

# Compliance v Cooperation: China and International Law

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## Abstract

While questions of State compliance with international law are the proper subject of their research, international lawyers need to make a clearer distinction between compliance and cooperation, and to pay greater attention to the concept of cooperation than they have to date. This is because the identification of cooperation as a necessary explanatory variable, sometimes running counter to compliance but more often than not a complement to it, helps to satisfy theoretical questions revolving around international law's lacunae, as well as to bring greater depth to compliance studies. Thus, compliance research shows that China has turned from a rebel with a cause in the 1960s into a reasonably good international citizen in the 21st century that, for the most part, complies with its international obligations: but it does not say anything about the international legal black hole into which the Chinese medium range ballistic missile disappeared in January 2007, or about China's position on Darfur and related questions. The concept which fills that hole is cooperation. It is from a deficit of the latter, rather than from failings in compliance as such, that international disputes and threats to the peace have often arisen.

## Introduction

International lawyers are necessarily concerned with the theories, questions and facts relating to State compliance with international law. As former United Nations ('UN') Secretary Kofi Annan pointed out, 'we enjoy a set of international rules of everything from trade to the law of the sea, from terrorism to the environment and from small arms to weapons of mass destruction...but, without implementation, our declarations ring hollow'.<sup>1</sup> Beyond the force of mere necessity, the study of compliance is compelled by intense intellectual curiosity. Lacking the complex machinery of enforcement underpinning municipal law, international law nevertheless projects legitimacy and authority and elicits an impressive degree of compliance from States. Why and how is this so? A whole literature has been built up on the subject, beginning with the work of

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1 United Nations General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc. A/59/2005 (2005).

J.L. Brierly, but most clearly associated with Louis Henkin, and carrying through to the present in the writings of Abram and Antonia Chayes, Harold Koh, Anne-Marie Slaughter, Benedict Kingsbury, José Alvarez, and others.<sup>2</sup>

Given the ongoing search for answers to such thorny questions, a further question, 'Is that all there is?' may appear as a tactic of avoidance, or distraction. But if we find that most States, including States conceived as 'renegade' or 'rogue', do indeed comply with most of their obligations under international law for most of the time, how do scholars account for ongoing international conflict, and where do they intellectually situate problems in the international political realm in a way which is intelligible to international law?<sup>3</sup> What other concepts pick up the lacunae, the silences left even when the requirements of compliance have been satisfied?<sup>4</sup> One potential avenue of research is the concept of cooperation, a topic of increasing interest to international relations scholars but which, because of its more political connotations, has rarely attracted the attention of international lawyers, with the significant exception of Richard Bilder.<sup>5</sup>

In distinguishing between the concepts of compliance and cooperation, it is necessary to pare down the meaning of both so that they (a) fit within a compatible dualism; and (b) remain relevant to questions of international law. I conceive compliance as a legal concept defined as a State's implementation and enforcement of the specific norms, principles and rules imbedded in the international treaty to which it is a party or in the constitutive rules of the international organisation of which it is a member. On the other hand, cooperation with international norms, principles and rules is a broader, more

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2 See J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6<sup>th</sup> ed) (1963) at 72; and Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1968) at 42. See, more recently, Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) at 271–285; Abram Chayes & Antonia Handler Chayes, 'On Compliance' (Spring 1993) 2 *International Organisation* 47 at 197; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 8 *The Yale Law Journal* 106 at 2656; Thomas M. Franck, *The Power of Legitimacy among Nations* (1990); Thomas M. Franck, *Fairness in International Law and Institutions* (1997); Harold Hongju Koh, 'Transnational Legal Process' (1996) 1 *Nebraska Law Review* 75 at 181–207; Harold Hongju Koh, 'Book Review: "The New Sovereignty"' (April 1997) 2 *American Journal of International Law* 91 at 389–391; Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (Fall 1998) *Houston Law Review* 35 at 623–680; José E. Alvarez, 'Why Nations Behave' (Winter 1998) *Michigan Journal of International Law* 19 at 303–317; Roger Fisher, *Improving Compliance with International Law* (1981); Christopher C. Joyner, 'Collective Sanctions as Peaceful Coercion: Lessons from the United Nations Experience' (1995) *Australian Yearbook of International Law* 16 at 241–270; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 4 *European Journal of International Law* 6 at 503–538; Anne-Marie Burley, 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine' (December 1992) 8 *Columbia Law Review* 92 at 1907–1996; Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 2 *American Journal of International Law* 87 at 205–239; Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (Winter 1998) *Michigan Journal of International Law* 19 at 345–372; Oona A. Hathaway, 'Do Human Rights Treaties Make A Difference?' (June 2002) 8 *Yale Law Journal* 111 at 1935–2042; Ryan Goodman & Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (February 2003) 1 *European Journal of International Law* 14 at 171–183; and Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (Summer 2000) *Case Western Reserve Journal of International Law* 32 at 339–440. For an international relations perspective, see Oran R. Young, *Compliance and Public Authority: A Theory with International Applications* (1979); and Oran R. Young, *International Governance: Protecting the Environment in a Stateless Society* (1994).

political concept. While it is normally understood by international lawyers as signifying reciprocal relations between states, between states and international organisations, or between interstate agencies to promote mutual interests or values,<sup>6</sup> here its meaning is broadened to include not only cooperation between states but the cooperation of an individual State or group of States with both consensual and emerging international norms. It is understood as action by a State or group of States that (1) promotes the object and purpose of an international treaty or regime, by, for instance, ratifying treaties without excessive reservations, assuming non-mandatory obligations and promoting the object and purpose of an organisation and its associated treaties; or that (2) indicates respect for international norms which are evolving but which have not yet been recognised as customary international law or entrenched in formal international legal instruments.<sup>7</sup> Like compliance, cooperation implies the voluntary acceptance by the State of constraints upon its freedom of action for the common good. However, while compliance may be seen as obedience to the letter of the law, cooperation in the sense described may be understood as State action reflecting respect for the spirit of the law or the spirit of evolving international norms. It relates to matters for which States arguably have a moral, rather than legal, obligation.

To demonstrate the value of making this broad distinction between compliance and cooperation, I have compared China's pre-1971 attitude to international organisations and international treaties with its participation since the 1970s in key international organisations in the areas of international security, political economy, environment and human rights.<sup>8</sup> I have assessed the degree of its compliance and cooperation with the norms, principles and rules of these international organisations and their associated

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3 Louis Henkin's oft cited observation is that: 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'. See Louis Henkin, *How Nations Behave*, above n2 at 42.

4 Although most international law scholars agree with Henkin, others have challenged his findings. See, for instance, Benedict Kingsbury, 'The Concept of Compliance', above n2 at 345–72.

5 See Richard Bilder, 'Beyond Compliance: Helping Nations Cooperate', in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) at 65–73. Bilder focuses on the importance of cooperation between States, rather than on an individual State's cooperation with norms per se (see also n6). But he also underlines the potential contradiction between compliance and cooperation, when an emphasis on compliance 'may point towards a backwards-looking and essentially legalistic approach focussing on State 'misbehaviour', rather than towards a productive enquiry into devising and deploying better normative techniques and arrangements that facilitate more effective international dealings and cooperation'. See *id* at 72. One of his suggestions for avoiding this trap is 'studying ways of strengthening the deeper structures of social and international cooperation, including obtaining a better understanding of the pervasive role of trust'. *Id* at 73.

6 For instance, among her helpful comments, Joanne Lee has pointed out that, in international criminal law, cooperation is often understood as 'mutual legal assistance' or 'judicial cooperation', leading to the sharing of evidence and other information with criminal courts between different State jurisdictions. Thus, article 86 of the Rome Statute of the International Criminal Court on the 'general obligation to cooperate': 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.' Letter from Joanne Lee to author, 13 August 2007.

7 See also Ann Kent, *Beyond Compliance: China, International Organisations and Global Security* (2007) at 16–18.

8 For detailed examination of these questions, see *ibid*.

treaties. The organisations include the Conference on Disarmament, the World Bank and International Monetary Fund ('IMF'), the World Trade Organisation ('WTO'), the World Health Organisation ('WHO'), the United Nations Environment Programme, the International Labour Organisation ('ILO'), and the UN Committee Against Torture.

In this article I present my principal findings; analyse the evidence for China's compliance and cooperation; provide negative examples of cases where China's compliance and cooperation have been brought into question; and conclude with an assessment of the value of treating cooperation as an analytical variable to be studied both separately from, and in conjunction with, questions of compliance.

## I. Principal Findings

For a State which has long been deemed least-likely to comply with international rules, China has made enormous progress since 1971, and particularly after the onset of economic modernisation in 1978. In the period prior to 1971, the year it finally replaced Taiwan as the official representative of China in the UN, China was seen as a 'rogue' State. In 1965, it was even calling for the abolition of the UN, and promoting the idea of the developing States of the world encircling the developed.<sup>9</sup> To make matters worse, it became absorbed from 1966 in the Cultural Revolution and began attacking its own legal and foreign policy institutions.

After 1971, following its progressive entry into the UN and other key international organisations, and its deeper integration into the international community, and for all its continuing sensitivity about its sovereignty, China began to comply with the rules of international organisations and treaties to which it became a party. In most cases its compliance improved over time. The initial impetus for its entry into an international organisation or its ratification of a treaty was primarily an instrumentalist desire to increase its international status and promote its interests, and indicated little sympathy with the norms and rules involved. This position altered with the process of China's participation, shifting from procedural into a deeper, more meaningful, compliance. The feedback effect of such processes led to its gradual reconception of its domestic interests to align more closely with the norms of the international institution. Its compliance was deepest when international pressures and its domestic interests converged. However, like most States, China's pattern of compliance has not been linear and has been sensitive to the changing international and domestic environment.

Like other States, China complies differently across, and within, issue areas. For international relations scholars this uneven pattern of compliance may be thought unusual, whereas international lawyers would anticipate such an outcome.<sup>10</sup>

International organisations and their associated treaties are themselves active players in the compliance process, not only because of their role in integrating States into the

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9 For Premier Zhou Enlai's call for the UN to be replaced, see *Peking Review* 8 (29 January 1965) no. 5 at 5–6.

10 For a recent challenge to such assumptions in international relations literature, see Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (2007).

international community, but also because of the variability in their purposes, functions, and enforcement mechanisms and their incentives and disincentives for compliance.

While China has normally 'complied' with international norms and rules, it has often not 'cooperated' with them. This conclusion may appear paradoxical, but the evidence for it is persuasive, and the implications for international law significant.

## 2. The Evidence: China's Compliance and Cooperation Record

In the international security regime as a whole, starting from a very low baseline, China has shown the greatest preparedness to change. In 1980, when it entered the Conference on Disarmament, it supported continued nuclear testing and the right of all States to acquire nuclear capability. Now, however, it embraces the principles of nuclear non-proliferation and disarmament and recognises the integrity of international security organisations and their associated treaties. Over a period of 27 years, it has thus altered its perception of its self-interest to accord with the norms, principles, and rules of the regime. It is prepared to renegotiate its sovereignty and accepts the costs as well as the advantages of participation. At the same time, it has made clear that its compliance and cooperation remain contingent on the reciprocal behaviour of other States, particularly that of the United States ('US'), whose strategic decisions are capable of undermining China's own security. Thus, because the US has not ratified the Comprehensive Test Ban Treaty ('CTBT'), China has signed but not yet ratified it. On the other hand, it has ratified the other major non-proliferation and disarmament treaties, in particular the Nuclear Non-Proliferation Treaty ('NPT') and the Chemical and Biological Weapons Conventions. In the opinion of leading non-proliferation and disarmament experts, it has largely complied with its obligations under these treaties.<sup>11</sup> It has also accepted more than 100 on-site inspections from the Organisation for the Prohibition of Chemical Weapons ('OPCW'). One significant area on which China has been working hard in the Conference on Disarmament since its entry in 1980 is the promotion of a treaty on the prevention of an arms race in outer space despite opposition from the US.<sup>12</sup>

China's lack of *cooperation* with the international security regime, on the other hand, has been expressed in more subtle ways. It has interpreted the norms and rules of the regime narrowly, has been slow to commit itself to voluntary and extended controls which accord with the spirit of its obligations, and has failed to participate in some voluntary agreements.<sup>13</sup> In matters directly implicating sovereignty, verification

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11 See, for instance, Yuan Jingdong, 'China's Proliferation and the Impact of Trade Policy on Defense Industries in the United States and China: Testimony before the US-China Economic and Security Commission', 12 July 2007; Shirley A. Kan, *China and Proliferation of Weapons of Mass Destruction and Missiles: Policy Issues*, Report for Congress (#RL31555) (Washington, DC, 6 September 2002) ('*Congressional Research Service*'); Yuan Jingdong, *Strengthening China's Export Control System* (2002) Monterey Institute of International Studies at [1]–[9] <cns.mii.edu/research/china/chicxp/prcxc.htm> accessed 6 November 2002; and Robert G. Sutter, *Chinese Nuclear Weapons and Arms Control Policies: Implications and Options for the United States Report for Congress* (25 March 1994) Washington DC at 94–422 S ('*Congressional Research Service Report*') <www.fas.org/spp/starwars/crs/94-422s.htm>.

12 Kent, above n7 at 74, 86–87, 90–91.

measures, and transparency, it has also been less than cooperative and has adopted a policy of 'asymmetrical transparency'. Nevertheless, it has voluntarily accepted intrusive controls and verification missions on two of its nuclear power reactors from the International Atomic Energy Agency (IAEA), which monitors compliance with the NPT. More recently, it has been one of the world's most outspoken defenders of the norms, institutions and rules of the international security system at a time when that system has been subjected to sustained assault.<sup>14</sup> From 2001, in the face of threats that the US intended to abrogate the Anti Ballistic Missile (ABM) Treaty, China was vociferous in every available multilateral forum about the need to preserve the treaty that it saw as the backbone of the arms control and nuclear disarmament regime.<sup>15</sup> In an apparent recasting of its security and foreign policy persona, China argued that for the US to undermine the authority of a legitimately constituted disarmament agreement was to embark on a new global arms race and weaken the arms control and disarmament consensus.<sup>16</sup> Even after the treaty was abrogated in 2002, China continued to defend the norms of nuclear non-proliferation and disarmament. The paradoxical result was that, whereas China had once been seen as a major threat to the international security regime, it now became a major bastion of support for it.

China has also changed in diverse ways as the result of its membership of the World Bank and the IMF.<sup>17</sup> Although initially it did not support the norms of either organisation, and found it difficult to adapt to Bank and Fund rules and requirements, it has since become increasingly compliant at both the international and national levels. In the case of the Bank, China has an exemplary record of project management and loan repayment. In the case of the Fund, China has benefited from opening up communication through the Article IV Consultations in broad areas of macroeconomic management. It has internalised its integration into the two international organisations by implementing their norms and rules in domestic legislation and through domestic institution-building. Where, however, their strictures appeared to undermine China's interests, it has adopted a policy of 'creative' independence which have raised questions about its cooperation. Paradoxically, China's very emphasis on legality has made it slow, in this regime as in others, to assume non-mandatory undertakings. It has adhered almost exclusively to the letter of the law, rather than developing its institutional relationships in accordance with the spirit of membership and the object and purpose of the World Bank and IMF Articles of Agreement. Critical to the difference between partial and full integration has been China's transparency and observance of standards, which have been seen in the Fund as a 'huge problem'.<sup>18</sup>

13 See Yuan Jingdong, 'China's Proliferation', above n11.

14 Indeed, such was China's concern about US abrogation of the Anti Ballistic Missile ('ABM') Treaty with the Soviet Union in May 2002 that, when I was interviewing officials in the Foreign Ministry's Disarmament Department, they were thinking out loud about ways to encourage US respect for international treaties by getting it to engage more deeply with international organisations. See Kent, above n7 at 90.

15 See, for instance, Sha Zukang, 'China's Perspective on Non-Proliferation', in Joseph Cirincione (ed), *Repairing the Regime: Preventing the Spread of Weapons of Mass Destruction* (2000) at 127–132.

16 See Sha Zukang cited in *People's Daily*, 21 February 2001 and 14 March 2001.

17 Kent, above n7 at 103–143.

In the related context of the WTO, which China joined on 11 December 2001, it has, with notable exceptions, made a commendable attempt to comply with WTO rules.<sup>19</sup> Already, a range of official and scholarly evaluations of China's record in the WTO has been concluded, despite the fact that, given the incremental nature of its WTO undertakings, in some issue areas, China's compliance over time may not yet be tested.<sup>20</sup> Most observers conclude that, despite many technical and practical difficulties, China has made considerable progress in its compliance with WTO rules, and, at least at the central level, is determined to meet its commitments.<sup>21</sup> Achievements include the steps, initiated before accession, to dismantle the protectionist system,<sup>22</sup> promulgation of laws and regulations that, for the most part, comply with its WTO obligations, efforts to strengthen the regulatory system and increased transparency. Problems that have also been flagged, however, include the technical and practical obstacles to fair, uniform, and impartial implementation; continuing and significant problems of transparency; areas, such as agriculture, where China may be in compliance but has instituted new regulations or standards that restrict market opening; resort to industrial policies that limit market access for non-Chinese origin goods; the slow progress of domestic institution and market-building; the incomplete development of a system of enforcement, particularly in relation to Intellectual Property Rights ('IPR'); opposition from local industries that did not initially consent to WTO provisions; and utilisation of remedies that are permissible under the WTO such as antidumping and health and safety standards.<sup>23</sup> Some of these problems have arisen from China's failure to cooperate with the spirit of the rules, rather than from its non-compliance per se. In other words, in the WTO both China's compliance record and its cooperation record have been uneven.

At the same time, as Nicholas Lardy has pointed out, some provisions which were actually built into China's WTO commitments have made compliance very difficult.

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18 Interview, IMF, Washington DC, 13 November 2000.

19 China's compliance has been analysed in Kent, above n7 at 234–245; and Ann Kent, 'China's Growth Treadmill: Globalisation, Human Rights and International Relations' (Summer 2004) 4 *The Review of International Affairs* 3 at 524–543. See also Gerald Chan, 'China and the WTO: the Theory and Practice of Compliance' (2004) *International Relations of the Asia-Pacific* 4 at 47–72; and extensive bibliography by Marilyn Shea, *China and the WTO: Implications for Economics and Change* <hua.umf.maine.edu/China/econw.html>.

20 See, in particular, WTO Director-General Supachai Panitchpakdi, *China and the WTO: Challenges and Opportunities for the Future* (2 December 2004) <www.wto.org> accessed 28 January 2005; United States Trade Representative, *2006 Report to Congress on China's WTO Compliance* (Washington DC, 11 December 2006); American Chamber of Commerce, People's Republic of China, *WTO Implementation* (20 August 2002) <www.amcham-china.org.cn/wto/wto\_1.htm>. For background, see World Trade Organisation, *Accession of the People's Republic of China: Decision of 10 November 2001*, WT/L/432 (23 November 2002); World Trade Organisation, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001); and Pitman Potter, 'Asia in the World Trading System' (October 2000) *Asia Pacific Report*, Special Issue at 20–21.

21 See evaluations in n20, esp. *2006 Report to Congress* at 1–9; and Nicholas Lardy, 'Survey – China and the World Trade Organisation: Problems on the Road to Liberalisation', *Financial Times*, 15 March 2002; 'US Trade Rep Says WTO Concerns Remain', *Associated Press*, 12 February 2004; and *China Rights Forum* (2002) 1, Special Issue: WTO: Profit...and Loss?; *China Rights Forum* (2003) 1, Special Issue: China as Partner to the World.

22 Thus, for instance, by the time China had entered the WTO its tariffs had already fallen by three-quarters, to an average of only 15 per cent, and it had committed to reducing its average tariff to only nine per cent by 2005. Lardy, 'China and the World Trade Organisation' above n21 at 1.

23 See above n19; and Kent, above n7 at 237.

These include China's unique and extensive undertaking, far surpassing those made by other countries, which, for instance, create problems for low-income Chinese farmers; its extensive commitments in the services sector, which were made without sufficient consultation with the relevant domestic regulators; and the limits to market access for Chinese goods in foreign markets that were accepted by China in its accession package. Some of these 'constrain the government's ability to smooth what will inevitably be a socially painful restructuring'.<sup>24</sup>

As a member of the WTO, China was proactive from the beginning. At the Cancun meeting in September 2003, the emergence of a powerful negotiating bloc, the G-20, was largely due to the leadership of Brazil, India and China. China was even promoted by the WTO Director-General as a possible intermediary between the developed and developing world. In the end, however, China's wish not to offend developed States prevented it from adequately representing the interests of developing States, whether at the meetings in Hong Kong in December 2005, or in Geneva in July 2006. By 2007, mounting complaints by the US and the European Union (EU) against record trade deficits with China (estimated for the US as US\$232.6 billion in 2006 and for the EU, at potentially 170 billion euros in 2007), suggested that China's compliance and its cooperation would likely be tested more rigorously in the future.<sup>25</sup> By the end of July 2007, the US had initiated two cases against China to be considered in the WTO's Dispute Settlement Body. The first, initiated in 2006 with the EU and Canada, sought to test whether China's local content requirements discriminated against foreign auto parts. The second was a complaint, later merged with a Mexican complaint, against China's 'tax funds, reductions and exemptions that discriminate against imported products... or that subsidise China's exports'.<sup>26</sup> In addition, Washington has launched two cases against China, which have not yet reached the panel stage, over piracy and counterfeiting concerns.

As one would anticipate, China has behaved more consistently like a developing state in the international environmental regime. In relation to the atmospheric environment, there has been a clear difference between its compliance in the areas of ozone protection, where its obligations are specific, and that of climate change, where they are general and limited.<sup>27</sup> In the former, China has complied internationally with its reporting obligations and in setting voluntary targets. It has also complied domestically in meeting legal and institutional targets and in the practical implementation of many of its reduction targets, even if it has deliberately limited its obligations by failing to ratify the full range of Amendments to the Montreal Protocol.

On the other hand, in the climate change regime, like other developing states, China does not have a formal obligation under the Framework Convention ('FCCC') and the

24 Lardy, 'China and the World Trade Organisation' above n21 at 1.

25 For the EU, see William Schomberg (Reuters News), *EU's Mandlesohn Sees China Trade Ties at Crossroads* (1 August 2007) <global.factiva.com>; for the US, see Reuters News, *China Blocks US Bid for WTO Tax Subsidy Probe* (25 July 2007) <global.factiva.com>.

26 Ibid.

27 Kent, above n7 at 144–180.



Kyoto Protocol to meet reduction targets and, in ensuing negotiations, has sought to avoid any introduction of such targets. Nevertheless, it has complied with its reporting obligations and worked to bring the Protocol into effect. Moreover, it has ratified the Protocol, acceding before Russia and Canada and non-participants such as the US and Australia.<sup>28</sup> Despite its lack of obligations at the international level, which according to one Non-Governmental Organisation ('NGO') has already made it the highest emitter of greenhouse gases ('GHG') in the world, it has sought to reduce its emission of GHG relative to Gross Domestic Product ('GDP').<sup>29</sup> Thus, impelled by research which underlined the dangers of global warming for its own national security and economic development, in June 2007 it produced a forward-looking plan, *China's National Climate Change Programme*. Although still rejecting mandatory caps, this document introduced policies and measures to address climate change for the period up to 2010, aiming to boost energy efficiency by 20 per cent over 2005 levels and to reduce GHG emissions in different industrial sectors by altogether 950 Mt CO<sub>2</sub> (million tons CO<sub>2</sub>).<sup>30</sup> China has also indicated its willingness to take part in negotiations on the extension of the Kyoto Protocol after 2012, and is cooperating with the EU to reduce emissions.<sup>31</sup> In 2007, it also hosted an International Conference on Climate Change in Hong Kong.<sup>32</sup>

At the international level, on the other hand, China has frequently not *cooperated* with environmental norms. Issues of sovereignty and self-interest have remained paramount. For this reason, as noted, it has strenuously resisted any effort by developed States to require developing States to accept targets for curbing the emission of greenhouse gases. It correctly points out that, from the 1970s, developed States had agreed that, since they bore chief responsibility for the build up of greenhouse gases, they would assume the initial responsibility for their reduction. China has also opposed any strengthening of the United Nations Environment Program's powers.<sup>33</sup> It has even brought pressure to bear on the World Bank to censor a report revealing the costs of air and water pollution in China.<sup>34</sup> It has ratified the major international atmospheric environmental conventions but has only ratified their associated Protocols and Amendments once it has ensured that these conform to its interests. Having achieved a satisfactory compromise, it has then been prepared to redefine some of its interests so that they harmonise with those treaty

28 Id at 176–177. See also 'China "Responsible" in Cutting Greenhouse Gas Emissions, Spokesman', *Xinhua News Agency*, 21 June 2007.

29 According to a report by the Netherlands Environmental Assessment Agency, China's CO<sub>2</sub> emissions surpassed those of the US by eight per cent in 2006. See NEAA, 'China Now No 1 in CO<sub>2</sub> Emissions: USA in Second Position' (Press Release, 19 June 2007) <[www.mnp.nl/en/service/pressreleases/2007](http://www.mnp.nl/en/service/pressreleases/2007)>.

30 National Development and Reform Commission, People's Republic of China, *China's National Climate Change Programme* (June 2007) <[www.china.org.cn/english/environment/213624.htm](http://www.china.org.cn/english/environment/213624.htm)>.

31 See 'New EU-China Project on Climate Change', *Xinhua News Agency*, 28 June 2007; and Peter Christoff, 'Capturing the Dragon: An Argument for Reshaping the Kyoto Protocol' (December/January 2007) *The Diplomat* at 20–23.

32 'We Must Do More to Save Our Planet', Editorial, *South China Morning Post*, 1 June 2007.

33 Kent, above n7 at 154; and 'China "Responsible"', above n28.

34 Mary-Anne Toy, 'Pollution Facts Suppressed by China', *Sydney Morning Herald*, 5 July 2007. China persuaded the World Bank to omit from its report the fact that 750,000 people a year die in China from pollution-related diseases.

obligations seen as less threatening to China's sovereignty, particularly where it appears that compliance would lead to profit or to technology transfer, or power and influence.

Finally, China has been less compliant with the international human rights regime than with other regimes and less responsive to its institutions.<sup>35</sup> For instance, although in theory supporting the norms of both the ILO Governing Body Committee on Freedom of Association ('CFA'), and the UN Committee against Torture ('CAT'), in practice China has viewed them as unacceptable challenges to its sovereignty. While it has complied with both bodies procedurally, and has adopted some lesser norms in the conventions to which it has become a Party, it has resisted the implementation of their core values, which impinge upon its sovereignty. In fact, the more it has shown compliance with the procedural requirements of these bodies and the more it has implemented lesser treaty obligations in its domestic legislation and institutions, the less it has been prepared to comply with their most vital standards. Thus, it refuses to implement the right to freedom of association, despite its obligation as a member of the ILO to do so, and does not comply with the definition, implementation, monitoring and enforcement of the prohibition against torture.<sup>36</sup> The reported killing of a worker who had been on strike because he had not been paid for some months is just one example of China's need to respect the right to freedom of association, while continuing reports of China's practice of torture, and its still shocking death penalty statistics, underline the continued fragility of citizens' rights.<sup>37</sup> The human rights system has thus revealed the outer limits of China's compliance in cases where international pressures are perceived by China as threatening critical domestic interests, including the nature of domestic governance.

Equally, China has failed to cooperate with these crucial norms in a variety of ways. First, it has avoided ratifying critical conventions or undertaking voluntary obligations. Thus, it has still not been prepared to ratify ILO Conventions No. 87 (Freedom of Association and Protection of the Right to Organise) and No. 98 (The Right to Organise and Collective Bargaining). Moreover, when ratifying the Convention against Torture, China denied the Committee's competence under Article 20 to undertake confidential inquiries or fact-finding missions on its territory, and was not prepared to accede to Article 21, allowing complaints by other States parties, or to Article 22, allowing complaints by individuals. It also voted against the draft Optional Protocol to the Convention against Torture, and failed to ratify it once it came into being.<sup>38</sup> Moreover, it has used a different interpretation of key concepts, thereby blunting their force. Thus, the aims of freedom of association were initially interpreted by Chinese authorities

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<sup>35</sup> Kent, above n7 at 225–227.

<sup>36</sup> Id at 211.

<sup>37</sup> Mary-Anne Toy, 'Chinese Capitalism Reveals Dark Side', *The Age*, 7 July 2007; Kent, above n7 at 206, 212; and Nora Boustany, 'Amnesty Reports Drop in Executions', *Washington Post*, 28 April 2007. According to Amnesty's April 2007 report, of 1,591 known executions in the world, China was responsible for at least 1,000, although the organisation stated that the real number of China's executions could have been as high as 8,000.

<sup>38</sup> Id at 213–214.

appearing before the ILO Committee on Freedom of Association as ‘to improve work conditions and promote peace’.<sup>39</sup> Likewise, the prohibition against torture has been addressed by Chinese legislation in different ways, but the definition of the act of torture under China’s Criminal Law has been narrowly construed as action to ‘coerce a statement’ (Art 136) or to subject imprisoned people to corporal punishment or abuse for this purpose (Art 189), rather than to officially use torture to punish, intimidate or coerce a person for any reason.

### 3. Negative Case Studies

#### A. *China’s Destruction of its Old Weather Satellite with an Intermediate Ballistic Missile in Outer Space*

On 12 January 2007, the People’s Liberation Army fired a medium range ballistic missile into outer space and destroyed an old People’s Republic of China weather satellite.<sup>40</sup> The international outrage which greeted this event was less justifiable than it may have first appeared. By unwritten agreement, since 1985 States have avoided the use of arms in outer space, but at the same time they have failed either to promulgate an international instrument prohibiting their use or to recognise such prohibition as part of customary international law. The negotiation of such a treaty has been opposed by the US in particular, for fear of the implications it might have for limiting US freedom of action, especially in relation to its planned missile defence programmes.<sup>41</sup> By contrast, since 1980, when it became a member of the Conference on Disarmament, and particularly over the last decade, China has pressed for negotiations to set up a treaty to prevent an arms race in outer space (‘PAROS’), in contrast to the Outer Space Treaty of 1967, which was not designed for military purposes.<sup>42</sup>

Thus, China has long supported the emerging norms opposing an arms race in outer space. And yet, even in such a case, if there is no specified international law constraining State action, China does not regard its freedom of action as in any way impaired. This controversial incident is just one instance of my argument that China is generally compliant with the letter of international law but often not cooperative with its spirit or with the spirit of emerging norms. Bates Gill has postulated that the compartmentalisation of policy-making in China meant that the Ministry of Foreign Affairs (‘MFA’) and other parts of the foreign policy and security apparatus had no idea of People’s Liberation Army (‘PLA’) plans, and that the MFA was as shocked as the outside world when the news of the missile strike was announced.<sup>43</sup> This is probably an

39 ILO Committee, 270<sup>th</sup> Report of the Committee on Freedom of Association, GB.245//5/8, 245<sup>th</sup> Sess., #302, 84 (February–March 1990).

40 William J. Broad, David E. Sanger & Joseph Kahn, ‘Space Missile Test Sets China Apart, US and Neighbours Worry over Intent’, *International Herald Tribune*, 20 January 2007.

41 It was perhaps for this reason that the US Government did not react immediately to the news of China’s missile, even though the Government knew beforehand that it was about to occur. See Michael R. Gordon & David S. Cloud, ‘US Knew of China’s Missile Test, but Kept Silent’, *New York Times*, 23 April 2007.

42 Kent, above n7 at 73–74, 86, 90–91; and conversation with Don Greig, 10 July 2007.

accurate reading of what actually happened on the ground. Internationally, however, judging from China's reasonable record of compliance in the arms control regime in general, there is little doubt that, had an international instrument existed which specifically outlawed the use of missiles in outer space, the PLA would have been bound by it and, moreover, the MFA would have ensured that the PLA was compliant. In the absence of such a treaty, Chinese decision makers clearly did not feel themselves bound either by the spirit of international norms or by emerging international norms.

### **B. The Situation in Darfur**

The unanimous vote on 31 July 2007 for UN Security Council Resolution 1769 to send a joint peacekeeping mission of 26,000 soldiers, the United Nations African Union Mission in Darfur ('UNAMID') to Sudan's troubled Darfur region, and the Sudanese Government's acceptance of this force represented a breakthrough in the long-drawn out international battle since 2003 to restore order in that country.<sup>44</sup> However, there is no doubt that China's sensitivity about State sovereignty has impeded the speedy resolution of this tragic situation, as well as of other matters before the UN Security Council. China's concern to avoid the inclusion of coercive sanctions in Security Council Resolutions has been largely responsible for the long diplomatic delay. Its role as major buyer of Sudanese oil is also doubtless a contributory factor. At the same time, China's insistence on first obtaining a State's consent before any outside intervention can proceed is consistent with its stand on UN intervention in East Timor and elsewhere. It is also related to its fear of outside humanitarian intervention in its own internal affairs without its consent, whether in Taiwan, Tibet or Xinjiang, and reflects the strong position on the principle of State sovereignty that it shares with many other developing States.<sup>45</sup> Moreover, since the principle of humanitarian intervention, or, as it is now conceived, the responsibility to protect, is not yet a universally recognised principle of international law, China can legitimately argue that the primary formal principles to which it owes allegiance are those of State sovereignty and non-intervention. Thus, this case too supports the thesis that China adheres to the letter of international law and to the letter of internationally recognised legal principles, but does not cooperate with emerging international norms like the responsibility to protect, which are not yet universally recognised as formal principles of international law.

However, while refusing to compromise its stand on principle, China has made a number of practical concessions on Darfur which the US itself has acknowledged. From July 2004 until August 2006, for instance, China abstained on a number of Chapter VII Security Council Resolutions on Sudan invoking sanctions, thereby at least allowing them to be adopted by the Security Council.<sup>46</sup> After August 2006, it progressed to the point of voting for the subsequent three Resolutions on Sudan.<sup>47</sup> China also claims to have

43 Bates Gill & Martin Kleiber, 'China's Space Odyssey: What the Antisatellite Test Reveals about Decision-making in Beijing' (May-June 2007) 3 *Foreign Affairs* 86 at 2–6.

44 *UN Approves Peacekeeping Force in Darfur* (31 July 2007) Online Newshour <[www.pbs.org/newshour](http://www.pbs.org/newshour)>.

45 See, for instance, Bates Gill & James Reilly, 'Sovereignty, Intervention and Peacekeeping: The View from Beijing' (Autumn 2000) *Survival* 42 at 41–59.

been instrumental in the diplomatic breakthrough after June 2007 when the Sudan Government accepted the stationing of this combined force, and offered 275 military engineers as part of the peacekeeping forces in Darfur.<sup>48</sup> On other sovereignty-sensitive issues that have recently concerned the Security Council, China has been the principal power negotiating and underwriting a solution to the nuclear standoff with North Korea. It took a leading diplomatic role in the Six-Party Talks, which have finally succeeded in persuading North Korea to shut down its Yongbyon nuclear reactor.<sup>49</sup> Despite its preference for negotiated solutions, China also voted for three Security Council Resolutions allowing non-coercive sanctions to be imposed on Iran, with the explicit understanding that 'sanctions are not the end but a means to urge Iran to return to negotiations'.<sup>50</sup>

## Conclusion

What are the implications of these findings for the case for making a clear distinction between compliance and cooperation, and for the need to pay more attention to the concept of cooperation? Viewing China's international behaviour through the optic of these two concepts, different patterns of behaviour emerge. Compliance research shows that China has indeed changed as a result of participation in international institutions. It has turned from a rebel with a cause in the 1960s into a reasonably good international citizen in the twenty first century that, for the most part, complies with its international obligations. This, in itself, is a valuable finding. However, it does not say anything about the international legal black hole into which the Chinese missile disappeared in January 2007, or about China's position on Darfur and related questions. The concept which fills that hole is cooperation. It is from a deficit of the latter, rather than from failings in compliance as such, that international tension and disputes with China, as well with other States, have often arisen.

The identification of cooperation as a necessary explanatory variable, sometimes running counter to compliance but more often than not a complement to it, therefore helps satisfy theoretical questions revolving around international law's lacunae. It also helps bring greater depth to compliance studies and provides useful policy direction. For

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46 From June 2004 to August 2006, China abstained on UNSC Resolution ('Res') 1556 (2004); UNSC Res 1564 (2004); UNSC Res 1574 (2004); UNSC Res 1591 (2005); UNSC Res 1593 (2005); UNSC Res 1672 (2006); and UNSC Res 1706 (2006). When it abstained, at least two other States also abstained, usually Russia and Qatar, but on one occasion, also the US. On the other hand, in that same period China supported Security Council Resolutions which were adopted unanimously, with 15 votes in favour: UNSC Res 1585 (2005); UNSC Res 1588 (2005); UNSC Res 1590 (2005); UNSC Res 1627 (2005) UNSC Res 1651 (2005); UNSC Res 1665 (2006); and UNSC Res 1679 (2006).

47 UNSC Resolution 1713 (2006); UNSC Resolution 1755 (2007); and UNSC Resolution 1769 (2007).

48 'China Opposes Expanded Sanctions against Darfur', *Reuters News*, 29 May 2007; and 'Chinese PM Voices Concern over Darfur Issue in Talks with Sudanese President', BBC Monitoring Asia Pacific, *Xinhua News Agency*, 4 November 2006; and 'China Raises Darfur While Courting Sudan', *Reuters News*, 3 April 2007.

49 'IAEA Says North Korea Reactor Shut, Seoul Sends Aid', *Reuters*, 16 July 2007, at <www.nytimes.com>.

50 UNSC Resolution 1696 (2006); UNSC Resolution 1737 (2006); and UNSC Resolution 1747 (2007). For citation, see statement by Ambassador Wang Guangya, Permanent Representative of China to the UN, on UNSC Resolution 1737, 23 December 2006, S/PV.5612 (2006).

instance, given China's cooperation deficit, which is arguably related to its culture and lack of a domestic rule of law tradition, it is clear that, where the international community needs China's compliance, it must first ensure that there is a corresponding rule or treaty binding China's actions. Thus, the need for an international treaty on the Prevention of an Arms Race in Outer Space is now incontrovertible, notwithstanding US objections. However, attention to the concept of cooperation is not only helpful in shining a light on issues hitherto neglected in international law research, and in providing a guide for policy. More importantly, while it may appear to highlight the silences in international law, a focus on the concept of cooperation in fact serves to underline the intrinsic value, indeed critical importance, of the continuing development and strengthening of international law.