

**THE POLITICAL ECONOMY
OF SOVEREIGNTY REVISITED:
A RE-EXAMINATION OF THE
PUBLIC CHOICE MODEL
IN LIGHT OF CHINA'S ACCESSION
TO THE WORLD TRADE ORGANIZATION**

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INTRODUCTION

THE STATE HAS LONG BEEN the principal actor in the international arena. This remains the case, notwithstanding the proliferation of supra-national institutions and sub-national organizations. State action, in turn, continues to reflect the notion of sovereignty in its largely traditional (undiluted but not unfettered) form. The international system may have acquired a less differentiated character since the Second World War, yet the principle of state independence and equality has not lost its theoretical and practical relevance.

National interests, however defined, are thus often placed above all others. Moreover, the pursuit of such interests generally involves the exercise of a high measure of discretion on the part of the state. In this respect, current practices do not diverge significantly from those that prevailed in broadly similar circumstances in the past. The institutional infrastructure has clearly undergone a transformation. Today's international discourse (rhetoric?) may also have undertones indicative of a greater willingness to transcend parochial interests than witnessed prior to the establishment of the United Nations. State behavior nevertheless seems to be mostly consistent with the historical pattern.¹

At the same time, there has been a marked increase in the number of international agreements entered into by sovereign parties and, as noted, multilateral organizations have experienced very rapid growth. This trend is difficult to reconcile with the persistence of state

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¹ See generally Michael Ross Fowler & Julie Marie Bunck, *Law, Power, and the Sovereign State* (University Park: The Pennsylvania State University Press, 1995); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

power. On the one hand, the quest for national autonomy apparently manifests itself as strongly as ever; on the other hand, developments are taking place on the international front that, on the face of it, point in the opposite direction. These developments have such momentum that one may be inclined to embrace the idea that the reluctance to surrender a meaningful degree of sovereignty is either the exception to the norm or a posture that cannot be effectively adopted in contemporary international settings.²

There is no dearth of legal scholars favorably disposed toward this proposition.³ Some argue, however, that the contradictions observed are the product of inaccurate reading of state actions rather than blurred international realities. According to the latter, the root of the problem lies in the academic tendency to attribute, in an old-style fashion, to policy makers engaged in the conduct of foreign affairs (or, for that matter, in any other policy domain) motives that are overly idealistic in nature. If the less utopian public choice theoretical framework is employed, the picture that emerges, it is claimed, does not generate conflicting signals.⁴

This relatively new framework has evolved as a possible alternative to its older public interest counterpart, although the two diametrically opposed perspectives may be viewed as complementary in character. The assumption underlying the latter is that policy makers are driven by a desire to maximize the common good/public interest (whether in the national or sub-national context). In pursuit of this lofty goal, they endeavor to serve the community in an optimal manner by addressing thoroughly collective action problems and tackling expertly private market failures, either through a direct production of goods and services or via regulation in its various forms.⁵

The public interest model has been criticized for offering insights into government functioning that are simply not credible. Two of its supposed limitations have been subject to particularly close scrutiny: the

² See generally Rodney Bruce Hall, *National Collective Identity: Social Constructs and International Systems* (New York: Columbia University Press, 1999); Daniel Philpott, *Revolutions in Sovereignty* (Princeton: Princeton University Press, 2001).

³ See generally William Bradford, "International Legal Compliance: Surveying the Field" (Winter, 2005) 36 *Geo. J. Int'l L.* 495.

⁴ *Ibid.*; see generally Kenneth W. Abbott, "The Trading Nation's Dilemma: The Functions of the Law of International Trade" (1985) 26:2 *Harv. Int'l L.J.* 501; Catherine England, *Governing Banking's Future: Markets vs. Regulation* (Washington: Cato Institute, 1991); Enrico Colombatto & Jonathan R. Macey, "A Public Choice Model of International Economic Cooperation and the Decline of the Nation State" (1996) 18 *Cardozo L. Rev.* 925; Kal Raustiala, "Rethinking the Sovereignty Debate in International Economic Law" (2003) 6 *J. Int'l Econ. L.* 841.

⁵ See generally Robert E. McCormick & Robert D. Tollison, *Politicians, Legislation, and the Economy: An Inquiry into the Interest-group Theory of Government* (Boston: Martinus Nijhoff Publishing, 1981).

notion that policy makers invariably operate at the benevolent end of the attitudinal spectrum and that they possess the ability to identify all relevant problems and opportunities and can respond to them in a timely and competent manner. The point is that government malevolence manifests itself often in authoritarian settings, and even in democratic environments, the selfless quest for ways to provide the best service to the public is a rare phenomenon. By the same token, government failure—reflecting, *inter alia*, inadequate capabilities—is a common occurrence.⁶

The public choice school aims to inject a measure of realism into the analysis of behavior on the supply side of the political arena. Its members argue that elected and unelected officials (predominantly bureaucrats in the case of the latter) are “rationally self-interested.” This implies that, like actors in the private sector, they seek to maximize personal advantage (“utility,” which encompasses power, wealth, etc.), even when such selfish conduct is inconsistent with the common good. They also display fallibility in the exercise of their duties (partly because of inner orientation, and partly because of the prevalence of various individual and organizational constraints).⁷

The notion of rational self-interest is by no means one with which students of international relations (including international law) are generally unfamiliar. It features prominently in regime theory, which qualifies as a mainstream component of the field (“regimes” can be loosely defined as sets of explicit “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area”; regimes may similarly be viewed as “man-made arrangements [social institutions] for managing conflict in a setting of interdependence”).⁸

Regime theory is underpinned by a more limited conception of rational self-interest, however, than its public choice counterpart. The crucial difference between these two perspectives lies in the fact that, whereas the former attributes rational self-interest to *states*, the latter makes *individuals* the focus of its attention. Or, to put it differently, while regime theory posits that *governments* have interests and preferences independent of the personal interests and preferences of actors (bureaucrats, politicians, representatives of pressure groups, etc.) who

⁶ *Ibid.*

⁷ See generally Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: The University of Chicago Press, 1991).

⁸ See Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983) at 1-2, 23 & 26. See also Robert Owen Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

shape national policy, members of the public choice school claim that individual-level influences are paramount.⁹

The emphasis on the personal dimension of state behavior reflects strong misgivings about ascribing interests and preferences to collective entities of any kind. The fundamental assumption is that institutions in general, and governments in particular, do not have interests and preferences in the strict sense of the term; individuals are the ones who express them and they thus constitute the appropriate unit of analysis in this context. It follows that public policy is driven by the interests and preferences of powerful constituents, rather than inspired by some mythically determined and scrupulously adhered to abstract construct, such as the “common good” or even “national interest.”¹⁰

If this argument is accepted as valid, one may be able to portray the persistent quest for maximizing the state’s freedom of action as not being at variance with the willingness to surrender sovereignty in multilateral contexts, a phenomenon otherwise inevitably viewed as a paradox. Key players in the domestic arena have no intention, *ceteris paribus*, of diluting their authority (a proxy for a host of personal privileges) by entering into agreements with representatives of different governments. It is nevertheless in their interest to do so when shifts in the socio-economic environment (market processes, technological change, and similar exogenous variables) deprive them of the power to operate unilaterally. In such circumstances, resorting to international cooperation is a tactic conducive to political survival.¹¹

A number of empirical studies lend support to this controversial hypothesis. The legal scholars who have conducted them demonstrate compellingly that domestic policy makers apparently bent on preserving their high degree of discretion (again, a proxy for a host of personal privileges) enter into international agreements because, given the external constraints, the alternative is less palatable. Somewhat counter-intuitively, opportunistically-managed sacrifice is thus an effective means to minimize threats to one’s position, where appropriate. Clinging unrealistically to a narrowly-focused national strategy could at times be an unproductive course of action, for it might lead to an erosion of power of players displaying such inflexibility.¹²

The problem lies in the fact that this conclusion rests on a rather thin empirical foundation. Only a handful of relevant international cases have been analyzed within the public choice framework as outlined here. Virtually all of them involve economic/financial regulation and have a

⁹ Frickey, *supra* note 7.

¹⁰ *Ibid.*

¹¹ Abbott, *supra* note 4; England, *supra* note 4; Colombatto & Macey, *supra* note 4; Raustiala, *supra* note 4.

¹² *Ibid.*

pronounced contemporary American dimension. The scope of extrapolating broadly from such a modest sample is therefore distinctly limited. Additional studies need to be undertaken, and the perspective, in terms of policy issues and geographical/historical representation, should be widened. The purpose of this paper is to contribute toward that effort by examining, from a public choice standpoint, China's decision to seek accession to the WTO. A multifaceted appraisal of this complex strategic move—focusing initially on the ramifications of far-reaching liberalization measures implemented across the Chinese economic policy spectrum, particularly on the foreign investment and trade front, and followed by an empirical assessment of the strengths and limitations of the public choice model—suggests that elite opportunism may not be the sole factor affecting the exercise of sovereignty in elaborate multilateral settings.

THE IMPLICATIONS OF “DEEP” INTEGRATION INTO THE WORLD ECONOMY

INSTITUTIONAL REFORMS ARE NORMALLY CHARACTERIZED as “gradual” or “radical.”¹³ In China's case, these adjectives are not entirely useful. The revamping of the pre-1978 structures, marked by both an extremely high degree of centralization and an extraordinary level of arbitrariness, has been a very long process. Yet, it would be inappropriate to equate such managed change with gradualism. During the extended retreat from Maoism, some radical decisions have been made, most notably to open the totally isolated country to foreign investment/trade and restore private property rights in the agricultural sector.¹⁴

While Gorbachev-style large-scale shock therapy has not been adopted, Chinese reforms for the past three decades or so have thus featured a mixture of steady movement and dramatic leaps forward. It is hence tempting to view WTO accession as an event which is no more likely to destabilize the current system than any other major strategic initiative embarked upon since 1978. One may legitimately argue, however, that it has potentially greater political ramifications than almost any other similar step taken by the post-Mao leadership. After all,

¹³ See generally Gordon G. Chang, *The Coming Collapse of China* (New York: Random House, 2001); Joe Studwell, *The China Dream: The Quest for the Last Great Untapped Market on Earth* (London: Profile Books Ltd., 2002); Minxin Pei, *China's Trapped Transition: The Limits of Developmental Autocracy* (Cambridge: Harvard University Press, 2006); James Mann, *The China Fantasy: How Our Leaders Explain Away Chinese Repression* (New York: Viking Adult, 2007); Susan L. Shirk, *China: Fragile Superpower* (Oxford: Oxford University Press, 2007).

¹⁴ *Ibid.*

the signing, on 11 November 2001, of the 900-page document paving the way for entry into the WTO was the culmination of truly tortuous and heavily contested negotiations stretching over 15 years.

The net economic benefits of accession are not easy to assess precisely. Nevertheless, it is possible to obtain a general picture, if the time horizon is varied to allow the traditional distinction between “long-term” and “medium-term” dynamics (the short-term perspective being of limited relevance here). Unsurprisingly, the consensus view is that, in the long-run, China will gain significantly from its WTO membership, provided that it adheres to the letter and spirit of the normative framework within which it is expected to operate. The advantages that China will derive from its new status will stem from the far-reaching liberalization program which it is formally committed to implement and from the greater freedom of action that it will enjoy as a *bona fide* member of the international economic community.¹⁵

In technical parlance, such long-term forecasts have “face validity” (i.e., they are valid, “on the face of it”).¹⁶ It is difficult to dispute the underlying logic, which is grounded in both common sense and historical observation. That said, predictions about the distant future inevitably lack a certain degree of credibility. One cannot dismiss them readily, but it is not appropriate to embrace them uncritically either, even if they are underpinned by sound reasoning and presented elegantly. Further, public choice theorists argue that politicians and bureaucrats are generally myopic.¹⁷ The corollary is that it is more productive to focus on the medium-term aspects of China’s entry into the WTO.

From this perspective, the outlook is rather challenging. In the agricultural sector, which is increasingly overshadowed by its dynamic industrial counterpart but remains a vital source of employment, large-scale inflows of foreign farm goods could accelerate the shedding of rural labor, possibly precipitating massive social unrest. An effective social security system might cushion the impact of a severe adjustment in this inherently unstable segment of the economy and significant job creation in the service sector, a potential pocket of rapid growth, would have even more favorable consequences. It is not at all certain, however, whether progress on those two fronts is likely to be sufficiently decisive to offset entirely the disruption caused by a flood of agricultural imports.¹⁸

¹⁵ See generally Nicholas R. Lardy, *Integrating China into the Global Economy* (Washington: Brookings Institution, 2002).

¹⁶ See generally W. Lawrence Neuman, *Social Research Methods* (Boston: Allyn and Bacon, 2000).

¹⁷ Frickey, *supra* note 7.

¹⁸ See generally Peter Drysdale & Ligang Song, *China’s Entry into the World Trade Organization* (London: Routledge, 2000); Supachai Panitchpakdi & Mark L. Clifford, *China and the WTO: Changing China, Changing World Trade* (Singapore:

Industry, particularly the state-controlled element, might experience an equally painful transition. The parts that are not foreign-driven have muddled through, successfully or otherwise, because of government support, both explicit and implicit (in recent years, the balance has shifted in favor of the latter). They display a lack of clear profit orientation, do not enjoy full commercial autonomy, are burdened with over-employment, and continue to be saddled with heavy social obligations (i.e., function as a substitute for public welfare). Greater exposure to foreign competition would place them under intense pressure, leading to deep retrenchment, with distinctly adverse political ramifications.¹⁹

The external threat facing the domestic banking system (broadly defined) is deemed to be particularly serious. The problem here lies in the fact that state-owned enterprises (“SOEs”) no longer receive subsidies directly from the government, which now provides them with funds via the financial intermediaries that it controls, with scarcely any reference to rigorous credit allocation standards. This politically-inspired *modus operandi* has resulted in ballooning non-performing loans, propelling the banking industry closer to insolvency than any of its equivalents in other countries that are relevant in this context, including Japan.²⁰

More importantly, given that insolvency may to some extent be regarded tactically as an accounting entry, Chinese state-controlled banks are illiquid to boot. Specifically, the bulk of their “assets,” in the form of loans to the SOEs, are by definition long-term, in that they must be rolled over to avoid triggering a debilitating financial crisis. Their liabilities, on the other hand, are short-term, and it is new deposits that are funding withdrawals. This is the classic formula for collapse, witnessed elsewhere in similar circumstances at various historical junctures.²¹

The plight of the rural cooperatives compounds the difficulties. The level of non-performing loans at these institutions, which constitute the backbone of the financial system in the traditionally volatile countryside, is estimated to be twice as high as at their urban counterparts. Nor should policy concerns be confined to banks and rural cooperatives. Another type of financial intermediary, namely the illegal deposit-taking company, has mushroomed in recent years. The entities

John Wiley & Sons (Asia) Pte Ltd., 2002); Deepak Bhattasali, Shantong Li & Will Martin, *China and WTO* (Washington: World Bank, 2004).

¹⁹ *Ibid.*

²⁰ Chang, *supra* note 13; Studwell, *supra* note 13; Minxin Pei, *supra* note 13; Mann, *supra* note 13; Shirk, *supra* note 13.

²¹ See generally *ibid.* The authors of these five non-mainstream but entirely credible works systematically expose serious cracks in China’s institutional facade and argue compellingly that its seemingly relentless modernization drive rests on potentially shaky politico-economic foundations.

which fall into this category are almost invariably grossly undercapitalized and poorly managed. They implode with worrisome regularity, obviously with no effective protection for their large number of customers.²²

Foreign competition could increase the fragility of the entire banking system, although paradoxically the mainstream component might be the most vulnerable. This observation reflects the assumption that, if financial liberalization proceeded as expected, depositors would have a real choice between shaky domestic institutions and sound foreign equivalents. It is reasonable to conclude that, *ceteris paribus*, they would opt for the latter. Some doomsayers envision a massive outflow of deposits from domestic sources to the foreign side.²³ Even if the shift was on a more modest scale, it could exacerbate strains within the ailing banking industry, posing great risks for the regime.²⁴

Financial liberalization, in the wake of WTO accession, could deliver the *coup de grace* to such institutions. This might prove beneficial in the long-run, but the political costs of the cleansing process could turn out to be high during the transition from the current unhealthy state of affairs to an inherently more stable environment. Should the re-engineering of the banking industry in general and the emergence of genuine competition as a result of the entry of foreign players in particular give rise to large-scale socio-economic turbulence, the regime might experience serious strains.²⁵

The challenge does not stem merely from the potential disruption in specific sectors, such as agriculture, industry, and finance—at least in the short/medium-term. WTO accession is likely to lead to fundamental adjustment to the rules of the political game in China, materially limiting the room to maneuver of the ruling elite/Communist Party, a development that is bound to be viewed unfavorably by members of the policy/bureaucratic establishment (who nevertheless have opted for joining the organization on present terms). The significant adjustment

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.* The far-reaching liberalization to which China has committed itself upon entering the WTO should not be underestimated. While the organization's rules for trade in goods apply effectively to all members, the obligations regarding services depend on each country's specific undertakings. And a few members at equivalent stages of socio-economic development have agreed to expose their financial industry to foreign competition at a pace and on a scale similar to that of China. See generally Drysdale & Ligang Song, *supra* note 18; Panitchpakdi & Clifford, *supra* note 18; Bhattasali, Shantong Li & Martin, *supra* note 18.

envisioned in this respect is regarded as the inevitable by-product of the internationalization of the Chinese economy.²⁶

Internationalization is a somewhat ambiguous concept employed “by a variety of writers in a variety of ways.”²⁷ Its elastic nature partly reflects the tendency, both in academic and policy contexts, to equate internationalization with globalization.²⁸ The meaning attributed to it also varies considerably with a host of factors that impinge on the construction in specific circumstances. Cultural influences, for example, may play a role in the process, as the contrasting approaches of Anglo-Saxon and Japanese scholars illustrate: “the definition of ‘internationalization’ differs between political scientists in Britain and America on the one hand, and those in Japan on the other. The former perceive internationalization as *doing to others*, while the latter perceive it as *adjusting to others*.”²⁹

These observations notwithstanding, it may be legitimately argued that internationalization manifests itself in three forms—concurrently, albeit not necessarily so. First, the internationalization of the *world economy*, mostly seen in the observable increase of flows of goods, services, and capital across national borders,³⁰ which is underpinned by the “exogenous easing of international exchange.”³¹ Second, the internationalization of the *state*, which features the restructuring of domestic institutions and policies as a response to internationalized production in the world economy. And third, a *firm* may be viewed as internationalized when “it organizes and coordinates multiple value-adding activities across national boundaries and [when] it internalizes the cross-border markets for the intermediate products arising from these activities.”³²

The internationalization of the Chinese economy has progressed apace in the past three decades or so in terms of integration into its world counterpart. The rapid expansion of foreign trade and the sharp rise in foreign investment serve as a powerful symbol of China’s remarkable transformation from a model of autarky into a major

²⁶ See generally Yongjin Zhang, “Reconsidering the Economic Internationalization of China: Implications of the WTO Membership” (2003) 12(37) *J. Contemp. China* 699.

²⁷ See Robert O. Keohane & Helen V. Milner, *Internationalization and Domestic Politics* (Cambridge: Cambridge University Press, 1996) at 3.

²⁸ See generally Peter Dicken, *Global Shift: The Internationalization of Economic Activity*, 2d ed. (New York: The Guilford Press, 1992).

²⁹ See generally Glenn D. Hook & Michael A. Weiner, *The Internationalization of Japan* (London: Routledge, 1992) at 119. (emphasis in original)

³⁰ See generally Keohane & Milner, *supra* note 27.

³¹ See *ibid.* at 25.

³² See John H. Dunning, *Multinational Enterprises and the Global Economy* (New York: Addison-Wesley Publishers Ltd., 1993) at 4.

international economic force, acting as a vital source of exports of goods and services (and increasingly capital), as well as a strong magnet for a wide range of imports (including capital). The latest, and perhaps the most intriguing, development on that front is the massive accumulation of foreign currency reserves by the central bank and their recycling through the international financial markets.³³

There has also been growing acceptance of the norms governing conduct in the global arena and the practices derived from those norms (which are solidly grounded in Western notions of free market and open economy). This “conformity,” which is an expression of the second dimension of internationalization, still falls short of qualifying as universal. However, it is becoming quite common and often involves reliance on quintessentially capitalist strategies/tactics (e.g., tapping the global capital markets by issuing bonds and seeking listings on stock exchanges throughout the world). While it is premature to suggest that the internationalization of the Chinese firm is accelerating significantly, fundamental changes are taking place even in this respect.³⁴

Viewing the external side of the post-1978 reform process from such a three-dimensional perspective is useful, in that it brings into sharp focus the fact that internationalization does not feature merely the lifting of barriers to the free flow of foreign trade and capital, but also has far-reaching domestic ramifications, including those of the political variety. This is practically taken for granted when the internal side of the picture (agriculture, industry, and urban environment) is examined—with special reference to the decentralization of decision-making from the capital to the provinces, and from ministries to enterprises—yet is not sufficiently highlighted otherwise.³⁵

In many respects, internal reforms, which aim at a gradual liberalization and marketization of the economy, involve the adoption of institutions and practices embedded in the world economy (i.e., enhancing compatibility between the internal and external settings, or *yu shije jingji jiegou*). However, this has never been an entirely smooth evolution, with the policy pendulum swinging from active promotion to deliberate restraint. National and provincial decision-makers have had ample discretion to vary the form and pace of internal restructuring in accordance with prevailing needs and constraints, and have imported external ideas and systems in a controlled fashion.³⁶

Moreover, the reforms undertaken by China’s leaders on their own initiative are often inspired by (ultimately status-enhancing, public choice-style!) instrumental calculations. For example, foreign trade

³³ Yongjin Zhang, *supra* note 26.

³⁴ See generally *ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

liberalization was embraced to some extent in order to boost export growth. By the same token, the opening of domestic financial markets was partly due to a desire to attract the international capital needed to sustain the modernization drive. Such cost-benefit logic may have played a role in virtually every significant restructuring effort. Indeed, it may have overshadowed the normative element (i.e., the reformist vision) in most circumstances.³⁷

The WTO factor arguably shifts the equation toward the normative end of the strategic spectrum. On the face of it, entry into the organization implies not just mechanical compliance with its principles and rules, but also a genuine endeavor to create a viable normative basis for such compliance. To state it differently, instrumental maneuvering may prove insufficient for the full implementation of the commitments to the world trade club that the country has joined. The process of the internalization of standards, laws, and institutions (i.e., norms) must take a quantum leap beyond instrumental action.³⁸

The corollary presumably is that the rules of the domestic political game would have to be rewritten significantly to reflect the new external realities. The post-1998 regime has been far less arbitrary than its predecessor and has over time developed a code of conduct that restricts the autonomy of government/party officials, including those ensconced atop the power pyramid. Nevertheless, this set of formal and informal guidelines (an appropriate term even where they are incorporated into legal instruments) lacks solid normative underpinnings, is not comprehensive in nature, and can hardly be described as uniformly binding.³⁹

WTO membership should entail a much deeper commitment to operating within a robust framework of international rules and a willingness to relinquish considerable control over the policy levers. This could undermine the foundations of a system which has not completely shed its authoritarian character and could thus have a debilitating effect on the elite presiding over it. The decision to sacrifice strategic discretion on such a scale, to countenance such radical shifts in the command structure, and to expose the leadership to such great risks does not appear to be entirely consistent with the self-interest of those who, following protracted negotiations, have opted for a potentially costly compromise.⁴⁰ This decision seems sufficiently critical and intriguing to prompt a re-examination of the emerging theories of sovereignty.

³⁷ *Ibid.*

³⁸ *Ibid.*; Anyuan Yuan, "China's Entry into the WTO: Impact on China's Regulating Regime of Foreign Direct Investment" (Spring, 2001) 35 *Int'l Law*. 195.

³⁹ Yongjin Zhang, *supra* note 26.

⁴⁰ Chang, *supra* note 13; Studwell, *supra* note 13; Minxin Pei, *supra* note 13; Mann, *supra* note 13; Shirk, *supra* note 13.

PARADIGM PARTIALLY VALIDATED

A PRELIMINARY ASSESSMENT is likely to lead to the conclusion that the public choice model of strategic action featuring the voluntary curtailment of state autonomy should be consigned to oblivion, given the steps taken by the Chinese government on the WTO front. The temptation to adopt such a negative stance perhaps ought to be resisted, however, for it might be inappropriate to discard this theoretical perspective altogether. After all, one cannot rule out the possibility that policy makers in Beijing assume, rightly or wrongly, that they would be able to maximize the benefits and minimize the costs of accession.⁴¹

The challenges the regime confronts are formidable, but they are not without precedent. At least two previous crucial decisions (to open the door to foreign investment and trade and dismantle collective farms) were fraught with similar dangers, yet the political system was not seriously destabilized following their implementation. The strategic view in the corridors of power in China may well be that not joining the WTO at this stage of the country's development is not a viable option. The costs of procrastination could be higher than those incurred upon entry. To the extent that the latter may be effectively controlled (again, not necessarily a valid premise), accession can be portrayed as the "lesser of the two evils" from the standpoint of the ruling elite.⁴²

This rather simple account is not without logical appeal, notwithstanding its overly macroscopic nature. It may nevertheless be enhanced by introducing the distinction between policy formulation and policy implementation. This distinction does not loom large in the public choice literature, where all phases of the strategic decision making process tend to be regarded as indistinguishable from one another, for both analytical and practical purposes.⁴³ The distinction is useful in the present context, for it paves the way for the development of a more complex, and hence more realistic, rational choice-type explanation of Chinese entry into the WTO.

Such an explanation should center on the proposition that policy commitments made when states assume bilateral/multilateral obligations are not invariably adhered to thereafter. International legal compliance is a problem that manifests itself across the geographical spectrum, but it may prove particularly hard to deal with in a transitional setting where the country involved has considerable bargaining power.⁴⁴ It is conceivable that China's leaders expect to reap

⁴¹ See generally *ibid.*

⁴² *Ibid.*

⁴³ Bradford, *supra* note 3.

⁴⁴ *Ibid.*

most of the benefits of WTO membership without fully delivering for the foreseeable future their “part of the bargain,” either because of sheer opportunism or because they realize that, as matters stand, their country just does not have the capacity to scrupulously implement the elaborate multilateral agreement which should govern its foreign economic relations in the coming years.

One needs to acknowledge that the issue of international legal compliance is shrouded in controversy. There is no dearth of scholars, including very prominent ones, who hold the view that this is not a matter of serious, or perhaps even legitimate, concern. For example, a leading authority, Henkin, asserts that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”⁴⁵ If this is the case, the question of Chinese conformity with its international contractual commitments does not merit careful attention.

Unfortunately, there is ample evidence to suggest that this is not the pattern in general nor is it the pattern in the WTO (or WTO-like) context in particular. Thus, two researchers who conducted a detailed study of adherence to obligations under the *General Agreement on Tariffs and Trade (GATT)* concluded that non-compliance with panel rulings was close to 30% and nearly 60% of rulings failed to elicit full compliance.⁴⁶ While conformity with rules is to some extent subject to conflicting interpretations—or, to state it differently, “in the eyes of the beholder”—these figures cannot be overlooked. There is apparently considerable scope here for a country so disposed to shift the complex WTO cost-benefit equation in its favor.

This statement is consistent with the picture painted by scholars who subscribe to the enforcement approach to international legal

⁴⁵ See Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2d ed. (New York: Columbia University Press, 1979) at 47. (original emphasis omitted)

⁴⁶ See Kal Raustiala & Anne-Marie Slaughter, “International Law, International Relations and Compliance,” in Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., *Handbook of International Relations* (Thousand Oaks: SAGE Publications, 2002) 538 at 549. See also Sebastiaan Princen, “EC Compliance with WTO Law: The Interplay of Law and Politics” (2004) 15(3) *Eur. J. Int'l L.* 555. It should be noted that non-compliance under the WTO regime poses a greater challenge than it did under its *GATT* predecessor. Be that as it may, the room to maneuver remains considerable. For a general discussion, see Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (Cambridge: Cambridge University Press, 2005); John H. Barton *et al.*, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton: Princeton University Press, 2006); John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006); John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2007).

compliance, and whose dissection of foreign policy is rooted in the political economy tradition of game theory and the analysis of collective action. They posit that states, or the elites that control state organs, operate like rational entities and hence they systematically assess the costs and benefits of alternative choices when making compliance decisions in international settings. Both the sources of non-compliance and the solutions to the problem emanate from the incentive structure. States opt to defect when confronted with an incentive structure in which the benefits of shirking exceed the costs of defection. By implication, strategies designed to secure compliance should seek to increase the likelihood and costs of defection through monitoring and the threat of sanctions.⁴⁷

The argument that states may deliberately choose not to comply hinges on the assumption that the motivation for entering into an internationally “binding” contract focuses largely on the signature part of the process, rather than compliance. According to Haas, “[e]ven if a state may believe that signing a treaty is in its best interest, the political calculations associated with the subsequent decision actually to comply with international agreements are distinct and quite different.”⁴⁸ The point is that states may attach symbolic or practical importance to the act of participation and signing, but place a low value on the specific content of the rules and consequently have no reservations about violating treaty provisions. The decision not to comply may also reflect conflicting priorities in that resources channeled in one direction are not available for other uses.⁴⁹

Enforcement theorists normally stipulate that the likelihood of international shirking depends on the problem structure of the particular cooperative context. Collaboration or mixed-motive situations carry greater incentives to defect than coordination situations, where states have strong reasons to cooperate in order to avoid common aversions. In collaboration situations, states have an incentive to renege on their commitments, because they gain more from the agreement if they reap all the benefits without investing their own fair share. Since collaboration is the predominant problem structure in inter-state relations, international treaties are seldom effective without proper incentive mechanisms.⁵⁰

In the absence of such mechanisms, shirking is the inevitable outcome. Monitoring compliance and implementing sanctions constitute

⁴⁷ Bradford, *supra* note 3.

⁴⁸ See Peter M. Haas, “Compliance with EU Directives: Insights from International Relations and Comparative Politics” (1998) 5(1) *J. Euro. Pub. Pol’y* 17 at 19.

⁴⁹ Bradford, *supra* note 3.

⁵⁰ *Ibid.*

the two key components of the enforcement strategy. The former enhances transparency and facilitates identification of non-complying parties/action. The latter increase the costs of shirking and render non-compliance a less appealing option. When pursued effectively, monitoring compliance and implementing sanctions can deter behavior that is incompatible with agreed-upon standards and induce compliance. According to Downs, “[a] punishment strategy is sufficient to enforce a treaty when each side knows that if it cheats it will suffer enough from the punishment that the net benefit will not be positive.”⁵¹

From a public choice perspective, China has an incentive to stretch the limits of the “defection” strategy within the WTO “game” as far as possible. By the same token, the monitoring and enforcement instruments are not sufficiently robust to render this an unproductive course of action. The US, a major trading partner and a key source of foreign investment, plays a crucial role in that respect. It monitors the fulfillment of treaty obligations via three channels: unilateral devices, intergovernmental coordination, and multilateral arrangements. The infrastructure supporting the undertaking is elaborate and managed effectively.⁵²

The unilateral component is the backbone of the system. The resources involved exceed those mobilized to oversee any other trade agreement and consist, *inter alia*, of a substantial professional team based in Washington, Geneva, and a number of large Chinese cities. The pivot of this mechanism is an inter-agency group called the Trade Policy Staff Committee (“TPSC”), particularly its Sub-committee on China’s WTO Compliance, formed by the Bush administration. The TPSC is chaired by the US Trade Representative Office’s Deputy Assistant and brings together experts from some twenty different government agencies, including the Departments of Treasury, Commerce, Agriculture, Labor, and State.⁵³

This inter-agency group is one of the three layers that make up the hierarchical structure responsible for monitoring Chinese adherence to WTO rules. While the actual surveillance and processing of incoming information takes place at the TPSC level, significant strategic issues are addressed at the deputy-level Trade Policy Review Group. For practical purposes, the cabinet-level National Economic Council, headed by the

⁵¹ See George W. Downs, David M. Rocke, & Peter N. Barsoom, “Is the Good News About Compliance the Good News About Cooperation” (1996) 50(3) *Int’l Org.* 379 at 385. See also A. Walter Dorn & Andrew Fulton, “Securing Compliance with Disarmament Treaties: Carrots, Sticks, and the Case of North Korea” (1997) 3 *Global Governance* 17; Arild Underdal, “Explaining Compliance and Defection: Three Models” (March, 1998) 4 *Eur. J. of Int’l Rel.* 5.

⁵² See generally Gerald Chan, “China and the WTO: The Theory and Practice of Compliance” (2004) 4(1) *Int’l Rel. Asia-Pacific* 47.

⁵³ *Ibid.* at 59.

chief economic adviser to the president, constitutes the apex of this system, although formally the chain of command extends to the holder of the highest political office in the land.⁵⁴

In monitoring conformity with contractual commitments, the TPSC acts as a clearing-house for information assembled by American businesses operating in China, as well as by US government agencies that follow and analyze events as they unfold over time. Since the private sector possesses critical mass and enjoys market penetration that its public counterpart perhaps lacks, it can probably provide the most extensive insights into compliance by the Chinese government and generate appropriate signals in a reasonably timely fashion. The administration has thus forged a close partnership with the American Chamber of Commerce in Beijing and Shanghai, the US-China Business Council, and the US Chamber of Commerce.⁵⁵

In terms of public sector efforts at ground level, the Department of State is leading a network of groups that carry out surveillance in the field. Four Department of Commerce compliance officers are attached for this purpose to the US Embassy in Beijing. The Embassy has established a WTO Implementation Coordination Committee, which is chaired by the Economic Minister. Its aim is to furnish a focal point for monitoring, compliance, technical assistance, and outreach activities undertaken by officials with diverse professional backgrounds (not confined to economics, commerce, agriculture, and customs, but also including environment, science and technology, and public affairs).⁵⁶

The WTO Implementation Coordination Committee is responsible for tracking and examining changes in laws and regulations, maintaining ongoing dialogue with US policy makers, systematically supplying information to the Chinese government and other relevant parties, and meeting frequently with members of the private sector and other diplomatic missions to assess progress and identify emerging problems. The five consulates in Shanghai, Guangzhou, Chengdu, Shenyang, and Hong Kong also contribute meaningfully to this thorough and well-coordinated multi-functional undertaking.⁵⁷

The US government is aware of the challenges China faces in seeking to implement (which encompasses the enforcement function) WTO rules and that, besides policing and playing a quasi-judicial role, it needs to educate and facilitate. To this end, it has embarked—in conjunction with the private sector, multilateral institutions, and the Chinese authorities at various levels—on an ambitious training program featuring numerous seminars and workshops in major urban centers.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 59-60.

⁵⁶ *Ibid.* at 60-61.

⁵⁷ *Ibid.* at 61.

According to Chan, “[t]he topics covered include the rule of law, financial services, protection of intellectual property and trade standards.” Other countries—notably, Australia, Canada, Germany, Japan, and the United Kingdom—engage in similar capacity-building activities.⁵⁸

The process of ensuring that China actually follows the line where necessary—that is, exerting pressure and employing moral suasion *ex post* as distinct from *ex ante*—is equally intensive. From an organizational perspective, it is driven by the US Department of Commerce through its Market Access and Compliance unit, whose goal is to “obtain market access for American firms and workers and to achieve full compliance by foreign nations with trade agreements they sign with [the US].”⁵⁹ A Trade Compliance Center, a key component of this unit, actively supports American traders who have legitimate grievances against other countries, including China. The Department of Commerce Trade Facilitation Office in Beijing provides positive reinforcement, as does the US Congress, both directly and indirectly.⁶⁰

As indicated, this is not a solo effort, even if the US is the most active and influential trading nation involved. Other countries pursue a similar agenda and employ similar strategies, albeit on a more modest scale. Again, Australia, Canada, Germany, Japan, and the UK may be singled out for this purpose. There is also a considerable degree of international cooperation in that respect—particularly, but not exclusively, in the European context—often featuring a coalition of countries rather than merely the US and one of its partners. Multilateral institutions, such as the Asian Development Bank and the World Bank, and non-governmental organizations, such as private foundations and universities, play a supportive role as well, notably in relation to capacity building.⁶¹

If all else fails, the US, alone or in concert with some of its allies, can resort to the Transition Review Mechanism (“TRM”) and Dispute Settlement Mechanism (“DSM”) of the WTO in order to seek redress from the Chinese side. The former is a rather unusual and wide-ranging instrument that compels the targeted country to provide detailed information to members and offer them the opportunity to scrutinize its record. In this specific case, China’s trading practices are to be examined annually and comprehensively during the first eight years following accession, and a final and most probing review is to be undertaken in the ninth and tenth years. The results will be reported to the WTO General Council for high-level assessment and will serve as an organizational

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 61-62 (brackets in original).

⁶⁰ *Ibid.* at 62.

⁶¹ *Ibid.*

vehicle for preventing and correcting deviation from agreed-upon standards.⁶²

The DSM is a more focused tool available to members who have reason to believe that they are not being treated fairly by trading partners bound by WTO rules. The common practice in such circumstances is to seek an effective dialogue with the target country involved. When this fails to produce a satisfactory response, the complaining member has the option to move for a settlement before a tribunal. If the offending party disregards the recommendations of the adjudicators, the aggrieved one may adopt appropriate retaliatory measures. Additional protective mechanisms built into the Chinese accession protocol include non-market economy anti-dumping devices, product-specific safeguards, textile safeguards, and national security-related exceptions.⁶³

We have discussed in considerable detail some of the decisive steps taken and powerful instruments designed to minimize the scope for Chinese shirking in the WTO context. On the face of it, this is not a fertile ground for testing, let alone validating, public choice-type propositions regarding sovereignty. It is tempting to conclude that the checks-and-balances are so sound that the system is virtually foolproof. Indeed, it is tempting to pursue this argument further and suggest that the institutional architects responsible for the blueprint were inspired, directly or indirectly, by the ideas floated by enforcement theorists (interestingly, successful adoption of these ideas could render them obsolete, a phenomenon highlighted in the “Lucas critique”).⁶⁴

The blueprint and the system that embodies it are undoubtedly extensive and tight. They do not qualify as foolproof, however. Retaliation, hardly an attractive course of action, is by no means automatic, as there are channels for appeal.⁶⁵ To make matters worse, the tribunal phase preceding it can stretch over a long period of time and take place in an organizational environment characterized by a high

⁶² *Ibid.* at 62-63.

⁶³ *Ibid.* at 63. For further discussion of the WTO DSM, see Van den Bossche, *supra* note 46; Barton *et al.*, *supra* note 46; *Sovereignty, the WTO, and Changing Fundamentals of International Law*, *supra* note 46; *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, *supra* note 46.

⁶⁴ See Robert E. Lucas, Jr., *Studies in Business-Cycle Theory* (Cambridge: MIT Press, 1981) at 104-130.

⁶⁵ See generally Bhagirath Lal Das, *The World Trade Organisation: A Guide to the Framework for International Trade* (London: Zed Books Ltd., 1999); David Smith & Zhu Guobin, *China and the WTO: Going West* (Hong Kong: Sweet & Maxwell, 2002); Qingjiang Kong, *China and the World Trade Organization: A Legal Perspective* (Singapore: World Scientific Publishing Co. Pte. Ltd., 2002); Bhagirath Lal Das, *The WTO and the Multilateral Trading System: Past, Present and Future* (London: Zed Books Ltd., 2004).

degree of fragmentation (and a favorable outcome is not guaranteed).⁶⁶ The disputants thus prefer to manage the conflict on a bilateral basis, without submitting to external adjudication. This, in turn, is often a protracted process that does not necessarily culminate in an unambiguous resolution.⁶⁷

Monitoring private agents' and public officials' behavior in China is a formidable challenge, even if the strategic commitment is firm and the resources devoted to the task are substantial. The country is large, diverse, and multi-layered, and the picture one sees lacks transparency. By the same token, this is not an ideal setting for effective problem solving. The Chinese bureaucracy is driven by its own dynamics, and it is not easy to deflect it from its path. The government structure affords virtual (i.e., non-electoral) representation to economic groups. Those groups pursue vigorously their narrow interests and resist strongly any efforts to undermine them, particularly from external sources.⁶⁸

Another noteworthy feature of the political system is its surprisingly decentralized nature. This is a legacy of the Maoist era. In two mass campaigns, the Great Leap Forward (1958) and the Cultural Revolution (1966-69), Mao Zedong sought to accelerate economic growth and social transformation in the face of stubborn opposition from status quo-oriented officials in Beijing. He embraced a policy of "playing to the provinces," or mobilizing provincial support as a counterweight to the center. Mao appealed to provincial leaders by delegating power to them and by co-opting them into top-level decision-making bodies.⁶⁹

During each of the campaigns, the macro- and micro-economic management apparatus was flattened significantly, and control and

⁶⁶ See generally Jeffrey J. Schott, *The WTO after Seattle* (Washington: Institute for International Economics, 2000).

⁶⁷ See generally Chan, *supra* note 52; Qingjiang Kong, *supra* note 65; Chad P. Bown, "The Economics of Trade Disputes, the GATT's Article XXIII, and the WTO's Dispute Settlement Understanding" (2002) 14(3) *Econ. & Pol.* 283; Daniel L. M. Kennedy & James D. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002).

⁶⁸ See generally Kenneth G. Lieberthal & Michel C. Oksenberg, *Policy Making in China* (Princeton: Princeton University Press, 1990); Kenneth G. Lieberthal & David M. Lampton, *Bureaucracy, Politics, and Decision Making in Post-Mao China (Studies on China, No. 14)* (Berkeley: University of California Press, 1992); Susan L. Shirk, *The Political Logic of Economic Reform in China* (Berkeley: University of California Press, 1993); Susan L. Shirk, *How China Opened its Door: The Political Success of the PRC's Foreign Trade and Investment Reforms* (Washington: Brookings Institution, 1994); Jianrong Huang, *The Applicability of Policy-Making Theories in Post-Mao China* (Aldershot: Ashgate Pub. Ltd., 1999); Feng Hui, *The Politics of China's Accession to the World Trade Organization: The Dragon Goes Global* (London: Routledge, 2006).

⁶⁹ *Ibid.*

resources were shifted dramatically from Beijing to the provinces. The Cultural Revolution was marked by an almost total collapse of the traditional state organs of power in the wake of the sending down of a large number of central government bureaucrats to the countryside for the purpose of revitalizing their ideological convictions through manual work. In the aftermath of the campaigns, both of which were ultimately deemed to be an unmitigated failure, Beijing reclaimed some but not all of the power it previously surrendered.⁷⁰

Indeed, Mao's successor as paramount leader, Deng Xiaoping, was inspired by his predecessor's historical example, even though he was propelled by a fundamentally different strategic vision. Deng consistently promoted market reform by playing to the provinces in a broadly similar fashion, an option which, for example, was not available to the centrally-constrained Gorbachev in equivalent circumstances. Under Deng's guidance, local officials became the largest bloc in the Central Committee during the reform era, and a radical decentralization of the fiscal system was carried out during the early stages of the post-1978 restructuring process.⁷¹

China was not only more decentralized, it also lagged behind the Soviet Union in granting institutions, as distinct from personalities, the authority to make decisions. It was, after all, a newer and less established member of the communist fraternity. Its evolution from a personalized rule to an institutionalized one was impeded by Mao's use of mass campaigns to prevent the routinization of the revolution. The authority of the Soviet Central Committee to choose party leaders was established definitively in 1957. By contrast, its Chinese equivalent had to share power with party elders who did not hold any official posts throughout the last two decades of the 20th century and possibly beyond.⁷²

The upshot is that policy implementation often takes the form of "particularistic contracting." Instead of standardized rules applied uniformly across the organizational spectrum, the strategic configuration reflects ad hoc arrangements negotiated by the parties involved (at central, provincial, city, rural, and enterprise levels). This policy selectivism results in great strategic flexibility and diversity. It may be viewed as a source of dynamism, in that it facilitates institutional adaptation in a complex socio-economic setting. At the same time, it may also lead to policy incoherence because signals emanating from the

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*; June Teufel Dreyer *et al.*, *China's Political System* (Upper Saddle River: Pearson Education, 2003).

administrative center are not transmitted effectively to the administrative periphery.⁷³

There are numerous examples to illustrate this phenomenon, including ones that are worth highlighting in this particular context. Perhaps most telling in that respect is China's decidedly mixed record in implementing the international regime for protecting intellectual property rights ("IPR"). This record has been the subject of several studies. Researchers addressing it from a political economy perspective have generally observed that, the center's supposedly honorable intentions notwithstanding, progress has been limited due to defiance at the periphery. Thus, "[a]t a minimum, even well-designed policies and institutions encounter resistance from provinces and localities where local officials are under tremendous pressure to show substantial results from their efforts at economic development and to whom copyright infringement may pose a strong lure."⁷⁴

A less familiar, but equally illuminating example is that of the Chinese Green Food program and the persistent attempts to adapt it to the requirements of the global organic food regime. This is another area of international strategic initiative that has been examined in considerable detail. Again, the achievements in terms of actual harmonization with global standards have been distinctly uneven. Implementation failures have rendered this a rather frustrating experience from an international regulatory standpoint, prompting one concerned social scientist to portray rural China as a "fragmented entrepreneurial state in which officials use state authority to privilege market activity."⁷⁵ In such an environment, "[s]tate entrepreneurs pursue alternative forms of compliance, disguise state participation in the market, and exploit their control over information, in an effort to resist monitoring and enforcement regimes."⁷⁶

Given these institutional dynamics, public choice arguments regarding elite behavior, while originally developed in a political milieu where interest mobilization proceeds in a largely unconstrained fashion, merit consideration. Communist China had never been a monolithic entity and the post-communist version still does not conform to

⁷³ Lieberthal & Oksenberg, *supra* note 68; Lieberthal & Lampton, *supra* note 68; *The Political Logic of Economic Reform in China*, *supra* note 68; *How China Opened its Door*, *supra* note 68; Jianrong Huang, *supra* note 68; Feng Hui, *supra* note 68.

⁷⁴ See Margaret M. Pearson, "China's Integration into the International Trade and Investment Regime," in Elizabeth C. Economy & M. C. Oksenberg, eds., *China Joins the World: Progress & Prospects* (New York: Council on Foreign Relations, 1999) 161 at 173.

⁷⁵ Paul Thiers, "Challenges for WTO Implementation: Lessons from China's Deep Integration into an International Trade Regime" (2002) 11(32) *J. Contemp. China* 413.

⁷⁶ *Ibid.*

simplistic Confucian stereotypes. Surprisingly powerful centrifugal forces are at work at all levels of the political pyramid. Nor is opportunism, a strong motivating factor in capitalist and non-capitalist settings alike, conspicuous by its absence. Public choice theories may legitimately be invoked to explain foreign policy decisions in general, and in relation to the WTO membership in particular.

NOT A ONE-DIMENSIONAL PATTERN

THE PRINCIPAL ATTRACTION OF MODELS lies in their economy of expression. They capture relevant aspects of reality and weave them elegantly into a compact analytical structure. Careful filtering and tight integration enhance clarity and focus attention on key variables in the picture. This may be viewed negatively, however, in that the highly disciplined process of elimination and synthesis leads, at times, to loss of information and hence factual misrepresentation. The more careful the filtering and the tighter the integration, the greater is the risk of distortion.⁷⁷ The limitations of the narrow framework constructed by public choice theorists to account for the apparent contradictions inherent in the exercise of sovereign power can be exposed by exploring further the Chinese willingness to join the WTO on challenging terms.

The notion of “strategic intent” may help to identify perhaps the most obvious shortcoming of this overly focused framework. Implementation failures in themselves are not necessarily indicative of a deliberate attempt to outmaneuver the other parties to the bargain. The intent may well be to adhere to the provisions of the agreement, but the outcome may diverge from expectations because of the impact of a host of “uncontrollable” factors. To the extent that the decision to make a binding international legal commitment does not rest explicitly on the Machiavellian assumption that countervailing forces will dilute it without provoking serious retaliation, the public choice conceptual edifice loses some of its luster. The lack of an effective distinction (other than among scholars associated with the enforcement approach to international legal compliance) between policy formulation and policy implementation compounds the problem.

It is, of course, possible to argue that implementation failures were fully anticipated and that this indeed prompted shrewd strategic planners to enter into an arrangement which offered considerable upside and modest downside (i.e., the opportunity to “have the proverbial cake and eat it too”). One could reasonably claim, in light of the available evidence (despite its tentative nature), that this was an element of the equation. The question is whether it was a significant element. Public

⁷⁷ See generally Neuman, *supra* note 16.

choice theorists might contend that suggestions to the contrary would not be consistent with logically compelling and empirically sound models of human/political behavior. Nevertheless, the facts in this particular case, while not unambiguous, support a broader interpretation of the policy dynamics.

There is thus a substantial body of academic literature emphasizing the role of ideas, as distinct from pure interests, in China's strategic evolution, both before and after 1997. The past three decades or so, the relevant period in this context, have witnessed much tension, latent and open, between segments of the policy establishment favorably disposed toward institutional innovation and those unenthusiastic about politico-economic restructuring. Four distinct groups have endeavored to actively promote their particular vision of the social order: reformists, moderates, soft conservatives, and ultra conservatives. Following an intense power struggle, the ultra conservatives were ruthlessly vanquished as a source of strategic influence and their soft counterparts were effectively marginalized.⁷⁸

Reformist and moderate factions comprise the core of the Chinese policy elite today. The strategic pendulum swings from one end of the ideological spectrum (reformist) to the other (moderate), depending on the state of the system (equilibrium fosters a reformist spirit and disequilibrium a moderate one) and on the policy issues involved (reformist instincts come into play when the economic side of the strategic agenda is addressed and moderate ones surface when the political side is under consideration).⁷⁹ From this perspective, WTO accession may be viewed as a bold step taken by high-level decision makers so firmly wedded to the reformist blueprint that they were willing to tolerate considerable disruption in pursuit of their goals. Indeed, some China watchers argue, compellingly or otherwise, that those who embrace the blueprint most passionately regard WTO membership as a potential means to remove the remaining pockets of resistance to rapid and comprehensive economic restructuring.⁸⁰

If the policy commitment to the international obligations assumed were as ambiguous as public choice theorists might claim, senior Chinese officials would have been less earnest in seeking to turn it into a workable proposition. The Ministry of Foreign Trade and Cooperation ("MOFTEC") has thus scrupulously reviewed and properly amended/repealed without hesitation thousands of laws and regulations (both of the State Council and its own). It has also concluded numerous bilateral agreements, bilateral investment pacts, and tax treaties. The

⁷⁸ See generally Shirk, *supra* note 13.

⁷⁹ *Ibid.*

⁸⁰ See generally Chang, *supra* note 13; Studwell, *supra* note 13; Minxin Pei, *supra* note 13; Mann, *supra* note 13; Shirk, *supra* note 13.

process of legislative adjustment undertaken following entry into the WTO is ongoing and has progressed smoothly throughout the entire period, notwithstanding the technical and organizational difficulties involved.⁸¹

By the same token, a network of WTO centers has been created in key urban areas. In addition, several private centers have been established to disseminate relevant information and provide appropriate guidelines to the necessary parties and the community at large. Main government departments have formed WTO committees to scrutinize industry-specific laws under the supervision of the State Council. "To meet public demand, a wide range of books about the WTO has been published and prominently displayed in major bookstores across the country." This amounts to a massive educational campaign, albeit one focused more on the cities than the countryside.⁸²

Two MOFTEC initiatives merit closer attention: the setting up of a Department of WTO Affairs and a Fair Trade Bureau for Imports and Exports. The former "comprises six offices, each staffed by four to eight people." Its organizational roots stem from MOFTEC's Department of International Trade and Economic Affairs, which was responsible for Chinese bilateral and multilateral negotiations in the bid to gain WTO membership. The mission of the new organizational arm is to secure compliance with the goods trade and services trade agreement and prevent statutory/regulatory deviation from WTO principles.⁸³

"The Fair Trade Bureau, consisting of eight offices with a total of about forty staff, is responsible for conducting investigations into imports and for determining whether or not anti-dumping, anti-subsidy and protective measures are applicable." It guides local companies, collectively and individually, when they face allegations of dumping and subsidy. The Bureau also studies other countries' discriminatory trade policies vis-à-vis China and acts, through bilateral and multilateral channels, to promote fair treatment for Chinese enterprises in the global commercial arena (the Investigation Bureau for Domestic Industry Injury, created by the State Economic Trade Commission, plays a similar role).⁸⁴

The *China-Business Review*, a periodical produced by the US-China Business Council, paints a generally favorable picture of top-down broad Chinese government efforts to ensure adherence to WTO rules. It highlights the fact that Stewart and Stewart, an American law firm, has been retained by the US-China Commission to prepare a report whose purpose is to establish benchmarks for future efforts to monitor and

⁸¹ See Chan, *supra* note 52 at 64-65.

⁸² *Ibid.* at 65.

⁸³ *Ibid.* at 66.

⁸⁴ *Ibid.*

assess Chinese compliance with those rules.⁸⁵ The willingness to allow an independent Western professional organization to shape the framework effectively in a solo fashion may be viewed as indicative of the seriousness with which senior policy makers and the foreign trade establishments approach the WTO agenda.

Given this pattern of action, one cannot dismiss lightly the argument that reformist ideas, as distinct from purely parochial interests, have inspired the leadership to take considerable risks in order to facilitate China's integration into the world economy. Moreover, to demonstrate otherwise, one would have to show convincingly that strategic decisions in Beijing are taken in a manner largely consistent with public choice assumptions, whether explicit or implicit. Yet, there is no solid evidence to suggest that this is the case. On the contrary, the procedural norms governing policy formulation that have crystallized since the late 1970's limit to all appearances the scope for group-centered opportunistic maneuvers, although the door is by no means hermetically closed.

It should thus be noted that the Chinese bureaucracy addresses problems, particularly those with wide ramifications, through "delegation by consensus." Specifically, the Communist Party delegates to the State Council the authority to make specific decisions. Senior members of the latter, in turn, delegate to their subordinates the authority to make decisions *if* the agents agree. If the agents reach a consensus, the decision is automatically ratified by the higher level. If the agents cannot agree, then the authorities step in to make the decision, or the issue is dropped altogether, or tabled until a consensus can be achieved. Delegation by consensus is practiced at each level of the organizational hierarchy: State Council to commissions, commissions to ministries and provinces, ministries and provinces to bureaus and cities, and so on.⁸⁶

From the standpoint of the principal, delegation by consensus functions effectively when it encourages groups to articulate their interests while creating incentives for them to reconcile their differences without external intervention. Needless to say, the flow of events does not invariably follow the official script. Public choice-style tactics and other factors may disrupt the rhythm. In such circumstances, it has become increasingly common over the years for the principals to escalate their coordination efforts. They seem to have been sufficiently successful, albeit more so in recent years than during the early phases of the reform

⁸⁵ *Ibid.* at 65.

⁸⁶ See generally Lieberthal & Oksenberg, *supra* note 68; Lieberthal & Lampton, *supra* note 68; *The Political Logic of Economic Reform in China*, *supra* note 68; *How China Opened its Door*, *supra* note 68; Jianrong Huang, *supra* note 68; Feng Hui, *supra* note 68.

program, to sustain delegation by consensus as a viable balancing institutional mechanism.⁸⁷

Another procedural norm closely adhered to by top political strategists is “incrementalism.” The pace of restructuring is expected to be moderate and socio-economic change is pursued in a piecemeal fashion. Radical transformation of the entire system and the key components thereof are to be avoided. Sequencing of reforms, preferably systematic in nature, is also favored because it minimizes the risks of costly blunders, simplifies error correction, and makes a backlash from potentially disaffected constituencies a less likely prospect. The corollary is that policy formulation is a distinctly elaborate process, often stretching over an extended period of time.⁸⁸

An equally salient feature of high-level bureaucratic decision making is the emphasis on maintaining rapid output expansion, other things being equal. Robust economic growth tends to keep core strata of society content and fosters a climate supportive of fundamental reconstruction. It helps to accomplish an objective that, according to Hirschman,⁸⁹ has often eluded reformers—namely, turning a complex “game” that is inherently redistributive into one in which everybody wins, or at least no one is worse off than before the shift in the status quo.⁹⁰

The issue of WTO membership must have been managed within a framework reflecting this *modus operandi*. The implication is that it has inevitably been subjected to an exceptionally broad-based and painfully slow assessment geared toward securing tangible benefits and preventing unnecessary discomfort to as many players in the domestic arena as possible. The course eventually followed is not without major redistributive consequences. Nor has it been charted by institutional architects operating in a setting free of partisan influences. Nevertheless, one cannot really see how in such an environment a small group of powerful officials could capture the policy agenda and proceed forcefully to reshape it in a manner entirely consistent with its narrow interests.

There can be little doubt that senior bureaucrats are broadly aware of the redistributive consequences and that they are not oblivious to the fact that, fortuitously, sluggish implementation might somehow mitigate them. It would be inappropriate to infer, however, that they have embarked on this extraordinarily challenging venture assuming confidently that they would be able to maximize net gains to themselves

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ See generally Albert O. Hirschman, *The Strategy of Economic Development* (New Haven: Yale University Press, 1958).

⁹⁰ See generally Lieberthal & Oksenberg, *supra* note 68; Lieberthal & Lampton, *supra* note 68; *The Political Logic of Economic Reform in China*, *supra* note 68; *How China Opened its Door*, *supra* note 68; Jianrong Huang, *supra* note 68; Feng Hui, *supra* note 68.

because the fallout would be contained as a result of selective execution at ground level and China's ability to escape serious sanctions due to its mixed compliance record. Opportunistic considerations may have played a part in the decision making process, but the picture painted here suggests that it has not been a prominent one and that the interests of the nation have been accorded a higher priority (even if opportunistically so, in certain respects) than those of the political elite or segments thereof.

Indeed, the policy establishment may not have had the foresight to fully anticipate the extent to which wide-ranging and deep-rooted implementation problems would impede progress on the WTO front. Public choice theorists posit that actors in the political arena are well-informed and rational. This proposition is not universally shared and there is ample evidence to the contrary, including in the Chinese context.⁹¹ The quantum leap taken to facilitate China's integration into the world economy may have been the product of a mix of strategic factors (e.g. long-term benefits outweighing the short-term/medium-term costs), ideological convictions (e.g. reformist zeal), and opportunistic motives (some pertaining to the nation and some to its leaders). In addition, there may have been an element of "ignorance" and "miscalculation" (and, of course, "randomness") in the equation.

One feature of the Chinese institutional façade which is commonly perceived as a stumbling block to smooth implementation of WTO rules is the ineffectiveness of the judiciary (in fact, the entire legal system). As matters stand, judicial independence remains a mirage rather than an ingrained aspect of social reality. Kong states:

According to the practice of cadre administration, judges, who fall within the category of cadres, are selected and appointed either by the Party Committee within the court or the local Party Committee. Although the *Organizational Law of People's Courts* and the *Judges Law* provide that court presidents, vice presidents, chief judges of court divisions and judges are appointed by the standing committees of local People's Congresses at corresponding levels, these personnel are in practice recommended by the local Party committee to the people's congress for approval.⁹²

Moreover, courts are viewed as Party/state organs and judges, particularly senior ones, and are normally former Party/government

⁹¹ Chang, *supra* note 13; Studwell, *supra* note 13; Minxin Pei, *supra* note 13; Mann, *supra* note 13; Shirk, *supra* note 13.

⁹² See Qingjiang Kong, *supra* note 65 at 101.

officials. The interaction between judges and other members of the politico-bureaucratic machinery is frequent and close. It is also asymmetrical, in that the pattern is usually determined by the latter. By the same token, for purposes of budget administration, courts are treated just like any typical Party/state organ, given that their budgets are appropriated by the local people's government through the financial department, whose budget plan is subject to the approval of the local People's Congress. To make matters worse, according to Kong, "the local Party political-legal committee, which is a leadership organ within the Party for political and legal work, orders that the important and difficult cases be referred to it for 'discussion.'"⁹³

Judicial autonomy is further circumscribed because the rigidly hierarchical structure of the judiciary prevents judges from adjudicating cases in a genuinely independent fashion. Rather than being equal in the professional sense of the term, judges are a component of a relentlessly top-down driven multi-layered system. Each one is strictly accountable to the head of division he/she belongs to, and the division is fully responsible to the Judicial Committee that is led by the President of the court. In most cases, it is the division head, the president, or the Judicial Committee, not the judge(s) actually involved, who render the judgment. If the case is deemed to be of considerable significance, the Judicial Committee plays invariably the dominant role.⁹⁴

The heavy reliance on the top layers of the hierarchy also reflects the low professionalization of the judiciary in that judges are not viewed as performing a function that calls for in-depth and systematic training. The 1995 *Judges Law* stipulates that judges should be graduates of tertiary-level educational institutions "in law or in other subjects who have acquired specialized legal knowledge." However, it allows judges who do not meet such standards but were appointed before this law came into effect to retain their posts by completing the relevant training. According to Kong, most of them, in fact, have not graduated from such institutions, but are former military officers. For presidents, vice presidents, and other senior court officials, extensive Party/government/military experience is effectively the norm.⁹⁵

In addition, judges operate in an environment characterized by strong aversion to litigation. The social preference is for non-adversarial conflict resolution and this manifests itself inevitably in judicial settings. A striking example of the ingrained desire to avoid confrontational tactics is the *Civil Procedure Law* ("CPL"), which explicitly encourages judges to promote non-adversarial processes even during court proceedings. In this context, cases are often adjudicated according to the principle of

⁹³ *Ibid.* at 101-102.

⁹⁴ *Ibid.* at 102.

⁹⁵ *Ibid.* at 103.

“equality and mutual benefit,” a pattern not conducive to seeking, in a determined manner, outcomes consistent with the rights and obligations of the affected parties as provided for by the pertinent laws and regulations.⁹⁶

A more problematic feature of the situation is corruption, which is rampant in China and afflicts the judiciary as well. Attempting to influence judicial decisions through financial means is a common practice, indicative of a lack of public respect for the legal system. Although court officials are prohibited from meeting privately with litigants and their representatives, approaching judges and discussing contested matters with them, an illegal practice in countries with well-functioning legal institutions, is regarded as acceptable conduct. Interestingly, such discussions frequently take place over meals and/or in karaoke lounges.⁹⁷

Whether or not corruption impinges on the outcome, judicial decisions may be diluted or even rendered completely irrelevant due to political machinations which are unavoidable in this vast and diverse developing country. According to Kong, “[i]n theory, all local powers stem from the centre.” Even areas with large ethnic minorities, where a certain degree of self-government is formally granted, do not enjoy as much autonomy as sub-federal units in federal nations. Nevertheless, economic reform has led to an erosion of central controls and accumulation of power at local levels. The corollary is that laws and regulations are implemented haphazardly throughout the country. The resistance of local authorities often assumes the form of interference with judicial processes, particularly when it concerns “the enforcement of judgments unfavorable to local interests.”⁹⁸

The difficulties to which decentralization gives rise are not confined to the judicial/legal domain. While the absence of tight central controls enhances sensitivity to local conditions and fosters grassroots initiative, which in turn underpins economic dynamism, the loose authority structure breeds “local protectionism.” Strategic impulses originating in Beijing are consequently transformed in the course of transmission to a point whereby realities on the ground do not correspond closely to central policy intentions. Deviations from this pattern are few and far between. They are to be found mostly in areas of economic activity such as distribution, insurance, and retail, which have emerged in recent years and are not yet dominated by vested interests.⁹⁹

⁹⁶ *Ibid.* at 105.

⁹⁷ *Ibid.* at 103-105.

⁹⁸ *Ibid.* at 102-103.

⁹⁹ See generally Andrew C. Mertha & Ka Zeng, “Political Institutions, Resistance, and China’s Harmonization with International Law” (2005) 182 *China Q.* 319.

The problems encountered in executing centrally-inspired plans, including ones which have international ramifications, extend beyond those with which relevant domestic and external actors are fully or partially familiar. A notable example is the *guanxi* culture, which is deeply embedded in the social fabric. The literal meaning of the term is "relationship," but it refers specifically to "personal connection" in everyday parlance. It is established through the exchange of favors, and reinforced through the exchange of trust. To the Chinese, *guanxi* has been an essential element of life, allowing them to rely on mutual support within a closely-knit interpersonal network during periods of famine, group violence, political turbulence, and war.¹⁰⁰

The traditional, socially defensive version of *guanxi* appears to have given way in the past two decades to a more opportunistic, socially manipulative one. Due to the rapid spread of materialism, the maximization of personal economic gains has become a key motive for building socially rewarding relationships. A well-functioning *guanxi* network is increasingly viewed as a form of social investment, potentially paving the way for the exploitation of profit-making opportunities and economic advancement. The term is now often equated with a *modus operandi* whose emphasis is on going through the backdoor, using personal connections, and obtaining concrete advantages as a result.¹⁰¹

The distorted *guanxi* culture impedes China's systematic transformation. From an international economic perspective, foreign firms, as outsiders to the domestically nurtured networks, are denied access to sensitive information, are subject to discriminatory treatment, and need to incur extra costs in order to secure a wide range of services. This deviates from the spirit and letter of internationally binding agreements, but the countervailing cultural forces are simply too powerful to be contained effectively at this early juncture in the modernization process. The picture may well change in the long-term, yet such expectations, even if valid, cannot provide reassurance in the short to medium-term.¹⁰²

These constraints need to be highlighted because of their seriousness and prevalence. Adherence to WTO rules in the face of such corrosive bottom-up influences is bound to be a highly selective exercise. The objective of bringing them into focus is not to bolster this compelling argument, however, since in itself it does not shift the balance of the theoretical claims examined here in one direction or another. Indeed, our contention is that they mostly serve to illustrate that the Chinese political center simply does not have the capabilities to ensure a high

¹⁰⁰ See generally Icksoo Kim, "Accession into the WTO: External Pressure for Internal Reforms in China" (2002) 11(32) J. Contemp. China 438.

¹⁰¹ *Ibid.* at 454.

¹⁰² *Ibid.*

degree of compliance, and may not even be fully aware of the magnitude of the task it confronts. Thus, they should not be construed as reflecting public choice-style efforts to convert the national agenda into a vehicle for the accumulation of personal benefits for those strategically positioned to shape it, other than on a relatively modest scale.

The evidence buttressing this contention is in the form of measures embraced by the central government to minimize the adverse impact of the barriers to compliance with the WTO regime. For example, mechanisms have been introduced not just to reduce the vulnerability of the potentially fragile banking industry to exogenous shocks, primarily through more effective regulation and supervision, but also to prepare it for intense external competition, via a mixture of financial reinforcement (e.g. recapitalization) and gradual liberalization. By the same token, the less feeble but heavily protected telecommunications industry has been streamlined and transformed into a configuration roughly akin to that of a level-playing field. Such initiatives have been witnessed across the industrial spectrum, often featuring consolidation and centralization (or to be precise, recentralization) designed, where appropriate, to wrest control from vested interests at the national and local levels, particularly the latter.¹⁰³

Legal reform poses a greater challenge because of its implications for system-wide governance, but it has by no means been frozen. Notably, in 1999, the Supreme People's Court ("SPR") unveiled an ambitious and comprehensive plan for overhauling the structure of the judiciary. Among the steps announced were various actions to enhance judicial independence and the integrity of organizational operations. Typical in this respect was the decision to switch gradually from "two-fold leadership" to "vertical leadership," allowing the supervising court to have a more tangible input into the selection and appointment of ranking judges of a lower court, which was previously the exclusive domain of the local Party Committee.¹⁰⁴

Another significant development was the adoption, initially on an experimental basis, of the principle of "judge in charge," literally aimed at creating a framework whereby members of the judiciary directly involved could enjoy a meaningful degree of autonomy in deciding cases. Since the promulgation of the 1999 SPC plan, the drive to increase judicial professionalism has gained considerable momentum. Recruitment standards have been raised and training programs have been expanded. The process of legal reform is in its early stages and there is substantial scope for further adjustments, including areas having a bearing on adherence to WTO rules (e.g. in terms of establishing the precedence of these rules over domestic laws). Nevertheless, the general course

¹⁰³ See generally Mertha & Ka Zeng, *supra* note 99.

¹⁰⁴ See Qingjiang Kong, *supra* note 65 at 106.

pursued cannot be readily reconciled with the notion that nothing but elite opportunism is propelling China on the international economic front.¹⁰⁵

In the final analysis, it is difficult to avoid the conclusion that policy capabilities, or a lack thereof, are an important factor in the delicate equation examined here. This is a side of the picture that public choice theorists and proponents of the enforcement approach to international legal compliance choose to de-emphasize. For enlightenment from this particular perspective, one needs to turn to the management school, whose members highlight the propensity of states to adhere to the provisions of international agreements and ascribe this pattern to efficiency considerations, self-interest, and widely-held values. According to them, non-compliance, when it manifests itself in concrete form, is seldom the result of a deliberate intent to breach established treaty obligations, but the unfortunate effect of capacity limitations and rule ambiguity. The corollary is that deviations from international legal commitments should be addressed through a progressive strategy of capacity building, rule clarification, and better transparency, rather than through coercive enforcement.¹⁰⁶

Capacity constraints feature prominently in the managerial-type dissection of the causes of non-compliance. As Young has observed, “[t]he effectiveness of international institutions varies directly with the capacity of the governments of members to implement their provisions.”¹⁰⁷ Political capacity constraints stem from the inability of signatories to induce public and private actors in the domestic arena to behave in a manner consistent with the terms of international agreements. Governments may fail to secure ratification, ensure adherence to treaty obligations (whether partially or across the board), or display the necessary administrative skills. Economic capacity constraints come into play when financial limitations impinge on states’ abilities to fulfill international legal commitments. A lack of sufficient resources may directly hamper compliance efforts, and macroeconomic forces may exert influence indirectly by affecting the overall climate in which public and private actors operate.¹⁰⁸

Managerial theorists further argue that non-compliance may be inadvertent. For a number of reasons, both general and determined by specific circumstances, treaty language is at times imprecise and unclear, and this results in misinterpretation by states. Thus, “more

¹⁰⁵ *Ibid.* at 105-111.

¹⁰⁶ Bradford, *supra* note 3.

¹⁰⁷ See Oran R. Young, “The Effectiveness of International Institutions: Hard Cases and Critical Variables” in James N. Rosenau & Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992) 160 at 183. (italics omitted)

¹⁰⁸ Bradford, *supra* note 3.

often than not there will be a considerable range within which parties may reasonably adopt differing positions as to the meaning of the relevant treaty language.”¹⁰⁹ Inadvertent non-compliance may also have its origins in the uncertainty involved in choosing the strategies required to meet treaty targets (given that different strategies can be pursued in such contexts). The problem manifests itself commonly, for example, in the area of international environmental law.¹¹⁰

The diagnosis of the causes of state actions inconsistent with international legal obligations translates into prescriptions for addressing violations. As Chayes and Handler Chayes claim in their seminal work on the subject: “If we are correct that the principal source of non-compliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly.”¹¹¹ The attention accorded to this mode of compliance management in the academic literature does not reflect its actual use and success, maintain the two scholars. Or, to state it more specifically, “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.”¹¹²

Instead, proponents of managerialism highlight the merits of capacity building, rule clarification, and enhanced transparency as remedies for non-compliance. Whereas some political and economic capacity constraints cannot readily be alleviated through international corrective measures, deficits in technical expertise, bureaucratic effectiveness, and financial resources may be partially or even entirely eliminated via systematic capacity building. By the same token, authoritative rule interpretation in appropriate international legal settings may significantly reduce non-compliance stemming from ambiguous treaty language.¹¹³

In this line of theorizing, dispute settlement is viewed primarily as clarifying common norms through interpretation and adjudication rather than serving as a channel for enforcement. However, it should be emphasized that the mechanisms of rule interpretation need not be confined to formal devices, and non-binding meditative processes may

¹⁰⁹ See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995) at 11. It should be noted that the WTO dispute settlement blueprint reflects more ambitious international community aspirations regarding sanctioning authority. For an overview, see Van den Bossche, *supra* note 46; Barton *et al.*, *supra* note 46; *Sovereignty, the WTO, and Changing Fundamentals of International Law*, *supra* note 46; *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, *supra* note 46.

¹¹⁰ See generally *ibid.*, Chayes & Handler Chayes.

¹¹¹ *Ibid.* at 22.

¹¹² *Ibid.* at 32-33.

¹¹³ See generally *ibid.*

also clarify treaty rules. Enhanced transparency, the third remedy, may provide positive reinforcement in this respect by contributing toward ambiguity reduction and fostering a sense of confidence among players in the substantive and procedural dimensions of the agreement.¹¹⁴

This case study should not be regarded as offering an endorsement of the management approach to international legal compliance and the visions of sovereignty loosely associated with it. Proponents of this gentle paradigm depict the global political landscape as devoid of virtually any opportunistic elements, providing an overly idealistic perspective on the conduct of foreign policy, which is to some extent out of tune with prevailing realities. Certain assumptions upon which it rests would also need to be adjusted in order to make them more relevant in the present context. There can be little doubt, for example, that Chinese officials have a firm grasp of WTO rules and that subtle differences in the interpretation of those rules are not the root of the problem. On the other hand, they may not fully appreciate the complexities and constraints which they face and may thus *inadvertently* deviate from the agreed-upon script.¹¹⁵

The virtues of managerialism nevertheless should not be overlooked. It incorporates values other than self-interest and treats international cooperation as a phenomenon which is not invariably the product of Machiavellian machinations. It does not portray strategic decision making as a single step and differentiates explicitly between policy formulation and policy implementation. The focus on the implementation component of the process encourages analysts to display constructive concern for institutional capabilities and the adverse implications for international law of the inadequacies exhibited by states in this respect. Scholars who embrace the postulates of management school also put forward progressive ideas regarding compliance enhancement which extend beyond traditional-style enforcement. Thus they effectively complement, but do not render fruitless, the analytical contributions of their public choice counterparts.

CONCLUSION

THE CONCEPT OF SOVEREIGNTY has long featured prominently in the study of international law and international relations. In recent years, it has been subject to a stream of intellectual innovations, resulting in considerable theoretical broadening and deepening. The insights generated by members of the public choice schools have been

¹¹⁴ *Ibid.*

¹¹⁵ See generally Donald C. Clarke, "China's Legal System and the WTO: Prospects for Compliance" (2003) 2 Wash. U. Global Stud. L. Rev. 97.

particularly illuminating because of their radical nature (in the sense of being unconventional, even counter-intuitive), rigorous structure, high degree of transparency, and far-reaching ramifications for the maintenance of the international order. Importantly, those insights have been examined empirically in international legal settings and have apparently emerged intact.

However, the empirical testing has been confined to a number of American case studies, undertaken in an environment where the political system operates in a manner similar to that of the economic marketplace. China's decision to seek entry into the WTO, on not entirely favorable terms, at least initially, allows academic researchers to extend the process geographically and culturally, and productively and reliably so, because it has been rather well documented. The conclusion we draw on the basis of our exploration of the available evidence is that the public choice framework is viable irrespective of national boundaries and historical experience, albeit not to a point of being able to offer a comprehensive account of sovereign action involving international law.

Elite opportunism seems to be merely one of several factors inducing the domestic political establishment to accept external legal constraints which are not without negative consequences, including influences which are fundamentally at variance with the motives attributed to state representatives by public choice theorists (e.g. the basically selfless commitment to the idea of an open and deregulated economy which functions efficiently and equitably). Strategy implementation also needs to be decoupled analytically from strategy formulation and accorded careful attention as a source of impulses potentially undermining international law. To the extent that institutional capabilities are sub-optimal, they should loom large on the international policy agenda, alongside traditional enforcement mechanisms.