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## **Governing the Seas: Murky Law and Political Shoals**

### **Abstract**

One global political dynamic in the 21st century is the trend towards legalization. Our paper is concerned with the politics of the legal regime governing the oceans. Several areas of the Pacific Ocean experience severe disputes over maritime space. On the one hand, legal norms shape political expectations and may foster peaceful cooperation. On the other hand, politics shape the situations in which legal norms may or may not be called upon. After all, it is a political decision to frame a dispute in legal terms.

The UN Convention on the Law of the Seas is a cornerstone of the international settlement system for maritime disputes. So far, the legal regime has not only been able to offer viable solutions to all disputed maritime areas. What happens to regime stability in such instances? Do such challenges result in a legitimacy crisis? Does the regime become obsolete to all its members? These questions become especially important when powerful states are part of the game. For instance, China has recently refused to engage in legal proceedings addressing the South China Sea disputes.

We are interested in the gap between the political and the legal dimensions of international law. Political actors selectively use references to international law. We argue that political actors emphasize their compliance with international law without actually being in full compliance. By (re)interpreting legal regulations in specific ways, they create political wiggling room. We pose regimes are re-stabilized by either incorporating new interpretations or excluding defiant voices.

### **Keywords:**

Politics of international law, legalization, legitimation, maritime dispute settlement, South China Sea dispute

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## **Introduction**

The trend towards legalization is one global political dynamic in the 21st century. The Pacific Ocean has been no exception in this development. Legal regimes help states to show their willingness to codify norms and rules; legalization works as a proof for state's legitimate actions on the international level. Moreover, legal regimes fulfill a core judicial function in conflict-resolution. Many areas of the Pacific Ocean experience severe disputes over maritime space. Some of these disputes have been resolved through international courts, while others do not appear to be resolvable in legal proceedings. On the one hand, legal norms shape political expectations and may foster peaceful cooperation. On the other hand, agreed-upon dispute settlement mechanisms lack enforcement in practice. Politics shape the situations in which legal norms may or may not be called upon. The power of states is not limited by the law but states can augment their power through legal interpretations in their favor. After all, it is a political decision to frame a dispute in legal terms. The more often states treat disputes as not litigable, the greater the challenge to a legal regime's effectiveness. Outright breaches of international legal norms pose an even greater threat to the regime.

Determining whether and how states break international law proves to be rather difficult, though. China has recently refused to engage in legal proceedings addressing one of the South China Sea disputes. Although, the UN Convention on the Law of the Seas (UNCLOS) endeavors to be the constitution of the seas, so far, the legal regime has not been able to offer viable solutions to all disputed maritime zones. We are interested in the gap between the political and the legal dimensions of international law which surfaces during disputes in regimes when powerful states are part of the game. Our paper is concerned with the politics of international law (Koskenniemi, 2009, 2011) applied to the legal regime governing the oceans. Our main argument rests on the observation that states never admit to breaking international law. Instead they use the law to argue for their legitimate right to the committed or planned action. Therefore, we are interested in the ways states use specific interpretations of legal norms and how these interpretations affect regime stability.

In this paper we argue that political actors emphasize their compliance with international law without actually being in full compliance. Our theoretical assumption is that states use the language of international law as an instrument to realize their interests in disputes. Hence, the law itself becomes an instrument to frame disputes but also to argue politics. Mechanisms of these politics of international law are: (1) States deny accusations of being in non-compliance

with international law; (2) states declare that the regime does not apply to the respective dispute; (3) states (re)interpret legal regulations in favor of their own interest. We are further interested on the effect of politics of international law to regime-stability which is challenged in disputes. Regimes as codified legal organizational frameworks or customary codes of conduct are structurally shaped by powerful actors' legal interpretations. Our assumption is that regimes are re-stabilized by either incorporating new interpretations or excluding defiant voices. Our test cases are the South China Sea disputes. As several states with diverging interests and capacities are involved in the disputes, we can compare different policies and interpretations regarding the same situation. While many observers strongly criticize the People's Republic of China's rejection of the arbitration process, China maintains it is in full compliance with UNCLOS.

### **The Politics of International Law<sup>1</sup>**

As Martti Koskenniemi (1990) put it, international law is the attempt of state leaders to establish the rule of law on the international level. Consequently, international law is generally regarded as a set of rules agreed upon by states<sup>2</sup> and which is widely accepted as effective law between states. International law encompasses treaty law<sup>3</sup>, customary law<sup>4</sup> and common principles of law<sup>5</sup>. Although not fixed in writing, customary international law is considered legally binding; states refer to it and the International Court of Justice (ICJ) recognizes it<sup>6</sup> (M. Koskenniemi, 1990; Koskenniemi, 2009). Yet, international law fundamentally differs in character compared to national law as known from democratic states, due to the lack of the division of branches – executive, legislative and judiciary. Although international law is set by the executives of nation states, those national executives internationally act as legislative, negotiating and signing treaties. Moreover, the international

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<sup>1</sup> Some sections in this paper have been adapted from Hühnert (2016).

<sup>2</sup> Here the focus is on states, as they are the main actors formulating international law. However, states are not isolated actors, but rather influenced by their social environment. That said, on a subsequent level, social actors such as non-governmental organizations as well as companies submit their interests to the political arena and thereby influence directly or indirectly the making of international law.

<sup>3</sup> Treaty law stands for all those norms that have been negotiated and codified in written treaties. States put these treaties into effect through signing and ratifying them.

<sup>4</sup> As indicated in the name, customary international law encompasses norms that are considered international custom. These norms have been established through repeated and widely accepted state practice, which is considered law over time.

<sup>5</sup> Furthermore, international law is based on general legal principles; for example, treaties are binding, specific laws overrule general laws and the latest law overrules former ones. Since the Second World War, this system has been UN-centered with a constantly growing body of treaties, norms and regulations.

<sup>6</sup> According to its statute, the International Court of Justice is supposed to recognize customary international law and act upon general legal principles next to treaty law. However, there are frequent disputes over what constitutes customary law and how it is established and changed with regard to interpretation in case law rulings (ICJ, 2014).

system lacks an institutional stability, as no overriding power enforces international law; there is simply no exercised monopoly of legitimate coercion (Gewaltmonopol). As for the judiciary, it shares the same fate as international law: Since international courts are based on international treaties, states must recognize the court as well as its rulings for the law to be effective. Hence, states can choose to put themselves under the jurisdiction of an international court – or not – without legal consequence.<sup>7</sup> Although the international system is often described as anarchic, it is not entirely without order.<sup>8</sup> In the international system a hierarchical order exists. It is established through the power and authority of states and institutions that are able, to a degree and by different means, to set and enforce rules.

International law can be understood as the result of a process in which states negotiate and stipulate what is right and wrong, what kind of behavior is lawful and what is not. This process is understood here as a political one through which foreign policy is expressed by states in interaction – the politics of international law. Hence, the interpretation of international law by political actors of states in itself produces and fixes meaning (Liste, 2012). In this regard, international law can be seen as text in which meaning of foreign policy articulation is fixed through the interaction of states. Text is not limited to written treaties but also encompasses social interaction and practices of customary law as well as international court rulings and other interpretations of customary law. The meaning of international law is determined by actors positioning themselves to those texts and the conflicting interpretations thereof. Andreas Fischer-Lescano and Philip Liste (2005) further differentiate two conflicting sides in this process: the political politics and the legal politics of international law.<sup>9</sup> Legal politics of international law refer to interpretation of international lawyers as well as courts whose work can be seen as fulfilling the promise of establishing national principle of the rule of law on the international level. In contrast, the political politics of international law are understood as state's practices which produce codified norms, rules and regulations through the negotiation of international treaties – the process of politically formulating and establishing international law. The politics of international law are considered the vocabulary

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<sup>7</sup> Although states can remove themselves from the international court's jurisdiction, they might face political consequences for not complying with the international legal system.

<sup>8</sup> From the 1980s onwards, the traditional idea of the international arena as anarchic system increasingly became subject to theoretical challenge (Milner, 1991; Onuf & Klink, 1989). Nowadays, a large body of literature in international relations describes the international system as a web of diffused authoritative relations where states are no longer the exclusive loci of authority (Lake, 2010; Rosenau, 2007; Tallberg, 2002; Zürn & M., 2012).

<sup>9</sup> The concept of politics of international law goes back to Hans Morgenthau; however, Fischer-Lescano and Liste (2005) take up this realist concept and combine it with a broader notion of socially constructed states' identities as well as a discursive understanding of states' relations and development of policies (Liste, 2012).

and language and as such a tool to articulate foreign policies (Liste, 2012). In a broader notion, the politics of international law encompass the process of not only setting international law but also interpreting it, reinforcing it, or altering its meaning either through explicit changes in the treaty texts or through interpreting the treaties anew, thereby altering the meaning attributed to certain terms and phrases. Whereas the legal politics of international law builds on the logic of case law arbitration, the political politics of international law is interest driven, strategic state behavior.

### **Politics and Contestation**

Featuring the idea of politics of international law, our paper builds on research on the contestation of norms. It offers valuable insights into how core international legal codes which qualify as robust norms are prone to change by state interpretation. Norm research has produced helpful explanations as to when and why states violate norms and how they act in situations of (non-)compliance. We further build on compliance research, which has focused on the question as to why states follow some rules while discarding others (Finnemore & Sikkink, 1998; Venzke, 2009; Wiener, 2007; Wiener & Puetter, 2009).

The realist assumption, that states violate norms whenever they conflict with their interests, fails to grasp the complexity of decision-making processes in a globalized system of highly legalized norms. Another approach is offered by classical liberal institutionalism which argues that international law, as the product of states' negotiations, can be understood as an (written or practiced) expression of state interests. Supposing that states only sign treaties they are willing to comply with, international law offers a compendium of negotiated state interests (Liste, 2012). After all, states share an interest in being perceived as reliable partners among the international community. Yet, Henkin has a point by observing that: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin, 1979, p. 49). States are actually balancing their interests and the conformity of their policies to international law. The value of international law as a stabilizing factor in the international system has been subject to debate. On the one hand, it is obvious that powerful states rather violate norms than comply to law that forbids favored actions. On the other hand, legitimation practices of states arguing for their compliance to norms show that states feel the need to make believe that they are acting in full-compliance, while they are not. The idea seems to be prevailing that legal regimes run stable as long as states comply with, or make believe that they are complying with the rules (Franck, 1995).

Shannon challenges the realist idea that states violate norms whenever they contradict their interests. In his political psychological approach he puts forward that “norms are what states make of them” (Shannon, 2000, p. 293). In certain situation states may face a dilemma between their interests against compliance and social constraint for norm compliance. “[V]iolation is motivated by self-interest, but is permitted by the nature of the norm and the situation, which conditions one’s ability to define a situation in a way that allows socially accepted violation” (Shannon, 2000, p. 300). Hence, states will only violate norms in situations that allow for socially acceptable justifications. Applied to international law as a specific set of norms states have the capacity to interpret legal codes in their favor or discard them through setting precedents.

States interpretations of norms may also be considered to be normal processes of contestation. Antje Wiener (2007, 2009) conceptualizes norms as non-stable regulations that are only stable through fixed meanings in certain moments of observation. The process of contestation is a natural one in which norms are constantly prone to change as their meaning has to be negotiated. In this process norms are either reinstated and strengthened through states’ confirmation (non-contestation or active support) or contested by (re-)interpretation. Contestation can thereby end in altered meaning or in rejection and replacement of the entire norm. Competing interpretations of international law can thus be perceived as social development of regulations (Wiener, 2007, 2009; Wiener & Puetter, 2009).

Contestations in terms of state’s interpreting international law may be understood as an attempt to change the meaning of international legal provisions in favor of a state’s policies that would otherwise be in conflict with common interpretations of the law. The core idea of this argument also drives the conceptual approach provided by Fischer-Lescano and Liste who develop the idea of politics of international law. Their argument rests on the observation that states argue for their actions to be legal as well as legitimate whenever they are doubted by others of being non-compliant. In their conceptual approach they further develop the idea of contestability by establishing that states have a tendency to argue that their actions are in compliance (Fischer-Lescano & Liste, 2005; Liste, 2012). One aspect here is that legal scholars tend to claim that states are breaking the law whereas states claim to be in full compliance with regime regulations.

Any legal provision or body of law is generated in a specific social context and is as such subject to constant interpretation. Law in general, including international law in particular, though relatively stable over time is perceived here as subject to social interaction and in principle, it is prone to change. The law is thereby the result of socially interacting groups, mainly state leaders, on the international level who contribute to negotiations with specific ideas of norms, values and beliefs that are shared in their society. Therefore, a variety of actors takes part in this process of constructing international law. All of these actors contribute their specific normative beliefs to this negotiation. Their collective image of justice is spelled out in specific rules of conduct, rules of common and acceptable practice, and codified laws. These normative beliefs may change over time; they may be adapted to a changing social context or attributed different meanings. Yet, other values and normative beliefs may be more fundamental and therefore reinforced through practice and remain stable over time.

While an accusation against a state who broke international law stands, the respective state hardly ever signs responsible for a breach but instead would argue for the lawfulness of the actions. Although norm contestation is in order between states, contestations come with a set of arguments that justify and legitimize the state's actions. With regard to the understanding of international law presented above, two strategic options appear to be possible for states when not acting in accordance with the common interpretation of international norms: to commit their actions clandestinely or to act out in the open, all the while claiming legality and moreover legitimacy for them. The option of hiding actions runs the risk of being perceived as knowingly violating effective international law. Once such covert actions have become public though, these politics must become lawful putting forward plausible arguments – that is, politicians have to seek legitimation. Yet, seeking legitimation is not primarily an instrument of scandal management, but rather accompanies each and every political decision.

Single challenges of international legal provisions may not necessarily lead to changes in the law. State behavior becomes especially interesting to analysis when norms are contested that are considered to be strong or fundamental. In such cases Tim Dunne speaks of “highly legalized norms” (Dunne, 2007, p. 270). Contesting such robust norms raises the question as to how the regimes are affected by challenges to their constitutive legal agreements. Although regimes may be damaged by unilateral challenges to their core meaning, Keating and Venzke (2014; 2012) attest that a single contestation does not automatically lead to a change in

normative structures, even though the challenging actor may be powerful. Even customary law usually requires more than one single precedent to incorporate substantial change. Emerging interpretations and challenging actions may still influence the international legal system, as they constitute instances to which others can refer whenever non-complying policies are questioned (Liese, 2009).

### **Power and the Politics of International Law**

Expressions such as breaking, violating or challenging are common terms to describe states' behavior towards international law, which emphasizes the perspective of legal politics of international law. States do accuse other states of violating international law, but they very rarely admit to being in non-compliance themselves. On the international level the matter of what international law is and how it applies is largely subject to states' interpretation (Marti Koskenniemi, 1990). Thereby, those states prove powerful that successfully dominate the negotiation, establishing their policies and structuring regimes. In consequence, the use of the language of international law is vital in formulating foreign policies that are perceived as lawful and legitimate (Fischer-Lescano & Liste, 2005). Those who have the prerogative of interpretation are able to act authoritative and use their power in politics. Accordingly, interpreting international law may produce different outcomes (Krasman, 2008). Hence, it is insightful to consider a state's actions not primarily as subject to international law. Rather, international law is the subject to states' policies and therefore prone to changes based on a state's interests. From a strictly legal perspective, subjects to international law can either act legally correct, complying to the rule, or illegally in non-compliance. However, from the international political perspective the question of violating international law becomes obsolete the moment that states can decide to disobey a treaty that does no longer suit their strategic interests (Hurd, 2007, p. 29). Consequently, the determination of right or wrong, lawful or unlawful, is in question when those states who are about to act in non-compliance with international law in an understanding of legal politics have the possibility to stop these laws from applying to them. This, however, does not mean that the categories of right and wrong have become obsolete. Rather, the meaning, that is the notion of what is right or wrong, is altered in favor of the actor who has the authority and power to establish their own interpretation as the commonly accepted one.

Paying attention to such processes, contestation of robust legalized norms, i.e. the politics of international law, can reinvigorate the research on regime stability. Mainly during the 1980s

regime analysis was a popular approach to study international cooperation. While some insights of this literature were incorporated in rational institutionalism as well as in social constructivism, explicit research on regimes has waned. Yet many matters in the field of ocean governance fit the notion of a regime. The seminal definition of Stephen Krasner defines a regime as “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge” (Krasner, 1983, p. 2). The ocean is regulated by a mix of international treaties, regional agreements, national legislation of coastal states and supplemented with informal coordination mechanisms. Various actors have different interests ranging from resource extraction over transport to preservation. While many different governing bodies claim authority, each body tends to privilege narrow interests. To the extent specific activities are governed by specific norms and rules, there is a great need to work out how to deal with norm collisions. Even UNCLOS itself needs a dispute settlement system to specify the very broad and general obligations of the Convention (Klein, 2014, p. 360).

As there are no clear rules on ordering overlapping and sometimes conflicting regulations, states need additional coordination instruments. An ocean regime could help states to stabilize expectations and create some regularity in state practices. Contestations of obligations arising from UNLOS illustrate the political actions states take to push for a specific interpretation of legal norms. With regard to the South China Sea Arbitral Tribunal, China contested its obligation to accept third-party dispute settlement. We assume that more powerful states are in a better position to shape the content of guiding principles according to their interests. At the same time, the ongoing development of the “way of doing things” inherently challenges the formation of stable patterns of behavior. With regard to dispute settlement systems, they may become obsolete if powerful states refuse participation. Lesser powers are thought to benefit particularly from judicial settlement system as legal means mitigate power asymmetries. In contrast to the few great powers, a great number of states would benefit if legal proceedings were part of regular state behavior to settle disputes. Thus states should be interested in safeguarding against behavior contradictory to their own interests, which however requires the power to successfully delegitimize unwelcome actions.

### **Power and Legitimation**

Conceptually we build on the power definition that combines rationalist and constructivist approaches to international relations which has been provided by Barnett and Duvall. They

define power as “the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate” (Barnett & Duvall, 2005, p. 42). Of the four types they conceptualize, the last two types are crucial to our argument: *structural* and *productive power*. Structural power is concerned with “the production and reproduction of internally related positions of super- and subordination, or domination, that actors occupy. [...] Productive power, by contrast, is the constitution of all social subjects with various social powers through systems of knowledge and discursive practices of broad and general social scope” (Barnett & Duvall, 2005, p. 55). These types are particularly crucial for an understanding of the relationship between states legal legitimation practices and power. Both, structural and productive power, concern the social production of capacities as well as the production of self-understanding and the perception of actors' interests (Barnett & Duvall, 2005, pp. 48-49). Productive power encompasses all those social processes that produce, fix, reproduce and alter meaning, embedded in a system of knowledge. Hence, social identities and capacities are only produced through the attribution of meaning<sup>10</sup> (Barnett & Duvall, 2005, pp. 56-57).

This notion of productive power allows an insight into the specific relation of legitimacy and power. Legitimation can be considered the process of an actor trying to acquire legitimacy through a respective claim towards a sanctioning audience. As argued so far, the states' claims for legitimacy are vital to international relations with regard to the constitution, development and meaning of international law. In other words, arguing that actions are legitimate is one of the main claims statesmen use to justify their actions in international politics. These theoretical considerations will eventually allow for a conceptual understanding of legitimacy claims and schemes.

Conceptually, legitimacy can be considered in two ways: as individual intrinsic motivation for actors to comply with rules; or as an instrument by leaders to exercise power. According to Mark Suchman legitimacy is “a generalized perception or assumption that the actions of an entity are desirable, proper, appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman, 1995, p. 574). To Ian Hurd (2007a: 30-33) this

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<sup>10</sup> Based on Michel Foucault's terminology, Barnett and Duvall define discourse as “sites of social relations of power because they situate ordinary practices of life and defined the social fields of action that are imaginable and possible” (Barnett/Duvall 2005: 55). This understanding of discourse emphasizes different aspects than the above-mentioned notion of Hansen (2006) and Liste (2012). Here, the focus is less on the theoretical understandings of discourse in detail. Their understanding of international law as a product of a discursive process and a shared understanding of these discourses as structured through power is more significant.

definition combines the notion of individual, subjective perception and belief that something is rightfully so, with the society's grown common understanding of what is right and wrong. This notion implies a sender of a legitimacy claim and a receiver thereof. So, legitimacy can only be attributed in interaction, by one actor to another, to their deeds, or to an institution or its collective actions. The respective audience as the receiver is sanctioning the sender's claim for legitimacy by either attributing legitimacy to the claim, thus granting authority to the sender, or not. To a certain degree, the receiver thereby sets the margins for the claim.

Moreover, legitimation is embedded in a social context of a collective system of belief, shared customs, symbols, language and understanding. The legitimate right to govern or rule is ordained in the context of this system and a shared system of rules, practices and behaviors. Hence, legitimacy is the product of a discursive process between those who seek legitimacy and those who can grant legitimacy. Socially produced ideas of what is just and what is unjust are not only included in this discourse but also play an essential role in both the claims and the attribution of legitimacy.

As many laws, especially in democratic states, are based on the shared system of beliefs on what is right and wrong, legitimacy and legality often function as synonyms. In contrast to legitimacy, as defined here, legality refers to behavior which is in accordance with a set of binding laws. Legal behavior thus encompasses all those actions that are allowed under effective law – nationally and internationally. Although a person may feel to be acting legitimate, they do not necessarily act in accordance with the law if the person's subjective perception of legitimacy does not coincide with effective law. Therefore, legitimacy may encompass a lot more ideas on regulations for behavior than are actually codified in writing. On the contrary, a lot of ideas may contribute to the formulation of effective law at some point if they prove stable over time and are collectively shared.

Though state authorities like to claim that their policies are legitimate, the mere claim does not lead to legitimacy acknowledged by the respective audience the authority was appealing to. Reus-Smit therefore describes legitimacy as “a quality that society ascribes to an actor's identity, interests, or practices, or to an institution's norms, rules, and principles” (Reus-Smit 2007: 159). Hence, legitimacy must be granted and can likewise be withdrawn. It is dependent on the audiences' approval and no authority can attribute legitimacy to itself. Auto-legitimation qua claim is not an option.

States have a genuine interest to display their foreign policies, and thereby their interpretation of international law, as legitimate. Not only need state leaders gain legitimacy among the state community but it is equally important to gain legitimacy within the own nation state (Hurd 2007a: 29). Hence, state officials tend to formulate foreign policy in accordance with and even in the language of international law (Liste 2012: 25). Likewise, politicians have to legitimize their foreign policies before their own people. It is vital for governments to have internal people's support for the security and foreign policies they are about to implement. This implies that international law is used as a source to generate legitimacy. While states participate in determining the meaning of international law, they also use it to argue for their politics – what is in line with international law cannot be wrong. Hence, we put forward an understanding of legitimation in process deliberately using international legal language as source for legitimacy. This process is also shaped by power.

In this case power is not the direct control (compulsory power) or the institutionally exercised control (institutional power) over near or distant subjects. Though these forms of power may also be part in the legitimation process, foremost structural, and even more so, productive power are essential to this process. Although legitimation certainly expresses structural power, in that it generates a social order of super- and subordination, the focus here will be rather on political authorities seeking to shape structures through making legitimacy claims. Productive power, as defined above, encompasses all those social processes that produce, fix, reproduce and alter meaning within in a system of shared knowledge. Stating legitimacy claims political authorities take part in the discourse through which subjects are produced; meaning is fixed and sometimes challenged by new, contesting interpretations which in themselves constitute attempts to alter meaning. Only the attribution of legitimacy in response constitutes the actor's power and ascribes authority, and is thus proof of the actor's exercise of productive power. Authority is understood here as the product of a complete legitimation process which constitutes a relation between the sender of the claim and its audience.<sup>11</sup> Similarly, compliance as such is a product of power.

### Internalization, Coercion and Self-interest

In a broader context of political processes legitimation is important in a rule-based system because it generates compliance. Actors comply with a rule when they adhere to it, follow and

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<sup>11</sup> This understanding is based on a Weberian understanding of authority as “the relation that exists between an actor and an institution when the actor perceives the institution to be legitimate” (Hurd 2007a: 60-61; Weber 1964: 152-153).

obey it. In a rule-based system compliance is a requirement to achieve stability. In contrast, non-compliance or rule-breaking causes non-stable expectations. These conditions are based on the assumption of rational actors making decisions based on calculations about expectable outcomes under the condition of compliance as a default option, while maximizing gains. The more stable these expectations are, the more reliable or predictable will the actors' behavior be. Though multiple ways are possible to generate compliance with rules in society, Ian Hurd distinguishes three model types that also signify different expressions of power: coercion, self-interest and legitimacy (Hurd 2007a: 34-61).

Although these three ways to achieve compliance rarely appear in such clean division in reality, it is nevertheless worthwhile to distinguish them analytically. These concepts often appear intermingled; legitimacy may be the result of an initial coercion or an incentive for self-interest. Following Hurd's conceptualization, legitimacy can be distinguished from coercion and self-interest, especially if it is about an actor internalizing the rule or norm. How does the internalization of rules make people voluntarily comply? As stated before, legitimacy is a subjective perception solely depending on how the actor receiving the claim understands and views the rule, institution or policy. Actors will hence attribute legitimacy to an authority, a rule or institution when they feel that it is right. Right in this sense does not necessarily have to refer to a moral standard, but to the individual or collective position that is informed through shared beliefs on moral and ethics within a social context. Once a rule is perceived as legitimate, actors will have a genuine interest to comply with it because they feel obliged to do so. This is the process of internalization (Hurd 2007a: 7).

Hurd further argues that internalization changes behavior, as it shapes the audience's view of their own interests. Applied to a collective, this means that "[o]nce widely shared in society, this belief changes the decision environment for all actors, even those who have not been socialized to the rule, because it affects everyone's expectations about the likely behavior of other players" (Hurd 2007a: 7). If a rule is internalized by an actor, the rule takes on an authoritative character. Authority can therefore be understood as a form of power or social control. Hence, compliance is generated with very few coercive means. In the absence of legitimation-based authority, coercion becomes more important to enforce power (Hurd 2007a: 61).

In contrast, coercion always refers to forcing an audience into compliance (in a material or non-material, psychological sense). In this case, an authority constantly needs to apply pressure and has to bear the costs of enforcing compliance. Furthermore, the risk of break-out and non-compliance as well as resistances building up is high, as the audience may follow competing interests. On the contrary, by providing incentives to make the audience comply, the amount of necessary force is less. However, the authority constantly has to provide incentives for the interest-maximizing audience not to abandon the subject.

In sum, actors, may it be states or a single state's people, theoretically have three reasons to comply with rules: (1) they are forced to do so: coercion; (2) they attach a great importance to compliance: self-interest (intrinsic incentives); and (3) they believe the rules are legitimate and should therefore be adhered to (up to the point that they have internalized them): legitimacy. Put simply, legitimacy is the cheapest way for states to exercise power, which is why states strive for it. In short, those states are powerful who are perceived as legitimate in interpreting the rules and can therefore determine the rules' meaning. In this light, it is not a given that states considered powerful in material terms (such as GDP and military capabilities) enjoy greater legitimacy than poorer states. States make legitimacy claims in order to generate compliance to rules, that are most suited to their interests. Challenges to legitimacy claims are also challenges to the power distribution in the international system.

### **Leverage in two ways: powerful states benefit and regimes are shaped**

The process of arguing for the legality and legitimacy of states' actions functions as a display of power. Such divergent outcomes hint to different understandings of international law and show how authorities gain power through discourse. We now turn to the South China Sea disputes to illustrate our theoretical argument.

The UN Convention on the Law of the Seas endeavors to be the constitution of the seas. So far, the legal regime has not only been able to offer viable solutions to all disputed maritime zones despite its elaborate dispute settlement system. For one, it is a political decision whether to adjudicate a dispute or to choose a different settlement method. Not many states engage in international legal proceedings, so the mere availability of a formal dispute settlement system is not sufficient. Moreover, states can make reservations exempting certain matters from legal settlement. Another reason is that not all issues concerning maritime matters actually fall under the scope of UNCLOS. For instance, disputed rights to dry land are

outside its scope, even though rightful claims to maritime zones are generated from title to land territory. Yet in practice it is not just the facts of a case but how the issues are formulated; careful wording and the case falls inside compulsory jurisdiction (Boyle, 1997, pp. 44-45). The formulation of submission opens an avenue for states to bring issues to a forum of their choice. Here is strong support for our argument that the precise content of international legal norms depends on their interpretation.

One of the thorniest current maritime disputes are the South China Sea Disputes. On the one side, China has extensive maritime claims in the South China Sea. The Chinese nine-dash-line forms a U-shaped zone reaching as far as some 800 nautical miles south from the Chinese coast, thus reaching in maritime zones claimed by the Philippines and other Southeast Asian states. In addition to the Chinese claims, some islands groups such as the Spratly Islands are claimed by several of the neighboring states. The long-standing dispute has been addressed in ASEAN sponsored forums but has not yet seen much progress towards a permanent settlement.

Rather surprisingly, the Philippines initiated arbitration proceedings under article 287 UNLOS in early 2013. That marked a turn away from the previous talks and informal settings. They turned to the Permanent Court of Arbitration for the establishment of an arbitration panel. The Philippines sought an Award that (1) declares the disputed waters are governed by UNCLOS and that China's claims based on its nine-dash-line are inconsistent with UNCLOS and therefore invalid, (2) to determine whether certain features are capable of generating entitlement to maritime zones greater than 12 M, and (3) enables the Philippines to enjoy its rights within and beyond in its exclusive economic zone and continental shelf that are established in the Convention (Government of the Philippines, 2013).

The Philippines explicitly stated that they were neither requesting the delimitation of maritime boundaries nor seeking determination which party enjoys sovereignty over the disputed islands. This is only surprising at first glance – the Philippines are making a deliberate effort to formulate the submission to establish jurisdiction. China has excluded maritime boundary delimitations as subject of binding dispute settlement procedures upon ratification of UNCLOS. For this reason, the Philippines emphasized that they were aware of the Chinese reservation and have avoided subjects covered by the Chinese Declaration (Government of the Philippines, 2013, para 7). The Philippines were successful with their careful formulation.

The panelists initially found they had jurisdiction on seven submissions, while conferring the decision about the other eight items to the merits phase. Later considering the remaining items, the tribunal found it had also jurisdiction on the other items, respectively some claims could not rightfully be upheld under international law and therefore no overlap existed (Permanent Court of Arbitration, 2016, para. 1203).

Instead, China has consistently rejected the arbitration procedure. China did not participate in the proceedings at any stage; it did neither submit any documents nor did Chinese representatives appear at the oral hearings. However, several official statements detailed the Chinese position before, during, and after the arbitration. In an extensive position paper, China offers its legal interpretation of the situation (Government of the People's Republic of China, 2014). Most importantly, China held the dispute matter to be the territorial sovereignty over certain maritime features and thus outside the scope of UNCLOS. For this reason, China maintained the arbitration panel has no jurisdiction over the Philippine claims. A second Chinese argument was that the disputing parties have agreed to resolve the dispute through negotiations. In an effort to substantiate this argument, China listed past negotiations as well as documents that point to future talks. Referring to article 280 and 281, China considered the UNCLOS dispute settlement not applicable because the parties had already agreed on the settlement means (i.e. negotiations) disbaring legal proceedings.

In July 2016, the panel handed down its award (Permanent Court of Arbitration, 2016). Returning to the issue of jurisdiction, the tribunal did not accept the Chinese arguments that it lacked standing. Neither did the Chinese reservation upon signature of UNCLOS make the Philippines' submission inadmissible nor were any previous agreements on further talks considered to be an exclusive choice for political means of settlement. In this regard, the less powerful state was successful in garnering support of the legal experts determining whether they were allowed to consider the merits of the case. At this crucial step in any legal proceeding, impartial access to the settlement mechanism is important for a system's effectiveness. As it is harder for less powerful states to withstand pressure in political realm, the choice for turning a dispute in one of legal technicalities may level the playing field. In the case of the South China Sea arbitration, the tribunal sided with the Philippines on the merits, too. The tribunal found that the rights established by UNCLOS superseded any claims based on historic rights. The Award found the nine-dash line incompatible with international law.

From this finding followed that the Philippines can consider the Chinese claims in the West Philippine Sea as void.

The government of the Philippines has been very successful in the legal politics of international law. While a clear victory in the legal proceedings, the crucial question is what is this victory worth outside the chamber? The politics of international law do not stop at a ruling. It is important to study how rulings are received and how they influence state practices.

Consistent with its objection to the arbitration and as announced, China rejected the award. The Chinese Ministry of Foreign Affairs “solemnly” declared “that the award is null and void and has no binding force” (Government of the People's Republic of China, 2016b). Simultaneously the Chinese government reaffirmed its claim to islands in the South Chinese Sea by name (Government of the People's Republic of China, 2016a). The same statement said, China was “acting in accordance with international law” and its “territorial sovereignty and maritime rights and interests in the South China Sea” were “based on the practice of the Chinese people and the Chinese government in the long course of history” (2016a). In strongly worded statements, Chinese diplomats reiterated the position that the tribunal was illegal and could not render a binding decision. For instance, a day after the award was published, China’s ambassador to the U.S. accused the tribunal of “professional incompetence” and warned that the ruling “will certainly intensify conflict and even confrontation.”<sup>12</sup> China thus pushed its view that the tribunal was illegitimate. China named several states as supporting its stance, mainly Middle Eastern and African states. Yet many of the alleged supporters have not issued independent statements and some even disavowed their alleged support.<sup>13</sup> Most industrial countries, including the United States, called on China to respect international law and to abide by the tribunal’s decision. This behavior clearly indicates that states positioned themselves in the aftermaths of the proceedings. China tried to demonstrate it was not isolated in rejecting the award. Its most valuable supporter was Russia, another great power and permanent member of the UN Security Council. However, many other influential states emphasized the legality of the tribunal and thus its findings. This group equated China’s stance with misguided power politics and infringing international law.

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<sup>12</sup> Remarks of Ambassador Cui Tiankai at Center for Strategic and International Studies on 13 July 2016, available at <http://www.china-embassy.org/eng/zt/abc123/t1380730.htm>

<sup>13</sup> Associated Press News, 13 July 2016, Picking sides: A World of Opinions on South China Sea Case, available at <https://apnews.com/f77d182647754042a31862481421cacc/picking-sides-world-opinions-south-china-sea-case>.

The most affected states from the Southeast Asian region have not been very outspoken. Among the ten ASEAN member states, only Vietnam had been a vocal supporter of the Philippines' decision to take the issue to arbitration. While not party to the proceedings, the Vietnamese government explicitly expressed its conviction, that the tribunal enjoyed jurisdiction, and resolutely protested any Chinese claim based on the nine-dash line in a statement to the tribunal. Shortly before the award was published, the foreign ministry spokesperson of Vietnam stated that Vietnam "wants the arbitration court to deliver a fair and objective decision, creating a basis to peacefully resolve disputes".<sup>14</sup> Yet it did not call for its observation. The joint statement of ASEAN foreign ministers meeting shortly after the publication of the award does not even make a reference to it. Reportedly Cambodia blocked a call to "respect the diplomatic and legal process" after receiving a pledge for \$500 million in aid from China.<sup>15</sup>

For now, it seems that the Philippines have not gotten a lot of mileage out of its win. A new administration took office just a couple of weeks before the award was published. While initially rejecting Chinese calls for bilateral talks, a year later both sides have met to discuss the issues. The Philippines might have strengthened their bargaining position. Yet China has been able to keep its claims in the South China Sea alive despite a ruling to the contrary.

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<sup>14</sup> Reuters World News, 2 July 2016, Vietnam urges 'fair' ruling from court handling South China Sea case, available at <http://www.reuters.com/article/us-southchinasea-ruling-vietnam-idUSKCN0ZI07M>.

<sup>15</sup> The Cambodia Daily, 25 July 2016: Cambodia Blocks Asean Statement on South China Sea, available at <https://www.cambodiadaily.com/news/cambodia-blocks-asean-statement-on-south-china-sea-115834/>.

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