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The Dynamics of International Legal Regime Formation: The Sino-British Joint Declaration on the Question of Hong Kong Revisited: A Rejoinder to Kevin Tan

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I appreciate Professor Tan's willingness to assume the role of a discussant and endeavour to initiate the process of a collective exploration of the issues addressed in my article. It must be stated at the outset that I find his arguments not compelling, am disappointed that he has not approached the task more carefully and wish that he had ventured deeper into methodological and theoretical territory. However, the two-way flow of ideas for which the *EJIL* provides a fertile platform yields intellectual benefits even when it is uneven and incomplete.

Tan's response is marred by inaccurate assertions and questionable observations. He portrays me as a strong advocate of regime theory, an assessment that bears no relationship to reality. I have indeed written extensively on international legal regimes, primarily in the environmental and economic domains. Yet, I invariably examine the concept cautiously and tentatively. I highlight its flaws in considerable detail and employ it subject to several reservations. I believe that it is not superior, but also not inferior, to other analytical constructs relied upon by international legal theorists.

I have a mild preference for rationalist (a category to which regime theory belongs) formulations over normative ones but, given the limitations of all the schools of

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thought in the field, I consistently advocate a multi-dimensional inquiry, incorporating different perspectives. My current *EJIL* article is no exception. It provides no endorsement of regime theory. Quite the contrary, it contends that institutionalism/neo-institutionalism (and, by implication, strictly speaking, regime theory) cannot account adequately for the formation of the Sino-British legal regime for Hong Kong.

I invoke the expression international legal regime in order to suggest that it is more fruitful to analyse the product of Sino-British negotiations regarding the future of Hong Kong as a regime rather than merely a legal agreement. The aim of my article is not to validate regime theory but to hopefully enhance understanding of the processes via which such entities are created or emerge. The notion of a regime serves just as a point of departure.

Tan erroneously claims that I do not specify which international legal regime I am dissecting, the pre-1997 (i.e., the 1984 Sino-British Agreement) or the post-1997 one. As the title, structure and substantive thrust of the article unambiguously indicate, I focus on regime formation, which took place in 1982–1984, rather than the evolution of the regime from inception to the present. This article is confined to the dynamics of regime formation and does not examine other aspects of regime development.

Tan's misreading of my article gives rise to additional problems. He expresses misgivings about the fact that the Sino-British legal regime for Hong Kong (for instance, actors' expectations) was not studied more intensively. As this (i.e., the regime) is not my principal focus, that would have been an unnecessary distraction.

The issue of sources, primary and secondary, and their scope, is brought up in a similar vein. My article does not aim to furnish a historical account of the Sino-British negotiations regarding the future of Hong Kong. If this was the objective, an international legal history journal, rather than the *EJIL*, would have been an appropriate outlet for it. The article is an exercise in theory-testing and, to a lesser extent, theory-building, not historical data mining.

The comparison with book-long academic work on *The Waitangi Treaty* and the *Paris 1919* factual tour de force is completely misplaced, given the fundamentally different analytical orientations. These solid historical surveys are structured as such and have no salient theoretical dimension. My article is closer to the opposite end of the research spectrum.

Access to primary sources relating to the Sino-British negotiations regarding the future of Hong Kong is difficult and costly at this juncture, for obvious reasons. I have relied on all the substantial relevant secondary sources, which consist of materials produced by writers (mostly highly established and well-connected journalists) close to insiders involved in the process. This may not be sufficient for reconstructing accounts of this particular phase in Hong Kong's legal history, but it provides a satisfactory basis for my theoretical exploration.

My article raises far more significant methodological questions than those cursorily identified by Tan. How does one generalize from a single case study? How can qualitative case studies be conducted systematically? And how can information be extracted from secondary sources in a reliable and transparent fashion? A pertinent discussion

would have been illuminating for readers of the journal, but Tan does not address any of these issues.

Nor does he focus in any meaningful way on my core theoretical arguments (i.e., those relating to the dynamics of regime formation), which offer scope for a fruitful debate. Instead, there is an oblique reference to concepts (egoistic self-interest, political power – symmetrical and otherwise – norms, principles, usage, customs and knowledge) which are employed by regime theorists but play a peripheral role in my framework. He further surprisingly asserts that such notions are fully understood by legal practitioners and thus do not need to be revisited by theoretically-oriented researchers. The former must be commended for their grasp of complex realities and the latter should be pitied for engaging in aimless intellectual manoeuvres.

Tan implicitly suggests, on the basis of a selective reading of the introduction to my article, that the systematic quest for theoretical enlightenment is not a productive undertaking. Instead, students of international law should immerse themselves in the fine details of historical surveys of distant events and accumulate knowledge by pursuing a path consistent with Deng Xiaoping's motto that 'practice is the sole criterion of truth'. I strongly beg to differ, without minimizing the value of sound historical research and practical wisdom. The notion that historical facts speak for themselves and that action ultimately is the most effective vehicle for learning remains far too restrictive to be resurrected in this intricate politico-legal context.

I vigorously dispute Tan's claim that elaborate historical accounts such as those cited by him furnish sufficient, or even ample, insights regarding the formation and subsequent development of international legal regimes. The 'raw material' needs to be processed in a disciplined, precise and transparent fashion. I endeavour to take a step in this direction, albeit in a focused manner, given the limited scope of my article. For book-long illustrations, closer to Tan's Singapore base, of what this research enterprise involves, readers may be referred to wide-ranging conceptual efforts to shed light on the evolution of the Association of Southeast Asia Nation's (ASEAN's) environmental[1] and security[2] regimes.

It is apparent that I believe that Tan has failed to connect with the principal theme of my article, present correctly my position and furnish a sturdy foundation for a productive methodological and theoretical dialogue. Nevertheless, the review serves a useful purpose in bringing into sharp focus the inherent tensions between international legal scholarship which draws inspiration from detailed historical surveys and practical experience and that which is driven by methodological and theoretical concerns.

The Sino-British Joint Declaration remains a fascinating case of international legal regime formation, rather than merely treaty making. Thus far, historians and practitioners, diplomats and lawyers, have done little to exploit its considerable

[1] See P. Nguitragool, *Environmental Cooperation in Southeast Asia: ASEAN'S Regime for Transboundary Haze Pollution* (2011).

[2] See A. Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order,* 2nd edn. (2009).

theoretical potential. There have been some systematic attempts by behaviourally-oriented political scientists and normatively-inclined international legal scholars to explore its various facets (I myself have written a book on the subject from a largely normative perspective).[3] However, rationalist forays into this complex territory have exposed limitations of overly narrow formulations, whether realist or institutionalist, and I take this opportunity yet again to reiterate my stance that a broader framework is needed.

[3] See R. Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (1997).