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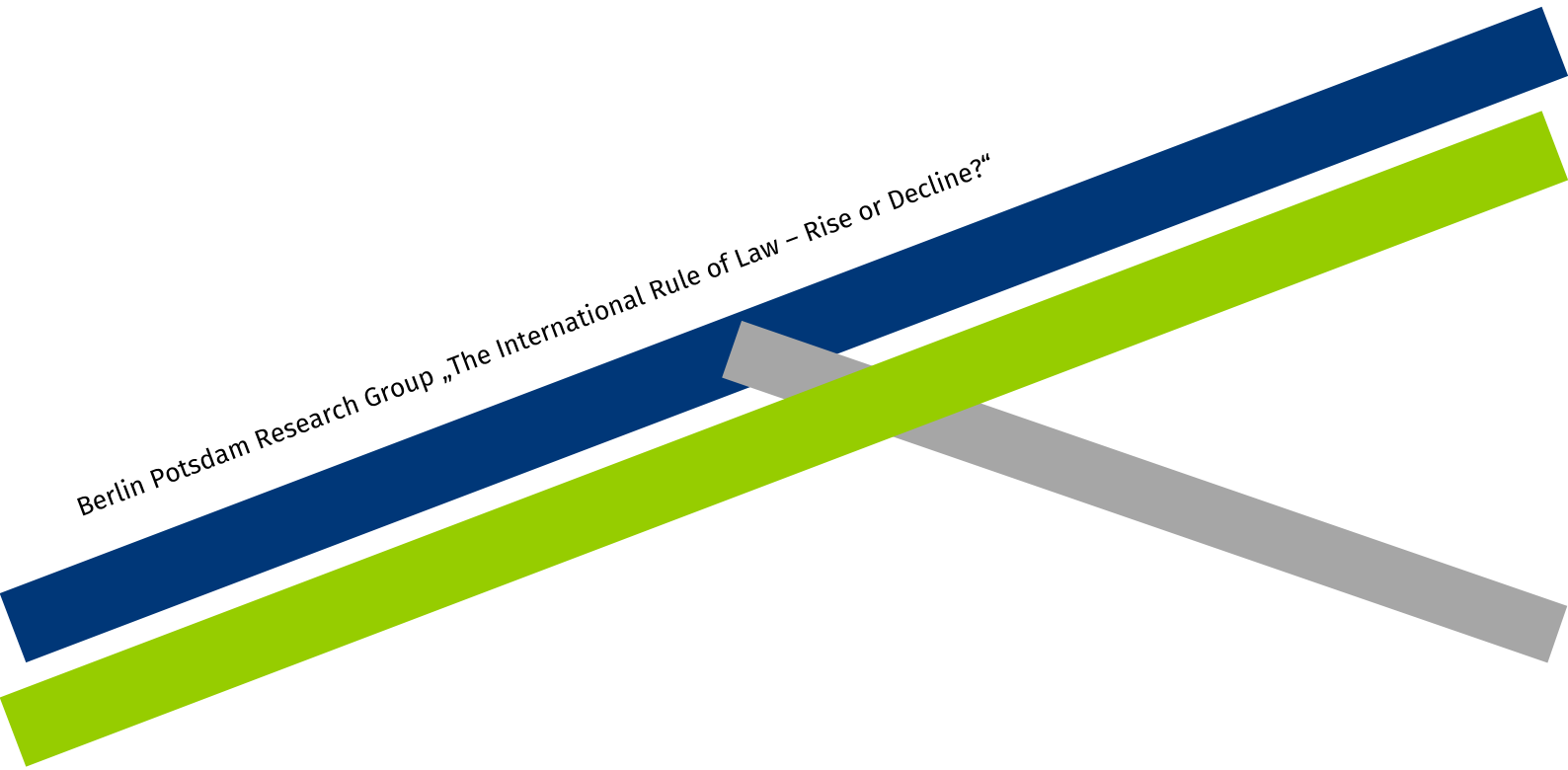
Malcolm Jorgensen

The Jurisprudence of the Rules-Based Order: Germany's Indo-Pacific Guidelines and the South China Sea Code of Conduct



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Berlin Potsdam Research Group
International Law – Rise or Decline?

Habelschwerdter Allee 34a
14195 Berlin

info@kfg-intlaw.de
+49 (0)30 838-61521
www.kfg-intlaw.de

The Jurisprudence of the Rules-Based Order: Germany's Indo-Pacific Guidelines and the South China Sea Code of Conduct

Malcolm Jorgensen[*]

Abstract:

Commitment to the 'rules-based order' (RBO) has emerged as a leading discourse among advocates for stability in global order. Yet, despite the most authoritative rules being those agreed between States to be legally binding, it is primarily political voices that advocate in these terms, often assuming that they also embody lawyers' commitment to the 'international rule of law'. Legal scholarship has in contrast remained sceptical regarding both the meanings of the RBO and the perils of uniting legal and non-legal rules within a single normative ideal. This paper defines the RBO in jurisprudential terms in order to interrogate a core strategic assumption driving the discourse: that establishing accessible and pragmatic non-legal rules that are consistent with international law, complements and reinforces legal rules governing the same subject matter. Using the case of the proposed ASEAN-China Code of Conduct in the South China Sea (COC), the paper demonstrates that the RBO and the international rule of law are antagonistic normative ideals in cases where legal rules have failed to constrain the competitive ambitions of a geopolitically dominant state. In such cases, a lack of distinction between legal and non-legal rules tends to reinforce underlying power imbalances and facilitate interpretations detrimental to the integrity of law. States must instead look beyond substituting one category of rules for another and seek strategies for reconfiguring power itself. Expanding recognition of the 'Indo-Pacific' connects the Asia-Pacific and Indian Oceans as a single geostrategic domain, which thereby takes into account considerations of the balances of power necessary for a RBO consistent with international law.

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1. Introduction

On 1 September 2020, Germany released its *Policy Guidelines for the Indo-Pacific*, thereby joining the growing number of States and regional organisations that endorse a concept of the Asia-Pacific and Indian Oceans as a single geostrategic domain.[1] Contained in the guidelines is a commitment to resolve tensions in the South China Sea (SCS) by supporting 'a substantive and legally binding Code of Conduct between China and the ASEAN Member States' (COC).[2] The significance of these words is easy to overlook, since there has been almost universal support among States for some version of the COC since its negotiations began in 2002. Yet, by explicitly calling for a code that is 'legally binding', Germany distinguished its diplomatic approach from nearly every other State engaged on the issue, all of whom remain sensitive to China's position that any such code should not comprise enforceable legal obligations. In consequence, even where claimant States undoubtedly desire legally binding rules, they have facilitated negotiations through a stance of diplomatic ambiguity that calls for a code merely 'consistent' with international law.[3] Doing so represents a strategic trade-off, forgoing insistence on the deeper institutional accountability of legality in expectation of reaching a pragmatic agreement that more effectively promotes cooperation.[4]

The COC thus presents the archetypal case for examining the substantive difference between political commitment to the 'rules-based order' (RBO), which has attained a hegemonic position in global governance discourse, and the commitment in legal scholarship to the 'international rule of law'.[5] In formal terms, the two concepts are generally understood to exist in a hierarchical relationship, with the broader and more inclusive RBO constructed upon a foundation of more authoritative and determinate rules of international law. In substantive terms, however, legal and political scholars are engaged in parallel and equally fraught debates to define the respective concepts in response to the same systemic challenges. In practice, both are quests for an unattainable holy grail, since the central concepts embody the very disputes and tensions that are necessitating interrogation of rules of global order in the first place.[6] The present author argued in 2018 that 'international law cannot save the rules-based order', meaning that interpretations of certain foundational legal rules have become so fragmented along geopolitical lines, and especially in the SCS, that they can no longer sustain commonly agreed norms and institutions capable of peacefully resolving consequential disputes.[7] This trend was well demonstrated in relation to the 12 July 2016 Arbitral Award in the long running case between the Philippines and China over maritime and other disputes in the South China Sea

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[1] Federal Foreign Office, *Policy Guidelines for the Indo-Pacific: Germany – Europe – Asia: Shaping the 21st Century Together* (1 September 2020), https://www.auswaertiges-amt.de/blob/2380514/f9784f7e3b3fa1bd7c5446d274a4169e/200901-indo-pazifik-leitlinien--1--data.pdf.

[2] *Ibid*, 16. Association of South East Asia Nations.

[3] The SCS claimants, other than China and Taiwan, are Vietnam, the Philippines, Malaysia and Brunei.

[4] See Timothy Meyer, 'Alternatives to Treaty-Making— Informal Agreements', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd edn. (OUP, 2020), 71.

[5] See Heike Krieger & Georg Nolte, 'The International Rule of Law – Rise or Decline? Approaching Current Foundational Challenges', in Heike Krieger, Georg Nolte & Andreas Zimmermann (eds.), *The International Rule of Law Rise or Decline?* (OUP, 2019). On the meanings of 'discourse' and its relationship to power see: Teun A. van Dijk, 'What is Political Discourse Analysis?' (1997) 11 *Belgian Journal of Linguistics* 11, 12-15.

[6] This analysis has been misinterpreted in the opening page of a recent monograph, which stated that: 'In late 2018, one jurist wrote that international law "cannot save the rules-based order," even asserting that the very search for the rules of law is an "unattainable holy grail"': See Stuart Casey-Maslen, *Jus ad Bellum: The Law on Inter-State Use of Force* (Hart Publishing, 2020), 1. The intended meaning of the words and argument are clear in the context of the quoted article, which is that attempts to find uncontested conceptual definitions of either 'the rules-based order' or 'the international rule of law' are 'quests for an unattainable holy grail' – not that rules themselves are unattainable: See Malcolm Jorgensen, 'International Law Cannot Save the Rules-Based Order', *The Interpreter* (18 December 2018), https://www.lowyinstitute.org/the-interpreter/international-law-cannot-save-rules-based-order.

[7] Jorgensen, *ibid*.

(SCS Award).[8] China has responded through forceful public diplomacy campaigns to advocate self-judging interpretations of the Award[9] and has correspondingly carved out a 'geolegal' order in the region, in which preponderant power is used to uphold its legal interpretations as effective political norms, which increasingly inform and structure the rational incentives for regional interactions independently of their recognition as law.[10]

The present paper addresses the corresponding side of this equation: that neither can a political RBO save international law in cases where existing treaty or other legal obligations have already failed to constrain the competitive ambitions of a geopolitically dominant State. This is a significant point to explore, since the contrary assumption drives much of the intensifying appeals to the political concept. Non-lawyers and policymakers regularly encounter what can appear as arcane juridical debates about the formalities and correct interpretations of international law, with binary distinctions seeming to exacerbate rather than resolve tensions in key cases.[11] There is thus an allure to seeking pragmatic and responsive rules that are founded in the more accessible legitimacy of political norms and values. Moreover, appealing to a RBO comprised of a dense network of different categories of rules is assumed to complement and reinforce legal rules governing the same subject matter.[12] Yet, this bargain may well be an illusion, with hard cases such as the COC demonstrating that a political RBO remains susceptible to the same limitations that have caused legal rules to fail. Redefining the nature of rules themselves, including even as 'a new type of international law',[13] amounts to a bootstrapping argument – that legal rules facing political pressures can be saved through reformulation as political obligations. Instead, the outcome may only add an additional normative layer with indeterminate authority, while having potentially perverse consequences on the rule of law.

This circularity can only be broken by addressing underlying power structures, and so it is significant that Germany's advocacy for a legally binding COC, as well as for a 'rules-based international order', sits within its new found commitment to the geostrategic concept of the 'Indo-Pacific'.[14] This is a historical turn, with the term 'Indopazifischen Raum' first emerging in the 1924 writings of German political geographer Karl Haushofer, on constructing dominant power balances in the region.[15] Germany's return to the concept, for the inverse purpose of counterbalancing overweening power, adds weight to a growing number of regional and global voices seeking mainstream recognition of the Indo-Pacific, which now includes an official European position.[16] The ultimate success of reimagining favourable balances of power across the Indo-Pacific will be the ability to articulate legally binding

[8] *In re Arbitration Between the Republic of the Philippines and the People's Republic of China (Award)* (Permanent Court of Arbitration, Case No. 2013-19, 12 July 2015).

[9] See Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17 *Chinese Journal of International Law* 207; Douglas Guilfoyle, 'The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea' (2019) 95 *International Affairs* 999, 1013-1016.

[10] See Malcolm Jorgensen, 'Equilibrium and Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order', *KFG Working Paper Series*, No. 21 (November 2018), https://ssrn.com/abstract=3283626.

[11] Meyer, 'Alternatives to Treaty-Making', 61-63.

[12] Mark A. Pollack & Gregory C. Shaffer, 'The Interaction of Formal and Informal International Lawmaking', in Joost Pauwelyn, Ramses A. Wessel & Jan Wouters (eds.), *Informal International Lawmaking* (OUP, 2012), 251.

[13] Heike Krieger, 'Populist Governments and International Law: A Rejoinder to Paul Blokker and Marcela Prieto Rudolphy', *EJIL:Talk!* (27 January 2020), https://www.ejiltalk.org/populist-governments-and-international-law-a-rejoinder-to-paul-blokker-and-marcela-prieto-rudolphy/.

[14] Per Heiko Maas, Federal Foreign Office, *Policy Guidelines for the Indo-Pacific*, 2.

[15] Timothy Doyle & Dennis Rumley, *The Rise and Return of the Indo-Pacific* (OUP, 2000), 29-30; Hans W. Weigert, 'Haushofer and the Pacific: The Future in Retrospect' (1942) 20 *Foreign Affairs* 732.

[16] Council of the European Union, *EU Strategy for Cooperation in the Indo-Pacific*, 7914/21 (16 April 2021), https://data.consilium.europa.eu/doc/document/ST-7914-2021-INIT/en/pdf; Garima Mohan, 'A European Strategy for the Indo-Pacific' (2020) 43 *The Washington Quarterly* 171.

rules that are also effective in governing consequential matters. This particular reconceptualisation of the power balance around China faces steep hurdles in trying to save the integrity of regional order but, unlike the COC, it at least takes account of the conditions necessary to do so. The COC emerges as a 'canary' in the minefield of regional tensions, and its silence as an effective instrument will be a warning to governments and policymakers of the perils of appealing to the RBO without heeding the geostrategic context that ensures consistency with the international rule of law.

This paper begins by reviewing existing jurisprudential perspectives on the RBO, which in the most formalistic sense may denote the totality of legal and non-legal rules of global governance. In principle, these different categories of rules remain conceptually distinct and arranged in a hierarchical relationship, with law enshrining the most authoritative and determinate rules upon which political rules are founded. However, in practice, a normative relationship of mutual-dependency is evident, where subordinate political norms can also operate to shape the interpretation and authority of legal rules. The paper thus draws upon comparative international law scholarship to develop a secondary interpretation of the RBO, which is as a predominantly Western conception of the particularistic liberal commitments enshrined within the legal order. This meaning competes with more sovereignty based legal conceptions, as articulated prominently by China and Russia, and thereby offers a more rather than less determinate legal concept than the 'rule of law' simpliciter. Policymakers responding to a disrupted global order have turned to the RBO in both senses, as a normative ideal that is perceived to offer a more accessible and pragmatic framework than law alone, but one capable of complementing and reinforcing a particular form of legal and political order.

The second section of the paper applies these concepts to the case of the ASEAN-China COC, which has emerged as the most prominent RBO agreement, within the most significant dispute, at the heart of the most consequential shift in global power. In this crucial case, it can be seen that the RBO discourse cannot overcome the fundamental problem that China, as a geopolitically dominant State, no longer recognises meaningful constraints on its ambition as enshrined in the *United Nations Convention on the Law of the Sea* (UNCLOS).[17] The trajectory of COC negotiations over nearly 30 years demonstrates that, by appealing to the RBO to circumvent intractable legal disputes, China's excessive maritime claims are being enshrined in what could be termed a 'rules-based order', but one that is destructive rather than resuscitative of the 'international rule of law'. The paper concludes by considering the relationship between the Indo-Pacific concept and international law, which is as a geostrategic account of the necessary conditions for any concept of a RBO, legal or otherwise. Calls for a COC that is binding and/or consistent with international law can be more credibly made within the context of a political strategy for constructing purposive power balances in the region. The evolution in German policy thus exemplifies the increasingly acute strategic decisions facing advocates for a RBO that is consistent with a law-based order.

2. Law and Politics of the Rules-Based Order

Appeals to variants of the RBO have risen exponentially since the end of the Cold War, and are by now well established as among the most prominent political concepts for defending the status quo of the global order that emerged during this period.[18] The relatively recent ubiquity of the term has

[17] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

[18] For a useful overview and conceptual history of the concept see the Lowy Institute Project: *Australia's Security and the Rules-Based Order*, https://www.lowyinstitute.org/about/programs-and-projects/australias-security-and-rules-based-order.

closely tracked post-Cold War shifts in global power, leading Samuel Moyn to describe 'a classic instance of an invention of tradition'.[19] Critics of the pervasive discourse charge that, as a concept, the RBO 'has become increasingly devoid of substance',[20] is a 'myth',[21] or that the history of the largely synonymous 'liberal international order' is 'neither very liberal nor very orderly'.[22] Yet, persistent examinations and invocations demonstrate a point of agreement among scholars and policymakers: the real power of the concept when employed as a metaphor for a disrupted global order.

Concrete definitions have been sought by leading commentators such as John Ikenberry, who has identified specific 'pillars' in the form of 'the security order, the economic order, and the human rights order'.[23] Disorder is thus evident where these three pillars 'have become unbundled, and their benefits can be obtained without buying into a suite of responsibilities, obligations, and shared values'.[24] From that perspective, it is especially Western States and policymakers who purposively employ the RBO term to convey a sense of disruption. The phrasing of German Foreign Minister Heiko Maas is representative: 'The international order is under huge pressure. Some players are increasingly engaging in power politics, thus undermining the idea of a rules-based order with a view to enforcing the law of the strong'.[25] Yet, all such formulations remain forensic constructions of hegemonic and therefore previously unstated understandings of global rules, institutions and conventions, and hence subject to deep substantive disagreements. The lack of precision in the RBO as a term of art should thus be no surprise, since there was little need to name and categorise what was distinctive about the global order in the immediate post-Cold War years, when the singularity and longevity of US influence seemed to be among its defining features.[26] Moreover, competing formulations of the RBO replicate genuine disputes over the power structures and values constituting global order, which are the real forces necessitating interrogation of international rules in the first place.[27]

What is clear is that primarily political voices advocate in these terms, while often assuming that they also embody lawyers' principal commitment to the 'international rule of law'.[28] Much of legal scholarship has in contrast remained sceptical regarding both the meanings of the RBO and the perils of uniting legal and non-legal rules within a single normative ideal. Still, the relative silence of lawyers remains both conspicuous and puzzling in circumstances where the most authoritative and determinate rules of global order are precisely those with legally binding force. The reality is that political power lies foremost with those governments and policymakers advocating for the RBO, leaving lawyers in the vulnerable position of being almost entirely missing from the most significant

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[19] Samuel Moyn (22 November 2020), https://twitter.com/samuelmoyn/status/1330481845323124739; See Google Books Ngram Viewer for appearances of the phrase 'rules-based order' in English language books since 1800: https://books.google.com/ngrams/graph?content=rules-based+order&year_start=1800&year_end=2019&corpus=26&smoothing=3&.

[20] Bobo Lo, 'Global Order in the Shadow of the Coronavirus: China, Russia and the West', *Lowy Institute* (29 July 2020), https://www.lowyinstitute.org/publications/global-order-shadow-coronavirus-china-russia-and-west.

[21] Andrew J. Bacevich, 'The "Global Order" Myth', *The American Conservative* (15 June 2017), https://www.theamericanconservative.com/articles/the-global-order-myth/.

[22] Patrick Porter, 'A World Imagined: Nostalgia and Liberal Order', *Cato Institute Policy Analysis*, No. 843 (5 June 2018), https://www.cato.org/policy-analysis/world-imagined-nostalgia-liberal-order.

[23] Yoichi Funabashi & G. John Ikenberry, 'Introduction', in Yoichi Funabashi & G. John Ikenberry (eds.), *The Crisis of Liberal Internationalism: Japan and the World Order* (The Brookings Institution, 2020), 2.

[24] G. John Ikenberry, 'The Next Liberal Order' (2020) 99 *Foreign Affairs* 133, 139.

[25] Heiko Maas & Jean-Yves Le Drian, 'Who, if not Us?', *Süddeutsche Zeitung* (14 February 2020), https://www.auswaertiges-amt.de/en/newsroom/news/maas-le-drian-sueddeutsche/2189696.

[26] Malcolm Jorgensen, 'The United States', in Robin Geiß & Nils Melzer (eds.), *The Oxford Handbook of the International Law of Global Security* (OUP, 2021), 927.

[27] John J. Mearsheimer, 'Bound to Fail: The Rise and Fall of the Liberal International Order' (2019) 43 *International Security* 7.

[28] See Krieger & Nolte, 'The International Rule of Law', 4-7.

discourse setting the terms for international law's future authority and legitimacy. The first half of this paper accordingly focusses on building the conceptual bridges for lawyers to engage with the RBO discourse, for the purpose of influencing greater recognition of the unique authority of legal rules and the conditions for making them effective. The following section starts by reviewing current limitations in the ways that political RBO advocates systematically appeal to legal authority, and the value that greater legal engagement can offer to both policy discourse and international law scholarship. The focus then turns to alternative jurisprudential interpretations of the RBO and the ways they might address the challenges of distinguishing between legal and non-legal rules, and of characterising the relationships between them. Existing positivist accounts are useful for drawing a conceptual distinction between law and non-law, but are not concerned to address political questions about the substantive interrelationship between categories of rules. An analysis from comparative international law is accordingly developed as a way for lawyers to translate substantive conceptions of law entailed in the RBO into jurisprudential terms. The section concludes by analysing the merits of these legal conceptions for shaping the global order, with a focus on the question of when the legal and non-legal rules of the RBO are more likely to sit in a complementary versus an antagonistic relationship.

a) The Value of Legal Engagement

The RBO as a political discourse is concerned with questions about the function and effects of norms constituting the order, which introduces competing strategic interpretations absent from legalistic concerns only to establish rules as law or non-law.[29] Nevertheless, a point of commonality between all political conceptions is that international law forms a core element of the RBO, and is assumed to have a mutually reinforcing relationship with associated non-legal rules.[30] Non-lawyers have long recognised value in the legalisation of rules, which includes qualities such as allowing for more credible and durable commitments, and reducing the transaction costs of managing and enforcing rules.[31] Categorisation of rules is nevertheless guided foremost by their function and effect, with sharp distinctions based on legal formality remaining a secondary concern. A representative example is in Australia's *2017 Foreign Policy White Paper*, which cites strengthening the 'rules-based international order' as a central pillar.[32] A commitment to 'the rule of law … beyond our borders' is defined not in terms of advocacy for legal rules however, but rather as 'an international order in which relations between States are governed by international law *and other rules and norms*'.[33] The 2018 G7 Foreign Ministers' Communiqué likewise declared commitments to 'the rules-based international order, including international law *and non-binding norms of state behaviour*', which was threatened by, among other things, 'the defiance of international law *and standards*'.[34]

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[29] See Malcolm Chalmers, 'Which Rules? Why There is No Single 'Rules-Based International System'', *Occasional Paper*, London: Royal United Services Institute [RUSI] (April 2019), https://www.rusi.org/sites/default/files/201905_op_which_rules_why_there_is_no_single_rules_based_international_system_web.pdf.

[30] Mark Beeson & Andrew Chubb, 'Australia, China and the Maritime 'Rules-Based International Order': Comparing the South China Sea and Timor Sea Disputes' (2019) *International Relations of the Asia-Pacific* 1, 5; Rory Medcalf, *Contest for the Indo-Pacific: Why China Won't Map the Future* (La Trobe University Press, 2020), 203.

[31] Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 426-431.

[32] Australian Department of Foreign Affairs and Trade, *2017 Foreign Policy White Paper* (November 2017), https://www.dfat.gov.au/sites/default/files/2017-foreign-policy-white-paper.pdf, 79.

[33] *Ibid*, 11 & 83, emphasis added.

[34] Group of Seven, *G7 Foreign Ministers' Communiqué* (23 April 2018), https://www.auswaertiges-amt.de/blob/2203866/e09ebbf5839c1065e0d75e38a8e360bf/gemeinsame-abschlusserklaerung-toronto-data.pdf, [4], emphasis added.

Confirmations along the lines that international law forms 'a fundamental pillar of the international rules-based order'[35] seek to clothe the RBO in the legitimacy of legal authority, and yet do so without specifying juridical relationships. This remains problematic for lawyers, for whom there is a categorical distinction between law and non-law, with the former rules seen to anchor the 'non-binding norms of state behaviour'.[36] Better integrating these jurisprudential sensibilities is thus crucial in order to address the fears of lawyers that any process of engaging with the RBO will compromise the authority of law. Moreover, legal distinctions add value to political accounts, by specifying the different magnitude of challenge entailed in disruptions to laws defining State sovereignty or associated powers of rule creation, for example, as compared to dependant political norms. The relationship between the RBO and the rule of law is accordingly more complicated than merely being more and less inclusive normative ideals, since the broader concept holds the potential to reinforce the visibility and legitimacy of law, but also to erode what is unique about legal authority. The question of how international law relates to the RBO in terms of hierarchy and interdependence therefore remains underdefined among its political advocates.

The value for legal scholarship of connecting to the RBO discourse remains obvious, with political scientists and policy analysts providing a wealth of sophisticated analysis of precisely the trends determining the future of international law, but which require conceptual keys to unlock insights. An example is in the leading research project by the German Institute for International and Security Affairs (SWP) on 'the rise and decline of the liberal international order', which persuasively identifies significant variables to include 'the underlying power configuration of the international order and its components; its principles, norms, rules and institutions; its patterns of cooperation and conflict; its enforcement mechanisms; its legitimacy, effectiveness and authority; its adaptability; and its evolution over time'.[37] These are all the major determinants that lawyers already recognise as reshaping the future of international legal order, but the SWP research addresses the significance of international law only indirectly – as one indices among others of the declining order.[38] Achieving more authentic dialogue promises to enrich scholarship in both directions but, should lawyers fail to engage, they risk being sidelined from today's most significant global order discourse – one that is already setting the terms for the future authority and legitimacy of international law.

b) Law and the Rules-Based Order

aa) Distinguishing Legal and Non-Legal Rules

The threshold task for defining the RBO in legally comprehensible terms is to clearly distinguish between the legal and non-legal rules of global governance. In orthodox terms, legally binding agreements, and the rules they create, are established in accordance with the recognised sources of international law, and thus foremost through compliance with treaty principles that include being a written agreement between States, or other authorised subjects, governed by international law.[39] The primary significance of this category of rules is to offer forms of accountability through specific

[35] European Union, *Statement by EU High Representative Borrell on Formation of New Israeli Government* (18 May 2020), https://www.un.org/unispal/document/statement-by-eu-high-representative-borrell-on-formation-of-new-israeli-government/.

[36] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413.

[37] Hanns W. Maull, 'The Once and Future Liberal Order' (2019) 61 *Survival* 7, 9.

[38] See Hanns W. Maull, 'The Rise and Decline of the Liberal International Order', in Hanns W. Maull (ed.), *The Rise and Decline of the Post-Cold War International Order* (OUP, 2018), 291-2.

[39] *Statute of the International Court of Justice* (1945) Art. 38; *Vienna Convention on the Law of Treaties* (1969), Art. 2(1)(a). See generally: Oscar Schachter, 'The Doctrine of Sources and the Inductive Science of Law', in Oscar Schachter (ed.), *International Law on Theory and Practice* (Brill Nijhof, 1991), 35-37.

rules and methods of interpretation, while breaches engage international state responsibility, up to and including sanctions and/or third party dispute settlement mechanisms under specific legal regimes.[40] The lawyer's task is to distinguish between legal obligations and those that are merely political or moral, using methods that include a subjective consideration of the intent to be legally bound, objective considerations of the 'text, context, and surrounding circumstances' of an instrument, independent of intent, as well as subsidiary questions of effect and substance.[41] However, in practice, the increasingly complex network of rules and agreements of global governance frequently complicate questions of legal status, including especially the impact of non-legal rules on recognised legal obligations.[42]

The specific anxieties over the RBO are relatively new, but the jurisprudential challenge of studying relationships between legal and non-legal norms of global conduct is not. Long before the rise of the RBO discourse, Judge Richard Baxter noted the phenomenon of 'instruments which deliberately do not create legal obligations but which are intended to create pressures and to influence the conduct of States and to set the development of international law in new courses'.[43] Among the most well-known examples are the 1941 *Atlantic Charter* concluded between US President Franklin D. Roosevelt and British Prime Minister Winston Churchill as a political agreement, but with a reverberating impact as a 'blueprint for the new international order' after the Second World War.[44] The Helsinki Accords were a non-treaty agreement at the Conference on Security and Co-operation in Europe, signed by 35 participating States on 1 August 1975.[45] The process exemplified the 'stress of international negotiations in which the parties cannot agree upon clear rules or principles to be followed',[46] but the agreement established understandings capable of strengthening détente between Western and Soviet bloc countries, including the 'fulfillment in good faith of obligations under international law'. The Accords thus had real legal impact and are considered to be among the most influential multilateral agreements of the Cold War era.[47]

Such distinctions have been most recently and comprehensively addressed by the Inter-American Juridical Committee of the Organization of American States (OAS), which on 7 August 2020 adopted the *Guidelines on Binding and Non-Binding Agreements*.[48] Rapporteur Duncan Hollis noted that, on the one hand, the rising prevalence and flexibility of non-traditional international agreements 'may be praised for offering States and other actors novel ways to coordinate and cooperate'. On the other hand, 'their diversity (and complexity) have generated significant questions over what legal status these agreements have, who can conclude them, how to identify them, and what legal effects, if any,

[40] See *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session*, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001).

[41] Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd edn. (OUP, 2020), 645; Joost Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', in Joost Pauwelyn, Ramses A. Wessel & Jan Wouters (eds.), *Informal International Lawmaking* (OUP, 2012), 131.

[42] Meyer, 'Alternatives to Treaty-Making', 59-61.

[43] Richard R. Baxter, 'International Law in "Her Infinitye Variety"' (1980) 29 *International and Comparative Law Quarterly* 549, 557.

[44] Philippe Sands, 'Lawless World: International Law after September 11, 2001 and Iraq' (2005) 6 *Melbourne Journal of International Law* 437, 439. See *The Atlantic Charter* (14 August 1941).

[45] See Michael Bothe, 'Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?' (1980) 11 *Netherlands Yearbook of International Law* 65.

[46] Baxter, 'International Law in "Her Infinitye Variety"', 557.

[47] *Ibid*, 559.

[48] Inter-American Juridical Committee, 'Guidelines of the Inter-American Juridical Committee for Binding and Non-Binding Agreements', *Department of International Law of the Secretariat for Legal Affairs of the Organization of American States* (7 August 2020), http://www.oas.org/en/sla/iajc/docs/Guidelines_on_Binding_and_Non-Binding_Agreements_publication.pdf.

they generate'.[49] Here the guidelines distinguish between agreements that are legally 'binding' (especially treaties for present purposes, but also contracts under domestic law), and non-binding 'political commitments' defined as a 'non-legally binding agreement between States, State institutions, or other actors intended to establish commitments of an exclusively political or moral nature'.[50] For this latter class of rules, 'law provides none of the normative force for the agreement's formation or operation'.[51]

The commentary to the OAS guidelines contends that the 'concept of a political commitment should not, however, be confused with "soft law"', with the latter term denoting the quality of law 'not as a binary phenomenon', but rather 'as existing along a spectrum of different degrees of bindingness or enforceability ranging from soft to hard'.[52] Nevertheless, it should be noted that there is no bright line between these concepts, with the same agreements or rules inconsistently categorised depending on the perspective of different scholars.[53] What is abundantly clear from this overview is that, irrespective of preferred appellation as 'political agreements' or 'soft law', this issue remains the subject of sophisticated and ongoing jurisprudential debate. To state it differently: distinguishing between legal and non-legal rules presents a challengingly high bar to entry for the non-lawyer policymaker, let alone for the mass public whose support is being sought for institutions of global governance. Where the objective of policymaking is not to achieve legal bindingness as an end in itself, but rather effective and legitimate forms of governance, then the nature of a rule remains a secondary concern of seemingly more interest to the international lawyer. This is thus also a salient reminder of the onus on international legal scholarship to demonstrate the functional significance of such distinctions if legal rules are to sustain the claim to be authoritative foundations for the RBO.

bb) Positivist Conceptions

Building upon the foregoing review, any credible jurisprudential interpretation of the RBO requires a precise account of how legal and non-legal rules may interrelate to form a unified order. The distinction between the concepts can be opaque for lawyers, with Sir Michael Wood following his definition of the 'international rule of law' with an observation that this 'also appears to be the sense of the curious term, a "rules-based" international society'.[54] Certainly, some legal analyses have treated the concepts as synonymous, thereby defining away conceptual complications.[55] These accounts are not the focus of this paper however, since they are not representative of the balance of approaches and, more importantly, do not address the reality that distinct and overlapping normative ideals have emerged. The most straight forward interpretation starts by simply distinguishing between

[49] *Ibid*, 9-10.

[50] *Ibid*, 24-25.

[51] *Ibid*, 10.

[52] *Ibid*, 53.

[53] Meyer, 'Alternatives to Treaty-Making', 60-61. See: Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly* 901, 901-902 and 914.

[54] Michael Wood, '"Constitutionalization" of International Law: A Sceptical Voice', in Kaiyan Homi Kaikobad & Michael Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice* (Martinus Nijhof Publishers, 2009), 91.

[55] See for example: Simon Chesterman, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System* (Federal Ministry for European and International Affairs, 2008), https://www.iilj.org/wp-content/uploads/2017/08/unsc_and_the_rule_of_law.pdf; Maja Groff & Joris Larik, 'Strengthening the Rules-Based Global Order: The Case for an International Rule of Law Package', *UN75 Global Governance Innovation Perspectives* (September 2020).

rules with authority drawn from recognised sources of international law, and rules drawn from political or moral authority.[56] The RBO in these terms can thus be defined as a compound term for the order of legal and non-legal rules of global governance. In March 2020, the Legal Adviser to the German Federal Foreign Office explained that international law and 'the rules-based international order' are 'complementary' in the following terms:

> International law refers to the legally binding rules on the relations between subjects of international law such as States. The political term rules-based order encompasses the legally binding rules of international law, but extends also to non-binding norms, standards and procedures in various international fora and negotiating processes.[57]

This is a fairly uncontentious and persuasive interpretation of the relationship since, as Shirley Scott observes: 'Western proponents of the term are likely attempting to capture soft law, institutional arrangements, and norms beyond those that have reached the status of custom and that may not appear in treaty law'. In positivist terms, the RBO is a 'broader term' than the rule of law, since 'the rules need not even be legal rules'.[58]

Legal scholarship is already familiar with the perils of 'deformalisation' in international law, whereby legal rules are increasingly shaped by informal rules and processes.[59] In analogous terms, the RBO concept has come to be identified by some jurists as a threat to the normative legitimacy and authority of international law. Scott notes the increasing preference of the US and its allies to advocate for global order in terms of the 'RBO' and related terminology, rather than in terms of 'international law'.[60] Doing so risks eclipsing international law as the authoritative normative framework for the global order, while compromising on the universality and stability promised by the legal order.[61] Talmon sees the shift as 'a dangerous development', since it 'blurs the distinction between binding and non-binding rules, giving the impression that all States and international actors are subject to this order, irrespective of whether or not they have consented to these rules'. The peril is that the RBO discourse will 'come to undermine the credibility of international law'.[62] The implication from these positivist accounts is the value of pledging fidelity foremost to some version of the 'international rule of law', in preference to quasi-legal or political concepts.

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[56] See Gregory C. Shaffer & Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2009) 94 *Minnesota Law Review* 706, 724-725.

[57] Stefan Talmon, 'Notable Statements on International Law During March 2020', *German Practice in International Law* (12 May 2020), https://gpil.jura.uni-bonn.de/2020/05/notable-statements-on-international-law-during-march-2020/. For such uses of the term see: Federal Foreign Office, *Policy Guidelines for the Indo-Pacific*, 14 and the answer of the Minister of State for Europe in the German Parliament in response to a question on the difference between international law and the '*regelbasierten Ordnung*': Deutscher Bundestag, '19. Wahlperiode – 123. Sitzung', Berlin (6 November 2019), 15287-15288 [Frage 62].

[58] Shirley V. Scott, 'The Decline of International Law as a Normative Ideal' (2018) 49 *Victoria University of Wellington Law Review* 627, 641.

[59] See Jean d'Aspremont, 'The Politics of Deformalization In International Law' (2011) 3 *Goettingen Journal of International Law* 503, 526-528; Anne van Mulligen, 'Framing Deformalisation in Public International Law' (2015) 6 *Transnational Legal Theory* 635, 636-637.

[60] Scott, 'The Decline of International Law as a Normative Ideal', 637-39.

[61] *Ibid*, 641.

[62] Stefan Talmon, 'Rules-Based Order v. International Law?', *German Practice in International Law* (20 January 2020), https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/. On issues of consent see: Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *American Journal of International Law* 1.

cc) Comparativist Conceptions

Positivist distinctions between law and non-law have an undeniable formal validity, but are not concerned with political questions about why the RBO discourse has become so dominant, and what impact it has upon legal rules. The RBO is a fundamentally functional rather than formal concept, being inclusive of all rules structuring global governance, irrespective of legal status. Adopting that functionalist lens, it becomes equally observable that legal and non-legal rules of the order are not entirely independent of each other, with the sets of norms and conventions comprising the broader RBO often driving a particularistic conception of international law itself. It is especially salient that the division between proponents and critics of the RBO discourse is largely identical to the divisions between Western and non-Western interpretations of basic rules of international law. A more complex story than the positivist account is at play, such that interpretations of law itself appear to be partly dependant on the broader context of non-legal rules and values constituting the order.

A standard explanation for the rise in RBO discourse is that its advocates aspire to language and concepts that frame defence of the global order in non-partisan terms.[63] This rationale does not completely explain the specific preference of non-lawyer policymakers for the RBO terminology, however, since the 'international rule of law' already encapsulates the ideal of an 'escape' from politics.[64] Rather, the dilemma is that appeals to the 'international rule of law', simpliciter, are increasingly unable to resolve geopolitical disagreements in certain consequential cases, with disputant States each claiming the mantel of law, but meaning quite different things. Here, the re-emerging field of comparative international law can offer a secondary understanding of the RBO as a particularistic conception of the international rule of law. This scholarship recognises that the real policymakers and practitioners of international law 'hail from different States and regions and often form separate, though sometimes overlapping, communities with their own understandings and approaches, as well as their own distinct influences and spheres of influence'.[65] Thus, pulled between normative imperatives, 'the field of international law is defined by a dynamic interplay between the centripetal search for unity and universality and the centrifugal pull of national and regional differences'.[66] This scholarship observes that

> different States and international bodies may set forth different interpretations of the same rules, sometimes strategically, other times unaware of the differences. In some cases, these varying interpretations may subsist with minimal attention, while in others they may change or destabilize the international rules themselves.[67]

In these terms, the substantive view of global order entailed in the RBO discourse can be recognised as informing a particularistic liberal conception of the purposes, content, and operation of international law.

It is not the objective of this paper to offer a detailed jurisprudential concept of law as entailed in the RBO, since any associated legal conceptions remain subject to the same contested interpretations as the primary political discourse. The contours of the concept can nevertheless be partially

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[63] Nick Bisley & Benjamin Schreer, 'Australia and the Rules-Based Order in Asia?' (2018) 58 *Asian Survey* 302, 309; Rebecca Strating, 'Maritime Disputes, Sovereignty and the Rules-Based Order in East Asia' (2019) 65 *Australian Journal of Politics & History* 449, 449.

[64] Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011), 37.

[65] Anthea Roberts, *Is International Law International?* (OUP, 2017), 2.

[66] *Ibid*, 3.

[67] Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier & Mila Versteeg, 'Conceptualizing Comparative International Law', in Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg (eds.) *Comparative International Law* (OUP, 2018), 4.

illuminated in accounts of a 'Western conception' of international law, as evident in the views of the Western Europe and Others Group at the UN.[68] Here, the declining power of the US and Western States to define rules of international law appears to be incentivising concepts that encase law within a political frame.[69] Without being exhaustive, issues of 'state sovereignty and human rights' have emerged as among the defining 'fundamental ideological tensions' that distinguish competing geo-political and legal communities.[70] Yet, advocates for orthodox 'Western' conceptions of international law encounter a deficit in language when seeking to advocate their particularistic conception of the legal order. Appeals to demonstrate fidelity to 'international law' or the 'international rule of law' in contested cases are undermined by a circularity in reasoning, in which States with mutually incompatible conceptions of international legal rules are implored to resolve their differences through those same rules.

The contours of a liberal view of global legal order are evident in initiatives such as the joint German-French 'Alliance for Multilateralism', which provides institutional context to the intended meanings of a 'rules-based international order based on the rule of law'.[71] It is clear that this initiative has never just been for multilateral rules per se, but for a substantive normative conception of the values of underlying law, as made clear by Heiko Maas' affirmation[72] that the initiative aligns with US President Joe Biden's proposed global 'Summit for Democracy'.[73] Similarly, the Atlantic Council's 'D-10 Strategy Forum' is an initiative that, since 2014, has brought together policy and strategic leaders from 'ten leading democracies at the forefront of building and maintaining the rules-based democratic order'.[74] A 2017 D-10 strategy paper on Russian challenges defines the 'Rules-Based Democratic Order' and 'liberal international order' as identical concepts: 'i.e. an international system based upon principles of democratic governance, the protection of individual rights, economic openness, and the rule of law'.[75] Moreover, the sole mention of international law in that paper is in the context of critiquing attempts to undermine the legitimacy of Western values, and Russia's specific charge 'that the West, led by the United States, is undermining global stability and international law'.[76] Thus, appeals to the rule of law are to a concept embedded within the groupings' broader political norms and values.

Russian Foreign Minister Sergey Lavrov is among the leading voices taking issue with this type of discourse, which he observes as 'the trend of our Western partners to make fewer references to international law or even remove it from the international lexicon altogether. Instead of the well-es-

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[68] Roberts, *Is International Law International?*, 9, 13-14; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (OUP, 2019), 59-61.

[69] Roberts, *Is International Law International?*, 641.

[70] *Ibid*, 192; Cai, *The Rise of China and International Law*, 142-143.

[71] Alliance for Multilateralism, 'What is the "Alliance for Multilateralism"?', https://multilateralism.org/the-alliance/; Federal Foreign Office, *Policy Guidelines for the Indo-Pacific*, 14; John Bellinger, 'New Global Declaration of Democratic Principles', *Lawfare* (16 February 2019), https://www.lawfareblog.com/new-global-declaration-democratic-principles.

[72] Heiko Maas, (11 January 2021), https://twitter.com/HeikoMaas/status/1348558768955674631?s=20.

[73] Joseph R. Biden Jr., 'Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump' (2020) 99 *Foreign Affairs* 64.

[74] See: Atlantic Council, 'D-10 Strategy Forum' (2019), https://www.atlanticcouncil.org/programs/scowcroft-center-for-strategy-and-security/global-strategy-initiative/democratic-order-initiative/d-10-strategy-forum/. The member States are: Australia, Canada, France, Germany, Italy, Japan, South Korea, the United Kingdom, and the United States, plus the European Union.

[75] Ash Jain et.al., *Strategy of "Constrainment": Countering Russia's Challenge to the Democratic Order* (March 2017), 5, fn. 5, https://www.atlanticcouncil.org/wp-content/uploads/2017/03/AC_Russia_StrategyConstrainment-ELECT-0313.pdf.

[76] *Ibid*, 6.

tablished term "international law" they are attempting to use a new expression, "a rules-based order"'. For Lavrov, this practice detracts from the true multilateralism embodied in the UN, in preference for a 'narrow circle of soulmates … imposing their opinion on others as universal and the only correct approach'.[77] Chinese officials emulate these sentiments in emphasising 'the international order underpinned by international law', while rejecting advocacy 'by a small number of countries of the so-called "rules-based" international order'.[78] This Sino-Russian convergence finds its clearest expression in the joint declaration on the 'Promotion of International Law' of 25 June 2016 (the declaration),[79] which represents 'a united challenge to Western hegemony in international law'.[80] The declaration should be taken seriously as reflecting a distinct conception of international law, with a lineage in long established recognition by China and Russia of robust notions of sovereignty that supersede liberal values, as contained in China and India's 1954 'Five Principles of Peaceful Coexistence'.[81] For Lauri Mälksoo, the distinction is thus located at a level more fundamental than mere doctrinal interpretation, such that the 'struggle and divergence of interpretations cannot be solved only by textual interpretations of the UN Charter'.[82] These political and constitutional principles of the legal order are not mere rhetoric, but have been employed 'in ways that have constrained Western agendas, promoted their own agenda, and challenged certain interpretations of international law'.[83] Some of the most prominent examples of irreconcilable views on the interpretation and operation of international law can be drawn back to these principles, including especially the parallel debates between Russian and Western international lawyers over the legality of Crimea's annexation in 2014,[84] and China's legal arguments in rejecting the 2016 SCS Award,[85] with opposing sides in both disputes claiming to be on the side of law.

Perhaps the most even-handed observation that can be offered in relation to both advocates and detractors of the RBO is that all powerful States, Western and non-Western, make appeals to 'international law' as the authoritative normative framework for resolving global disputes, and yet these

[77] Permanent Mission of the Russian Federation to the European Union, 'Excerpts from Russian Foreign Minister Sergey Lavrov's Remarks at a Roundtable Discussion with the Participants of the Gorchakov Public Diplomacy Fund' (22 April 2020), https://russiaeu.ru/en/news/excerpts-russian-foreign-minister-sergey-lavrovs-remarks-roundtable-discussion-participants.

[78] Jiechi Yang, 'Secretary Antony J. Blinken, National Security Advisor Jake Sullivan, Director Yang and State Councilor Wang at the Top of Their Meeting' (18 March 2021), https://www.state.gov/secretary-antony-j-blinken-national-security-advisor-jake-sullivan-chinese-director-of-the-office-of-the-central-commission-for-foreign-affairs-yang-jiechi-and-chinese-state-councilor-wang-yi-at-th/.

[79] Ministry of Foreign Affairs of the Russian Federation, 'The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law' (25 June 2016), https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698. Reaffirmed in 2021: Ministry of Foreign Affairs of the Russian Federation, 'Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions' (23 March 2021), https://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4647776?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB.

[80] Roberts, *Is International Law International?*, 291.

[81] *Ibid*, 291-292; Chang-fa Lo, 'Values to Be Added to an "Eastphalia Order" by the Emerging China' (2010) 17 *Indiana Journal of Global Legal Studies* 13, 16-17.

[82] Lauri Mälksoo, 'Russia and China Challenge the Western Hegemony in the Interpretation of International Law', *EJIL:Talk!* (15 July 2016), https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/.

[83] Roberts, *Is International Law International?*, 299.

[84] See Anne Peters, Christian Marxsen & Matthias Hartwig, 'Symposium: The Incorporation of Crimea by the Russian Federation in the Light of International Law' (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 1.

[85] Ingrid Wuerth, 'China, Russia, and International Law', *Lawfare* (11 July 2016), https://www.lawfareblog.com/china-russia-and-international-law.

appeals are unavoidably to partial understandings, with 'competing understandings of power constituting multiple meanings of the rule of law'.[86] Western international lawyers are effectively advocating for conceptions of international law informed by the RBO discourse, which forms the counterpoint to international law as encapsulated in the Russia-China declaration. Understood in these terms, the RBO can offer a *more* rather than *less* determinate jurisprudential concept than bare references to 'the international rule of law'. For Western advocates, the RBO has never been a mere literal appeal to an order based on rules, but rather shorthand for the totality of hitherto shared hegemonic understandings and conventions. The recent British push to abandon commitment to the 'rules-based international system' in its *Integrated Review of Security, Defence, Development and Foreign Policy*, is therefore misplaced to the extent that it interprets the RBO as no more than a 'defence of the status quo' that 'is no longer sufficient for the decade ahead'.[87] Advocacy for the RBO has always been for a particularistic and adaptive liberal understanding of what are 'good rules, ones that are equal or fair'.[88] Adopting such a comparative approach recognises that the interpretation of law itself is being structured by power politics and that lawyers must increasingly identify which political conception of law they advocate over another. To state as much will surely be anathema to the presumed lawyers' privilege of being able to remain above the political fray, such that a purist international lawyer may see such efforts as 'both irrelevant and potentially dangerous'.[89] Yet current political trends are already fuelling expectations among some Chinese scholars that 'China might somewhat reshape the Western conception of law and rule of law'.[90] Thus, it is a challenge that lawyers must meet and steer, including in reasserting boundaries between the legal and political, and through new language to describe fragmenting concepts of law.

c) Politics of the Rules-Based Order

Both positivist and comparativist jurisprudential accounts offer pathways for legal scholarship to enter the RBO discourse in defence of the integrity of international law. For this objective, the decisive issue becomes identifying the conditions under which legal and non-legal rules sit in a complementary versus an antagonistic relationship, and therefore when the RBO is likely to be consistent with the international rule of law. Policymakers face the twin challenges of translating the complexities of international law into comprehensible global governance, while also contending with the fragmented interpretations of legal principles along geopolitical lines.[91] In each case, it is not the legal form of rules that is of primary concern, but rather the discursive accessibility and effectiveness of rules in global governance.[92] Abbott and Snidal note the higher contracting costs of legalised agreements, which include that

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[86] Malcolm Jorgensen, *American Foreign Policy Ideology and The International Rule of Law: Contesting Power Through the International Criminal Court* (CUP, 2020), 6.

[87] HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (March 2021), https://www.gov.uk/government/publications/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy, 11.

[88] Graham Allison, 'The Myth of the Liberal Order' (2018) 97 *Foreign Affairs* 124, 125; Cai, *The Rise of China and International Law*, 109.

[89] Roberts, *Is International Law International?*, 3.

[90] Cai, *The Rise of China and International Law*, 61.

[91] Paul Gewirtz, 'Limits of Law in the South China Sea', *East Asia Policy Paper 8* (May 2016), https://www.brookings.edu/research/limits-of-law-in-the-south-china-sea/, 4.

[92] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries of Law* 9, 13.

> [l]egal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across States complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements.[93]

This is especially so under conditions of shifting global power, such that it has become 'difficult to achieve new multilateral treaties and to progress stalled treaty regimes'.[94] Baxter thus suggests that it 'is inevitable that in the course of negotiation and compromise, those who write international instruments will set down on paper whatever will secure agreement, even though the resulting product may not fall into the neat categories to which lawyers are addicted'.[95] Embrace of the RBO discourse is enabled nevertheless by an assumption that establishing accessible and pragmatic non-legal rules that are consistent with international law complements and reinforces existing or desired legal regimes, with States becoming 'enmeshed' in a process that progressively shifts towards more binding and more determinate commitments.[96] Boyle's assessment is that, although soft law is open to forms of abuse, this is no less so for law properly so called and hence, in his estimate, 'it has generally been more helpful to the process of international law-making than it has been objectionable'.[97] There is thus an allure for policymakers in appealing to the normative ideal of the RBO as a dynamic framework of mutually reinforcing legal and non-legal rules.

Conversely, low barriers to entry equate to low barriers to norm change and exit, potentially weakening the stability of a non-legal order. Most problematically, normative hierarchies can be subverted if unaccountable political obligations develop into focal points that dominate the interpretation and operation of law. Pollack and Shaffer argue that actors may 'strategically create and deploy formal and informal lawmaking procedures in an attempt to undermine, change, and reorient substantive legal provisions with which they disagree, and advocate for legal norms that most closely fit their substantive preferences'.[98] Consequences can include the alteration of formally agreed treaty norms through informal and less consensual processes, with dominant power becoming determinative. Bradley and Goldsmith consider the specific problem of 'nonbinding political commitments' under US constitutional law, which they define as 'an agreement, usually written, between the President or one of the President's subordinates and a foreign nation or foreign agency. Its defining characteristic is that it imposes no obligation under international law and a nation incurs no state responsibility for its violation'.[99] The issue is that 'a successor President is not bound by a previous President's political commitment under either domestic or international law and can thus legally disregard it at will'.[100] Additional drawbacks include the erosion of agreed procedures and the relative lack of transparency for political compared with treaty agreements, which has a negative impact on generally recognised features of the rule of law.[101] The combined effect of these vulnerabilities is a version of the 'broken windows theory', where the growing visibility of political agreements, as an alternative normative ideal, becomes corrosive to the unique authority of law.[102]

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[93] Abbott & Snidal, 'Hard and Soft Law in International Governance', 434.

[94] Scott, 'The Decline of International Law as a Normative Ideal', 640.

[95] Baxter, 'International Law in "Her Infinitye Variety"', 565.

[96] Abbott & Snidal, 'Hard and Soft Law in International Governance', 446; Pollack & Shaffer, 'The Interaction of Formal and Informal International Lawmaking', 251.

[97] Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 914.

[98] Pollack & Shaffer, 'The Interaction of Formal and Informal International Lawmaking', 252.

[99] See Meyer, 'Alternatives to Treaty-Making', 67.

[100] Curtis A. Bradley & Jack L. Goldsmith, 'Presidential Control over International Law' (2017) 131 *Harvard Law Review* 1201, 1218.

[101] *Ibid*, 1291-1292.

[102] Meyer, 'Alternatives to Treaty-Making', 66.

Hollis observes that 'due to the speed and flexibility that informality allows – or perhaps the (undemocratic) opportunity to evade often lengthy and uncertain legislative approval processes – States now use political commitments in lieu of treaties to redress a range of global governance issues'. Examples cited include the Third Basel Accord to regulate bank capital requirements, following the 2008 global financial crisis, and the 2015 Joint Comprehensive Plan of Action (JCPOA) to regulate Iran's nuclear program.[103] Neither sought treaty status, despite addressing two of the most consequential global challenges in recent decades, with much of the explanation seeming to lie with political expediency and the pressure to agree to some RBO over none. The US State Department defended the form of the JCPOA as consistent with America's 'long-standing practice of addressing sensitive problems in negotiations that culminate in political commitments'. Reasons cited were the ones of pragmatism and effectiveness, such that the 'success of the JCPOA will depend not on whether it is legally binding or signed', but rather on political protections and penalties built into the regime.[104] By the same logic, however, the Obama administration's decision to avoid formal treaty processes likely 'planted the key seeds for the deal's ultimate demise'.[105] The reasons for the non-treaty status of the JCPOA relate more to domestic Senate gridlock than international disagreement, but the consequences are the same – the US under President Donald Trump was able to abandon the agreement with few formal barriers.[106]

These alternative scenarios demonstrate the RBO discourse as a double-edged sword, which lawyers must negotiate around in order to preserve the integrity of international law. Anne-Marie Slaughter has considered the case of the 2015 Paris Agreement, which gives effect to obligations under the 1992 *United Nations Framework Convention on Climate Change*.[107] The Paris Agreement is itself a treaty, yet broad multilateral agreement was achieved only through the conditional-bindingness of provisions, whereby each signatory state must itself determine, plan, and report on 'nationally determined contributions' to mitigate climate change, with no legal wrong committed in cases of non-compliance.[108] Negotiations canvassed the relative merits of legal form, with the European Union (EU) and various small island States taking the position that creating legal obligations was necessary to ensure compliance, whereas the US argued that doing so would likely reduce participation, or result in less ambitious targets.[109] Slaughter exemplifies the deformalised and policy-oriented approaches that characterise American legal reasoning generally, and which can reveal much about the jurisprudence of the RBO.[110] Her conclusion was that the operative rules of the Paris Agreement are 'not law' but rather 'essentially a statement of good intentions'.[111] Yet, although she lamented this failure to

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[103] Hollis, *The Oxford Guide to Treaties*, viii. See respectively: Basel III (7 December 2017), https://www.bis.org/basel_framework/; JCPOA (done at Vienna 14 July 2015), https://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf.

[104] Julia Frifield (19 November 2015), cited in Matthew Weybrecht, 'State Department Affirms That Iran Deal Is Only a Political Commitment', *Lawfare* (28 November 2015), https://www.lawfareblog.com/state-department-affirms-iran-deal-only-political-commitment.

[105] Jamil N. Jaffer, 'Elements of Its Own Demise: Key Flaws in the Obama Administration's Domestic Approach to the Iran Nuclear Agreement' (2019) 51 *Case Western Reserve Journal of International Law* 77, 78.

[106] *Ibid*, 86.

[107] Anne-Marie Slaughter, 'The Paris Approach to Global Governance', *Project Syndicate* (28 December 2015), https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12.

[108] *Adoption of the Paris Agreement* FCCC/CP/2015/L.9/Rev.1 (UNFCCC, 2015), Art. 4.

[109] Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 *The American Journal of International Law* 288.

[110] See Jorgensen, *American Foreign Policy Ideology and The International Rule of Law*, 38-44 & 96.

[111] Slaughter, 'The Paris Approach to Global Governance'. Slaughter's characterisation of Paris Agreement provisions as 'not-law' is disputed: Daniel Bodansky, 'The legal character of the Paris Agreement' (2016) 25 *Review of European, Comparative & International Environmental Law* 142, 142-143.

meet the 'gold standard' of a 'binding document that can be enforced by courts and arbitration tribunals', she concluded that 'its deficits in this regard are its greatest strengths as a model for effective global governance in the twenty-first century'.[112]

This interpretation is fully in line with the evocative description by Slaughter's former boss at the US State Department, Secretary Hillary Clinton, who critiqued the 'old architecture' of global governance as akin to the 'Parthenon in Greece, with clean lines and clear rules'. In contrast, the rules and institutions that Clinton sought resembled the deconstructivist architecture of Frank Gehry: 'a dynamic mix of materials, shapes, and structures'.[113] This metaphor seems to well capture the logic driving advocates of the RBO over the 'international rule of law', especially as US control over the core institutions of global order declines. Indeed, the contemporaneous US National Security Strategy of 2010 cited the limitations of 'working inside formal institutions and frameworks', calling instead for 'a new diversity of instruments, alliances, and institutions in which a division of labor emerges on the basis of effectiveness, competency, and long-term reliability'.[114] The presumption behind conceptualising legal and non-legal rules within a common normative ideal is that formal barriers to engagement can be overcome, while fashioning a framework for rules that is consistent with and therefore reinforces particularistic understandings of existing legal regimes.[115]

The question of what ultimately determines the positive or negative relationship between the RBO and international law is addressed by Pollack and Shaffer, who posit that

> formal and informal laws and lawmaking processes are likely to interact in a *complementary* fashion where distributive conflict is low, while informal and formal laws and lawmaking forums are likely to interact in competitive, *antagonistic* ways where distributive conflict among States is high.[116]

Such a hypothesis raises obvious implications when advocating for a more pragmatic approach to rules in disputes such as the SCS, where the heart of the issue is not one of coordinating common interests but rather an intractable distributive conflict over maritime rights and resources. The conundrum facing advocates for the RBO in preference to a law-based discourse is captured by Scott: if the singular authority of international law is maintained, 'it would be easier for China to make strategic use of the ideal as it approaches power parity with the United States', in ways that reinforce disruptive conceptions of law. Alternatively, however, the RBO discourse 'makes it far less likely that international law can act as a fulcrum on which to mediate differing positions in relation, for example, to the South China Sea'.[117] The ASEAN-China COC offers the ideal case to test out the strategic assumptions behind the rise of the RBO discourse, including whether it has tactical advantages over international law alone, and whether the ultimate outcome supports a rise or decline in the international rule of law.

3. The South China Sea Code of Conduct

The object and purpose of UNCLOS is to operate as a 'constitution of the oceans' that offers foundational legal rules and procedures for determining 'all issues relating to the law of the sea…as an

[112] Slaughter, 'The Paris Approach to Global Governance'.

[113] Hillary Rodham Clinton, *Hard Choices: A Memoir* (Simon & Schuster, 2014), 33.

[114] The White House, *National Security Strategy of the United States of America* (27 May 2010), 41, 46.

[115] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7, 15-16.

[116] Pollack & Shaffer, 'The Interaction of Formal and Informal International Lawmaking', 242, emphasis added.

[117] Scott, 'The Decline of International Law as a Normative Ideal', 643.

important contribution to the maintenance of peace, justice and progress for all peoples of the world'.[118] These rules specifically govern the definition of maritime zones, how they are to be calculated in relation to territory, and States' associated legal rights. Thus, although UNCLOS remains 'silent on sovereignty over legally defined features',[119] it sets the parameters for claims considered to have some basis under international law, and those that simply remain outside of any credible legal understanding. The clear and persuasive conclusion of the 2016 SCS Award, is that the balance of Chinese legal claims in this disputed region remain of that latter variety, with almost no recognition beyond China's own international lawyers that they are 'even minimally persuasive'.[120] Yet, the challenge facing other claimant States is that China simultaneously maintains geopolitical power preponderance in the region, and has actively seized and defended its legal claims as a political reality. These practices extend back to at least 1992, when China competed successfully with Vietnam to take control of disputed maritime features,[121] have advanced to the construction and militarisation of artificial islands,[122] and most recently include establishing administrative control over the Paracel and Spratly Islands.[123] The consequence of self-judging interpretations of UNCLOS, made tangible through factual control, is that merely appealing to 'international law' now tends to exacerbate rather than assuage tensions.

The impasse is among the leading rationales for ASEAN States seeking a COC with China since 2002, which has become the most prominent initiative for managing tensions pending substantive resolution of legal rights. The COC is not intended to replicate the substance of UNCLOS, being more focused on preventing unintended confrontations and maritime accidents, and certainly does not apply to settlement of territorial or delimitation disputes.[124] In this sense, it has always been something of a 'stop-gap measure', but one nevertheless intended to complement and reinforce the UNCLOS regime.[125] There is precedent for such initiatives, with the 1995 UN Food and Agriculture Organization *Code of Conduct for Responsible Fisheries* providing one example of a non-binding code that has been assessed to complement and strengthen UNCLOS.[126] The 2014 *Code for Unplanned Encounters at Sea* likewise provides political rules of the road that complement but do not supersede the 1972 *Convention on the International Regulations for Preventing Collisions at Sea*.[127] In each case, the detailed provisions of the codes are crafted to overcome coordination and communication challenges that may, respectively, lead to destructive fisheries practices and the escalation of tensions between different militaries at sea. The COC is likewise a clear case of the RBO in action, but in circumstances

[118] Alan Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change' (2005) 54 *The International and Comparative Law Quarterly* 563, 566; *UNCLOS*, Preamble.

[119] Gregory B. Poling, *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute* (Rowman & Littlefield, 2013), 18.

[120] Florian Dupuy & Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124, 141. See *In re Arbitration Between the Republic of the Philippines and the People's Republic of China (Award)*; Nong Hong, 'The South China Sea Arbitral Tribunal Award: Political and Legal Implications for China' (2016) 38 *Contemporary Southeast Asia* 356, 360.

[121] Carlyle A. Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea' (2013) 33 *SAIS Review* 75, 76.

[122] Katherine Morton, 'China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?' (2016) 92 *International Affairs* 909, 934.

[123] Diane Desierto, 'China's Maritime Law Enforcement Activities in the South China Sea' (2020) 96 *International Law Studies* 257, 258.

[124] Yang Fang, 'The South China Sea Disputes', in Jing Huang & Andrew Billo (eds.), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015), 176.

[125] *Arbitration Between the Republic of the Philippines and the People's Republic of China (Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No. 2013-19, 29 October 2015), [208].

[126] Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change', 573.

[127] Anh Duc Ton, 'Code for Unplanned Encounters at Sea and its Practical Limitations in the East and South China Seas' (2017) 9 *Australian Journal of Maritime & Ocean Affairs* 227; *Code for Unplanned Encounters at Sea*, adopted April 2014, https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea.

of intense distributional conflict, involving a geopolitically dominant state unconstrained by treaty rules.

There is little doubt that other SCS claimant States have also frequently advanced their maritime claims contrary to the rule of law,[128] but the present case seeks to test the capacity of the RBO to constrain a geopolitically dominant power, and therefore remains primarily focused on Chinese conduct. From that perspective, a conspicuous feature is the stark contrast between China's resistance to granting treaty or other legally binding status to any eventual code, and the long-expressed preference of ASEAN States for an agreement enshrined in international law.[129] Despite those preferences, claimant States have largely resiled from explicitly making such demands, instead seeking to construct a RBO solution that transposes substantive or at least complementary obligations onto political foundations. Yet, such a strategy cannot meet the fundamental cause of failure for the multilateral treaty, which is that the regional balance of power favours a preponderant state willing and able to interpret or breach the law on a self-judging basis. The COC presents as a crucial test of the strategic advantages and consequences of advocating the ideal of rules-based resolutions beyond the positive rules of international law.

a) Negotiation History

The nearly 30-year history of COC negotiations has produced an ever-growing list of draft documents of and about the code, but little evidence of progress towards an agreement likely to be consistent with or binding under international law.[130] Leading commentator Carlyle Thayer has comprehensively documented the negotiation history, including especially the ways that parties have perceived and articulated the relationship between the COC and international law.[131] ASEAN members first officially committed among themselves to peacefully resolve SCS disputes in July 1992, including by applying 'the principles contained in the Treaty of Amity and Cooperation in Southeast Asia as the basis for establishing a code of international conduct over the South China Sea'.[132] First drafts were exchanged between ASEAN and China in 2000, with ASEAN calling for a code 'consistent with' international law, and China affirming that law provided the 'basic norms governing state-to-state relations'. Neither draft sought legal bindingness however.[133] An inability to agree on a final text led ASEAN States and China to sign the unambiguously political and non-binding 'Declaration on the Conduct of Parties in the South China Sea' (DOC) in November 2002.[134] The DOC affirmed only that 'the adoption of a code

[128] Sarah Raine, 'Beijing's South China Sea Debate' (2011) 53 *Survival* 69, 76; Christopher B. Roberts, 'ASEAN, The 'South China Sea' Arbitral Award, and the Code of Conduct: New Challenges, New Approaches' (2018) 10 *Asian Politics & Policy* 190, 196-197.

[129] Carlyle A. Thayer, 'ASEAN's Long March to a Code of Conduct in the South China Sea', *Maritime Issues* (18 July 2017), http://www.maritimeissues.com/politics/aseans-long-march-to-a-code-of-conduct-in-the-south-china-sea.html, 9.

[130] For a useful timeline see: Charmaine Deogracias, 'Timeline of the ASEAN and China Code of Conduct in the South China Sea' (9 August 2017), https://verafiles.org/articles/vera-files-fact-sheet-timeline-asean-and-china-code-conduct.

[131] See Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea'; Carlyle A. Thayer, 'ASEAN's Code of Conduct in the South China Sea: A Litmus Test for Community Building?' (2012) 10 *The Asia-Pacific Journal* 1; Carlyle A. Thayer, *ASEAN China: Framework of a COC* (Background Briefing, 6 August 2017), https://de.scribd.com/document/355938565/Thayer-ASEAN-China-Framework-of-a-COC-August-6-2017.

[132] *ASEAN Declaration on the South China Sea*, Adopted in Manila, Philippines (22 July 1992), https://cil.nus.edu.sg/wp-content/uploads/2017/07/1992-ASEAN-Declaration-on-the-South-China-Sea.pdf; *Treaty of Amity and Cooperation in Southeast Asia* (1976).

[133] Thayer, 'ASEAN's Long March to a Code of Conduct in the South China Sea', 1.

[134] Shicun Wu & Ren Huaifeng, 'More Than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea' (2003) 2 *Chinese Journal of International Law* 311, 311.

of conduct in the South China Sea would further promote peace and stability in the region', but without defining the functional distinction between the agreements.[135] Certainly, the DOC is framed in terms of acknowledging 'the purposes and principles' of international law, but the list of law includes not only UNCLOS, but also China's particularistic 'Five Principles of Peaceful Coexistence', as equally representing 'universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations'. The invocation of law in the DOC is thus not to a framework for binding and determinate obligations, but to normative principles subject to flexible national interpretations. For these reasons among others, Carlyle Thayer concluded that 'the DOC was stillborn'.[136]

The COC barely progressed in the intervening decades, due to a combination of ASEAN disunity and strategic Chinese obstruction.[137] It took more than two further years after the DOC was completed before the ASEAN States could even agree on the terms of reference for a working group for its implementation. Throughout, China insisted that substantive disputes should be resolved only bilaterally between directly concerned parties, in what amounted to a divide-and-conquer strategy.[138] A delay of six years ensued, until ASEAN finally agreed to only 'promote dialogue and consultation among the parties', thereby setting aside its preference for first undertaking internal consultations, along with its long-standing practice of consensus decision-making.[139] China specifically stalled attempts to progress from the DOC to a COC by insisting that implementation of the former agreement was the overriding priority, while COC discussions were to be delayed pending '"appropriate timing" or when unspecified "appropriate conditions" were met'.[140]

In terms of substantive proposals, ASEAN presented an internal draft of COC elements in 2012, with the objective of creating a 'rules-based framework'. Notably, the suggested elements mirrored a treaty regime, albeit without claiming to be one, including rules governing entry into force, reservations, withdrawal and breach, and mechanisms for dispute settlement, up to and including those provided for under UNCLOS.[141] By 2013, China finally agreed to 'consultations on moving forward the process' of the COC, but while remaining ambiguous on its ultimate form and function. Chinese Foreign Minister Wang Yi explained that the

> COC is not to replace DOC, much less to ignore DOC and go its own way. The top priority now is to continue to implement DOC, especially promoting maritime cooperation. In this process, we should formulate the road map for COC through consultations, and push it forward in a step-by-step approach.[142]

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[135] *Declaration on the Conduct of Parties in the South China Sea* (4 November 2002), https://www.files.ethz.ch/isn/125380/5066_South_China_Sea.pdf.

[136] Thayer, 'ASEAN's Code of Conduct in the South China Sea', 2.

[137] Yee Kuang Heng, 'ASEAN's Position on the South China Sea', in Jing Huang & Andrew Billo (eds.), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015), 72-74.

[138] See Cai, *The Rise of China and International Law*, 174-175.

[139] Walter Lohman, 'ASEAN's Diplomacy Regarding the South China Sea', in Jing Huang & Andrew Billo (eds.), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015), 83-84. See Vinod K. Aggarwal & Jonathan T. Chow, 'The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation' (2010) 17 *Review of International Political Economy* 262, 267.

[140] Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea', 78.

[141] ASEAN, 'Proposed Elements of a Regional Code of Conduct in the South China Sea (COC) between ASEAN Member States and the People's Republic of China' (25 June 2012), https://de.scribd.com/document/355900495/ASEAN-s-Proposed-Elements-of-the-ASEAN-China-COC-in-the-SCS.

[142] Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Minister Wang Yi on Process of "Code of Conduct in the South China Sea"' (5 August 2013), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/activities_663312/t1064869.shtml.

This cryptic account provides little clarity, especially when perhaps the only categorical distinction was the prospect of shifting from a politically to legally binding agreement. The increased ambiguity in relation to both timeframe and legal status led Thayer to make the contemporaneous (and prescient) observation that the discussions 'are likely to be protracted if not interminable'.[143]

The delivery of the SCS Award in 2016 seemed to infuse new energy into the COC negotiations, with Minister Wang announcing in March 2017 that the parties had completed a first draft framework for the code.[144] At this stage the then ASEAN Secretary-General expressed the importance of progressing towards agreement on 'a legally binding instrument'.[145] By August 2017 the representatives of ASEAN and China had finalised the framework for the COC, which closely followed the 2012 ASEAN internal proposal of elements, including objectives of establishing a 'rules-based framework', but while avoiding demands for legal bindingness.[146] Even as the Secretary-General repeated such calls, the pragmatism of the RBO remained ever present, with the Philippine Foreign Secretary qualifying that: 'We push for the legally binding but we also open up our minds to anything that will move us forward'.[147] By August 2018 the parties had agreed to a single draft negotiating text that repeated previous suggestions for elements consistent with a treaty but, as Thayer observes, these did not for example 'mention the duty of state parties to UNCLOS to immediately comply with awards issued through arbitral proceedings established under Annex VII'.[148]

At the 36th ASEAN Summit in June 2020, the Chairman released a statement that was notable for the number of references to the centrality of UNCLOS as the 'legal framework within which all activities in the oceans and seas must be carried out', while continuing the practice of calling for a COC 'consistent' with, rather than binding under international law.[149] That pattern intensified five months later at the 37th ASEAN Summit, with a notable increase in the weight accorded to UNCLOS in terms of its 'universal and unified character', and that 'its integrity needs to be maintained'.[150] Both statements called for 'full and effective implementation' of the DOC, while also being 'encouraged by the progress of the substantive negotiations towards the early conclusion of an effective and substantive…[COC] consistent with international law, including the 1982 UNCLOS'.[151] Yet, in the context of such pointed appeals to UNCLOS, the language of mere 'consistency' with international law can only be read as deliberate diplomatic ambiguity on the part of ASEAN. Members sustained their clear preference for legal bindingness, yet attaining Chinese cooperation precluded articulation of this singular distinguishing feature.[152] Looking ahead, Ian Story concludes that, although 'Southeast Asian

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[143] Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea', 83.

[144] Reuters Staff, 'China Says First Draft of South China Sea Code of Conduct Ready', *Reuters* (8 March 2017), https://www.reuters.com/article/us-china-parliament-southchinasea-idUSKBN16F0JR.

[145] Kanupriya Kapoor & Manuel Mogato, 'South China Sea Code with Beijing Must Be Legally Binding – ASEAN Chief', *Reuters* (28 April 2017), https://www.reuters.com/article/asean-summit-secgen-idINKBN17U1TU.

[146] See Thayer, *ASEAN China: Framework of a COC*.

[147] Raul Dancel, 'ASEAN, China Adopt Framework of Code of Conduct for South China Sea', *The Straits Times* (6 August 2017), https://www.straitstimes.com/asia/se-asia/chinas-foreign-minister-says-maritime-code-negotiations-with-asean-to-start-this-year.

[148] Carlyle A. Thayer, 'A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct', *The Diplomat* (3 August 2018), https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/.

[149] ASEAN, 'Chairman's Statement of the 36th ASEAN Summit' (26 June 2020), https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf, [13], [64-65].

[150] ASEAN, 'Chairman's Statement of the 37th ASEAN Summit' (12 November 2020), https://asean.org/storage/43-Chairmans-Statement-of-37th-ASEAN-Summit-FINAL.pdf, [9], [50], [84-85].

[151] ASEAN, 'Chairman's Statement of the 36th ASEAN Summit', [64-65]; ASEAN, 'Chairman's Statement of the 37th ASEAN Summit', [84-85].

[152] Minh Quang Nguyen, 'Saving the China-ASEAN South China Sea Code of Conduct', *The Diplomat* (28 June 2019), https://thediplomat.com/2019/06/saving-the-china-asean-south-china-sea-code-of-conduct/.

countries will continue to emphasize international law to protect their rights and interests', the COC 'will not be signed in 2021'. Rather, ongoing delays may extend into years, 'by which time China will have greatly consolidated its position in the South China Sea'.[153]

b) 'Legally Binding' versus 'Consistent with International Law'

A persistent tension across the history of COC negotiations is that nearly all States (other than China) have identified their interest in rules that are 'legally binding', yet official statements have almost uniformly adopted the language of a code 'consistent with' international law. This diplomatic ambiguity has caused significant confusion among non-lawyers, with journalists and analysts alike often reporting on progress towards a 'legally binding' COC.[154] Drawing this distinction may appear as a merely legalistic exercise, especially if the final rules are indeed complementary to the objects and purposes of the underlying treaty regime. However, the careful and precise choice of language indicates that States themselves recognise real consequences in the distinctions. There is nothing exceptional about the practice of strategic or 'constructive ambiguity' in international agreements, which assumes that vagueness can assist completion of a formal agreement, especially as a step towards greater substantive agreement.[155] ASEAN in particular has a tradition of 'diplomatic ambiguity', in the sense of 'the presence in diplomatic texts of language [that] potentially carries a number of different meanings – in order to achieve consensus'.[156] But the practice is evident well beyond the region, with international States and organisations routinely describing the code in terms aligned with the RBO discourse. These practices require close scrutiny, since ambiguity can equally have negative effects of obscuring the substance of an underlying agreement, 'thus enabling power and influence to determine where and when the rule applies'.[157] The consequence would be to confirm rather than oppose hegemonic power.

A minority of official statements have called explicitly for a 'legally binding' COC, thus carrying the implication of normative or functional superiority of legal over non-legal rules. France's 2019 'Defence Strategy in the Indo-Pacific' appears relatively clear in calling for 'establishment of a binding code of conduct' under the heading 'Upholding the respect for international law'.[158] Yet, where the issue of legality is of the essence, the absence of specific words is capable of sustaining ambiguity. A joint Singapore-US call for an 'effective and binding' COC implies the force of law, for example,[159] but the ambiguity is evident when compared to an almost identical Vietnam-US statement a month

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[153] Ian Storey, 'The South China Sea Dispute in 2020-2021', *Perspective*, *ISEAS Yusof Ishak Institute* (3 September 2020), https://www.iseas.edu.sg/wp-content/uploads/2020/08/ISEAS_Perspective_2020_97.pdf, 1, 7.

[154] See for example: Sarah Raine, 'Beijing's South China Sea Debate' (2011) 53 *Survival* 69, 70; Luchi de Guzman, 'ASEAN Targets Completion of Code of Conduct Within Three Years', *CNN Philippines* (4 November 2019), https://www.cnnphilippines.com/news/2019/11/4/asean-china-code-of-conduct-south-china-sea.html.

[155] Geoff Berridge & Lorna Lloyd, *Dictionary of Diplomacy*, 3rd edn. (Palgrave Macmillan, 2012), 73.

[156] Stéphanie Martel, 'From Ambiguity to Contestation: Discourse(s) of Non-Traditional Security in the ASEAN Community' (2017) 30 *The Pacific Review* 549. On the distinction between 'ambiguity, vagueness, incompleteness, and inconsistency' see: Adil Ahmad Haque, 'Indeterminacy in the Law of Armed Conflict' (2019) 95 *International Law Studies* 118, 119-20.

[157] Michael Byers, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171, 180.

[158] Ministère des Armées, *France's Defence Strategy in the Indo-Pacific* (2019), https://www.defense.gouv.fr/english/layout/set/print/content/download/559602/9683963/version/1/file/France%27s+Defence+Strategy+in+the+Indo-Pacific+-+Summary+-+2019.pdf, 16.

[159] United States Embassy in Singapore, 'Joint Statement by the United States of America and the Republic of Singapore' (24 October 2017), https://sg.usembassy.gov/remarks-president-trump-prime-minister-lee-singapore-joint-statements-october-23-2017/.

later that called explicitly for 'an effective, *legally binding*' COC.[160] Germany's words and actions have long been consistent with support for legal bindingness, with Chancellor Angela Merkel telling a Beijing Audience in 2016 'that Germany would be pleased if…a binding code of conduct were to be agreed with the ASEAN countries and China.'[161] The 2020 Policy Guidelines are framed in the standard terms of support for 'a peaceful, rules-based and cooperative solution', based in particular on UNCLOS as interpreted by the 2016 SCS Award. Pointedly, however, the guidelines go further in calling for

> a substantive and *legally binding* Code of Conduct between China and the ASEAN Member States for the South China Sea. It is envisaged that the Code will include a *mechanism for the peaceful settlement of disputes* and rules on the common use of resources, with the involvement of third-party countries, in accordance with the UN Convention on the Law of the Sea.[162]

This document is unusual for its precise language in specifying the legal character and mechanisms of the COC, which is certainly stronger than ASEAN voices, but also beyond general global practice – including even Germany's own subsequent statements. A possible implication of achieving this level of legal bindingness would be to create a form of protection against China raising further substantive rights after completion of the COC, such that the German position communicates a political as much as a legal message.

More commonly, states have remained reluctant to call explicitly for legally binding rules, which has produced an ad hoc variety of expressions that are intended to communicate the seriousness of the COC, but without invoking the seriousness of law itself. These include: a call under the Obama administration for 'a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements';[163] EU support for a COC built on the foundations of a 'collaborative diplomatic process';[164] US-New Zealand policy in favour of 'a meaningful and effective Code of Conduct';[165] and Indian support for a COC 'on the basis of consensus'.[166] The characteristic equivocation between direct and more diplomatic language is well demonstrated in the evolution of joint ministerial statements of the Australia-Japan-United States Trilateral Strategic Dialogue between 2013-2019. The issue was first raised in 2013 as a call 'for ASEAN and China to agree on a meaningful Code of Conduct'.[167] By 2017 the challenge was framed in terms of 'upholding the rules-based order', with calls for claimants to 'make and clarify their maritime claims in accordance

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[160] The White House, 'Joint Statement: Between the United States of America and the Socialist Republic of Viet Nam' (13 November 2017), https://vn.usembassy.gov/20171112-joint-statement-united-states-america-socialist-republic-viet-nam/, emphasis added.

[161] Angela Merkel, 'Speech by Federal Chancellor Angela Merkel on Receiving an Honorary Doctorate from Nanjing University on 12 June 2016 in Beijing' (12 June 2016) https://www.bundesregierung.de/breg-en/chancellor/speech-by-federal-chancellor-angela-merkel-on-receiving-an-honorary-doctorate-from-nanjing-university-on-12-june-2016-in-beijing-796560.

[162] Federal Foreign Office, *Policy Guidelines for the Indo-Pacific*, 35, emphasis added.

[163] Patrick Ventrell, 'South China Sea', Press Statement, Washington, DC (3 August 2012), https://2009-2017.state.gov/r/pa/prs/ps/2012/08/196022.htm.

[164] Council of the EU, 'Guidelines on the EU's Foreign and Security Policy in East Asia (11492/12)' (15 June 2012), http://www.eeas.europa.eu/archives/docs/asia/docs/guidelines_eu_foreign_sec_pol_east_asia_en.pdf, [32].

[165] The White House, Office of the Press Secretary, 'Fact Sheet: The United States and New Zealand: Forward Progress' (20 June 2014), http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-united-states-and-new-zealand-forward-progress. On the origins of the factsheet see Robert Ayson, 'The South China Sea and New Zealand's Foreign Policy Balancing Act', in Enrico Fels & Truong-Minh Vu (eds.), *Power Politics in Asia's Contested Waters* (Springer, 2016), 493.

[166] Ministry of External Affairs, 'Remarks by the Prime Minister at 12th India-ASEAN Summit' (12 November 2014) http://mea.gov.in/aseanindia/Speeches-Statements.htm?dtl/22567/Remarks+by+the+Prime+Minister+at+12th+IndiaASEAN+Summit+Nay+Pyi+Taw+Myanmar.

[167] US Department of State, 'Australia-Japan-United States Trilateral Strategic Dialogue Ministerial Joint Statement' (4 October 2013), https://2009-2017.state.gov/r/pa/prs/ps/2013/10/215133.htm.

with the international law of the sea as reflected in…[UNCLOS] and to resolve disputes peacefully in accordance with international law'.[168] The SCS Award was affirmed as 'final and legally binding' on parties, while full and effective implementation of the DOC was urged. Most significantly, the ministers urged timely finalisation of the COC as '*legally binding, meaningful, effective, and consistent with international law*', thereby seemingly resolving distinctions by endorsing both bindingness and consistency.[169] The 2018 statement again cited the SCS Award, but appeared to also pick up the euphemistic ASEAN practice of referring to the Award only as giving 'full respect for legal and diplomatic processes'.[170] The language was conspicuously more ambiguous in relation to the COC, which was to be merely 'consistent with existing international law, as reflected in UNCLOS'.[171] Legal bindingness appeared to be a subject under contemporaneous discussion, with then Australian foreign minister Julie Bishop asked whether, given China's breaches of treaty law, negotiation of the COC was 'purely political theatre'. Bishop responded that the answer would depend in part on whether the ultimate agreement 'was to be enforced'.[172] The 2019 trilateral statement confirmed the ambiguous language in calling for a COC merely 'consistent with existing international law'.[173]

In August 2020, France, Germany and the United Kingdom released a joint statement that reiterated UNCLOS as the 'comprehensive legal framework' governing SCS relations, while endorsing its interpretation in the 2016 Award.[174] A further Note Verbale to the UN referred in even more emphatic terms to the 'specific and exhaustive conditions set forth in the Convention' in relation to both the application of 'straight and archipelagic baselines' and of the 'regime of islands to naturally formed land features', as each was relevant to Chinese claims.[175] Yet, despite citing the exhaustive nature of UNCLOS, and Germany's own call for legal bindingness in its Indo-Pacific guidelines that same month, the three States nevertheless called only for 'a rules-based, co-operative and effective Code of Conduct consistent with UNCLOS'.[176] EU policy has traversed the same diplomatic terrain, in which forum and context appear to influence the choice of language. In 2020, EU High Representative Josep Borrell advocated for 'an effective, substantive and *legally binding*" COC,[177] yet, a joint ASEAN-EU statement signed by Borrell less than three months later referred only to a COC 'consistent with international

[168] Reflecting the US legal position that it is not bound as a treaty party, but that UNCLOS nevertheless expresses customary international law.

[169] US Department of State, 'Australia-Japan-United States Trilateral Strategic Dialogue Ministerial Joint Statement' (6 August 2017), https://www.state.gov/australia-japan-united-states-trilateral-strategic-dialogue-ministerial-joint-statement/, emphasis added.

[170] See *infra*.

[171] US Department of State, 'Australia-Japan-United States Trilateral Strategic Dialogue Joint Ministerial Statement' (5 August 2018), https://2017-2021.state.gov/australia-japan-united-states-trilateral-strategic-dialogue-joint-ministerial-statement/index.html.

[172] Julie Bishop, 'Interview with David Lipson', *ABC The World* (2 August 2018), https://www.foreignminister.gov.au/minister/julie-bishop/transcript-eoe/interview-david-lipson-abc-world.

[173] US Department of State, 'Trilateral Strategic Dialogue Joint Ministerial Statement, August 1, 2019' (2 August 2019), https://2017-2021.state.gov/trilateral-strategic-dialogue-joint-ministerial-statement-august-1-2019/index.html. Identical phrasing was adopted in the 'Joint Statement Australia-U.S. Ministerial Consultations (AUSMIN) 2020' (28 July 2020), https://www.dfat.gov.au/geo/united-states-of-america/ausmin/joint-statement-ausmin-2020.

[174] Federal Foreign Office, 'Joint Statement by France, Germany and the United Kingdom on the situation in the South China Sea today' (29 August 2019), https://www.auswaertiges-amt.de/en/newsroom/news/-/2242280.

[175] Permanent Mission of Germany to the UN, Note Verbale, No. 324/2020 (16 September 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_DEU_NV_UN_001.pdf.

[176] Federal Foreign Office, 'Joint Statement by France, Germany and the United Kingdom'.

[177] Josep Borrell, 'Strengthening EU-ASEAN partnership, an urgent necessity', *A Window on the World* (20 September 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/85434/strengthening-eu-asean-partnership-urgent-necessity_en, emphasis added.

law, including the 1982 UNCLOS'.[178] It is clear that different diplomatic calculations come into play across diverse forums, but such ambiguity remains defensible only if doing so can be shown to complement and reinforce the more authoritative law-based order.

There are parallel advantages from China's perspective for sustaining diplomatic ambiguity, notwithstanding its consistent preference against legally binding rules. One Chinese scholar has commented that, on the one hand, China 'holds an open attitude towards the COC, letting the consultation process take its own course'. Yet, on the other hand, there is recognition that explicitly foreclosing legal bindingness 'would not sit well with the ASEAN countries. Nor would it help China's image. Certain countries are full of suspicions of China. In their view, China would hate a legally binding COC because it would constrain her actions in the South China Sea'.[179] In response to questions on whether the COC has binding force, Minister Wang answered 'definitely yes'. Yet, his further response emphasised only that the COC 'is an upgraded and strengthened version' of the DOC, such that the ultimate outcome will be 'high-quality regional rules with more binding force and more concrete connotations'.[180] Such an appeal is contrary to one of the positivist claims for law, which is that legal bindingness has an absolute binary quality – obligations either exist or they do not.[181] Prosper Weil has criticised the advent of a 'sliding scale of normativity' in legal order, with gaps between law and politics 'bridged only at the cost of denying the specific nature of the legal phenomenon'.[182] Minister Wang's language confirms the non-legal character of the rules, since there is no scope for appealing to degrees of 'more' or 'less' legally binding force to demonstrate commitment. Rather than being consistent with the rule of law, the use of diplomatic ambiguity in this case is facilitating its erosion, and thereby a central rationale for the RBO discourse.

c) Domination through a Rules-Based Order

The risk entailed in governing SCS relations foremost through the ideal of the RBO is the erosion of normative hierarchies between law and non-law, which is inconsistent with multilateral treaty rules specifically, and with the rule of law generally. There have long been warnings that the 'holy grail' of the COC may in practice offer 'a tool for China to legitimize its actions in the South China Sea by engaging in the process while subverting its spirit'.[183] The gap between the legal aspirations of claimants, and political realities, is provocatively captured by James Holmes:

> The only code of conduct worth having would be one by which China renounces its nine-dashed line of the region and the associated territorial claims; matches its words with deeds by evacuating sites it has poached from other countries' exclusive economic zones; stops asserting the right to proscribe certain foreign naval activities within the nine-dashed line; and

[178] Conseil de l'Union européenne, 'Co-Chairs' Press Release of the 23rd ASEAN-EU Ministerial Meeting' (1 December 2020), https://www.consilium.europa.eu/fr/press/press-releases/2020/12/01/co-chairs-press-release-of-the-23rd-asean-eu-ministerial-meeting/#.

[179] Luo Liang, 'A Guide to the South China Sea COC', *China-US Focus* (25 September 2017), https://www.chinausfocus.com/peace-security/a-guide-to-the-coc.

[180] Ministry of Foreign Affairs of the People's Republic of China, 'Wang Yi Responds to Four Questions on the Consultations on the Code of Conduct in the South China Sea (COC)' (1 August 2019), https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1685673.htm.

[181] Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167, 181; C.f. Baxter, 'International Law in "Her Infinitye Variety"', 564. There may however be forms of relative normativity within the category of legal norms, such as *jus cogens* norms and obligations *erga omnes*: See Weil, 'Towards Relative Normativity in International Law?'.

[182] Weil, 'Towards Relative Normativity in International Law?', 417.

[183] Huong Le Thu, 'The Dangerous Quest for a Code of Conduct in the South China Sea', *Asia Maritime Transparency Initiative* (Blog Post, 13 July 2018), https://amti.csis.org/the-dangerous-quest-for-a-code-of-conduct-in-the-south-china-sea/.

> agrees that the purpose of any code of conduct is to lock in the UN Convention on the Law of the Sea as the regional status quo.[184]

On its current trajectory however, the COC may effectively constitute ASEAN ratification of the current status quo, in the unlikely expectation that 'letting China keep its past gains will purchase its forbearance and goodwill in the future'.[185] Little in the evidence to date suggests that China is moving towards a COC capable of constraining its own ambition, while there is ample evidence of its development as a tool enabling it.

A notable feature of China's unwavering opposition to granting treaty or otherwise legally binding status to the COC is the parallels with Western rationales for invoking the RBO in preference to law. In this narrow area of global governance at least, China embraces the language of 'rule-based governance' to describe the COC, which it praises as evidence of the 'conviction of regional countries to jointly set rules in the region'.[186] China similarly released a joint statement with the EU in July 2018, in which both sides 'reaffirmed their commitment to…the rules-based international order with the United Nations at its core, and to uphold the UN Charter and international law, including the principles of sovereignty, territorial integrity and inviolability of borders'.[187] Such uses of RBO terminology are not an endorsement by China of the substantive commitments of Western RBO advocates but, rather, only of their strategy of using the flexibility of non-legal norms to promote particularistic conceptions of order. The framing seeks the legitimacy of 'greater alignment with "Western" conceptions of order, especially as States seek reassurance of the rules-based elements of the international order amidst global uncertainty, a US-China trade war, and perceived US disregard of certain rules'.[188] Doing so exploits precisely the weakness predicted to emerge when the RBO and the international rule of law are promoted as overlapping normative ideals.

China's overriding strategic rationale for seizing control of the SCS remains carving out a buffer zone of security in its 'near seas' in which it can defend against external actors and forms of governance – not unlike the US 'Monroe Doctrine' in the Americas.[189] To that end, China seeks to exclude external powers, such as the US and other Western States, from setting any rules-based terms, which it asserts must reflect the legitimacy of an entirely regional solution – and thereby also of associated power balances.[190] Chinese scholars identify 'fend[ing] off intervention by non-regional players' as among the essential purposes of the COC,[191] with Minister Wang warning in 2017 that a precondition for progress was that there be 'no major disruption from outside parties'.[192] Giving effect to these terms,

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[184] James R. Holmes, 'ASEAN Should Reject a Code of Conduct in the South China Sea', *The Diplomat* (5 September 2013), https://thediplomat.com/2013/09/asean-should-reject-a-code-of-conduct-in-the-south-china-sea/.

[185] *Ibid*.

[186] Ministry of Foreign Affairs of the People's Republic of China, 'The First Reading of the Single Draft Negotiating Text of the Code of Conduct (COC) in the South China Sea Completed Ahead of the Schedule' (1 August 2019), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1685674.shtml.

[187] Delegation of the European Union to China, 'Joint Statement of the 20th EU-China Summit' (17 July 2018), https://eeas.europa.eu/delegations/china/48424/joint-statement-20th-eu-china-summit_en.

[188] Simone van Nieuwenhuizen, 'Australian and People's Republic of China Government Conceptions of the International Order' (2019) 73 *Australian Journal of International Affairs* 181, 186.

[189] Timothy Doyle & Dennis Rumley, *The Rise and Return of the Indo-Pacific* (OUP, 2020), 49, 158; Robert D. Kaplan, *Asia's Cauldron* (Random House, 2014), 41.

[190] Ralph Jennings, 'Why China, Once Coy, Suddenly Wants to Discuss a Code of Conduct for a Disputed Sea', *VOA News* (23 September 2020), https://www.voanews.com/east-asia-pacific/voa-news-china/why-china-once-coy-suddenly-wants-discuss-code-conduct-disputed.

[191] Luo Liang, 'A Guide to the South China Sea COC'.

[192] Cliff Venzon, 'Beijing Sets Conditions for New South China Sea Code of Conduct', *Nikkei Asia* (7 August 2017), https://asia.nikkei.com/Politics/Beijing-sets-conditions-for-new-South-China-Sea-code-of-conduct2.

China has proposed a COC clause that 'the Parties shall not hold joint military exercises with countries from outside the region unless the parties concerned are notified beforehand and express no objection'.[193] Such a broadly worded clause would clearly exclude joint naval exercises with members of the Quadrilateral Security Dialogue—comprised of the US, Japan, India and Australia—who have emerged as among the most prominent RBO advocates, as well as any support for 'Freedom of Navigation Operations' (FONOPs).[194] Both initiatives seek to contest the regional balance of power necessary for China's preferred legal order, with the proposed clause thereby narrowing the geostrategic options for ASEAN States.[195]

The most acute demonstration of the tensions within the RBO are in the contestation between political obligations entailed in the COC (and precursor agreements) on the one hand, and the legal obligations created by the 2016 SCS Award on the other. The Philippines first commenced proceedings to establish an Arbitral Tribunal in January 2013, in accordance with legal rights under UNCLOS.[196] China responded initially by holding out the prospect of restarting COC negotiations, as an incentive for ASEAN States to pressure the Philippines to abandon its treaty-based action.[197] Following that unsuccessful initiative, the Tribunal itself was ultimately required to consider the nature of the various agreements and their relationship to law, and in particular whether the 2002 DOC precluded recourse to the compulsory dispute settlement procedures under Part XV, section 1 of UNCLOS.[198] China argued that the DOC agreement to resolve disputes 'through friendly consultations and negotiations' constituted a prior agreement by the parties 'to seek settlement of the dispute by a peaceful means of their own choice' within the meaning of Article 281 of UNCLOS.[199] The Tribunal rejected this argument in its jurisdictional decision of 2015, finding that 'the DOC was not intended by its drafters to be a legally binding document, but rather an aspirational political document'.[200] In RBO terms, the effect of the jurisdictional decision was to reiterate the distinction and hierarchy between legal and non-legal rules.

China has responded to both the jurisdictional and merits decisions of the Tribunal by directly contesting the assumed privilege of legal obligations within the RBO. Certainly, UNCLOS provides circumstances under which 'States Parties may conclude agreements modifying or suspending the operation of provisions' of the Convention, but under no interpretation has China met the legal notification requirements in the present case.[201] Instead, China merely asserts the suspension of treaty rights on the basis of a 'solemn commitment' made under the DOC which, despite being a political agreement, is said to contravene the principle of '*Pacta sunt servanda*. This fundamental norm of

[193] Mark J. Valencia, 'The Draft Code of Conduct for the South China Sea Has Significant Political Ramifications for ASEAN', *ASEAN Today* (24 September 2018), https://www.aseantoday.com/2018/09/the-draft-code-of-conduct-for-the-south-china-sea-has-significant-political-ramifications-for-asean/.

[194] Anisa Heritage & Pak K. Lee, 'The Sino-American Confrontation in the South China Sea: Insights from an International Order Perspective' (2020) 33 *Cambridge Review of International Affairs* 134, 147, 150-151.

[195] Ankit Panda, 'Pentagon: Chinese Warship in 'Unsafe' Encounter with US Destroyer During Freedom of Navigation Operation', *The Diplomat* (2 October 2018), https://thediplomat.com/2018/10/pentagon-chinese-warship-in-unsafe-encounter-with-us-destroyer-during-freedom-of-navigation-operation/.

[196] Under Part XV, section 1, with the tribunal to be constituted under Annex VII, *UNCLOS*.

[197] Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea', 80.

[198] The Annex VII tribunal determined its own jurisdiction in the case under *UNCLOS*, Arts. 288(4), 296(1) & Annex VII, Art. 11: See *Arbitration Between the Republic of the Philippines and the People's Republic of China (Jurisdiction and Admissibility)*, [114].

[199] Under Art. 281, *UNCLOS*. See *Arbitration Between the Republic of the Philippines and the People's Republic of China (Jurisdiction and Admissibility)*, [202].

[200] *Ibid,* [217].

[201] *UNCLOS*, Art. 311(3) & (4). Following *VCLT*, Arts. 41 & 58.

international law must be observed'.[202] China's interpretation subverts the hierarchy of rules within regional order, such that the only 'breach' recognised by China is the Philippines' invocation of legally mandated dispute settlement procedures.[203] The eroded status of treaty rules is further evident in the forementioned ASEAN practice of referring to the SCS Award only euphemistically as 'full respect for legal and diplomatic processes'.[204] The Award remains a singular achievement precisely because it brought an international legal process to bear on the dispute, which Chinese scholars acknowledge as creating specific forms of leverage for claimant states.[205] The diplomatic strategy of framing the legal process in less formal RBO terms is contributing to a COC that not only lacks legal force, but that fails to meet even the lesser standard of being consistent with international law.

China has progressively altered the very subject matter of any eventual COC, in particular by constructing and possessing islands that did not even exist 19 years ago, but which now alter parties relative bargaining positions.[206] Given the expressed COC goal to 'further promote peace and stability in the region',[207] China can increasingly make the case that a freeze on the status quo will ultimately be the approach most consistent with underlying objectives. Such conduct is certainly not unprecedented, with evidence that various States sought to consolidate control over maritime territory in the decades preceding the conclusion of UNCLOS negotiations, in the expectation that de facto gains would be enshrined in law.[208] In the present case, China and ASEAN's agreement on a COC single draft negotiating text is more likely to facilitate international law as a source rather than constraint on Chinese power.[209] Ian Storey here poses the rhetorical question: 'why would China sign a credible, legally binding, and effective code of conduct that ties its hands in the South China Sea when it increasingly possesses the naval and coast guard assets to pursue de facto control within the nine-dash line'?[210] The Chinese Ministry of Foreign affairs welcomed agreement on the COC negotiating text in 2018, as evidence that the parties 'are capable of reaching regional rules adhered to by all'. Yet, the statement was concluded with an announcement that China had 'dispatched its most advanced marine rescue ship equipped with professional search-and-rescue teams to the Nansha Islands days ago'.[211] This was ostensibly in the interests of providing forms of maritime assistance and

[202] State Council Information Office, 'Document Reprint: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea' (2016) 15 *Chinese Journal of International Law* 909, 928.

[203] Ministry of Foreign Affairs of the People's Republic of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines' (30 October 2015), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml.

[204] Carlyle A. Thayer, 'The Southeast Asia Claimant States, ASEAN and the South China Sea Dispute', *Maritime Issues* (14 November 2016), http://www.maritimeissues.com/politics/the-southeast-asia-claimant-states-asean-and-the-south-china-sea-dispute.html. See for example: ASEAN, 'Press Statement by the Chairman of the ASEAN Foreign Ministers' Retreat' (16-17 January 2020), https://asean.org/storage/2020/01/17.1.2020-AMMR-Press-Statement-Final.pdf, [3].

[205] Cai, *The Rise of China and International Law*, 298.

[206] Ronald O'Rourke, *China's Actions in South and East China Seas: Implications for U.S. Interests – Background and Issues for Congress* (Congressional Research Service, 1 August 2018), 71-73.

[207] Thayer, 'A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct'.

[208] Ken Booth, *Navies and Foreign Policy* (Routledge Revivals, 2014), 241.

[209] Le Thu, 'The Dangerous Quest for a Code of Conduct in the South China Sea'.

[210] Ian Storey, 'ASEAN's Failing Grade in the South China Sea', in Gilbert Rozman & Joseph C. Liow (eds.), *International Relations and Asia's Southern Tier* (Springer, 2018), 116.

[211] China's name for the Spratly Islands. Ministry of Foreign Affairs of the People's Republic of China, 'Wang Yi: The Agreement of the Single Draft Negotiating Text of the Code of Conduct (COC) in the South China Sea Proves that China and the Countries of the Association of Southeast Asian Nations (ASEAN) Are Capable of Reaching Regional Rules Adhered to by All' (2 August 2018), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1583333.shtml.

other 'international public service', but thereby also communicated China's resolve to maintain physical control of the very disputed features that had necessitated COC negotiations in the first place. The evidence after many years of negotiations and delays is not of an emerging solution consistent with UNCLOS, but rather that 'the rules-based order in the form of the COC could assist and justify China's expansion and ultimately its sole control of the South China Sea'.[212]

4. Germany's Indo-Pacific Guidelines and International Law

The fraught history of COC negotiations gives support to the hypothesis that the RBO and the international rule of law are antagonistic normative ideals in cases where legal rules have failed to constrain competitive ambitions of a geopolitically dominant state. Lassa Oppenheim argued over a century ago that, without a functioning balance of power at the global level, 'an overpowerful State will naturally try to act according to discretion and disobey the law', thereby becoming 'omnipotent'.[213] Likewise, with the absence of a regional balance of power in the SCS, 'the emphasis upon norms becomes a public relations exercise, unrelated to the real security concerns of the States involved'.[214] The COC is expressed as a measure to avoid confrontations between claimant States 'pending the peaceful settlement of territorial and jurisdictional disputes', yet the RBO alone cannot reverse 'Beijing's systematic distortion of international law and subsequent attempts to impose its own international order'.[215] So long as China possesses both the means and the motive to construct an order around its geostrategic interests, no peaceful settlement of disputes will be possible through commonly agreed legal rules, while workaround strategies of developing political rules serve only to entrench hierarchies of power.

The circularity of reinforcing legal obligations with political rules, while locating the authority of political obligations in their consistency with legal rules, can only be broken by addressing the underlying power dynamics that are driving disruptions across both categories of rules. Doing so presents the most onerous task of all for advocates of a more normatively desirable political and legal order, and one that may very well prove beyond the capabilities of any.[216] Nevertheless, reimagining the Asia-Pacific and Indian Oceans as a connected strategic, economic and diplomatic space, is gaining momentum as among the most significant attempts to construct balances of power more favourable to legal stability over the long term. Moreover, redefining the regional unit to encompass the latent balancing potential of India, and that of other 'likeminded' States, aligns directly with the particularistic forms of global and legal order embedded in the RBO.[217] Germany's 2020 Policy Guidelines are thus significant because they contribute to the normalisation of the 'Indo-Pacific' as the recognised 'global centre of strategic and economic gravity'[218] and therefore 'the key to shaping the international order in the 21st century'.[219] Policymakers and scholars have for some years advocated for the Indo-Pacific, especially within the 'Quad' states of the US, India, Japan and Australia, with ASEAN and now European States joining the project of fostering regional connectivity towards more favourable

[212] Le Thu, 'The Dangerous Quest for a Code of Conduct in the South China Sea'.

[213] Lassa Oppenheim (1912), cited in Hans Joachim Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 1973), 274.

[214] Leszek Buszynski, 'ASEAN, the Declaration on Conduct, and the South China Sea' (2003) 25 *Contemporary Southeast Asia* 343, 358-359.

[215] Frédéric Grare, 'Germany's New Approach to the Indo-Pacific', *Internationale Politik Quarterly* (16 October 2020), https://ip-quarterly.com/en/germanys-new-approach-indo-pacific.

[216] For a sceptical view see Hugh White, 'Without America: Australia in the New Asia' (2017) 68 *Quarterly Essay* 61.

[217] Brendan Taylor, 'Is Australia's Indo-Pacific Strategy an Illusion?' (2020) 96 *International Affairs* 95, 101.

[218] Medcalf, *Contest for the Indo-Pacific*, 14.

[219] Federal Foreign Office, *Policy Guidelines for the Indo-Pacific*, 8.

power balances.[220] Formulations overlap and diverge according to the interests and standpoints of different States and groupings, but commitment to a 'rules-based international order' forms a common touchstone.[221] Thus, commitments to the RBO and the Indo-Pacific are intertwined in ways already shaping the future of international law, and acutely so in the areas encompassing the SCS as the 'core of the Indo-Pacific'.[222]

a) Geography versus Geostrategy

One observation made throughout German statements on the Indo-Pacific is that it has 'no generally agreed geographical definition', with the federal government defining it broadly as 'the entire area shaped by the Indian and Pacific Oceans'.[223] Part of the explanation for definitional divergence is simply that the Indo-Pacific has emerged in response to fundamentally geostrategic rather than geographical needs.[224] Jakub Grygiel defines geostrategy as 'the geographic direction of a state's foreign policy. More precisely, geostrategy describes where a state concentrates its efforts by projecting military power and directing diplomatic activity'.[225] In this sense, any attempt to define the Indo-Pacific solely in terms of conventional geographical boundaries – such as land, maritime or national features – is unlikely to capture the underlying interests driving the conceptual evolution.[226] Rather, the Indo-Pacific remains 'an inherently maritime conception of strategic geography',[227] and is 'both a region and an idea: a metaphor for collective action, self-help combined with mutual help'.[228] Chinese officials appear to have little doubt in this regard, and have responded by systematically reaffirming the geographical unit of the 'Asia-Pacific'.[229] Where China does harbour doubts, they relate more to questions of credibility, especially following the failure of the Obama administration's much touted 'pivot to Asia' to rebalance regional power.[230] Minister Wang's oft-quoted conclusion is that the Indo-Pacific is nothing but an 'attention-grabbing idea' that will 'dissipate like ocean foam',[231] but has nevertheless warned against such forms of 'pseudo-multilateralism'.[232]

What is most telling, is that contestation over meanings of the Indo-Pacific replicate and converge with the geostrategic logic structuring the RBO discourse, which speaks louder than any framing as a neutral geographical descriptor. Former Japanese Prime Minister Shinzo Abe is generally credited

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[220] Janka Oertel & Andrew Small, 'Promoting European Strategic Sovereignty in Asia', *ECFR Policy Brief* (November 2020), https://ecfr.eu/publication/promoting-european-strategic-sovereignty-in-asia/, 18.

[221] Felix Heiduk & Gudrun Wacker, 'From Asia-Pacific to Indo-Pacific: Significance, Implementation and Challenges', *SWP Research Paper*, No. 9 (July 2020), 29.

[222] Rory Medcalf, 'Rules, Balance, and Lifelines: An Australian Perspective on the South China Sea' (2016) 21 *Asia Policy* 6, 9.

[223] Bundesregierung, 'German Government Adopts Guidelines for the Indo-Pacific Region' (3 September 2020), https://www.bundesregierung.de/breg-en/news/indo-pacific-1781916.

[224] For a contrary view of the Indo-Pacific as a 'condition' as well as a 'strategy' see: Taylor, 'Is Australia's Indo-Pacific strategy an illusion?', 95-96.

[225] Jakub J. Grygiel, *Great Powers and Geopolitical Change* (Johns Hopkins University Press, 2006), 23.

[226] Heiduk & Wacker, 'From Asia-Pacific to Indo-Pacific', 8.

[227] Rebecca Strating, 'Norm Contestation, Statecraft and the South China Sea: Defending Maritime Order' (2020) *The Pacific Review* 1, 3.

[228] Medcalf, *Contest for the Indo-Pacific*, 248.

[229] Feng Liu, 'The Recalibration of Chinese Assertiveness: China's Responses to the Indo-Pacific Challenge' (2020) 96 *International Affairs* 9, 15-16.

[230] Feng Zhang, 'China's Curious Nonchalance Towards the Indo-Pacific' (2019) 61 *Survival* 187, 188.

[231] Lynn Kuok, 'Shangri-La Dialogue: Negotiating the Indo-Pacific security landscape', *The Straits Times* (1 June 2018), https://www.straitstimes.com/opinion/negotiating-the-indo-pacific-security-landscape.

[232] Katerina Ang, 'Europe Pivots to Indo-Pacific with "Multipolar" Ambitions', *Financial Times* (9 February 2021), https://www.ft.com/content/408e1244-bc27-47f2-bdfc-20bf328e4114.

with originating the idea of a 'Free and Open Indo-Pacific Strategy', which he championed as a strategy for 'the rule of law, and the rules-based order'.[233] ASEAN's 'Outlook on the Indo-Pacific', adopted at its June 2019 summit, confirms a view of the 'Asia-Pacific and Indian Ocean regions, not as contiguous territorial spaces but as a closely integrated and interconnected region'. In that context, the document sets out principles for strengthening 'a rules-based framework' in the region and 'respect for international law', including the UN Charter and UNCLOS.[234] In December 2018, the US Congress passed the *Asia Reassurance Initiative Act* which, consistent with its title, asserts that '[w]ithout strong leadership from the United States, the international system, fundamentally rooted in the rule of law, may wither… It is imperative that the United States continue to play a leading role in the Indo-Pacific region'.[235] The US now advocates for 'A Free and Open Indo-Pacific', which is framed in terms of upholding a 'strong, rules-based architecture', with commitment to 'cooperate with Indo-Pacific partners to maintain freedom of navigation and other lawful uses of the sea' and resolution of the SCS disputes 'in accordance with international law'.[236] India claims that it supports only a 'geographical definition', but its substantive commitments remain to the same forms of regional connectivity necessary for 'a common rules-based order' and for demonstrating 'absolute commitment to international law'.[237] Rory Medcalf characterises such statements as a point of geostrategic convergence, with all advocates identifying the Indo-Pacific with 'rules, norms, international law, the rights and sovereignty of small States and the rejection of coercion'.[238]

b) A Rules-Based Order Consistent with International Law

Interdependence between the Indo-Pacific concept and a RBO consistent with international law provides context for interpreting Germany's 2020 Policy Guidelines. The broader parameters of an EU outlook can be seen in the European Commission's 2019 declaration that, in this policy area, China is 'a systemic rival promoting alternative models of governance'.[239] France offered the first European response specifically in Indo-Pacific terms, with its 2018 strategy framed as commitment to a 'rules and law-based international order'[240] and a 'multipolar order based on the rule of law'.[241] Germany

[233] Shinzo Abe, 'Address by Prime Minister Abe at the Seventy-Third Session of the United Nations General Assembly' (25 September 2018), https://www.mofa.go.jp/fp/unp_a/page3e_000926.html. See Richard Javad Heydarian, *The Indo-Pacific: Trump, China, and the New Struggle for Global Mastery* (Palgrave Macmillan, 2020), 5-6.

[234] ASEAN, 'ASEAN Outlook on the Indo-Pacific' (23 June 2019), https://asean.org/storage/2019/06/ASEAN-Outlook-on-the-Indo-Pacific_FINAL_22062019.pdf.

[235] Public Law 115-409, Sec. 2(5).

[236] US Department of State, 'A Free and Open Indo-Pacific: Advancing a Shared Vision' (4 November 2019), https://www.state.gov/wp-content/uploads/2019/11/Free-and-Open-Indo-Pacific-4Nov2019.pdf, 7, 23.

[237] Narendra Modi, 'Prime Minister's Keynote Address at Shangri La Dialogue' (1 June 2018), https://www.mea.gov.in/Speeches-Statements.htm?dtl/29943/Prime+Ministers+Keynote+Address+at+Shangri+La+Dialogue+June+01+2018.

[238] Medcalf, *Contest for the Indo-Pacific*, 236.

[239] European Commission, 'EU-China – A Strategic Outlook' (12 March 2019), https://ec.europa.eu/info/sites/info/files/communication-eu-china-a-strategic-outlook.pdf, 1.

[240] French Ministry for Europe and Foreign Affairs, 'French Strategy in the Indo-Pacific: "For An Inclusive Indo-Pacific"' (2 May 2018), https://www.diplomatie.gouv.fr/en/country-files/asia-and-oceania/the-indo-pacific-region-a-priority-for-france/#sommaire_3.

[241] French Ministry for Europe and Foreign Affairs, 'The Indo-Pacific Region: A Priority for France' (updated August 2019), https://www.diplomatie.gouv.fr/en/country-files/asia-and-oceania/the-indo-pacific-region-a-priority-for-france/. See also Ministry of Foreign Affairs (Netherlands), 'Indo-Pacific: een leidraad voor versterking van de Nederlandse en EU-samenwerking met partners in Azië' (13 November 2020), https://www.rijksoverheid.nl/documenten/publicaties/2020/11/13/indo-pacific-een-leidraad-voor-versterking-van-de-nederlandse-en-eu-samenwerking-met-partners-in-azie/.

has built upon this groundwork and offers its own guidelines as 'the basis for a future EU strategy'.[242] Heiko Maas has explained that:

> We want to help shape that order – so that it is based on rules and international cooperation, not on the law of the strong. That is why we have intensified cooperation with those countries that share our democratic and liberal values. In so doing, we are strengthening the idea of a multipolar world in which no country has to decide between poles of power.[243]

Strengthening relations with ASEAN remains at the core of Germany's vision – 'with a view to consolidating a multipolar region embedded within a multilateral, rules-based system'.[244] Significantly for current purposes, there appears to be some recognition within the document of the conditions under which the RBO and international law sit in a complementary versus antagonistic relationship. In relation to the distributive conflict of the SCS, it is emphasised that 'it is not the law of the strong that must prevail, but the strength of the law', and specifically the 'comprehensive' framework of UNCLOS. In contrast, coordination challenges regarding the 'environment, labour and trade, dealing with pandemics, human rights and arms control' can be best addressed 'through regional or international regulatory frameworks and structures'.[245] The willingness to seek legal bindingness, and to cite the conditions necessary for a RBO consistent with international law, may well form a 'common denominator' for a united EU Indo-Pacific strategy, which is scheduled for release in September 2021.[246]

The upshot is that, although the German guidelines have been described as comparatively 'cautious',[247] their use of more inclusive terms cannot neutralise the reality of buying into a discourse that entails a logical progression towards contesting regional balances of power.[248] Certainly China's state-run media perceives Germany's stance to 'reveal its recognition of the US strategic orientation toward the Asia-Pacific region, and even herald a US-Germany convergence in the future of their attitudes and overall policy lines in handling issues in this region'.[249] The guidelines thus suggest a reckoning between a lingering desire in Berlin for 'equidistance' between the US and China,[250] and a stated commitment to uphold the international rule of law in the Indo-Pacific and beyond. Federal Minister of Defence Annegret Kramp-Karrenbauer is unequivocal that, in light of substantial alignment with American values, 'it is out of the question that Germany would take a position of equal distance between China and the US'.[251] Kramp-Karrenbauer has previously acknowledged the need

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[242] Bundesregierung, 'German Government Adopts Guidelines for the Indo-Pacific Region'.

[243] Federal Foreign Office, 'Foreign Minister Maas on the Adoption of the German Government Policy Guidelines on the Indo-Pacific Region' (2 September 2020), https://www.auswaertiges-amt.de/en/newsroom/news/maas-indo-pacific/2380474.

[244] Per Heiko Maas, Federal Foreign Office, *Policy Guidelines for the Indo-Pacific*, 3.

[245] *Ibid*, 11.

[246] Josep Borrell, 'The EU needs a strategic approach for the Indo-Pacific' (12 March 2021), https://eeas.europa.eu/headquarters/headquarters-homepage/94898/eu-needs-strategic-approach-indo-pacific_en.

[247] Frédéric Grare, 'Germany's New Approach to the Indo-Pacific', *Internationale Politik Quarterly* (16 October 2020), https://ip-quarterly.com/en/germanys-new-approach-indo-pacific.

[248] Mathieu Duchâtel & Garima Mohan, 'Franco-German Divergences in the Indo-Pacific: The Risk of Strategic Dilution', *Institut Montaigne* (30 October 2020), https://www.institutmontaigne.org/en/blog/franco-german-divergences-indo-pacific-risk-strategic-dilution.

[249] Xin Hua, 'Influencing Indo-Pacific Region Difficult for Europe', *Global Times* (3 September 2020), https://www.globaltimes.cn/content/1199869.shtml.

[250] Hal Brands, 'Germany Is a Flashpoint in the U.S.-China Cold War', *Bloomberg* (23 February 2021), https://www.bloomberg.com/opinion/articles/2021-02-23/germany-is-a-flashpoint-in-the-cold-war-between-u-s-and-china.

[251] Annegret Kramp-Karrenbauer, '"This Is a Huge Break with the Past"', *Internationale Politik Quarterly*, (28 April 2021), https://ip-quarterly.com/en/huge-break-past.

for effective power to be put in the service of international law, observing in 2019 that Indo-Pacific partners

> feel increasingly encroached upon by China's claim to power. They would like to see a clear sign of solidarity, in support of applicable international law, inviolable territory, and free shipping routes. The time has come for Germany to give such a sign, to be present in the region together with our allies. Because it is in our interest that existing law be observed.[252]

Speaking at a later event on 'The Indo-Pacific: Geostrategic Challenges and Opportunities for Australia and Germany', Kramp-Karrenbauer appealed to the ideal of the RBO as a repudiation of 'might makes right'.[253] Germany's embrace of the Indo-Pacific concept suggests heightened recognition that upholding what it perceives to be a 'right' legal and political order in the region will require the combined might of strategically connected partners.

The 'mental maps'[254] of the Indo-Pacific are already setting the course, with Berlin confirming its intent to send a naval frigate to Japan, Australia and South Korea in 2021 in order to 'deepen ties with…partners in the democratic camp'.[255] The operation will include sailing through the SCS for the first time since 2002, as a show of commitment to the 2016 Arbitral Award and to 'multilateral, rule-based principles and values', including UNCLOS.[256] Uncertainty appears to linger within government about intended signals however, with Germany previously endorsing US FONOPs as 'an affirmation of applicable international law',[257] but the 2021 announcement accompanied by statements explicitly ruling out any possibility of sailing within 12 nautical miles of disputed features. Publicly foreclosing that option unnecessarily undercuts signals in support of international law, since the transit through the SCS could have simply declined to acknowledge excessive claims, while avoiding disputed areas in practice. Regardless, the signals being sent remain consistent with both the power balancing and normative aspirations of the Indo-Pacific concept.[258] The national interests outlined in the Policy Guidelines do extend well beyond the geopolitical, encompassing everything from climate change, to maritime security, to digital transformation. Germany acceded in January 2021 to the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, which was touted as 'a key step towards implementing the policy guidelines for the Indo-Pacific region'. Yet,

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[252] Annegret Kramp-Karrenbauer, 'Speech by Federal Minister of Defence at the Bundeswehr University Munich' (7 November 2019), https://www.bmvg.de/de/aktuelles/speech-federal-minister-of-defence-security-policy-147072.

[253] Australian Strategic Policy Institute, 'The Indo-Pacific: Geostrategic Challenges and Opportunities for Australia and Germany', *ASPI Presents* (6 November 2020), https://www.aspi.org.au/video/aspi-presents-indo-pacific-geostrategic-challenges-and-opportunities-australia-and-germany.

[254] Medcalf, *Contest for the Indo-Pacific*, 16. See Council of the EU, *EU Strategy for Cooperation in the Indo-Pacific*, [7].

[255] Shogo Akagawa, 'Germany To Send Naval Frigate to Japan with Eye on China', *Nikkei Asia* (25 January 2021), https://asia.nikkei.com/Politics/International-relations/Indo-Pacific/Germany-to-send-naval-frigate-to-Japan-with-eye-on-China.

[256] Stefan Talmon, 'Germany Announces Deployment of Warship to the South China Sea', *German Practice in International Law* (3 March 2021), https://gpil.jura.uni-bonn.de/2021/03/germany-announces-deployment-of-warship-to-the-south-china-sea/.

[257] Stefan Talmon, 'Germany Takes a More Outspoken and Active Position on the South China Sea Disputes', *German Practice in International Law* (30 March 2021), https://gpil.jura.uni-bonn.de/2021/03/germany-takes-a-more-outspoken-and-active-position-on-the-south-china-sea-disputes/.

[258] See Annegret Kramp-Karrenbauer, 'For Stability, Prosperity and a Rules-Based Order in the Indo-Pacific Region', ASEAN Defence Ministers' Meeting Plus (9 December 2020), https://www.bmvg.de/en/news/indo-pacific-region-for-a-rule-based-order-4912214.

even this decision was framed within broader geostrategic aims of promoting an 'inclusive, multilateral world order in which international law applies, as opposed to the law of the strong'.[259] The shift in Germany's outlook may or may not ultimately succeed in upholding a preferred legal and political order, with conflicting policy priorities continuing to hamper German and European approaches to this onerous task.[260] Likewise, there remains caution towards Germany's capacity among regional partners, as well as warranted scepticism about the coherence of the Indo-Pacific concept as a whole.[261] Yet, what does seem clear, is that Germany is aligning itself with a new European recognition that increasing layers of rules cannot substitute for building geostrategic connectivity and balances of power consistent with a law-based order.

5. Conclusion

The rise of the RBO discourse in addressing disruptions to global order is not without merits – sustaining the ideal of international relations governed by multilateral rules, in terms that are accessible and comprehensible by policymakers and the mass public alike. This is an especially germane attribute in an era where the legitimacy of elite expertise in global governance is facing systematic backlash.[262] Moreover, as is evident in defined cases, more generally agreed legal norms can be given specific form and force by crafting complementary rules as political and moral obligations. However, the strategy of advocating a RBO order in lieu of a 'law-based order' has limits, and these emerge clearly in cases where existing legal rules have failed to constrain the competitive ambitions of a geopolitically dominant state. In the case of UNCLOS in the SCS, fragmentated understandings of underlying legal obligations appear to have driven the ascendency of the RBO discourse, as a means to overcome the competitive geopolitical interests of claimant States. Appealing to more accessible and effective rules, agnostic to their legal bindingness, seems to hold the promise of a pragmatic escape from an intractable dispute.

Yet, the history of the ASEAN-China COC, as the architype of governance through the RBO, demonstrates that prior failure to reach agreement on foundational rules of law fatally undercuts the integrity of any subsequent agreement 'consistent' with law. Medcalf is surely correct to state that '[o]f course, it has always been a rules-and power-based order', but according to the assumption that 'the rules moderate the power, adding, at the very least, some predictability, restraint and boundaries into a competitive dynamic otherwise based on the ugly logic of "might is right"'.[263] The emerging danger is not merely of a 'symbolic code that lacks teeth', but of a COC that codifies power hierarchies in a manner destructive to the rule of law.[264] In 2019 Minister Wang used the analogy of building a house to describe progress towards the COC:

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[259] Federal Foreign Office, 'Combating Piracy: Germany Intends to Accede to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia' (27 January 2021), https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/asien/recaap-kabinettsbeschluss/2437518.

[260] Gideon Rachman, 'Europe Has Handed China a Strategic Victory', *Financial Times* (4 January 2021), https://www.ft.com/content/2d759671-0b1d-4587-ba63-7480990f0438.

[261] Eric J. Ballbach & Laura Morazzini, 'A Restrained Embrace: South Korea's Response to Germany's Indo-Pacific Strategy', *SWP Comment* (13 February 2021), https://www.swp-berlin.org/fileadmin/contents/products/comments/2021C13_SouthKorea_Indo_Pacific.pdf; William Choong, 'The Return of the Indo-Pacific Strategy: An Assessment' (2019) 73 *Australian Journal of International Affairs* 415.

[262] Martti Koskenniemi, *International Law and the Far Right: Reflections of Law and Cynicism* (T.M.C. Asser Press, 2019), 11-13.

[263] Medcalf, *Contest for the Indo-Pacific*, 203.

[264] Ian Storey, 'ASEAN's Failing Grade in the South China Sea', in Gilbert Rozman & Joseph C. Liow (eds.), *International Relations and Asia's Southern Tier* (Springer, 2018), 121.

> In the past, there were 11 designs from the 11 countries on how this house would look like. Now, we have laid in place good groundwork for a single design of this house, and we have also put in place the fundamentals, like the supporting pillars of this house.[265]

Persistent invocations of UNCLOS, across numerous iterations of the COC, make clear that ASEAN States agree by consensus that the multilateral treaty regime provides the single design for regional law-based architecture, which should in turn inform any supporting rules. In contrast, China continues to envision a regional order literally constructed upon the groundwork of its artificial islands and excessive claims in the SCS, and is now seeking the supporting pillars of a COC that ratifies the status quo.

Identifying the conditions under which the RBO and the international rule of law can be aligned, points towards the inescapably geostrategic nature of responses framed in Indo-Pacific terms. Strengthening recognition within Germany and across Europe is moving slowly but surely beyond forms of normative contestation, to instead engage at the level of global power balances. Acceptance of the concept beyond the region is especially significant since, whereas China has adeptly exploited internal ASEAN dynamics to prevent effective collective balancing, it has proven less successful in using the same tactics against the external States now seeking to contribute to a new Indo-Pacific balance of power.[266] This should not, however, be seen as condemning global order to enter some new form of cold war. As Medcalf emphasises, although the Indo-Pacific 'dilutes and absorbs Chinese influence' by design, it seeks to do so not by excluding China from its own region, but rather by 'incorporating it in one that is large and multipolar'.[267] German policymakers have reasoned here that, if Beijing rejects the guidelines as a form of containment, it would thereby also concede its rejection of underlying normative ideals, including those entailed in the RBO.[268] These understandings are encapsulated in the concept of an '*inclusive*, rules-based Indo-Pacific', which is embedded as a guiding principle within both the German guidelines and the preliminary European strategy.[269]

Without giving credible attention to the balance of power in crucial regions of the world, habitual appeals to the RBO may be increasingly subverted in consequential cases. In his defence of positive legal rules as the most authoritative statement of global relations, Prosper Weil reminded that 'it is law with its rigor…that comes between the weak and the mighty to protect and deliver'.[270] Yet, achieving effective and non-self-judging rules of international law may require a renewed and genuine collaboration with political advocates for the RBO. The commitments of international lawyers and policymakers converge in a common cause, which is the project of constructing geostrategic conditions under which legal and political rules can complement and reinforce one another towards a more normatively desirable global order.

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[265] Charissa Yong, 'ASEAN, China Agree on Text to Negotiate Code of Conduct in South China Sea', *The Straits Times* (2 August 2018), https://www.straitstimes.com/politics/asean-china-agree-on-text-to-negotiate-code-of-conduct-in-south-china-sea.

[266] Jeff M. Smith, *Asia's Quest for Balance: China's Rise and Balancing in the Indo-Pacific* (Rowman & Littlefield, 2018), 236-237.

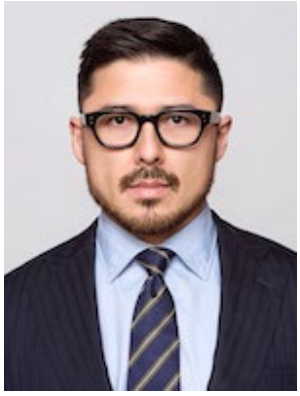
[267] Medcalf, *Contest for the Indo-Pacific*, 31.

[268] Lewe Paul, 'Germany in the Indo-Pacific: Expectations and Policy Options', *Konrad-Adenauer-Stiftung* (27 November 2020), https://www.kas.de/en/single-title/-/content/germany-in-the-indo-pacific-expectations-and-policy-options.

[269] Heiko Maas, 'Europe Needs a Strategy for the Indo-Pacific', *Handelsblatt* (12 April 2021), https://www.auswaertiges-amt.de/en/newsroom/news/maas-handelsblatt-indopacific/2453358, emphasis added. See Council of the EU, *EU Strategy for Cooperation in the Indo-Pacific*, [5].

[270] Weil, 'Towards Relative Normativity in International Law?', 442.

The Author



Dr. Malcolm Jorgensen is a Fellow of the Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" and the author of *American Foreign Policy Ideology and the International Rule of Law* (Cambridge University Press, 2020). He was awarded his PhD in International Law and American Foreign Policy from the Sydney Law School, University of Sydney, where he lectured in Public International Law and remains an Associate of the Sydney Centre for International Law. During his doctoral studies, Malcolm was resident at the United States Studies Centre, University of Sydney, where he was a Research Associate and Lecturer in American politics and foreign policy. He holds a Bachelor of Laws (Hons) and a Bachelor of Arts (Hons) with majors in Economics and International Relations, each from the University of Queensland. Following undergraduate studies, Malcolm was a Judge's Associate in the Supreme Court of Queensland and subsequently admitted to the legal profession in Australia. He most recently served as an Assistant Director in the Australian Department of Foreign Affairs and Trade, International Legal Branch and Sanctions, Treaties and Transnational Crime Branch. Malcolm's research focusses on the politics of international law, concentrating on foreign policy ideology and comparative conceptions of law, American international legal policy, and the changing global order. He is an experienced broadcast and print media commentator.

The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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