

**THE JURISPRUDENCE OF THE RULES-BASED ORDER:
THE POWER OF RULES CONSISTENT WITH BUT NOT
BINDING UNDER INTERNATIONAL LAW**

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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 about the meaning of the RBO and alive to the perils of uniting legal and non-legal rules within a single normative ideal. This article defines the RBO in jurisprudential terms in order to interrogate a core strategic assumption driving the discourse: that establishing non-legal rules that are consistent with international law complements and reinforces binding legal rules governing the same subject matter. In positivist terms, the RBO generally refers to the order of legal and non-legal rules of global governance but has increasingly developed a secondary meaning as a comparative conception of international law informed by particularistic Western and liberal notions of global order. Using the case of the proposed ASEAN-China Code of Conduct in the South China Sea, the article demonstrates that the RBO and the international rule of law have become antagonistic normative ideals in cases where legal rules have failed to constrain the self-judging interpretations of a geopolitically dominant state. States must instead look beyond substituting one category of rules for another and seek to construct the geostrategic balances of power necessary for a RBO that is consistent with international law.

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I INTRODUCTION

On 1 September 2020, Germany released its *Policy Guidelines for the Indo-Pacific* ('2020 Policy Guidelines'), 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 Policy Guidelines is a commitment to resolving tensions in the South China Sea ('SCS') by supporting 'a substantive and legally binding Code of Conduct between China and the ASEAN Member States'.² The significance of these words is easy to overlook, since there has been almost universal support among states for some version of the Code of Conduct ('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 two central concepts: 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, properly constituted 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 definitional debates are quests for an unattainable holy grail, since the central concepts embody the real disputes and tensions that are necessitating

¹ Federal Government (Germany), *Policy Guidelines for the Indo-Pacific: Germany – Europe – Asia* (Policy Guidelines, August 2020) <<https://www.auswaertiges-amt.de/blob/2380514/f9784f7e3b3fa1bd7c5446d274a4169e/200901-indo-pazifik-leitlinien--1--data.pdf>> ('Policy Guidelines for the Indo-Pacific').

² Ibid 16. ASEAN is the Association of Southeast Asian Nations.

³ The South China Sea ('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* (Oxford University Press, 2nd ed, 2020) 59, 71.

⁵ See Heike Krieger and Georg Nolte, 'The International Rule of Law: Rise or Decline?' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford University Press, 2019) 3. On the meanings of 'discourse' and its relationship to power, see Teun A van Dijk, 'What is Political Discourse Analysis?' (1997) 11(1) *Belgian Journal of Linguistics* 11, 12–15.

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, 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 (‘SCS Award’).⁸ China has responded through forceful public diplomacy campaigns to advocate self-judging interpretations of the SCS Award⁹ 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 article addresses the corresponding side of the international law–RBO 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 self-judging legal interpretations of a geopolitically dominant state. This is a significant point to explore, since the contrary assumption that it can drives much of the intensifying appeals to the political concept. Non-lawyers and policymakers rarely engage with what can appear as formalistic juridical debates about questions of correct interpretation and compliance with international law, with binary distinctions seeming to exacerbate rather than resolve tensions in key cases.¹¹ Instead, the primary focus is on finding pragmatic and responsive rules which are founded in the more accessible legitimacy of political norms and values. Moreover, appealing to a RBO comprising a dense network of different categories of rules is assumed to complement and reinforce legal rules governing

⁶ This analysis has been misinterpreted in the opening page of a recent monograph, which stated: ‘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”’: 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: Malcolm Jorgensen, ‘International Law Cannot Save the Rules-Based Order’, *The Interpreter* (Blog Post, 18 December 2018) <<https://www.lowyinstitute.org/the-interpreter/international-law-cannot-save-rules-based-order>>, archived at <<https://perma.cc/G65G-MM4D>> (‘Rules-Based Order’).

⁷ Jorgensen, ‘Rules-Based Order’ (n 6).

⁸ *South China Sea Arbitration (Philippines v China) (Award)* (Permanent Court of Arbitration, Case No 2013–19, 12 July 2016) (‘*South China Sea Arbitration*’).

⁹ See Chinese Society of International Law, ‘The South China Sea Arbitration Awards: A Critical Study’ (2018) 17(2) *Chinese Journal of International Law* 207; Douglas Guilfoyle, ‘The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea’ (2019) 95(5) *International Affairs* 999, 1013–16.

¹⁰ See Malcolm Jorgensen, ‘Equilibrium & Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order’ (Working Paper No 21, Berlin Potsdam Research Group, November 2018) <<https://ssrn.com/abstract=3283626>>.

¹¹ Meyer (n 4) 61–3.

the same subject matter.¹² Yet, this bargain may well be an illusion, with consequential cases such as the COC demonstrating that a political RBO remains susceptible to the limits of international law more generally.¹³ Redefining the nature of rules themselves amounts to a bootstrapping argument — that legal rules facing political pressures can be saved through reformulation as political obligations. Instead, doing so may merely add an additional normative layer with indeterminate authority, while having potentially perverse consequences on the rule of law. The COC thus emerges as a ‘canary’ in the minefield of regional tensions, with its silence as an effective instrument serving as a warning to governments and policymakers of the perils of appealing to the RBO without heeding geostrategic conditions for ensuring consistency with the international rule of law.¹⁴

This article begins by reviewing existing jurisprudential perspectives on the RBO, which in positivist accounts denotes the totality of legal and non-legal rules of global governance. In principle, these are complementary but conceptually distinct categories of rules, with law enshrining the most authoritative and legitimate norms upon which political rules are founded. However, in practice, a normative relationship of mutual dependency is evident, where subordinate political rules operate to shape the interpretation and authority of legal norms. The article thus draws upon comparative international law scholarship to identify a secondary meaning of the RBO, which is as a conception of international law informed by particularistic Western and liberal notions of global 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. The significance of identifying these jurisprudential dynamics is that it demonstrates that the non-legal rules of the RBO may sit in either a complementary or antagonistic relationship with the international rule of law, which remains dependent on underlying balances of global power and associated conceptions of global order.

The second part of the article 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 has an antagonistic relationship with the rule of law where China, as a geopolitically dominant state, has already failed to recognise meaningful constraints on its self-judging legal interpretations of the *United Nations Convention on the Law of the Sea* (‘UNCLOS’).¹⁵ The trajectory of COC

¹² Mark A Pollack and Gregory C Shaffer, ‘The Interaction of Formal and Informal International Lawmaking’ in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 241, 251.

¹³ For a leading account of the limitations of international law, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 3, 225.

¹⁴ Jakub J 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’: Jakub J Grygiel, *Great Powers and Geopolitical Change* (Johns Hopkins University Press, 2006) 22.

¹⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (‘UNCLOS’).

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 article concludes by considering the connection between international law and evolving geostrategic concepts such as the 'Indo-Pacific', which seek to take account of purposive power balances in the region. The increasing embrace of such concepts by Germany and other advocates for a RBO exemplifies the acute strategic decisions facing states that advocate for rules consistent with a normatively desirable law-based order.

II 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.¹⁶ The relatively recent ubiquity of the term has closely tracked post-Cold War shifts in global power, leading Samuel Moyn to describe 'a classic instance of an invention of tradition'.¹⁷ Critics of the pervasive discourse charge that, as a concept, the RBO 'has become increasingly devoid of substance',¹⁸ is a 'myth',¹⁹ or that the history of the largely synonymous 'liberal international order' is 'neither very liberal nor very orderly'.²⁰ 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'.²¹ 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

¹⁶ For a useful overview and conceptual history of the concept, see generally 'Australia's Security and the Rules-Based Order', *Lowy Institute* (Web Page) <<https://www.lowyinstitute.org/about/programs-and-projects/australias-security-and-rules-based-order>>, archived at <<https://perma.cc/84UR-JHYK>>.

¹⁷ @samuelmoyn (Samuel Moyn) (Twitter, 22 November 2020, 11:02pm AEDT) <<https://twitter.com/samuelmoy/status/1330481845323124739>>, archived at <<https://perma.cc/4YQC-LGVQ>>. For appearances of the phrase 'rules-based order' in English language books since 1800, see *Google Books Ngram Viewer* (online) <https://books.google.com/ngrams/graph?content=rules-based+order&year_start=1800&year_end=2019&corpus=26&smoothing=3&>, archived at <<https://perma.cc/5DBS-W9QL>>.

¹⁸ Bobo Lo, 'Global Order in the Shadow of the Coronavirus: China, Russia, and the West' (Analysis Paper, Lowy Institute, July 2020) 5 <<https://www.lowyinstitute.org/publications/global-order-shadow-coronavirus-china-russia-and-west>>, archived at <<https://perma.cc/4866-VSGL>>.

¹⁹ Andrew J Bacevich, 'The "Global Order" Myth', *The American Conservative* (Blog Post, 15 June 2017) <<https://www.theamericanconservative.com/articles/the-global-order-myth/>>, archived at <<https://perma.cc/4RCT-UB6C>>.

²⁰ Patrick Porter, 'A World Imagined: Nostalgia and Liberal Order' (Analysis Paper No 843, Cato Institute, 5 June 2018) <<https://www.cato.org/policy-analysis/world-imagined-nostalgia-liberal-order>>, archived at <<https://perma.cc/HGF9-2P3F>>.

²¹ Yoichi Funabashi and G John Ikenberry, *The Crisis of Liberal Internationalism: Japan and the World Order* (Brookings Institution Press, 2020) 2.

values'.²² 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 former 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.'²³ 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.²⁴ Moreover, competing formulations of the RBO mirror substantive disputes over the power structures and values constituting global order, which are the real forces necessitating interrogation of international rules in the first place.²⁵

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'.²⁶ Much of the discourse is driven by a desire for language that frames defence of the global order in non-partisan terms, which appears to align with rule of law ideals.²⁷ Richard Maude, who oversaw drafting of Australia's *2017 Foreign Policy White Paper*, has observed (critically) that the RBO terminology implicitly 'takes power out of the equation of global order'.²⁸ Yet the formulation is unsatisfying for lawyers, for whom the concept of the 'international rule of law' already suggests the ideal of an 'escape' from politics.²⁹ Legal scholarship has in consequence remained sceptical about the meaning of the RBO and alive to the perils of uniting legal and non-legal rules within a single normative ideal. Still, the relative silence of lawyers remains both

²² G John Ikenberry, 'The Next Liberal Order' (2020) 99(4) *Foreign Affairs* 133, 139.

²³ Heiko Maas and Jean-Yves Le Drian, 'Who, If Not Us?', *France Diplomacy* (Web Page, 14 February 2019) <<https://www.diplomatie.gouv.fr/en/country-files/germany/events/article/who-if-not-us-15-02-19>>, archived at <<https://perma.cc/YAB4-C64S>>.

²⁴ Malcolm Jorgensen, 'The United States' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford University Press, 2021) 926, 927; Nick Bisley, 'Australia's Rules-Based International Order' in Melissa Conley Tyler, Allan Gyngell and Bryce Wakefield (eds), *Australia and the Rules-Based International Order* (Australian Institute of International Affairs, 2021) 27, 28–9.

²⁵ For a critical analysis of these power structures and values, see John J Mearsheimer, 'Bound to Fail: The Rise and Fall of the Liberal International Order' (2019) 43(3) *International Security* 7.

²⁶ See Krieger and Nolte (n 5) 4–7. On the contested meanings of the 'international rule of law' and for a suggested 'functionalist' definition, see Malcolm Jorgensen, *American Foreign Policy Ideology and the International Rule of Law: Contesting Power through the International Criminal Court* (Cambridge University Press, 2020) 80–7 ('*American Foreign Policy Ideology*').

²⁷ Nick Bisley and Benjamin Schreer, 'Australia and the Rules-Based Order in Asia: Of Principles and Pragmatism' (2018) 58(2) *Asian Survey* 302, 309; Rebecca Strating, 'Maritime Disputes, Sovereignty and the Rules-Based Order in East Asia' (2019) 65(3) *Australian Journal of Politics and History* 449, 449.

²⁸ 'Ep 41: Richard Maude on the Indo-Pacific, Models of World Politics, and Australian Foreign Policy', *Australia in the World* (February 2020) 00:18:40.

²⁹ Martti Koskeniemi, *The Politics of International Law* (Hart Publishing, 2011) 37.

puzzling and conspicuous in circumstances where the most authoritative and legitimate rules of global order are precisely those with legally binding force. Moreover, 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 discourse setting the terms for the future of international legal order.

The first half of this article accordingly seeks to build the conceptual bridges for lawyers to engage with the RBO discourse and thereby facilitate greater recognition of the unique authority of legal rules and the necessary conditions to make them effective. The following section starts by reviewing current deficiencies in the ways that RBO advocates appeal to legal authority, and the value that authentic 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 characterise the relationships between legal and non-legal rules. 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 characterise substantive conceptions of law entailed in the RBO. The section concludes by analysing the power of these legal conceptions to shape global order, with a focus on the variables that determine whether legal and non-legal rules of the RBO sit in a complementary versus an antagonistic relationship.

A *The Value of Legal Engagement*

The invocation of international law by RBO advocates presents a complicated set of opportunities and challenges for legal scholarship which political advocates themselves are rarely aware of. On the one hand, a point of commonality among all political advocates is confirmation along the lines that international law forms ‘a fundamental pillar of the international rules-based order’.³⁰ This aligns with the positivist presumption among many lawyers that a categorical distinction exists between law and non-law, with legal rules seen to anchor dependent non-binding norms.³¹ Yet, political advocates simultaneously represent a point of departure, since the value of rules is determined not by legal form but rather according to a rational calculation of effectiveness in global governance.³² Certainly non-lawyers have long recognised value in the legalisation of rules, which includes advantages such as more credible and durable commitments, and reducing the transaction costs of managing and

³⁰ EEAS Press Team, ‘Israel: Statement by the High Representative Josep Borrell on the Formation of a New Government’ (Press Release, The Office of the European Union Representative, 18 May 2020) <https://eeas.europa.eu/delegations/palestine-occupied-palestinian-territory-west-bank-and-gaza-strip/79576/israel-statement-high-representative-josep-borrell-formation-new-government_en>, archived at <<https://perma.cc/A2VU-2NUX>>.

³¹ Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law* 413, 417; Jan Klabbers, ‘The Redundancy of Soft Law’ (1996) 65(2) *Nordic Journal of International Law* 167, 181.

³² Martti Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2007) 8(1) *Theoretical Inquiries in Law* 9, 13.

enforcing rules.³³ This remains a contingent calculation however, with Kenneth Abbott and Duncan Snidal noting the countervailing higher contracting costs of legalised agreements, which include that

[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.³⁴

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’.³⁵ Former ICJ judge Richard Baxter thus concluded 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.³⁶

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 political discourse threatens to alienate lawyers to the extent that it clothes the RBO in the legitimacy of international law, and yet does so without upholding the juridical relationships that define legal authority. A representative example is in the *2017 Foreign Policy White Paper*, which cites strengthening the ‘rules-based international order’ as a central pillar.³⁷ However, a commitment to ‘the rule of law ... beyond our borders’ is not defined in terms of advocacy for legal rules, but rather as ‘an international order in which relations between States are governed by international law *and other rules and norms*’.³⁸ This can be contrasted with Germany’s equivalent *2021 Federal Government White Paper*, which also emphasises defence of the RBO, but more explicitly defines it in terms of ‘establishing an international rule of law’ grounded in the ‘further juridification of international relations’.³⁹ The comparison demonstrates the importance of better incorporating jurisprudential sensibilities in order to assuage lawyers’ fears that further engaging with the RBO threatens the authority of law. There is obvious value for legal scholarship in connecting to the RBO discourse, with political scientists providing a wealth of sophisticated analysis of precisely

³³ Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421, 426–31.

³⁴ *Ibid* 434.

³⁵ Shirley V Scott, ‘The Decline of International Law as a Normative Ideal’ (2018) 49(4) *Victoria University of Wellington Law Review* 627, 640.

³⁶ RR Baxter, ‘International Law in “Her Infinite Variety”’ (1980) 29(4) *International and Comparative Law Quarterly* 549, 565.

³⁷ Australian Government, *2017 Foreign Policy White Paper* (White Paper, November 2017) 79 <<https://www.dfat.gov.au/sites/default/files/2017-foreign-policy-white-paper.pdf>>, archived at <<https://perma.cc/G3ZT-WCPN>>.

³⁸ *Ibid* 11 (emphasis added).

³⁹ Federal Government (Germany), ‘A Multilateralism for the People: Federal Government White Paper’ (White Paper, May 2021) 11, 33, 35 <<https://www.auswaertiges-amt.de/blob/2460320/0e29e9a0f2c3b9af9a4268ba913f26a9/weissbuch-multilateralismus-data.pdf>>, archived at <<https://perma.cc/33FP-SR7Z>>.

the trends determining the future of international law, but which require interdisciplinary literacy to translate insights.⁴⁰ Conversely, integrating legal distinctions promises to enhance political accounts by specifying the different magnitude of challenge entailed in disruptions to foundational laws, such as those defining state sovereignty or associated powers of rule creation, as compared to dependent political norms. 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*

1 *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.⁴¹ The primary significance of this category of rules is to offer forms of accountability through specific 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.⁴² 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.⁴³ 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.⁴⁴

⁴⁰ See, eg, the leading research project by the German Institute for International and Security Affairs on 'The Rise and Decline of the Liberal International Order': Hanns W Maull, *The Rise and Decline of the Post-Cold War International Order* (Oxford University Press, 2018) 291–2.

⁴¹ *Statute of the International Court of Justice* art 38; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a) ('VCLT'). See generally Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991) vol 13, 35–7.

⁴² See International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (23 April – 1 June and 2 July – 10 August 2001) ch IV(E)(2) ('Draft Articles on Responsibility of States for Internationally Wrongful Acts') 43.

⁴³ Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2nd ed, 2020) 645; Joost Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 125, 131–9.

⁴⁴ Meyer (n 4) 59–61.

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, 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’.⁴⁵ 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.⁴⁶ 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 1975.⁴⁷ The process exemplified the ‘stress of international negotiations in which the parties cannot agree upon clear rules or principles to be followed’,⁴⁸ but the agreement established understandings capable of strengthening détente between Western and Soviet bloc countries, including the ‘[f]ulfilment in good faith of obligations under international law’.⁴⁹ The Accords thus had real legal impact and are considered to be among the most influential multilateral agreements of the Cold War era.⁵⁰

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*.⁵¹ 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’.⁵² 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, they generate’.⁵³ Here, the guidelines distinguish between agreements that are legally

⁴⁵ Baxter (n 36) 557.

⁴⁶ Philippe Sands, ‘Lawless World: International Law after September 11, 2001 and Iraq’ (2005) 6(2) *Melbourne Journal of International Law* 437, 439. See ‘The Atlantic Charter’ (Policy Paper, 14 August 1941); The White House, ‘The New Atlantic Charter’ (Media Release, 10 June 2021) <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/10/the-new-atlantic-charter/>>, archived at <<https://perma.cc/3YFR-HYUT>>.

⁴⁷ *Conference on Security and Co-operation in Europe: Final Act*, signed 1 August 1975, 2 <<https://www.osce.org/files/f/documents/5/c/39501.pdf>>, archived at <<https://perma.cc/FQ7J-6VN8>> (‘*Conference on Security and Co-operation in Europe*’). For an examination of the interplay of legal and non-legal norms in the Helsinki Accords, see Michael Bothe, ‘Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?’ (1980) 11 *Netherlands Yearbook of International Law* 65.

⁴⁸ Baxter (n 36) 557.

⁴⁹ *Conference on Security and Co-operation in Europe* (n 47) 8.

⁵⁰ See Baxter (n 36) 559.

⁵¹ Inter-American Juridical Committee, Department of International Law of the Secretariat for Legal Affairs of the Organization of American States, *Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements* (Guidelines, 7 August 2020) <http://www.oas.org/en/sla/iajc/docs/Guidelines_on_Binding_and_Non-Binding_Agreements_publication.pdf>, archived at <<https://perma.cc/22CG-WQUH>>.

⁵² *Ibid* 9.

⁵³ *Ibid* 9–10.

‘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’.⁵⁴ For this latter class of rules, ‘law provides none of the normative force for the agreement’s formation or operation’.⁵⁵ 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’.⁵⁶ 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.⁵⁷

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 forms of governance, then the nature of a rule remains a secondary concern of seemingly more interest to the international lawyer. This is thus another 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.

2 *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’.⁵⁸ Certainly, some legal analyses have treated the concepts as

⁵⁴ Ibid 24–5.

⁵⁵ Ibid 10.

⁵⁶ Ibid 53.

⁵⁷ Meyer (n 4) 60–1. See AE Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48(4) *International and Comparative Law Quarterly* 901, 901–2, 913.

⁵⁸ Michael Wood, ‘“Constitutionalization” of International Law: A Sceptical Voice’ in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Martinus Nijhoff Publishers, 2009) 85, 89, 91.

synonymous, thereby defining away conceptual complications.⁵⁹ These accounts are not the focus of this article, 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 straightforward interpretation starts by simply distinguishing between rules with authority drawn from recognised sources of international law, and rules drawn from political or moral authority.⁶⁰ 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.⁶¹

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’.⁶² In positivist terms, the RBO is a ‘broader term’ than the rule of law, since ‘the rules need not even be legal rules’.⁶³

Legal scholarship is already familiar with the perils of ‘deformalisation’ in international law, whereby legal rules are increasingly shaped by informal rules and processes.⁶⁴ 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’.⁶⁵ Doing so risks eclipsing international law

⁵⁹ See, eg, Simon Chesterman, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System* (Final Report, 2008) <https://www.iilj.org/wp-content/uploads/2017/08/unsc_and_the_rule_of_law.pdf>, archived at <<https://perma.cc/VHV4-QE8H>>; Maja Groff and Joris Larik, ‘Strengthening the Rules-Based Global Order: The Case for an International Rule of Law Package’ (Issue Brief, Stimson Center, September 2020) <<https://www.stimson.org/2020/strengthening-the-rules-based-global-order-the-case-for-an-international-rule-of-law-package/>>, archived at <<https://perma.cc/AD4B-CFHV>>.

⁶⁰ See Gregory C Shaffer and Mark A Pollack, ‘Hard vs Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) 94(3) *Minnesota Law Review* 706, 724–5.

⁶¹ Cited in Stefan Talmon, ‘Notable Statements on International Law during March 2020’, *GPIL – German Practice in International Law* (Blog Post, 12 May 2020) <<https://gpil.jura.uni-bonn.de/2020/05/notable-statements-on-international-law-during-march-2020/>>, archived at <<https://perma.cc/C3EF-6UVA>>.

⁶² Scott (n 35) 641.

⁶³ *Ibid.*

⁶⁴ See Jean d’Aspremont, ‘The Politics of Deformalization in International Law’ (2011) 3(2) *Goettingen Journal of International Law* 503, 526–8; Anne van Mulligen, ‘Framing Deformalisation in Public International Law’ (2015) 6(3–4) *Transnational Legal Theory* 635, 636–7.

⁶⁵ Scott (n 35) 637–9.

as the authoritative normative framework for the global order, while compromising on the universality and stability promised by the legal order.⁶⁶ Stefan 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’.⁶⁷ The peril is that the RBO discourse will ‘come to undermine the credibility of international law’.⁶⁸ 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.⁶⁹

3 *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 the substance of 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 dependent on the broader context of non-legal rules and values constituting the order.

Here, the re-emerging field of comparative international law can offer a secondary meaning of the RBO as a particularistic conception of the international rule of law. The dilemma facing policymakers is that appeals to ‘international law’, simpliciter, are increasingly unable to resolve geopolitical disagreements in certain consequential cases, with disputant states each claiming the mantle of law but meaning quite different things. Comparative international law scholarship responds that the real policymakers and, in particular, 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’.⁷⁰ More particularly,

⁶⁶ Ibid 641.

⁶⁷ Stefan Talmon, ‘Rules-Based Order vs International Law?’ in Stefan Talmon (ed), *German Practice in International Law: 2019* (Cambridge University Press, forthcoming) vol 1, 1, 1–3. On issues of consent, see Nico Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108(1) *American Journal of International Law* 1.

⁶⁸ Talmon (n 67).

⁶⁹ For a visual representation of this view, see figure 3 in Heike Krieger, *Let’s Speak Law! A Call for a Legally Embedded Multilateralism* (Report No 2, December 2021) 20–1 <<https://www.sef-bonn.org/en/publications/global-trends-analysis/022021/>>, archived at <<https://perma.cc/LV4N-N2MQ>>.

⁷⁰ Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) 2.

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.⁷¹

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

It is not the objective of this article 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 illuminated by accounts of a ‘Western conception’ of international law, as is evident in the views of the Western Europe and Others Group at the UN.⁷² 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.⁷³ Without being exhaustive, issues of ‘state sovereignty and human rights’ have emerged as among the defining ‘fundamental ideological tensions’ that distinguish competing geopolitical and legal communities.⁷⁴ 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 liberal view of global legal order can be identified 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’.⁷⁵ It is clear that this initiative has never just been for multilateral rules per se, but for a substantive normative conception of the values underlying law. Such is made clear by Heiko Maas’ affirmation⁷⁶ that the initiative aligns with US President Joe Biden’s global ‘Summit for Democracy’.⁷⁷ 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-

⁷¹ Anthea Roberts et al, ‘Conceptualizing Comparative International Law’ in Anthea Roberts et al (eds), *Comparative International Law* (Oxford University Press, 2018) 3, 4.

⁷² See Roberts, *Is International Law International?* (n 70) 5–17; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press, 2019) 59–61.

⁷³ Roberts, *Is International Law International?* (n 70) 13.

⁷⁴ *Ibid* 192; Cai (n 72) 142–3.

⁷⁵ ‘What is the “Alliance for Multilateralism”?’, *Alliance for Multilateralism* (Web Page) <<https://multilateralism.org/the-alliance/>>, archived at <<https://perma.cc/7ARC-6C8B>>; *Policy Guidelines for the Indo-Pacific* (n 1) 14.

⁷⁶ @HeikoMaas (Heiko Maas) (Twitter, 11 January 2021, 8:14pm AEST) <<https://twitter.com/HeikoMaas/status/1348558768955674631?s=20>>, archived at <<https://perma.cc/AB6G-DXHW>>.

⁷⁷ Joseph R Biden Jr, ‘Why America Must Lead Again: Rescuing US Foreign Policy after Trump’ (2020) 99(2) *Foreign Affairs* 64.

based democratic order'.⁷⁸ A 2017 D-10 strategy paper on Russian challenges defines the 'rules-based democratic order' and 'liberal international order' as identical concepts, that is, 'an international system based upon principles of democratic governance, the protection of individual rights, economic openness, and the rule of law'.⁷⁹ 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'.⁸⁰ Thus, appeals to the rule of law are to a concept embedded within 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-established term 'international law' they are attempting to use a new expression, 'a rules-based order'.⁸¹

For Lavrov, this practice detracts from the true multilateralism embodied in the *Charter of the United Nations*, thereby threatening a 'dangerous relapse into bloc policy and creation of dividing lines between a group of Western countries and other states'.⁸² 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"

⁷⁸ See 'D-10 Strategy Forum', *Atlantic Council* (Web Page) <<https://www.atlanticcouncil.org/programs/scowcroft-center-for-strategy-and-security/global-strategy-initiative/democratic-order-initiative/d-10-strategy-forum/>>, archived at <<https://perma.cc/3PND-9TWG>>; John Bellinger, 'New Global Declaration of Democratic Principles', *Lawfare* (Blog Post, 16 February 2019) <<https://www.lawfareblog.com/new-global-declaration-democratic-principles>>, archived at <<https://perma.cc/BME4-X48N>>. The member states are: Australia, Canada, France, Germany, Italy, Japan, South Korea, the United Kingdom and the United States, plus the European Union.

⁷⁹ Ash Jain et al, 'Strategy of "Constrainment": Countering Russia's Challenge to the Democratic Order' (Research Paper, Atlantic Council of the United States and Centre for International Governance Innovation, March 2017) 5 n 5 <https://www.atlanticcouncil.org/wp-content/uploads/2017/03/AC_Russia_StrategyConstrainment-ELECT-0313.pdf>, archived at <<https://perma.cc/GV89-VYU2>>.

⁸⁰ Ibid 6.

⁸¹ 'Excerpts from Russian Foreign Minister Sergey Lavrov's Remarks at a Roundtable Discussion with the Participants of the Gorchakov Public Diplomacy Fund', *Permanent Mission of the Russian Federation to the European Union* (Web Page, 22 April 2020) <<https://russiaeu.ru/en/news/excerpts-russian-foreign-minister-sergey-lavrovs-remarks-roundtable-discussion-participants>>, archived at <<https://perma.cc/799K-M629>>. See generally Sergei V Lavrov, 'On Law, Rights and Rules' (2021) 19(3) *Russia in Global Affairs* 228.

⁸² 'Foreign Minister Sergey Lavrov's Address at the General Debate of the 76th Session of the General Assembly, New York, September 25, 2021', *Ministry of Foreign Affairs of the Russian Federation* (Web Page, 25 September 2021) <https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4867111>, archived at <<https://perma.cc/XHF3-DRMW>>.

international order'.⁸³ This Sino-Russian convergence finds its clearest expression in a series of joint statements that commenced with the declaration on the 'Promotion of International Law' of 25 June 2016 ('the Sino-Russian declaration'),⁸⁴ which represents 'a united challenge to Western hegemony in international law'.⁸⁵ 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'.⁸⁶ 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'.⁸⁷ Some of the most prominent examples of irreconcilable views on the interpretation and operation of international law trace back to these principles, including especially the parallel debates between Russian and Western international lawyers over the legality of Crimea's annexation in 2014 and more profound challenges to Ukraine's sovereignty,⁸⁸ and China's legal arguments in rejecting the 2016 SCS Award,⁸⁹ with opposing sides in both disputes claiming to be on the side of law. These states stake their authority in guardianship of a universally agreed legal order against a Western 'civilizational' mission to liberalise 'the very role of international law'.⁹⁰ Yet, the associated legal interpretations confirm conceptions of international law that are no less informed by particularistic ideologies and partisan interests.

Perhaps the most even-handed observation that can be offered in relation to both advocates and critics of the RBO is that all powerful states, Western and

⁸³ 'Secretary Antony J Blinken, National Security Advisor Jake Sullivan, Director Yang and State Councilor Wang at the Top of Their Meeting' (Press Release, US Department of State, 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/>>.

⁸⁴ *Letter Dated 8 July 2016 from the Representatives of China and the Russian Federation to the United Nations Addressed to the Secretary-General*, 70th sess, Agenda Item 85, UN Docs A/70/982 and S/2016/600 (12 July 2016) annex ('*The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*'). Reaffirmed on 23 March 2021 in the 'Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions': see Achilles Skordas, 'Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021' (2021) 81(2) *Heidelberg Journal of International Law* 293.

⁸⁵ Roberts, *Is International Law International?* (n 70) 291.

⁸⁶ *Ibid* 291–2. See also Chang-Fa Lo, 'Values to Be Added to an "Eastphalia Order" by the Emerging China' (2010) 17(1) *Indiana Journal of Global Legal Studies* 13, 16–17.

⁸⁷ Lauri Mälksoo, 'Russia and China Challenge the Western Hegemony in the Interpretation of International Law', *EJIL:Talk!* (Blog Post, 15 July 2016) <<https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/>>, archived at <<https://perma.cc/C5SF-42TT>>.

⁸⁸ See Christian Marxsen, Anne Peters and Matthias Hartwig, 'Symposium: "The Incorporation of Crimea by the Russian Federation in the Light of International Law"' (2015) 75 *Heidelberg Journal of International Law* 3, 3–4; Roy Allison, 'Russian Revisionism, Legal Discourse and the "Rules-Based" International Order' (2020) 72(6) *Europe-Asia Studies* 976, 991–2.

⁸⁹ Ingrid Wuerth, 'China, Russia, and International Law', *Lawfare* (Blog Post, 11 July 2016) <<https://www.lawfareblog.com/china-russia-and-international-law>>, archived at <<https://perma.cc/J8PP-R6GK>>.

⁹⁰ Alexander N Vylegzhanin et al, 'The Concept "Rules-Based Order" in International Legal Discourses' (2021) 2 *Moscow Journal of International Law* 35, 51.

non-Western, make appeals to ‘international law’ as the authoritative normative framework for resolving global disputes, and yet these appeals are unavoidably fragmented along ideological lines, with ‘competing understandings of power constituting multiple meanings of the rule of law’.⁹¹ This is not to deny that terminology may have real consequences, with Heike Krieger warning that ‘many states of the Global North have left the rhetorical reliance on international law as the decisive frame for international relations to Russian and Chinese policies’.⁹² Indeed, these two states seem alert to the value of jointly adopting the language of ‘the international law-based world order’, while denouncing ‘rules elaborated in private by certain nations or blocs of nations’.⁹³ Yet, in substantive terms, Western international lawyers advocate for conceptions of international law informed by the RBO discourse, which forms the counterpoint to a particularistic conception of international law as encapsulated in the Sino-Russian joint statements. The real distinction thus becomes more a question of ‘who is given an opportunity to speak’.⁹⁴ 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’. The more 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’.⁹⁵ 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’.⁹⁶

Adopting such a comparative approach recognises that the interpretation of law itself is being structured by power and ideology 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’.⁹⁷ 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’.⁹⁸ Thus, it is a challenge that lawyers must

⁹¹ Jorgensen, *American Foreign Policy Ideology* (n 26) 6.

⁹² Krieger (n 69) 22–3.

⁹³ ‘Joint Statement of the Russian Federation and the People’s Republic of China on the International Relations Entering a New Era and the Global Sustainable Development’, *President of Russia* (Web Page, 4 February 2022) <<http://en.kremlin.ru/supplement/5770>>, archived at <<https://perma.cc/B79P-T5DS>>.

⁹⁴ Sebastiaan Van Severen, ‘Lavrov’s Lament: A Russian Take on the Rules-Based Global Order’, *EJIL:Talk!* (Blog Post, 16 July 2021) <<https://www.ejiltalk.org/lavrovs-lament-a-russian-take-on-the-rules-based-global-order/>>, archived at <<https://perma.cc/88B7-ZM8T>>.

⁹⁵ ‘Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy’ (Policy Paper, Her Majesty’s Government, March 2021) 11 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975077/Global_Britain_in_a_Competitive_Age_-_the_Integrated_Review_of_Security__Defence__Development_and_Foreign_Policy.pdf>, archived at <<https://perma.cc/FEH5-X6E6>>.

⁹⁶ Graham Allison, ‘The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom’ (2018) 97(4) *Foreign Affairs* 124, 125. See also Cai (n 72) 109.

⁹⁷ Roberts, *Is International Law International?* (n 70) 3.

⁹⁸ See, eg, Cai (n 72) 61.

meet and steer, including in defining boundaries between the legal and political, and through new language to describe fragmenting concepts of law.

C *Politics of the Rules-Based Order*

The combined value of positivist and comparativist jurisprudential accounts is their conceptualisation of how rules interrelate, which thereby offers pathways for legal scholarship to shape the RBO discourse in defence of the integrity of international law. The aim is to better integrate lawyers into the broader political task of identifying conditions under which legal and non-legal rules sit in a complementary relationship, and therefore when invoking the RBO is likely to reinforce associated conceptions of the international rule of law. A core presumption sustaining the strength of the RBO discourse is that establishing accessible and pragmatic non-legal rules which are consistent with international law complements and reinforces existing or desired legal regimes. In particular, states are seen to be ‘enmesh[ed]’ in a process that progressively shifts them towards more binding and authoritative commitments.⁹⁹ Alan Boyle here concludes that, although soft law is open to forms of abuse, this is no less so for law properly so called and hence ‘it has generally been more helpful to the process of international law-making than it has been objectionable’.¹⁰⁰ Policymakers are thus reassured that their appeals to the normative ideals of the RBO are to a dynamic framework of mutually reinforcing legal and non-legal rules.¹⁰¹

The correlative to low barriers to entry is, however, the reality of low barriers to norm change and exit. Most problematically, normative hierarchies can be subverted if unaccountable political obligations develop into focal points that dominate the interpretation and operation of law. Mark Pollack and Gregory 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.¹⁰²

Consequences can include the alteration of formally agreed treaty norms through informal and less consensual processes, with dominant power becoming determinative.¹⁰³ Curtis Bradley and Jack 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

⁹⁹ Abbott and Snidal (n 33) 446; Pollack and Shaffer (n 12) 251.

¹⁰⁰ Boyle (n 57) 914.

¹⁰¹ Mark Beeson and Andrew Chubb, ‘Australia, China and the Maritime “Rules-Based International Order”’: Comparing the South China Sea and Timor Sea Disputes’ (2021) 21(2) *International Relations of the Asia-Pacific* 233, 237; Rory Medcalf, *Contest for the Indo-Pacific: Why China Won’t Map the Future* (La Trobe University Press, 2020) 157–61.

¹⁰² Pollack and Shaffer (n 12) 252.

¹⁰³ See Meyer (n 4) 67.

that it imposes no obligation under international law and a nation incurs no state responsibility for its violation.¹⁰⁴

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’.¹⁰⁵ Additional drawbacks include the erosion of agreed procedures and transparency relative to treaty agreements, which has a negative impact on generally recognised features of the rule of law.¹⁰⁶ The combined effect of these vulnerabilities is a version of the “‘broken windows” theory’, where the growing visibility of political agreements becomes corrosive to the unique authority of law.¹⁰⁷

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.¹⁰⁸

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.¹⁰⁹ Neither sought treaty status, despite addressing two of the most consequential global challenges in recent decades. 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’.¹¹⁰ Reasons cited were 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.¹¹¹ 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’.¹¹² The

¹⁰⁴ Curtis A Bradley and Jack L Goldsmith, ‘Presidential Control over International Law’ (2018) 131(5) *Harvard Law Review* 1201, 1218. For a forthcoming and comprehensive empirical study of non-binding international agreements from a US and comparative perspective, see Curtis A Bradley, Jack Goldsmith and Oona A Hathaway, ‘The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis’ (2023) 90 *University of Chicago Law Review* (forthcoming) <<https://ssrn.com/abstract=4023641>>.

¹⁰⁵ *Ibid* 1218.

¹⁰⁶ *Ibid* 1291–2.

¹⁰⁷ Meyer (n 4) 66.

¹⁰⁸ Hollis (n 43) viii.

¹⁰⁹ *Ibid*. See Basel Committee on Banking Supervision, Bank for International Settlements, *Basel III: Finalising Post-Crisis Reforms* (Report, 7 December 2017) <<https://www.bis.org/bcbs/publ/d424.pdf>>, archived at <<https://perma.cc/WMD8-5FTW>>; *Joint Comprehensive Plan of Action* (14 July 2015, adopted 18 October 2015) <https://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf>, archived at <<https://perma.cc/W7V3-A2QZ>>.

¹¹⁰ Letter from Julia Frifield to Mike Pompeo, 19 November 2015, 1 <<http://www.humanrightsvoices.org/assets/attachments/documents/11.24.2015.state.dept.letter.jcpoa.pdf>>, archived at <<https://perma.cc/VD3B-CCVH>>.

¹¹¹ *Ibid*.

¹¹² Jamil N Jaffer, ‘Elements of Its Own Demise: Key Flaws in the Obama Administration’s Domestic Approach to the Iran Nuclear Agreement’ (2019) 51(1) *Case Western Reserve Journal of International Law* 77, 78.

reasons for the non-treaty status of the JCPOA relate more to domestic Senate gridlock than international disagreement, but its vulnerabilities were the same — when political power and ideology shifted under President Donald Trump, the agreement was able to be abandoned with few formal barriers.¹¹³

These alternative scenarios demonstrate the RBO discourse as a double-edged sword, which lawyers have strong incentives to influence 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*.¹¹⁴ 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.¹¹⁵ Negotiations canvassed the relative merits of legal form, with the European Union 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.¹¹⁶ Slaughter exemplifies the deformed and policy-oriented approaches that characterise American legal reasoning generally, and which can reveal much about the jurisprudence of the RBO.¹¹⁷ Her conclusion was that the operative rules of the *Paris Agreement* are ‘not law’ but rather ‘essentially a statement of good intentions’.¹¹⁸ Yet, although she lamented this failure to 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’.¹¹⁹

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’.¹²⁰ In contrast, the rules and institutions that Clinton sought resembled the deconstructivist architecture of Frank Gehry: ‘a dynamic mix of materials, shapes, and structures’.¹²¹ This metaphor seems to well capture the logic driving advocacy of the RBO in preference to the ‘international rule of law’, especially as US control over the values and institutions of global order declines. Indeed, the contemporaneous US

¹¹³ Ibid 78, 86.

¹¹⁴ Anne-Marie Slaughter, ‘The Paris Approach to Global Governance’, *Project Syndicate* (Blog Post, 28 December 2015) <<https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>>, archived at <<https://perma.cc/F6VH-28K8>>.

¹¹⁵ *Adoption of the Paris Agreement*, 21st sess, Agenda Item 4(b), UN Doc FCCC/CP/2015/L.9/Rev.1 (12 December 2015) annex (‘*Paris Agreement*’) art 4(2).

¹¹⁶ Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’ (2016) 110(2) *The American Journal of International Law* 288, 297.

¹¹⁷ See Jorgensen, *American Foreign Policy Ideology* (n 26) 38–44, 96.

¹¹⁸ Slaughter (n 114). Slaughter’s characterisation of the *Paris Agreement*’s provisions as ‘not-law’ is disputed: see Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25(2) *Review of European, Comparative and International Environmental Law* 142, 142–3.

¹¹⁹ Slaughter (n 114).

¹²⁰ Hillary Rodham Clinton, *Hard Choices* (Simon & Schuster, 2014) 33.

¹²¹ Ibid.

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’.¹²² 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 of rules that are consistent with and therefore reinforce particularistic understandings of global legal order.¹²³

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.¹²⁴

Such a hypothesis raises obvious implications when advocating for a more pragmatic approach to rules in disputes such as that in 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 self-judging conceptions of law.¹²⁵ 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’.¹²⁶ The ASEAN-China COC offers a crucial case to test 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 is consistent with normatively desirable conceptions of the international rule of law.

III 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 important contribution to the maintenance of peace, justice and progress for all peoples of the world’.¹²⁷ 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

¹²² The White House, *National Security Strategy* (Report, May 2010) 40–1, 46.

¹²³ Martti Koskenniemi, ‘The Politics of International Law: 20 Years Later’ (2009) 20(1) *European Journal of International Law* 7, 15–16.

¹²⁴ Pollack and Shaffer (n 12) 242 (emphasis added).

¹²⁵ Scott (n 35) 643.

¹²⁶ *Ibid.*

¹²⁷ Alan Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (2005) 54(3) *International and Comparative Law Quarterly* 563, 566; *UNCLOS* (n 15) Preamble para 1.

features',¹²⁸ 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 lawyers that they are 'even minimally persuasive'.¹²⁹ 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. The timeline of these practices extends back to at least 1992, when China competed successfully with Vietnam to take control of disputed maritime features,¹³⁰ has progressed to the construction and militarisation of artificial islands,¹³¹ and most recently includes establishing administrative control over the Paracel and Spratly Islands.¹³² 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.¹³³

The impasse is among the leading rationales for ASEAN states seeking the 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.¹³⁴ In this sense, it has always been something of a 'stop-gap measure', but one nevertheless intended to complement and reinforce the *UNCLOS* regime.¹³⁵ 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

¹²⁸ Gregory B Poling, *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute* (Report, July 2013) 18.

¹²⁹ Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107(1) *American Journal of International Law* 124, 141. See generally *South China Sea Arbitration* (n 8); US Department of State, *People's Republic of China: Maritime Claims in the South China Sea* (Limits in the Seas No 150, January 2022) <<https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf>>, archived at <<https://perma.cc/TA4T-Y6NF>>.

¹³⁰ Carlyle A Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea' (2013) 33(2) *S AIS Review of International Affairs* 75, 76.

¹³¹ Katherine Morton, 'China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?' (2016) 92(4) *International Affairs* 909, 934.

¹³² Diane A Desierto, 'China's Maritime Law Enforcement Activities in the South China Sea' (2020) 96(1) *International Law Studies* 257, 258.

¹³³ See Paul Gewirtz, 'Limits of Law in the South China Sea' (Policy Paper No 8, Centre for East Asia Policy Studies, Brookings, May 2016) 4 <<https://www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2.pdf>>, archived at <<https://perma.cc/575L-HDVF>>.

¹³⁴ Yang Fang, 'The South China Sea Disputes' in Jing Huang and Andrew Billo (eds), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015) 164, 176.

¹³⁵ *South China Sea Arbitration (Philippines v China)* (Award on Jurisdiction and Admissibility) (Permanent Court of Arbitration, Case No 2013-19, 29 October 2015) [208] ('*South China Sea Arbitration (Jurisdiction and Admissibility)*').

UNCLOS.¹³⁶ 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*.¹³⁷ 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 of intense distributional conflict involving a geopolitically dominant state committed to disruptive interpretation of treaty rules.

There is little doubt that other SCS claimant states have also frequently advanced their maritime claims contrary to the rule of law,¹³⁸ but the present case seeks to test the capacity of the RBO to complement and reinforce legal rules capable of constraining a geopolitically dominant power and therefore remains primarily focused on Chinese conduct. From that perspective, a conspicuous feature is the stark contrast between the long-expressed preference of ASEAN states for an agreement enshrined in international law and China's resistance to granting treaty or other legally binding status to any eventual code.¹³⁹ 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.¹⁴⁰ 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

¹³⁶ Boyle (n 127) 573.

¹³⁷ Anh Duc Ton, 'Code for Unplanned Encounters at Sea and its Practical Limitations in the East and South China Seas' (2017) 9(4) *Australian Journal of Maritime and Ocean Affairs* 227; Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, 22 April 2014 <<https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea>>, archived at <<https://perma.cc/27SC-WFJZ>>.

¹³⁸ Sarah Raine, 'Beijing's South China Sea Debate' (2011) 53(5) *Survival* 69, 76; Christopher B Roberts, 'ASEAN, The "South China Sea" Arbitral Award, and the Code of Conduct: New Challenges, New Approaches' (2018) 10(2) *Asian Politics and Policy* 190, 196–7.

¹³⁹ Carlyle A Thayer, 'ASEAN's Long March to a Code of Conduct in the South China Sea', *Maritime Issues* (Blog Post, 18 July 2017) 9 <<http://www.maritimeissues.com/politics/aseans-long-march-to-a-code-of-conduct-in-the-south-china-sea.html>>, archived at <<https://perma.cc/UQE3-682A>>.

¹⁴⁰ For a useful timeline, see Charmaine Deogracias, 'Timeline of the ASEAN and China Code of Conduct in the South China Sea', *Vera Files* (Fact Sheet, 9 August 2017) <https://verafiles.org/articles/vera-files-fact-sheet-timeline-asean-and-china-code-conduct>.

international law.¹⁴¹ 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’.¹⁴² 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’.¹⁴³ However, neither draft sought legal bindingness. An inability to agree on a final text led ASEAN states and China to sign the political and non-binding *Declaration on the Conduct of Parties in the South China Sea* (‘DOC’) in November 2002.¹⁴⁴ The DOC affirmed that ‘the adoption of a code 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.¹⁴⁵ 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’.¹⁴⁶ The invocation of law in the DOC is thus not to a framework of binding and determinate obligations, but to normative principles subject to comparative national interpretations.

The COC barely progressed in the intervening decades due to a combination of ASEAN disunity and strategic Chinese obstruction.¹⁴⁷ Following completion of the DOC, it was more than two years before the ASEAN states could even agree on the terms of reference for a working group for its implementation.

¹⁴¹ See Thayer, ‘ASEAN, China and the Code of Conduct in the South China Sea’ (n 130); Carlyle A Thayer, ‘ASEAN’s Code of Conduct in the South China Sea: A Litmus Test for Community-Building?’ (2012) 10(34) *Asia-Pacific Journal* 1 (‘ASEAN’s Code of Conduct in the South China Sea’); Carlyle A Thayer, *ASEAN-China: Framework of a COC* (Background Briefing, 6 August 2017) <<https://scribd.com/document/355938565/Thayer-ASEAN-China-Framework-of-a-COC-August-6-2017>>, archived at <<https://perma.cc/W27Q-24V6>> (‘Framework’).

¹⁴² ASEAN, *1992 ASEAN Declaration on the South China Sea* (adopted 22 July 1992) (emphasis added) <<https://cil.nus.edu.sg/wp-content/uploads/2017/07/1992-ASEAN-Declaration-on-the-South-China-Sea.pdf>>, archived at <<https://perma.cc/ELE9-7BWF>>. See generally *Treaty of Amity and Cooperation in Southeast Asia*, opened for signature 24 February 1976, 1025 UNTS 316 (entered into force 15 July 1976).

¹⁴³ Chairman of ASEAN, *Chairman’s Statement of the 36th ASEAN Summit: Cohesive and Responsive ASEAN*, 26 June 2020, [64] <<https://asean.org/wp-content/uploads/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>>, archived at <<https://perma.cc/FRQ3-BYNK>> (‘Chairman’s Statement of the 36th ASEAN Summit’); Governments of the Member States of ASEAN and the Government of the People’s Republic of China, *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>, archived at <<https://perma.cc/Y9FP-TCTC>>.

¹⁴⁴ Wu Shicun and 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(1) *Chinese Journal of International Law* 311, 311.

¹⁴⁵ *Declaration on the Conduct of Parties in the South China Sea* (n 143).

¹⁴⁶ See *ibid.*

¹⁴⁷ Yee Kuang Heng, ‘ASEAN’s Position on the South China Sea and Implications for Regional Peace and Security’ in Jing Huang and Andrew Billo (eds), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015) 69, 72–4.

Meanwhile, China pursued what amounted to a divide-and-conquer strategy by insisting that substantive disputes should be resolved only bilaterally between directly concerned parties.¹⁴⁸ A further 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 longstanding practice of consensus decision-making.¹⁴⁹ 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’.¹⁵⁰

In terms of substantive proposals, ASEAN presented an internal draft of COC elements in 2012, with the objective of creating a ‘rules-based framework’.¹⁵¹ 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*.¹⁵² 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.¹⁵³

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’.¹⁵⁴

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

¹⁴⁸ See Cai (n 72) 174–5.

¹⁴⁹ Walter Lohman, ‘A Critical Assessment of ASEAN’s Diplomacy regarding the South China Sea’ in Jing Huang and Andrew Billo (eds), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015) 82, 83–4; Vinod K Aggarwal and Jonathan T Chow, ‘The Perils of Consensus: How ASEAN’s Meta-Regime Undermines Economic and Environmental Cooperation’ (2010) 17(2) *Review of International Political Economy* 262, 267.

¹⁵⁰ Thayer, ‘ASEAN, China and the Code of Conduct in the South China Sea’ (n 130) 78.

¹⁵¹ ASEAN, *ASEAN’s 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://scribd.com/document/355900495/ASEAN-s-Proposed-Elements-of-the-ASEAN-China-COC-in-the-SCS>>, archived at <<https://perma.cc/F5A4-QN9D>>.

¹⁵² *Ibid.*

¹⁵³ ‘Foreign Minister Wang Yi on Process of “Code of Conduct in the South China Sea”’, *Embassy of the People’s Republic of China in the Republic of Mauritius* (online, 5 August 2013) <<https://www.mfa.gov.cn/ce/cemu/eng/zgxw/t1064869.htm>>, archived at <<https://perma.cc/AG2A-DWVJ>>.

¹⁵⁴ Thayer, ‘ASEAN, China and the Code of Conduct in the South China Sea’ (n 130) 82.

parties had completed a first draft framework for the code.¹⁵⁵ At this stage the then ASEAN Secretary-General expressed the importance of progressing towards agreement on ‘a legally binding instrument’.¹⁵⁶ 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.¹⁵⁷ Even as the Secretary-General voiced that preference, 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’.¹⁵⁸ 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’.¹⁵⁹

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*, while continuing the practice of calling for a COC ‘consistent’ with, rather than binding, under international law.¹⁶⁰ 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’.¹⁶¹ 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*.¹⁶²

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

¹⁵⁵ Reuters Staff, ‘China Says First Draft of South China Sea Code of Conduct Ready’, *Reuters* (online, 8 March 2017) <<https://www.reuters.com/article/us-china-Parliament-southchinasea-idUSKBN16F0JR>>, archived at <<https://perma.cc/SSP6-LU7F>>.

¹⁵⁶ Kanupriya Kapoor and Manuel Mogato, ‘South China Sea Code with Beijing Must Be Legally Binding — ASEAN Chief’, *Reuters* (online, 28 April 2017) <<https://www.reuters.com/article/asean-summit-secgen-idINKBN17U1TU>>, archived at <<https://perma.cc/7K4F-7KUA>>.

¹⁵⁷ See *Framework* (n 141).

¹⁵⁸ Raul Dancel, ‘ASEAN, China Adopt Framework of Code of Conduct for South China Sea’, *The Straits Times* (online, 6 August 2017) <<https://www.straitstimes.com/asia/se-asia/chinas-foreign-minister-says-maritime-code-negotiations-with-asean-to-start-this-year>>, archived at <<https://perma.cc/2R6L-V9P8>>.

¹⁵⁹ Carl Thayer, ‘A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct’, *The Diplomat* (Blog Post, 3 August 2018) <<https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>>, archived at <<https://perma.cc/NYZ5-8WR6>>.

¹⁶⁰ *Chairman’s Statement of the 36th ASEAN Summit* (n 143) [64]–[65].

¹⁶¹ Chairman of ASEAN, *Chairman’s Statement of the 37th ASEAN Summit: Cohesive and Responsive*, 12 November 2020, [9], [50], [84]–[85] <<https://asean.org/wp-content/uploads/43-Chairmans-Statement-of-37th-ASEAN-Summit-FINAL.pdf>>, archived at <<https://perma.cc/J3C7-V949>> (‘*Chairman’s Statement of the 37th ASEAN Summit*’).

¹⁶² *Chairman’s Statement of the 36th ASEAN Summit* (n 143) [64]–[65]; *Chairman’s Statement of the 37th ASEAN Summit* (n 161) [84]–[85].

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.¹⁶³ Looking ahead, Ian Storey concludes that, although ‘Southeast Asian countries will continue to emphasize international law to protect their rights and interests’, the COC ‘will not be signed in 2021’.¹⁶⁴ Rather, ongoing delays may extend into years, ‘by which time China will have greatly consolidated its position in the South China Sea’.¹⁶⁵

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. Drawing this distinction may seem overly legalistic, especially if the final rules are indeed complementary to the objects and purposes of the underlying treaty. 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.¹⁶⁶ 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’.¹⁶⁷ However, the practice has been adopted well beyond the region, with other states and organisations routinely describing the COC 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’.¹⁶⁸ The consequence would be to enable rather than constrain 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

¹⁶³ Nguyen Minh Quang, ‘Saving the China-ASEAN South China Sea Code of Conduct’, *The Diplomat* (Blog Post, 29 June 2019) <<https://thediplomat.com/2019/06/saving-the-china-asean-south-china-sea-code-of-conduct/>>, archived at <<https://perma.cc/SF5A-Z45H>>.

¹⁶⁴ Ian Storey, ‘The South China Sea Dispute in 2020–2021’ [2020] (97) *ISEAS Perspective* 1, 1.

¹⁶⁵ *Ibid* 7.

¹⁶⁶ GR Berridge and Lorna Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy* (Palgrave Macmillan, 3rd ed, 2012) 51.

¹⁶⁷ Stéphanie Martel, ‘From Ambiguity to Contestation: Discourse(s) of Non-Traditional Security in the ASEAN Community’ (2017) 30(4) *Pacific Review* 549. On the distinction between ‘ambiguity, vagueness, incompleteness, and inconsistency’, see generally Adil Ahmad Haque, ‘Indeterminacy in the Law of Armed Conflict’ (2019) 95 *International Law Studies* 118, 119–20.

¹⁶⁸ Michael Byers, ‘Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change’ (2003) 11(2) *Journal of Political Philosophy* 171, 180.

conduct' under the heading 'Upholding the respect for international law'.¹⁶⁹ 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,¹⁷⁰ but an almost identical Vietnam-US statement a month later called explicitly for 'an effective, *legally binding*' COC.¹⁷¹ Germany's words and actions have long been consistent with support for legal bindingness, with then 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.'¹⁷² 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.¹⁷³ Pointedly, however, the Policy 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.¹⁷⁴

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 and even Germany's own subsequent statements. An important implication of achieving this level of legal bindingness would be to constrain China from 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 been reluctant to call explicitly for legally binding rules, which has produced an ad hoc variety of expressions 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

¹⁶⁹ Ministère des Armées, *France's Defence Strategy in the Indo-Pacific* (2019) 16 <https://apcss.org/wp-content/uploads/2020/02/France-Defence_Strategy_in_the_Indo-Pacific_2019.pdf>, archived at <<https://perma.cc/EC44-4GB2>>.

¹⁷⁰ 'Joint Statement by the United States of America and the Republic of Singapore' (Statement, The White House, 24 October 2017) <<https://www.pmo.gov.sg/Newsroom/joint-statement-republic-singapore-and-united-states-america>>, archived at <<https://perma.cc/SLD9-922W>>.

¹⁷¹ 'Joint Statement: Between the United States of America and the Socialist Republic of Viet Nam' (Statement, US Embassy & Consulate in Vietnam, 13 November 2017) (emphasis added) <<https://vn.usembassy.gov/20171112-joint-statement-united-states-america-socialist-republic-viet-nam/>>, archived at <<https://perma.cc/B7SQ-GY5Q>>.

¹⁷² Angela Merkel, 'Speech by Federal Chancellor Angela Merkel on Receiving an Honorary Doctorate from Nanjing University on 12 June 2016 in Beijing' (Speech, Nanjing University, 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>>, archived at <<https://perma.cc/LKM8-45Q9>>.

¹⁷³ *Policy Guidelines for the Indo-Pacific* (n 1) 53.

¹⁷⁴ *Ibid* (emphasis added).

procedures for peacefully addressing disagreements’;¹⁷⁵ EU support for a COC built on the foundations of a ‘collaborative diplomatic process’;¹⁷⁶ US-New Zealand policy in favour of ‘a meaningful and effective Code of Conduct’;¹⁷⁷ and Indian support for a COC ‘on the basis of consensus’.¹⁷⁸ 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’.¹⁷⁹ 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 with the international law of the sea as reflected in [UNCLOS] ... and to resolve disputes peacefully in accordance with international law.¹⁸⁰

The SCS Award was affirmed as ‘final and legally binding’ on parties, while full and effective implementation of the DOC was urged.¹⁸¹ 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.¹⁸² The 2018 statement appeared to walk back these commitments however, reverting to the euphemistic ASEAN practice of referring to the Award only as giving ‘full

¹⁷⁵ Patrick Ventrell, ‘South China Sea’ (Press Statement, Office of Press Relations, Bureau of Public Affairs, 3 August 2012) <<https://2009-2017.state.gov/r/pa/prs/ps/2012/08/196022.htm>>, archived at <<https://perma.cc/R3AJ-RLP2>>.

¹⁷⁶ Council of the European Union, *Guidelines on the EU’s Foreign and Security Policy in East Asia*, EU Doc No 11492/12 (15 June 2012) 19 [32] <https://eas.europa.eu/archives/docs/asia/docs/guidelines_eu_foreign_sec_pol_east_asia_en.pdf>, archived at <<https://perma.cc/K738-G7CF>>.

¹⁷⁷ Office of the Press Secretary, The White House, ‘The United States and New Zealand: Forward Progress’, *The White House: President Barack Obama* (Fact Sheet, 20 June 2014) <<http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-united-states-and-new-zealand-forward-progress>>, archived at <<https://perma.cc/UVE5-5E69>>. On the origins of the fact sheet, see Robert Ayson, ‘The South China Sea and New Zealand’s Foreign Policy Balancing Act’ in Enrico Fels and Truong-Minh Vu (eds), *Power Politics in Asia’s Contested Waters: Territorial Disputes in the South China Sea* (Springer, 2016) 493.

¹⁷⁸ ‘Remarks by the Prime Minister at 12th India-ASEAN Summit, Nay Pyi Taw, Myanmar’ (Speech, 12th Indian-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>>, archived at <<https://perma.cc/4XA5-6UPD>>.

¹⁷⁹ Office of the Spokesperson, US Department of State, ‘Trilateral Strategic Dialogue Joint Statement’ (Media Note, 4 October 2013) <<https://2009-2017.state.gov/r/pa/prs/ps/2013/10/215133.htm>>, archived at <<https://perma.cc/4AWN-525P>>.

¹⁸⁰ Reflecting the US legal position that it is not bound as a treaty party, but that *UNCLOS* nevertheless expresses customary international law: Office of the Spokesperson, US Department of State, ‘Australia-Japan-United States Trilateral Strategic Dialogue Ministerial Joint Statement’ (Media Note, 6 August 2017) <<https://2017-2021.state.gov/australia-japan-united-states-trilateral-strategic-dialogue-ministerial-joint-statement/index.html>>, archived at <<https://perma.cc/T9XT-ZCTW>>.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* (emphasis added).

respect for legal and diplomatic processes'.¹⁸³ 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'.¹⁸⁴ Legal bindingness was a subject under contemporaneous discussion, with then Australian Foreign Minister Julie Bishop being asked whether, given China's breaches of treaty law, negotiation of the COC was 'purely political theatre'.¹⁸⁵ Bishop responded that the answer would depend in part on whether the ultimate agreement 'was to be enforced'.¹⁸⁶ The 2019 trilateral statement confirmed the ambiguous language in calling for a COC merely 'consistent with existing international law'.¹⁸⁷

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 SCS Award.¹⁸⁸ 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.¹⁸⁹ Yet, despite citing the exhaustive nature of *UNCLOS*, and Germany's own call for legal bindingness in its *2020 Policy Guidelines* that same month, the three states nevertheless only called for 'a rules-based, co-operative and effective Code of Conduct consistent with UNCLOS'.¹⁹⁰ 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*'

¹⁸³ Office of the Spokesperson, US Department of State, 'Australia-Japan-United States Trilateral Strategic Dialogue Joint Ministerial Statement' (Media Note, 5 August 2018) [7] <<https://2017-2021.state.gov/australia-japan-united-states-trilateral-strategic-dialogue-joint-ministerial-statement/index.html>>, archived at <<https://perma.cc/6MPP-UZYU>>. See below n 212 and accompanying text.

¹⁸⁴ *Ibid* [8].

¹⁸⁵ Interview with Julie Bishop (David Lipson, ABC The World, 2 August 2018) <<https://www.foreignminister.gov.au/minister/julie-bishop/transcript-oeo/interview-david-lipson-abc-world>>.

¹⁸⁶ *Ibid*.

¹⁸⁷ Office of the Spokesperson, US Department of State, 'Trilateral Strategic Dialogue Joint Ministerial Statement, August 1, 2019' (Media Note, 2 August 2019) [12] <<https://2017-2021.state.gov/trilateral-strategic-dialogue-joint-ministerial-statement-august-1-2019/index.html>>. Equivalent phrasing was welcomed in: 'Joint Statement — Australia-US Ministerial Consultations (AUSMIN) 2020', *Australian Government, Department of Defence* (Statement, 29 July 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/statements/joint-statement-australia-us-ministerial-consultations-ausmin-2020-0>>, archived at <<https://perma.cc/3KNR-5FAX>>.

¹⁸⁸ 'Joint Statement by France, Germany and the United Kingdom on the Situation in the South China Sea Today (29.08.2019)' (Press Release, Federal Foreign Office, 29 August 2019) <<https://www.auswaertiges-amt.de/en/newsroom/news/-/2242280>>, archived at <<https://perma.cc/4STD-3XY3>> ('Joint Statement by France, Germany and the United Kingdom').

¹⁸⁹ Note Verbale from the Permanent Mission of Germany to the Secretary-General of the United Nations, 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>, archived at <<https://perma.cc/4HQK-EJ76>>.

¹⁹⁰ 'Joint Statement by France, Germany and the United Kingdom' (n 188).

COC,¹⁹¹ yet, a joint ASEAN-EU statement signed by Borrell less than three months later referred only to a COC ‘consistent with international law, including the 1982 UNCLOS’.¹⁹² 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 corresponding advantages from China’s perspective for sustaining diplomatic ambiguity, notwithstanding its consistent preference against legally binding rules. One Chinese scholar, Luo Liang, has commented that, on the one hand, China ‘holds an open attitude towards the COC, letting the consultation process take its own course’.¹⁹³ 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.¹⁹⁴

In response to questions on whether the COC has binding force, Minister Wang answered ‘definitely yes’.¹⁹⁵ 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’.¹⁹⁶ 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.¹⁹⁷ 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

¹⁹¹ Josep Borrell, ‘Strengthening EU-ASEAN Partnership, an Urgent Necessity’, *EEAS* (Blog Post, 20 September 2020) (emphasis added) <https://eeas.europa.eu/headquarters/headquarters-homepage/85434/strengthening-eu-asean-partnership-urgent-necessity_en>, archived at <<https://perma.cc/WH56-G38D>>.

¹⁹² Council of the European Union, ‘Co-Chairs’ Press Release of the 23rd ASEAN-EU Ministerial Meeting’ (Press Release, 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/>>, archived at <<https://perma.cc/9QCW-WVGU>>.

¹⁹³ Luo Liang, ‘A Guide to the South China Sea COC’, *China-US Focus* (Blog Post, 15 September 2017) <<https://www.chinausfocus.com/peace-security/a-guide-to-the-coc>>, archived at <<https://perma.cc/NFB8-ZXYL>>.

¹⁹⁴ *Ibid.*

¹⁹⁵ ‘Wang Yi Responds to Four Questions on the Consultations on the Code of Conduct in the South China Sea (COC)’, *Ministry of Foreign Affairs of the People’s Republic of China* (online, 1 August 2019) <https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/yzs_663350/gjlb_663354/2787_663568/2789_663572/201908/t20190802_524936.html>, archived at <<https://perma.cc/RET9-SPBR>>. See also ‘State Councilor and Foreign Minister Wang Yi Had Virtual Meeting with Philippine Foreign Secretary Teodoro Locsin’, *Consulate-General of the People’s Republic of China in Gothenburg* (online, 14 July 2020) <<https://www.mfa.gov.cn/ce/cggb//eng/xwdt/t1797959.htm>>, archived at <<https://perma.cc/ZX2J-LBN6>>.

¹⁹⁶ *Ibid.*

¹⁹⁷ Klabbers (n 31) 181. Cf Baxter (n 36) 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 (n 31).

legal phenomenon'.¹⁹⁸ 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 foreseeable consequence of governing SCS relations in terms of the RBO is that China has now seized the opportunity to translate geopolitical dominance into particularistic interpretations and developments of international law itself. 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'.¹⁹⁹ The gap between the legal aspirations of claimants and the 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 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.²⁰⁰

On its current trajectory however, the COC may effectively constitute ASEAN ratification of the status quo, in the unlikely expectation that 'letting China keep its past gains will purchase its forbearance and goodwill in the future'.²⁰¹ 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 has embraced 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'.²⁰² China similarly released a joint statement with the EU in July 2018, in which both sides

¹⁹⁸ Weil (n 31) 417.

¹⁹⁹ 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/>>, archived at <<https://perma.cc/NJ3T-6YRH>>.

²⁰⁰ James R Holmes, 'ASEAN Should Reject a Code of Conduct in the South China Sea', *The Diplomat* (Blog Post, 5 September 2013) <<https://thediplomat.com/2013/09/asean-should-reject-a-code-of-conduct-in-the-south-china-sea/>>, archived at <<https://perma.cc/3839-LGEW>>.

²⁰¹ *Ibid.*

²⁰² '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', *The South China Sea Issue* (online, 1 August 2019) <https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/201908/t20190802_8523410.htm>, archived at <<https://perma.cc/ZHU8-Q3WX>>.

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.²⁰³

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 law. 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.²⁰⁴

Doing so exploits precisely the weakness predicted to emerge when the RBO and the international rule of law are promoted as overlapping normative ideals.

The most acute demonstration of the tensions within the RBO is 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 commenced proceedings to establish an Arbitral Tribunal in January 2013, in accordance with legal rights under *UNCLOS*.²⁰⁵ Among the issues determined by the Tribunal was the question of how political agreements between the parties related to existing legal obligations and, in particular, whether the 2002 DOC precluded recourse to the compulsory dispute settlement procedures under pt XV, s 1 of *UNCLOS*.²⁰⁶ 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 art 281 of *UNCLOS*.²⁰⁷ 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’.²⁰⁸ In RBO terms, the jurisdictional decision reiterated 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.²⁰⁹ Instead, China merely

²⁰³ ‘Joint Statement of the 20th EU-China Summit’ (Press Release, Delegation of the European Union to China, 17 July 2018) <https://eas.europa.eu/delegations/china/48424/joint-statement-20th-eu-china-summit_en>, archived at <<https://perma.cc/P7NQ-CPBH>>.

²⁰⁴ Simone van Nieuwenhuizen, ‘Australian and People’s Republic of China Government Conceptions of the International Order’ (2019) 73(2) *Australian Journal of International Affairs* 181, 186.

²⁰⁵ Under *UNCLOS* (n 15) pt XV s 1, with the tribunal being constituted under annex VII.

²⁰⁶ The Annex VII tribunal determined its own jurisdiction in the case under *UNCLOS* (n 15) arts 288(4), 296(1) and annex VII art 11: see *South China Sea Arbitration (Jurisdiction and Admissibility)* (n 135) [110]–[111], [114].

²⁰⁷ *South China Sea Arbitration (Jurisdiction and Admissibility)* (n 135) [202].

²⁰⁸ *Ibid* [217].

²⁰⁹ *UNCLOS* (n 15) art 311(3), (4). Following *VCLT* (n 41) arts 41, 58.

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 international law must be observed’,²¹⁰ 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.²¹¹ The eroded status of treaty rules is further evident in the aforementioned ASEAN practice of referring to the SCS Award only euphemistically as ‘full respect for legal and diplomatic processes’.²¹² The SCS Award remains a singular achievement precisely because it brought an international legal process to bear on the dispute, which Chinese scholar Congyan Cai acknowledges as creating specific forms of leverage for claimant states.²¹³ The diplomatic strategy of framing the legal process in terms consistent with the RBO discourse is therefore 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’s overriding strategic rationale for seizing control of the SCS remains the carving out of 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.²¹⁴ 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.²¹⁵ Liang identifies ‘fend[ing] off intervention by non-regional players’ as among the essential purposes of the COC,²¹⁶ with Minister Wang warning in 2017 that a precondition for progress was that there be ‘no major disruption from outside

²¹⁰ 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(4) *Chinese Journal of International Law* 909, 910, 928.

²¹¹ ‘ and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines’, *Ministry of Foreign Affairs of the People’s Republic of China* (Press Statement, 30 October 2015) <https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201510/t20151030_679419.html>, archived at <<https://perma.cc/H9VQ-XBDG>>.

²¹² Carlyle A Thayer, ‘The Southeast Asia Claimant States, ASEAN and the South China Sea Dispute’, *Maritime Issues* (Blog Post, 14 November 2016) <<http://www.maritimeissues.com/politics/the-southeast-asia-claimant-states-asean-and-the-south-china-sea-dispute.html>>, archived at <<https://perma.cc/RD7U-VR3V>>. See, eg, ‘Press Statement by the Chairman of the ASEAN Foreign Ministers’ Retreat’ (Press Statement, ASEAN, 16–17 January 2020) [3] <<https://asean.org/wp-content/uploads/2021/03/74.pdf>>, archived at <<https://perma.cc/7QFF-A5XJ>>.

²¹³ Cai (n 72) 298.

²¹⁴ Timothy Doyle and Dennis Rumley, *The Rise and Return of the Indo-Pacific* (Oxford University Press, 2019) 49, 158; Robert D Kaplan, *Asia’s Cauldron: The South China Sea and the End of a Stable Pacific* (Random House, 2014) 41.

²¹⁵ Ralph Jennings, ‘Why China, Once Coy, Suddenly Wants to Discuss a Code of Conduct for a Disputed Sea’, *VOA News* (Blog Post, 23 September 2020) <<https://www.voanews.com/east-asia-pacific/voa-news-china/why-china-once-coy-suddenly-wants-discuss-code-conduct-disputed>>, archived at <<https://perma.cc/VKW3-X75T>>.

²¹⁶ Liang (n 194).

parties'.²¹⁷ Giving effect to these terms, 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'.²¹⁸ Such a broadly worded clause would clearly exclude joint naval exercises with members of the Quadrilateral Security Dialogue — comprising 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').²¹⁹ Both initiatives seek to contest the regional balance of power necessary for China's preferred legal order, with the proposed rules thereby narrowing the geostrategic options for ASEAN states.

China continues to alter the very subject matter of any eventual COC, in particular by constructing and possessing islands that did not even exist 20 years ago, but which now modify parties' relative bargaining positions.²²⁰ Given the expressed COC goal to 'further promote peace and stability in the region',²²¹ China can increasingly make the case that a freeze on the status quo will 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.²²² The Chinese Ministry of Foreign Affairs welcomed agreement on the COC negotiating text in 2018 as evidence that the parties 'are capable of maintaining peace and stability ... and reaching regional rules adhered to by all through negotiation'.²²³ Yet, that statement was combined 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'.²²⁴ This

²¹⁷ Cliff Venzon, 'Beijing Sets Conditions for New South China Sea Code of Conduct', *Nikkei Asia* (online, 7 August 2017) <<https://asia.nikkei.com/Politics/Beijing-sets-conditions-for-new-South-China-Sea-code-of-conduct2>>, archived at <<https://perma.cc/BM39-YNBJ>>.

²¹⁸ Mark J Valencia, 'The Draft Code of Conduct for the South China Sea Has Significant Political Ramifications for ASEAN', *ASEAN Today* (online, 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/>>, archived at <<https://perma.cc/4K5K-9FND>>.

²¹⁹ Anisa Heritage and Pak K Lee, 'The Sino-American Confrontation in the South China Sea: Insights from an International Order Perspective' (2020) 33(1) *Cambridge Review of International Affairs* 134, 147, 150–1. See 'Quad Leaders' Joint Statement: "The Spirit of the Quad" (Press Statement, The White House, 12 March 2021) <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/12/quad-leaders-joint-statement-the-spirit-of-the-quad/>>, archived at <<https://perma.cc/2DUG-GTNL>>.

²²⁰ Ronald O'Rourke, *US–China Strategic Competition in South and East China Seas: Background and Issues for Congress* (Report No R42784, 26 January 2022) 67–71 <<https://crsreports.congress.gov/product/pdf/R/R42784/>>, archived at <<https://perma.cc/QYA7-T9FR>>.

²²¹ 'ASEAN's Code of Conduct in the South China Sea' (n 141) 2.

²²² Ken Booth, *Navies and Foreign Policy* (Routledge, 2014) 241.

²²³ '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', *Ministry of Foreign Affairs of the People's Republic of China* (online, 2 August 2018) <https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/yzs_663350/gjlb_663354/2777_663548/2779_663552/201808/t20180806_523689.html>, archived at <<https://perma.cc/MS8M-VV8K>>.

²²⁴ *Ibid.* The 'Nansha Islands' is China's name for the Spratly Islands.

was ostensibly in the interests of providing forms of maritime assistance and other ‘international public service’, but thereby also communicated China’s resolve to maintain physical control of the very disputed features that had necessitated the COC negotiations. 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’.²²⁵

IV CONCLUSION: A RULES-BASED ORDER CONSISTENT WITH INTERNATIONAL LAW

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.²²⁶ Moreover, rules as political and moral obligations may be developed as an important tool to complement and reinforce accountable and multilateral conceptions of the rule of law over arbitrary and self-judging alternatives. Rory 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”’.²²⁷ However, the strategy of advocating a RBO order in lieu of a ‘law-based order’ has limits, and these emerge most clearly in cases where legal rules have failed to constrain the self-judging interpretations of a state exercising regional or global dominance.

The history of the ASEAN-China COC, as the archetype of governance in terms of the RBO, demonstrates that prior failure to reach agreement on foundational legal rules fatally undercuts the integrity of any subsequent agreement ‘consistent’ with law. The incipient 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.²²⁸ In 2019, Minister Wang used the analogy of building a house to describe progress towards the COC:

In the past, there were 11 designs from the 11 countries on how [sic] this house would look like. Now, we have laid in place good groundwork for a single design

²²⁵ Le Thu (n 199).

²²⁶ Martti Koskeniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (Asser Press, 2019) 11–17.

²²⁷ Medcalf (n 101) 157 (emphasis in original).

²²⁸ Ian Storey, ‘ASEAN’s Failing Grade in the South China Sea’ in Gilbert Rozman and Joseph Chinyong Liow (eds), *International Relations and Asia’s Southern Tier: ASEAN, Australia, and India* (Palgrave Macmillan, 2018) 111, 121.

of this house, and we have also put in place the fundamentals, like the supporting pillars of this house.²²⁹

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.

Advocates for the RBO have envisioned a virtuous cycle in which legal obligations are reinforced with political rules, while the authority of political obligations is located in their consistency with legal rules. Yet, what the present article and case study have demonstrated is that any effective defence of the integrity of international law must take account of underlying power structures. Lassa Oppenheim argued over a century ago that, without a functioning balance of power at the global level, ‘an over-powerful State will naturally try to act according to discretion and disobey the law’, thereby becoming ‘omnipotent’.²³⁰ 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’.²³¹ It is therefore notable that Germany’s *2020 Policy Guidelines* form part of an ambitious global project to strategically connect the Asia-Pacific and Indian Oceans as ‘the key to shaping the international order in the 21st century’.²³² According to proponents of the ‘Indo-Pacific’, this concept ‘dilutes and absorbs Chinese influence’ by design, not by excluding China from its own region, but rather by ‘incorporating it in one that is large and multipolar’.²³³ Alternative formulations exist, but commitment to a ‘rules-based international order’ remains a common touchstone for the Indo-Pacific strategies emerging across diverse states and groupings.²³⁴ Observing the EU and its rapid embrace of this geostrategic framing in 2021, it is hard not to perceive the correlation with its newly emerging practice of explicitly

²²⁹ Charissa Yong, ‘ASEAN, China Agree on Text to Negotiate Code of Conduct in South China Sea’, *The Straits Times* (online, 2 August 2018) <<https://www.straitstimes.com/politics/asean-china-agree-on-text-to-negotiate-code-of-conduct-in-south-china-sea>>, archived at <<https://perma.cc/48LK-W6VN>>.

²³⁰ L Oppenheim, *International Law: A Treatise* (Longmans, Green, 2nd ed, 1912) vol 1, 80.

²³¹ Leszek Buszynski, ‘ASEAN, the Declaration on Conduct, and the South China Sea’ (2003) 25(3) *Contemporary Southeast Asia* 343, 358–9.

²³² *Policy Guidelines for the Indo-Pacific* (n 1) 8. See Garima Mohan, ‘A European Strategy for the Indo-Pacific’ (2020) 43(4) *Washington Quarterly* 171.

²³³ Medcalf (n 101) 24.

²³⁴ Felix Heiduk and Gudrun Wacker, ‘From Asia-Pacific to Indo-Pacific: Significance, Implementation and Challenges’ (Research Paper No 9, German Institute for International and Security Affairs, July 2020) 29. See ‘ASEAN Outlook on the Indo-Pacific’ (Statement, ASEAN, 23 June 2019) <https://asean.org/asean2020/wp-content/uploads/2021/01/ASEAN-Outlook-on-the-Indo-Pacific_FINAL_22062019.pdf>, archived at <<https://perma.cc/53YR-QMMP>>; The White House, *Indo-Pacific Strategy of the United States* (Report, February 2022) 7, 8 <<https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf>>, archived at <<https://perma.cc/7C9P-L5F2>>; ‘Joint Communication to the European Parliament and the Council: The EU Strategy for Cooperation in the Indo-Pacific’ (Communication, European Commission, 16 September 2021) <https://eeas.europa.eu/sites/default/files/jointcommunication_2021_24_1_en.pdf>, archived at <<https://perma.cc/9AHD-L89U>>.

calling for ‘an effective, substantive and legally binding Code of Conduct in the South China Sea’.²³⁵ This particular reconceptualisation of regional power balances faces steep and potentially insurmountable hurdles,²³⁶ but is noted here because, unlike the COC, it represents a genuine attempt to take account of the geostrategic conditions necessary for a RBO consistent with international law.

What is certain is that, absent more 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, Weil reiterated that ‘it is law with its rigor ... that comes between the weak and the mighty to protect and deliver’.²³⁷ Yet, achieving effective and non-self-judging rules of international law may require a renewed and genuine legal engagement 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.

²³⁵ European Commission (n 234) 5. See also ‘South China Sea: Statement by the Spokesperson on Challenges to Peace and Stability’ (Press Statement, EEAS, 24 April 2021) <https://eeas.europa.eu/headquarters/headquarters-homepage/97194/south-china-sea-statement-spokesperson-challenges-peace-and-stability_en>, archived at <<https://perma.cc/65JP-62Q4>>.

²³⁶ For sceptical views, see Hugh White, ‘Without America: Australia in the New Asia’ (2017) 68 *Quarterly Essay* 1; Brendan Taylor, ‘Is Australia’s Indo-Pacific Strategy an Illusion?’ (2020) 96(1) *International Affairs* 95.

²³⁷ Weil (n 31) 442.