institutional capacity augments selective adaptation to build better understanding of local performance of international treaty standards.

Summary

This book is a work of interpretation, suggesting an approach to understanding legal performance in China in relation to international treaty standards on trade and human rights. Local implementation of international treaty standards remains an issue of significant importance and discord. The paradigms of selective adaptation and institutional capacity call attention to normative and operational dimensions of local performance in connection with international trade and human rights treaty standards. The insights presented by normative and operational analysis of treaty performance have potential to build understanding as well as to manage and reduce the incidence of disputes. Treaty performance assessments can enable scholars and policy makers to understand more fully and predict more accurately the likely contours of local legal behaviour. In turn, this may lead to the development of more effective responses to treaty behaviour.

The discussion in the chapters that follow provides an interpretive case study for understanding local treaty performance in China, and suggests intriguing possibilities for broader prediction. Moving from the "what" and the "how" of legal performance in China – much of which is well known[90] – to the "why" is an essential step toward understanding treaty performance. Thus, although the circumstances of China's accession to the GATT/WTO are well known, our understanding of the reasons affecting China's performance of GATT/WTO trade standards remains imperfect. Similarly, in the areas of contract and property law, the content and origins of these essential legal regimes are reasonably well understood and yet we still have much to discover in terms of the reasons underlying performance. In the area of human rights, the content and process of laws and practices in China are well documented but we still face uncertainties in explaining the underlying reasons for legal system performance. The chapters that follow offer an approach to explanation that looks beyond immediate issues of political will and intentionality to more fundamental questions about norms and operations. This is only a first step, but one that enables us to look beyond compliance with legal texts to broader questions about international

and comparative legal performance. It is hoped that further research will support more scholarly discovery, contribute to more informed policy making, and strengthen international understanding about trade and human rights performance, thereby reducing and preventing disputes and facilitating more effective international cooperation.