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Malcolm Jorgensen

**Equilibrium & Fragmentation in the International Rule of Law:
The Rising Chinese Geolegal Order**

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Equilibrium & Fragmentation in the International Rule of Law : The Rising Chinese Geolegal Order

Malcolm Jorgensen¹

Abstract:

Seeming consensus has formed among legal scholars and practitioners that a rising China seeks changes in rules and institutions of international law. Yet, attendant accounts of how such changes may and already do restructure global legal order remain relatively underdeveloped. An observed rise in the international rule of law during immediate post-Cold War years has now been disrupted by a confluence of regional shifts in geopolitical power and contestation of law's normative foundations by newly empowered states. In these circumstances, advocates for stability and continuity in variations of the "liberal international order" or "rules-based order" have sought to defend the authority and resilience of universally defined international legal norms against various regional challenges to the boundary between law and politics. Yet, as both global power and universal conceptions of law fragment, so too will the presumed equilibrium between international law's political and normative foundations. Signs of fragmentation are now conspicuously playing out in East and Southeast Asia, where the relative rise of China is amplified by alternative Chinese conceptions of foundations and purposes of global legal order. This working paper introduces the concept of "geolegal power" to describe the competitive logic of a territorially bounded leading state restructuring interpretation and development of legal rules and institutions, which is emerging more explicitly within regional subsystems. Fragmentation of the international rule of law by a rising Chinese "geolegal order" is demonstrated by contested maritime rules in three key areas: freedom of navigation; third-party and judicial settlement; and, territorial claims under UNCLOS. Evidence that China is carving out an effective subsystem of rules designated as "law" in the most consequential of security and geopolitical domains poses a critical challenge to the structure of a unified and universal system of international law. Legal scholars and practitioners must better grasp reconfiguring foundations of international law in order to address rising orders of "geolegal power", in which the regional meaning and operation of law is no longer reconcilable within the terms of an "international" rule of law.

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1. Introduction

On 12 July 2016 the Permanent Court of Arbitration (“the PCA”) delivered its ruling in the long running case between the Philippines and China over maritime and other disputes in the South China Sea (“SCS”).² Many accounts described a “slam-dunk” win for the Philippines,³ in which the PCA reasserted largely orthodox interpretations of the parties’ international legal rights against China’s particularistic and unconventional legal claims. Yet, despite the Philippines being delivered a firm legal foundation to vindicate its claims, within a year commentators were instead describing a “a slam-dunk diplomatic victory for Beijing”, in which the Philippines all but ceded its victory in further negotiations, as the price for accommodating Chinese interests.⁴ Almost by consensus international lawyers have viewed China’s total rejection of the PCA ruling as an abrogation of jurisdictional obligations under the *United Nations Convention on the Law of the Sea* (“UNCLOS”), and yet the two countries signed a joint statement affirming their good faith commitment to “universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS”.⁵

The fate of the South China Sea Arbitration illustrates a fundamental instability at the boundary between law and politics in an era when both geopolitical and normative foundations of global order are shifting and reconfiguring. Regional shifts in geopolitical power have gone hand in hand with newly empowered states using rising influence to contest normative foundations of international legal order. In these circumstances, advocates for stability and continuity in post-Cold War legal order have appealed to the unity and universality of the international rule of law as providing institutional resilience against fundamental structural change. According to this view, the high threshold to posing a system-wide challenge insulates global legal order against regional disruptions to the boundaries between legal and political action. Yet, as both global power and universal conceptions of law fragment, so too will the presumed global equilibrium between international law’s political and normative foundations.

Signs of fragmentation in the international rule of law are now conspicuously playing out in East and Southeast Asia,⁶ where the relative rise of China is amplified by alternative Chinese conceptions of foundations and purposes of global legal order. This working paper introduces the concept of *geolegal power* to describe the competitive logic of a territorially bounded leading state restructuring interpretation and development of legal rules and institutions, which is emerging more explicitly within regional subsystems. Fragmentation of the international rule of law toward *geolegal orders* is demonstrated through the case of China’s contestation of regional maritime

² *The South China Sea Arbitration (the Republic of Philippines v. The People’s Republic of China)*, Award (12 July, 2016) 2013-19 PCA.

³ McCoy, Alfred W., *In the Shadows of the American Century: The Rise and Decline of Us Global Power* (Haymarket Books, 2017) at 226; Ku, Julian, ‘The South China Sea Arbitration Is Here! And China Will Not Be Happy’, *Opinio Juris* (12 July, 2016) <http://opiniojuris.org/2016/07/12/the-south-china-sea-arbitration-is-here-and-china-is-not-happy/>, last accessed 09 November 2018.

⁴ Heydarian, Richard J., ‘Duterte’s Soft-Pedalling on Beijing: Good for Manila, Bad for ASEAN’, *The Straits Times* (4 May, 2017) <https://www.straitstimes.com/opinion/dutertes-soft-pedalling-on-beijing-good-for-manila-bad-for-asean>, last accessed 09 November 2018.

⁵ Ministry of Foreign Affairs of the People’s Republic of China, *Joint Statement between the Government of the People’s Republic of China and the Government of the Republic of the Philippines* (16 November, 2017) https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1511299.shtml, last accessed 09 November 2018.

⁶ The term “Southeast Asia” will primarily be used hereafter, but is intended to include Mainland China, being situated between East and Southeast Asia.

rules in three key areas: freedom of navigation; third-party and judicial settlement; and, territorial claims under UNCLOS. These dynamics present a critical challenge for the international rule of law precisely because they magnify the distance between narratives of international law's universalism, and the reality of its particularistic spatial and normative foundations. International legal scholarship must better understand the architecture sustaining a universal legal order in order to recognise and address the rise of internally coherent but mutually incompatible regional orders with no unifying global reference point.

2. The Equilibrium of Post-Cold War Global Order

The sense that international law is at an inflection point in its post-Cold War development is well encapsulated in Krieger and Nolte's observation of "signs of crisis in the development of international law and international relations".⁷ Reviewing the uncertain development of international law in the post-Cold War era, they thus pose the question of whether we are currently witnessing a "rise or decline" in the international rule of law. Such growing unease with changes in global order needs to be understood in relative historical terms as following the post-Cold War decades in which some, particularly Western voices, interpreted stability as a sign of decreasing contestation of underlying values and norms of global order. An observed initial "rise", beginning in the decade of the 1990s, is accordingly interpreted in this paper as the consequence of a period of stable equilibrium, in the sense of "a state of balance among competing forces or institutions" capable of sustaining unity in the progressive development of international law.⁸ Specifically, equilibrium was formed between post-Cold War global power preponderance of the US and its allies and recommitment to the authority and underlying norms of the post-World War Two ("WWII") rules and institutions. For Burke-White the entirety of the post-WWII period amounted to a "transatlantic moment" in which the US and Europe wielded such influence that they "embedded their particular preferences into the substance of international law".⁹ The political consequence of achieving such an equilibrium is that the operation of power itself recedes from view: reflexive adjustments towards the established equilibrium conceal the need for conspicuous exercises of power to enshrine particularistic values and norms in legal rights and duties. Thus, appeals to rising universality in the international rule of law, so understood, could be made without reference to parochial political interests, even as law sustained underlying hierarchies of hegemonic power. To so observe is not to critique or even evaluate the normativity of that order relative to alternatives – of which it may well be superior. Rather it is merely to unmask the architecture and dynamics of the claimed ideal of a universal legal order as a precursor to explaining how changes in global power distribution and understandings of legal norms may now operate to disrupt and alter the global equilibrium anchoring the rule of law.

a) The Ideal of Universal Legal Order

References to "universality" in the international rule of law require some further illumination, since the concept is used in a wide variety of senses in legal scholarship. Most prominently it is at the

⁷ See Krieger, Heike & Georg Nolte, 'The International Rule of Law-Rise or Decline? Points of Departure' (October 2016) No. 1 *KFG Working Paper Series* at 5.

⁸ Eskridge, William N. Jr & Philip P. Frickey, 'Foreword: Law as Equilibrium' (1994) 108 *Harvard Law Journal* 26 at 28.

⁹ Burke-White, William W., 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism' (2015) 56 *Harvard International Law Journal* 1 at 4-5.

heart of contentious debates about whether substantive cosmopolitan values, such the content of human rights norms, should prevail globally against particularistic national and cultural values. In the period of the perceived “rise” in the rule of law, “a liberal view on the direction history is taking and regarding a narrow purpose of the State became a generally held expectation, and thereby assumed a hegemonic role”.¹⁰ Koskenniemi describes the growing confidence in the “idea of unity as humankind’s natural *telos*” and the belief most prevalent in the 1990s of “modernity and interdependence gradually leading to integration and to a worldwide ‘international legal community’”.¹¹ These iterations and claims for substantively “universal” rule of law values extend from deeper philosophical questions about enlightenment values, and are thus inherently contentious – as demonstrated by well-known critiques canvassed in the cultural “Asian Values” debates¹² and other sceptical responses from critical legal scholarship.¹³

However, a related but more formalistic sense of “universality” also appears in jurisprudential debates as the attribute of international legal rights and duties, regardless of content, applying uniformly “throughout the entire planet in a universal manner” without discrimination between subjects of the international legal order.¹⁴ Beaulac identifies the more formal sense of “universality” as foundational to the concept of the international rule of law noting that, even where critical legal scholarship has identified origins of legal order in Western Europe, “none of these authors would dare question the universality of international law, or dispute that its normativity is applicable to all members of the international community”.¹⁵ Likewise, Sir Arthur Watts maintains that the international rule of law must exhibit “completeness” in the sense that it reaches and applies to all members of the legal community. Here “it is the international legal order whose universality is important and unquestioned, rather than that of particular rules”.¹⁶ Furthermore, Watts argues that international law’s “enforcement should be similarly universal, that is that it should be capable of being enforced equally in respect of all members of the community”.¹⁷ This meaning and ideal of universality in international legal order thus encompasses the qualities of “‘unity’ or ‘coherence’ of international law” as a single normative system.¹⁸

b) Fragmentation in the Legal Order

The ideal of a universal rule of law extends from an understandable sense among legal scholars and practitioners that the alternatives – of fragmentation and disunity – are an existential threat to

¹⁰ Krieger & Nolte (n 7) at 6.

¹¹ Koskenniemi, Marti, ‘Introduction: International Law and Empire – Aspects and Approaches’, in *International Law and Empire: Historical Explorations*, eds. Walter Rech Marti Koskenniemi, and Manuel Jiménez Fonesca (Oxford University Press, 2017) at 3.

¹² Bruun, Ole, and Michael Jacobsen, *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Routledge, 2003).

¹³ See Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007).

¹⁴ See Jouannet, Emmanuelle, ‘Universalism and Imperialism: The True-False Paradox of International Law?’ 18 *The European Journal of International Law* 379 at 385-386.

¹⁵ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’, in *Relocating the Rule of Law*, eds. G. Palombella & N. Walker (Hart Publishing, 2009) at 209-210.

¹⁶ Watts, Arthur, ‘The International Rule of Law’ (1993) 36 *German Yearbook of International Law* 15 at 27.

¹⁷ *Ibid* at 39.

¹⁸ Simma, Bruno, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 *European Journal of International Law* 265 at 267; Prost, Mario, *The Concept of Unity in Public International Law* (Bloomsbury Publishing, 2012) at 36.

the authority of the system as a whole. Peters observes that fragmentation “implies the loss of international law’s quality as a legal order (or system). An agglomeration of isolated and diverse norms does not amount to a legal order”.¹⁹ Raising the spectre of “fragmentation” evokes responses that include “a fear of anarchy, a feeling of lack of direction, a worry over the end of an international ‘order’”.²⁰ Indeed, the prominent calls from within Western states to defend some variation of the “liberal international order”²¹ or “rules-based order”²² are, from a legal perspective, effectively an appeal to preserving universality in international law. The anxiety of these policymakers and scholars alike is not that rules will disappear from key domains of global politics, but rather that rules will transform into fragmented and competing bodies of law that lack common sources and norms for reconciliation. More specifically, these predominantly Western voices have sought to confirm that unified understandings are properly to be found in the institutions and jurisprudence defining the post-WWII, and especially post-Cold War, status quo of international order.²³

There are thus strong incentives for scholars to focus on the structure and consequences of international law as a universal system, since any non-universal account will lack the purposive attribute of providing common norms, equally valid for all states. This purposive approach gives rise to a dilemma, however, which is that scholarship is often compelled to make a further assumption that such universality exists as an empirical fact, and that conclusions about the structure and operation of law can be drawn accordingly. Watts’ claim for the progressive development of law is that: “A century ago there could have been some justification for seeing international law as little more than the expression of the structure of power in the international community and as not so much regulating it as following it”. In the modern era however, states “accept the reality of international law and its immediate relevance to the conduct of their international relations”. The international rule of law thus exhibits universality “in practice as well as principle”.²⁴ The normative imperative for universality in the international rule of law thus not only constrains prescriptive accounts of how the law should look, but also narrows descriptive diagnoses of how the international legal system actually does and can look. Otherwise sound normative reasons for only acknowledging the power of international law within a universal system produces intentional blind spots to the ways rules and institutions detached from a unified system of law may nevertheless carry real power.

Legal scholarship has responded to these tensions through a renewed interest in mapping out the ways that international law in practice has always been “understood, interpreted, applied, and approached differently in different settings”.²⁵ David Kennedy observed a decade ago that, from a

¹⁹ Peters, Anne, ‘Fragmentation & Constitutionalization’, in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford & Florian Hoffmann (Oxford University Press, 2016).

²⁰ Martineau, Anne-Charlotte, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’ (2009) 22 *Leiden Journal of International Law* 1 at 5.

²¹ See Macron, Emmanuel, *Transcription du discours du Président de la République, Emmanuel Macron, devant le congrès des États-Unis d’Amérique* (25 April, 2018) <http://www.elysee.fr/declarations/article/transcription-du-discours-du-president-de-la-republique-emmanuel-macron-devant-le-congres-des-etats-unis-d-amerique/>, last accessed 09 November 2018.

²² Bisley, Nick & Benjamin Schreer, ‘Australia and the Rules-Based Order in Asia?’ (2018) 58 *Asian Survey* 302.

²³ See Stewart, Patrick M., ‘World Order: What, Exactly, Are the Rules?’, *CFR* (3 May, 2016) <https://www.cfr.org/blog/world-order-what-exactly-are-rules>, last accessed 09 November 2018.

²⁴ Watts (n 16) at 42.

²⁵ Roberts, Anthea, et al., ‘Conceptualizing Comparative International Law’, in *Comparative International Law*, eds. Anthea Roberts, et al. (Oxford University Press, 2018) at 3.

sociological perspective, international law “is applied differently in different places. It is more dense here than there”.²⁶ The re-emerging field of comparative international law recognises the forces that compel common global institutions to make their terms with divisions among legal policymakers who “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”.²⁷ Thus, pulled between these normative imperatives, “the field of international law is defined by a dynamic interplay between the centripetal search for unity and universality and the centrifugal pull of national and regional differences”.²⁸

The need for legal scholarship to acknowledge and confront fragmentation becomes clear when conclusions continue to be drawn from presumptions that the reception and operation of international legal order remains universal. A recent prominent example is in Oona Hathaway and Scott Shapiro’s book *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, in which the authors assert that Chinese occupation of maritime features in the SCS are “worth little as long as the rest of the world refuses to recognize them”.²⁹ That conclusion follows a sophisticated argument that legal prohibitions against territorial conquest, tracing back to 1928, remain the necessary source of legitimacy for exercising effective global power. The observation that international law facilitates effective power turns on a globally recognised order in which legal rules inform states’ rational calculations about what actions will likely be challenged as threats to that order.³⁰ In Hathaway and Shapiro’s words: “Real power – power useful for achieving important political objectives – does not exist in the absence of law. Law creates real power. States can reach their goals only if others recognize the results of their actions”. To demonstrate this point, they argue that the outlawing of war in the 1928 Kellogg-Briand Pact ensured that Japan’s 1931 occupation of Manchuria yielded little benefit, since “it was not enough if no one treated Manchuria as Manchukuo”.³¹ The “Stimson Doctrine” of 1932 confirmed the US policy against recognising territorial claims achieved by conquest.³²

Examples of presumed universality are also found in leading International Relations accounts, with John Ikenberry making a comparable argument that potential Chinese challenges to the established equilibrium of global legal order would require “a ‘power transition’ moment, that is, a dramatic moment when the old order is overturned and rising states step forward to build a new one”. Moreover, China would need to provide “a wider model of global order” as is presumed necessary to replace the prevailing system of universal law.³³ Here Ikenberry’s reassurances for the structural resilience of international law are grounded in scepticism that China has the incentive or capacity to effect such “a dramatic moment” of global change that establishes a new equilibrium.

²⁶ Kennedy, David, ‘One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’ (2007) 31 *New York University Review of Law & Social Change* 641 at 642.

²⁷ Roberts, Anthea, *Is International Law International?* (Oxford University Press, 2017) at 2.

²⁸ *Ibid* at 3.

²⁹ Hathaway, Oona A., & Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster, 2017) at 423.

³⁰ See Hathaway, Oona A., & Scott J. Shapiro, ‘What Realists Don’t Understand About Law’, *Foreign Policy* (9 October, 2017) <http://foreignpolicy.com/2017/10/09/what-realists-dont-understand-about-law/>, last accessed 09 November 2018.

³¹ Hathaway & Shapiro (n 29) at 422.

³² *Ibid* at 166-167.

³³ Ikenberry, G. John., ‘Why the Liberal World Order Will Survive’ (2018) 32 *Ethics & International Affairs* 17 at 28.

These related arguments for stability amount to an institutional claim that the entrenched structure of a universal legal order alters the rational incentives for actors to challenge the unity of the rule of law.³⁴ The global rule of law thus operates like a competitive system in which it is costly and inefficient to operate outside of an equilibrium point. In an economic market, a seller of goods and services priced above or below the market rate will be punished financially and pushed back toward the stable rate formed by market forces. Likewise, in the international legal system, an actor who attempts to revise rules and institutions in a way conflicting with established power will be incentivised to return to established modes of legal behaviour. Hathaway and Shapiro presume such a global equilibrium in international law when they argue, for example, that Russia can advance sophisticated but novel legal claims justifying its annexation of Crimea, “but if the rest of the world does not recognise the claim, tourists from everywhere but Russia will vacation elsewhere, ATMs will run dry, and the economy will wither away”.³⁵ Thus the global nexus between power and prevailing conceptions of the rule of law deprives states of rational incentives to challenge that order – even in a regional context. Similarly, Ikenberry’s assumption of a global equilibrium leads him to argue that, if China aspires to “undermine and replace the existing liberal international order, the constraints on doing so are overwhelming”.³⁶ Prohibitively high costs associated with overturning the international legal system thus render it largely resilient to revolutionary changes: the constitutive rules and institutions of the rule of law stand or fall together as a universal order.

Yet, inherent in the logic of an equilibrium, is that a decline in the political and normative foundations of the extant order will be associated with decline in the unity and stability of the rule of law itself. What Hathaway, Shapiro and Ikenberry’s accounts overlook is that the very logic they rely on, of an equilibrium between power and law, points to the ways in which the combination of increasing fragmentation in regional geopolitical power and assertiveness of alternative conceptions of law is altering the rational incentives to challenge the universality of the international rule of law. The immediate post-Cold War conceptions of the rule of law represented a relatively stable equilibrium between a particular global structure of power and the legal values and rights of those who benefited from that structure. Fragmentation of these political foundations is inconsistent with persistence of a unitary and universalistic legal order over the longer term. In Roberts’ words: “If international power becomes more competitive and fragmented, one can expect increased pressure to be placed on notions of universal international law”.³⁷ That pressure is now evident with rising Chinese power in East and Southeast Asia and the incentives to channel power through fragmented conceptions of international legal rights and duties.

3. China’s Challenge to Universal Order

Acknowledging non-universal understandings of international law poses an obvious difficulty for notions of a unified legal system fixed on a global equilibrium point. Where sufficiently distinctive conceptions are associated with the fracturing of geopolitical power, the presumption of stability through universality will dissolve. Alan Wachman has argued that “the PRC³⁸ does not contest the

³⁴ See Keohane, Robert O., ‘Rational Choice Theory and International Law: Insights and Limitations’ (2002) 31 *The Journal of Legal Studies* 307 at 11-12.

³⁵ Hathaway & Shapiro (n 29) at 422.

³⁶ Ikenberry (n 33) at 27.

³⁷ Roberts (n 27) at 289.

³⁸ People’s Republic of China.

singularity of the international system. Both the United States and the PRC understand that there is a single international system, but both Beijing and Washington are struggling to ensure that it reflects values they each prefer”.³⁹ Such conclusions are sound to the extent that they merely observe that both countries prefer the ideal of universal legal order, but it does not necessarily follow that either country will not “contest the singularity of the international system” in practical terms, as a tactical measure for advancing particularistic values in law. The elements for such transformation are now conspicuously demonstrated in the words and actions of China, who either already enjoys forms of dominance in domains vital to regional legal order, or is laying the military and institutional foundations for doing so. Seeming acquiescence to the trajectory of post-Cold War global order has now shifted towards more robust challenges to universal legal order.

a) Legal Challenges

On 25 June 2016, Russia and China released a joint declaration on the “Promotion of International Law” (“the declaration”), in which they sought to articulate foundational political understandings informing substantive rules and institutions of law.⁴⁰ Much of the content was framed in the shadow of specific disputes, such as the then global condemnation of Russian actions in Ukraine, and the 2016 PCA ruling against China.⁴¹ Nevertheless, the declaration expressed long established positions of China and Russia about the proper constitution of global legal order – in particular robust notions of sovereignty as contained in China and India’s 1954 “Five Principles of Peaceful Coexistence”.⁴² Accordingly, although there are detailed accounts of a distinctive Chinese conception of international law,⁴³ the declaration serves as an efficient reference point for illustrating the contours of recent Chinese contestation. For Mälksoo the declaration reveals “disagreement between the West and the two leading non-Western powers – China and Russia – on foundational constitutional principles of international law, especially the UN Charter”.⁴⁴ More particularly, the declaration contests core principles that underpin the presumed post-Cold War universality of international law. As such the contest is located at a more fundamental level than disagreement over rules and doctrines of law such that the “struggle and divergence of interpretations cannot be solved only by textual interpretations of the UN Charter”.⁴⁵

What is most significant about the declaration’s “united challenge to Western hegemony in international law”⁴⁶ is the way in which the central principle of “sovereign equality” is defined in

³⁹ Wachman, Alan M., ‘Playing by or Playing with the Rules of UNCLOS?’, in *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, eds. Peter Dutton (Naval War College Press, 2010) at 115.

⁴⁰ Ministry of Foreign Affairs of the Russian Federation, *The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law* (25 June, 2016) http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698, last accessed 09 November 2018.

⁴¹ Wuerth, Ingrid, ‘China, Russia, and International Law’, *Lawfare* (11 July, 2016) <https://www.lawfareblog.com/china-russia-and-international-law>, last accessed 09 November 2018.

⁴² Roberts (n 27) at 291-292; Lo, Chang-fa, ‘Values to Be Added to an “Eastphalia Order” by the Emerging China’ (2010) 17 *Indiana Journal of Global Legal Studies* 13 at 16-17.

⁴³ See in particular Xue, Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (Martinus Nijhoff, 2012).

⁴⁴ Mälksoo, Lauri, ‘Russia and China Challenge the Western Hegemony in the Interpretation of International Law’, *EJIL: Talk!* (15 July, 2016) <https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/>, last accessed 09 November 2018.

⁴⁵ *Ibid.*

⁴⁶ Roberts (n 27) at 291.

opposition to a legal order capable of operating universally. The declaration defines sovereign equality to mean that states “enjoy their rights on the basis of independence and on an equal footing, and assume their obligations and responsibilities on the basis of mutual respect”. The relevant clauses of the declaration revolve around dimensions of an “absolutist”⁴⁷ sovereignty, including condemnation of unilateral military interventions contrary to the UN Charter, “the principle of non-intervention in the internal or external affairs of States”, the controlling role of state consent in dispute settlement, and respect for legal immunities of states and their officials. Here Wuerth argues that:

the sovereign-equality aspect of the Joint Declaration highlights the long-standing and deeply held views of Russia and China that international law has historically been a tool of Western Imperialism and that sovereignty and sovereign equality of the states are the key doctrinal bulwarks against such imperialism today.⁴⁸

Privileging sovereignty in these ways constitutes a rejection of invocations to maintain universality as merely a facade masking politicised Western interests.

The important structural implication of reasserting sovereignty in this manner is that, in practice, powerful states are given more explicit sanction to project their distinctive interests and values onto law itself. The system envisioned in the declaration is one fixed on “the principle of non-intervention in the *internal or external* affairs of States”.⁴⁹ As Roberts observes, this form of sovereignty has the effect that it “protects the sovereignty of different regional hegemon within their own spheres of influence”.⁵⁰ The claim that international law cannot legitimately constrain even the external affairs of states preserves any *de facto* sphere of geopolitical influence, with law left little to no scope for asserting independent norms and values to constrain foreign policy. Mälksoo alludes to these dynamics in reviewing geographical implications of the Russia and China declaration and its presumptively “neutral” foundation of sovereign equality:

The world of ‘sovereign equality’ of the UNSC’s permanent members is also a world of *de facto* legitimized spheres of influence where dictators are entitled to do what they want because they are protected by their state sovereignty and the veto power of their protector state among the permanent members of the UNSC... One actual result of disagreements on the UN Charter and the limits of the veto power in the UNSC has been the flourishing of regional, rather than universal, international law since the end of the Cold War, including in matters of collective security.⁵¹

Fu Ying, chairwoman of the Foreign Affairs Committee of China’s National People’s Congress, argues that China objects to conceptions of global order that entail “rejection and pressure by the US and other Western countries on China’s political system”. Instead China supports the UN based system understood in terms of sovereign equality, with no desire to “unravel the entire system or start all over again”.⁵² The tangible consequence of China contesting normative foundations of the rule of

⁴⁷ Burke-White (n 9) at 56.

⁴⁸ Wuerth (n 41).

⁴⁹ Emphasis added.

⁵⁰ Roberts (n 27) at 292.

⁵¹ Mälksoo (n 44).

⁵² Ying, Fu, ‘Putting the Order(S) Shift in Perspective’, *Speech by Fu Ying at the 52nd Munich Security Conference* (13 February, 2016) <https://www.securityconference.de/en/activities/munich-security-conference/msc-2016/speeches/speech-by-fu-ying/>, last accessed 09 November 2018.

law, however, demonstrates that structural changes can be realised by eroding universal reference points for global order, without any necessity to overturn the system as a whole.

The challenges to global legal norms posed by China are significant enough on their own, but are now being amplified by a parallel fracturing of political purpose within the very Western states that were expected to defend the status quo. The election of President Donald Trump has been only the most dramatic example of rising populist-nationalism in electoral politics defined by foreign policy scepticism of “globalism”,⁵³ and an associated view of “international law as a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people”.⁵⁴ The challenge posed by China and other rising states shares in common with the populists the critique that Western universalising aspirations promote “an unmediated liberal individualism, together with an equally unmediated collectivism of humanity as such. This takes place at the expense of various intermediate and mid-level categories, such as highly particularistic national identities, cultural traditions, subcultures and ‘peoples’”.⁵⁵ For Posner, populists do not accept that there is “any inherent value to an international order that respects differences among nations” and thus it is entirely proper to defend national preferences and differentiated rights for one’s own nationals, and to enshrine them within the legal order.⁵⁶ Populist constituencies within Western countries are effectively in a transnational alliance with rising powers in opposing the exercise and purpose of Western power necessary to uphold globalised understandings of the post-Cold War rule of law. Geopolitical shifts remain the main driver of fragmentation in the global legal system, but expressions of electoral populism undoubtedly “magnify the implications of these global power shifts”.⁵⁷ This translates into opposition to defending a universal system of international law, and thereby provides the ideal permissive conditions for Chinese regional interests.⁵⁸ According to Hurrell “the challenge is often not to a particular regime, treaty, or agreement, but rather an attack on the very notion of a rules-based order itself and of the very idea and ideal of international law”.⁵⁹

The most notorious demonstration of populist politics aligning with Chinese preferences is in fact one that long predates the rise of Trump: US reliance on UNCLOS as customary law without formal accession to the full treaty regime. That failure is perennially mentioned in the literature, including in the Russia-China Declaration, which warns that UNCLOS rules must be “applied consistently”, in a thinly veiled reference to the inconsistency of the US relying on the treaty without accepting its full constraints.⁶⁰ The US approach is more complex than mere self-serving interpretation of rules however, with *The Chicago Council on Global Affairs’* survey of American leaders confirming not

⁵³ See Trump, Donald J., *Remarks by President Trump to the 73rd Session of the United Nations General Assembly, New York, NY* (25 September, 2018) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>, last accessed 09 November 2018.

⁵⁴ Posner, Eric A., ‘Liberal Internationalism and the Populist Backlash’ (2017) 49 *Arizona State Law Journal* 795 at 795.

⁵⁵ Salter, Michael, ‘Law, Power and International Politics with Special Reference to East Asia: Carl Schmitt’s Grossraum Analysis’ (2012) 11 *Chinese Journal of International Law* 393 at 420.

⁵⁶ Posner (n 54) at 797.

⁵⁷ Ikenberry, G. John, ‘The End of Liberal International Order?’ (2018) 94 *International Affairs* 7 at 18.

⁵⁸ Fitzgerald, John, ‘Handing the Initiative to China’, *Inside Story* (19 January, 2017) <http://insidestory.org.au/handing-the-initiative-to-china/> last accessed 09 November 2018.

⁵⁹ Hurrell, Andrew, ‘Beyond the Brics: Power, Pluralism, and the Future of Global Order’ (2018) 32 *Ethics & International Affairs* 89 at 91.

⁶⁰ Ministry of Foreign Affairs of the Russian Federation (n 40).

only universal support for UNCLOS ratification among Democrats, but also solid majority support among Republican leaders.⁶¹ The incoherence in US regional leadership can be traced back to specific voting rules of the US Senate that inflate the power of a minority of voices representing the brand of instinctively anti-multilateralist politics that propelled Trump into the White House.⁶² Whatever the root cause, the American aspiration to defend a universal system of maritime rules is critically weakened by the conspicuous failure to convince even US senators of the neutrality of those rules, let alone regional contenders for greater maritime control.⁶³

The “trump” card for the US led rules-based order was always assumed to be the uniquely universal attraction of its values, and their normative superiority and pull for both states and their citizens. That assumption has collapsed with the rotation of the former division between the West and its allies against the rest, to a division between advocates for a universal system of law and the rest – which now cuts through as well as between states.⁶⁴ Achieving a unified foundation for the international rule of law was always a daunting challenge: with the collapse of the constructed consensus of the West it is now effectively an impossible one.

b) Geopolitical Challenges

Alternative national conceptions of international law transform into a substantive challenge to law’s unity where shifting norms are promulgated by states newly empowered to contest global rules and institutions. It is by now somewhat trite to observe the shift away from unipolarity at the end of the Cold War toward a more multipolar international system. The relative decline of US power has been matched by the relative and absolute rise of China and other “BRICS” countries, each seeking to assert greater influence within a regional sphere of influence.⁶⁵ Here Ikenberry has envisioned the consequences to include a possible “breakdown” whereby the current international order may:

yield to an international system where several leading states or centers of power – for example, China, the United States, and the European Union – establish their own economic and security spheres. The global order would become a less unified and coherent system of rules and institutions, while regional orders emerge as relatively distinct, divided, and competitive geopolitical spheres.⁶⁶

Historical experience suggests that each of these countries, as well as other regional groupings, can be expected to crystallise geopolitical power in the rules, interpretations and institutions of

⁶¹ Smeltz, Dina et. al., *United in Goals, Divided on Means* (The Chicago Council on Global Affairs, 2015) at 15.

⁶² See Bromund, Theodore R., James Jay Carafano & Brett D. Schaefer, ‘7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea’, *The Heritage Foundation* (4 June, 2018) <https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea>, last accessed 09 November 2018.

⁶³ Jorgensen, Malcolm, ‘What the U.S. Congress Fails to Realize When It Comes to TPP’, *The National Interest* (30 June, 2015) <http://nationalinterest.org/blog/the-buzz/what-the-us-congress-fails-realize-when-it-comes-tpp-13224>, last accessed 09 November 2018.

⁶⁴ See Trump, Donald J., *Remarks by President Trump at APEC CEO Summit, Da Nang, Vietnam* (10 November, 2017) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/>, last accessed 09 November 2018.

⁶⁵ Brazil, Russia, India, China and South Africa. See: Burke-White (n 9) at 2; Chesterman, Simon, ‘Asia’s Ambivalence About International Law and Institutions: Past, Present, and Futures’ (2017) 27 *European Journal of International Law* 945 at 966.

⁶⁶ Ikenberry, G. John, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, 2011) at 310.

international law governing regional as well as global order. The structural effect of geopolitical contestation will be to move away from the ideal of a unitary system, and towards a fragmented system in which leading states dominate regional subsystems.

The receding of US primacy is the key geopolitical factor fuelling such a shift in East and Southeast Asia – even as it remains the most consequential player in the region. The dominance of the Western led international order did not depend on global hegemony, which never existed in practice, but rather on the US possessing unchallenged regional hegemony in its own hemisphere, combined with the absence of any serious competitor to establish regional hegemony in another part of the globe. In the immediate years after the Cold War, Samuel Huntington made the case for maintaining US primacy for the sake of “international order and stability”.⁶⁷ By primacy in power politics he meant “that a government is able to exercise more influence on the behaviour of more actors with respect to more issues than any other government can”.⁶⁸ Throughout the balance of the twentieth century, and into the first decade of the next, the US occupied such a position of primacy across the Asia Pacific in which it remained the main reference point for all significant decisions.⁶⁹ The US is the only state that has achieved the status of regional hegemon, being unchallenged in the Western hemisphere for over a century, and through that period has on four occasions played the role of “offshore balancer” in preventing “imperial Japan, Wilhelmine Germany, Nazi Germany, and the Soviet Union from gaining regional supremacy”.⁷⁰ The US thus has a strong incentive to prevent China transforming into a hegemon in its own region, from which position it can dominate not only the political and economic relations between regional states, but also the operation of law.

The incentives for China to contest US regional primacy are thus equally obvious. It is unsurprising that China has a sense of being hedged in by a network of US allies and bases, as well as up to 60,000 US troops deployed in the region. The 12 nautical mile zone of territorial waters granted by UNCLOS makes for a scant buffer zone between it and the US Seventh Fleet.⁷¹ Nearly a generation ago, John Mearsheimer argued in *The Tragedy of Great Power Politics* that: “A wealthy China would not be a status quo power but an aggressive state determined to achieve regional hegemony. This is not because a rich China would have wicked motives, but because the best way for any state to maximize its prospects for survival is to be the hegemon in its region of the world”.⁷² The evidence is now that “a risen China”⁷³ has already ended US primacy in areas central to its strategic interests, and thus most prominently in the maritime domain.⁷⁴ China’s response of assertively positioning itself in the SCS is by now so advanced that it is increasingly observed by commentators as a fact, rather than a threat capable of effective response. An analysis for the *Lowy Institute* concluded that:

⁶⁷ Huntington, Samuel P., ‘Why International Primacy Matters’ (1993) 17 *International Security* 68 at 82.

⁶⁸ *Ibid* at 68.

⁶⁹ Scott, Shirley V., ‘The Impact on International Law of US Non-Compliance’, in *United States Hegemony and the Foundations of International Law*, eds. Michael Byers and Georg Nolte (Cambridge University Press, 2003) at 450-451.

⁷⁰ Mearsheimer, John J, *The Tragedy of Great Power Politics* (Norton, 2001) at 40-41.

⁷¹ Nathan, Andrew J., ‘The Chinese World Order’, *The New York Review of Books* (12 October, 2017) <http://www.nybooks.com/articles/2017/10/12/chinese-world-order/>, last accessed 09 November 2018.

⁷² Mearsheimer (n 70) at 402.

⁷³ Layne, Christopher, ‘The US–Chinese Power Shift and the End of the Pax Americana’ (2018) 94 *International Affairs* 89 at 90, original emphasis.

⁷⁴ Wesley, Michael, ‘Steering between Primacies: Challenges to the Australia-US Alliance’ (2017) 24 *Asia Policy* 59 at 60-61.

Beijing's islands-building in the South China Sea and their militarisation, replete with surface-to-air missiles, is near complete. With guile, threat, and coercion, China can now seize control of one of the main transport arteries of Southeast Asia, making a mockery of international laws and norms.⁷⁵

The artificial island features have been steadily militarised with personnel and weaponry⁷⁶ and have been described as “unsinkable aircraft carriers”⁷⁷ allowing the projection of military power far from China's mainland.

China is now the second largest, and by some measures the most powerful economy in the world, and may surpass the US as measured by GDP before 2030.⁷⁸ These figures have underpinned China's careful recalibration of military advantages in the region, with military spending approximately a third of the US, but second largest globally.⁷⁹ The reality of a rebalance in military strength having already taken place is well demonstrated in considering the meaning of military advantage at the regional level. It is an oft-repeated statistic that the US spends more than the next 7 military spending countries combined.⁸⁰ Yet, as Professor Hugh White notes, global does not equate to regional preponderance, since the US “must project power over vast distances and operate from a few widely scattered forward bases, while China is close to home, giving it a huge asymmetrical edge”.⁸¹ White concludes that the most likely future is one in which “America will cease to play a major strategic role in Asia, and China will take its place as the dominant power”.⁸² He continues that “Asia became largely free of power politics in 1972, when China stopped challenging America in the region”, but that period has ended with a return to classic great power rivalry.⁸³

Beyond a primary interest in its regional security, China has in parallel emerged as “the region's strategic entrepreneur”, building the infrastructure of a more ambitious institutional framework for power.⁸⁴ Chief among these projects is the trillion dollar “One Belt One Road” (“OBOR”) initiative that will build a new “silk road” confirming China as the hub of global economic development and trade routes.⁸⁵ Although Chinese public diplomacy presents the initiative as guided by a

⁷⁵ Brennan, Elliot, ‘China Eyes Its Next Prize – the Mekong’, *The Interpreter* (5 June, 2018) <https://www.lowyinstitute.org/the-interpreter/china-eyes-its-next-prize-mekong>, last accessed 09 November 2018.

⁷⁶ Nevitt, Mark, ‘The South China Sea's Muddled and Increasingly Militarized Future’, *Just Security* (1 June, 2018) <https://www.justsecurity.org/57279/south-china-seas-muddled-increasingly-militarized-future/>, last accessed 09 November 2018.

⁷⁷ Fish, Isaac S. & Keith Johnson, ‘China's New Airstrip in the South China Sea Is Almost Completed’, *Foreign Policy* (16 April, 2015) <https://foreignpolicy.com/2015/04/16/chinas-new-airstrip-in-the-south-china-sea-is-almost-completed/>, last accessed 09 November 2018.

⁷⁸ Smith, Noah, ‘Who Has the World's No. 1 Economy? Not the U.S.’, *Bloomberg* (18 October, 2017) <https://www.bloomberg.com/view/articles/2017-10-18/who-has-the-world-s-no-1-economy-not-the-u-s>, last accessed 09 November 2018.

⁷⁹ SIPRI, *SIPRI Military Expenditure Database* (2017) <https://www.sipri.org/databases/milex>, last accessed 09 November 2018.

⁸⁰ Breene, Keith, ‘Which Countries Spend the Most on Their Military?’, *World Economic Forum* (2 March, 2017) <https://www.weforum.org/agenda/2017/03/the-us-spends-more-on-defence-than-all-of-these-countries-combined/>, last accessed 09 November 2018.

⁸¹ White, Hugh, *Without America: Australia in the New Asia* (Quarterly Essay, 2017) at 33-34.

⁸² *Ibid* at 1.

⁸³ *Ibid* at 11.

⁸⁴ Wesley (n 74) at 63.

⁸⁵ See Fallon, Theresa, ‘The New Silk Road: Xi Jinping's Grand Strategy for Eurasia’ (2015) 37 *American Foreign Policy Interests* 140.

commercial and economic logic, it is unambiguously an extension of Chinese geopolitical power that will facilitate access to pressure points to bend trading partners towards Chinese will. Apart from the expected ordinary concessions that such an initiative will yield, there are already high profile examples of the project shading into neo-colonial behaviour, such as the acquisition by China of Sri Lanka's Hambantota Port, previously built and financed by China through a debt arrangement that the Sri Lankan Government was unable to meet.⁸⁶ OBOR has been compared favourably to the post-WWII US Marshall plan, with equivalent or greater associated geopolitical payoffs.⁸⁷ In conjunction with projects such as the 2015 Asian Infrastructure Investment Bank ("AIIB"), China's institutional innovation is rolling back the US 70 year command over global governance.⁸⁸

Faced with these momentous challenges the US government has responded with increasingly forceful rhetoric, with Vice President Mike Pence declaring that: "China wants nothing less than to push the United States of America from the Western Pacific and attempt to prevent us from coming to the aid of our allies. But they will fail".⁸⁹ Yet one of the Trump administration's first foreign policy announcements was to reject the now defunct Trans-Pacific Partnership ("TPP"),⁹⁰ which was touted as a "mega-regional trade agreement" to entrench US interests and preferences in the region.⁹¹ The TPP was always constructed upon geopolitical foundations, with former US Defense Secretary Ashton Carter arguing that "passing TPP is as important to me as another aircraft carrier".⁹² President Barack Obama never defended the deal simply in terms of free trade benefits, but drew attention to the threat posed by China and its attempts "to write the rules for the world's fastest-growing region".⁹³ He argued that "TPP is more than just a trade pact; it also has important strategic and geopolitical benefits. TPP is a long-term investment in our shared security and in universal human rights".⁹⁴ US withdrawal from the TPP has assisted in vacating the field for Chinese

⁸⁶ Abi-Habib, Maria, 'How China Got Sri Lanka to Cough up a Port', *New York Times* (25 June, 2018) <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>, last accessed 09 November 2018.

⁸⁷ See Layne (n 73) at 101.

⁸⁸ Jorgensen, Malcolm, 'China and the AIIB: Towards a New Rules-Based Order?', *The Interpreter* (17 March, 2015) <https://www.lowyinstitute.org/the-interpreter/china-and-aiib-towards-new-rules-based-order>, last accessed 09 November 2018.

⁸⁹ Pence, Mike, *Remarks by Vice President Pence on the Administration's Policy Toward China*, *The Hudson Institute, Washington, D.C.* (4 October, 2018) <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>, last accessed 09 November 2018.

⁹⁰ Renegotiated without US membership as the "Comprehensive and Progressive Agreement for Trans-Pacific Partnership".

⁹¹ Poletti, Arlo, 'Containment through Trade? Explaining the US Support for the Trans-Pacific Partnership', in *US Foreign Policy in a Challenging World*, eds. Matteo Dian & Barbara Pisciotta Marco Clementi (Springer, 2018) at 46.

⁹² Carter, Ashton, 'Remarks on the Next Phase of the U.S. Rebalance to the Asia-Pacific (McCain Institute, Arizona State University)', *Remarks on the Next Phase of the U.S. Rebalance to the Asia-Pacific, McCain Institute, Arizona State University* (6 April, 2015) <https://www.defense.gov/News/Speeches/Speech-View/Article/606660/remarks-on-the-next-phase-of-the-us-rebalance-to-the-asia-pacific-mccain-institut/>, last accessed 09 November 2018.

⁹³ Obama, Barack H., *Remarks by the President in State of the Union Address* (20 January, 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>, last accessed 09 November 2018.

⁹⁴ Obama, Barack H., *Remarks by President Obama at ASEAN Business and Investment Summit, Kuala Lumpur, Malaysia* (20 November, 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/11/20/remarks-president-obama-asean-business-and-investment-summit>, last accessed 09 November 2018.

interests, as encapsulated in its alternative Regional Comprehensive Economic Partnership (“RCEP”) trade agreement.⁹⁵

The evident desire of the US and its allies to find a convergent normative and geopolitical basis for balancing China is perhaps most evident in the revived “Quadrilateral Security Dialogue” or “Quad” whereby four democracies – the US, Japan, India and Australia – have been flagged as a grouping capable of reasserting a unified rules-based order.⁹⁶ Yet, even if such initiatives were to overcome very significant obstacles,⁹⁷ a more confrontational stance toward China, or reinforced regional alliances, promise only to slow or at best set limits to Chinese expansion, but will not return the region to a situation consistent with international law – absent dramatic and likely violent means. Following Pence’s speech, Chinese state-run media responded that hidden behind vocal rhetoric was “a problem of mentality. More often than not, it is those who lack confidence that are engaging in fearmongering”.⁹⁸ Admiral Philip Davidson, commander of US Indo-Pacific Command, declared to the Senate Armed Services Committee in April 2018 that: “In short, China is now capable of controlling the South China Sea in all scenarios short of war with the United States”.⁹⁹ Strengthened and more assertive regional relationships may well yield some real benefits,¹⁰⁰ but they will not dislodge China from its constructed territories, or be sufficient to enforce compliance with international law at any acceptable cost. White explains the implications for a universal system of legal order when the power base of US primacy on which it was previously constructed has eroded. The US has thus:

succeeded in asserting abstruse points of international law, but failed to stop China from building its bases, and the cautious, low-key and legalistic way they were conducted only emphasised how reluctant Washington was to do anything that might risk a confrontation or disrupt the wider relationship with China. The result was therefore quite counterproductive for Washington.¹⁰¹

In light of legal contestation and geopolitical shifts in East and Southeast Asia, legal scholarship cannot cling to the hope that a global equilibrium in international legal order will be restored. New understandings are needed of how a fragmented international rule of law may increasingly look and operate.

⁹⁵ Shaffer, Gregory & Henry Gao, ‘China’s Rise: How It Took on the US at the WTO’ (2018) 1 *University of Illinois Law Review* 115 at 181-182.

⁹⁶ Roy-Chaudhury, Rahul & Kate Sullivan de Estrada, ‘India, the Indo-Pacific and the Quad’ (2018) 60 *Survival* 181 at 181-182.

⁹⁷ Grossman, Derek, ‘The Quad Is Not Enough’, *Foreign Policy* (19 October, 2018) <https://foreignpolicy.com/2018/10/19/to-balance-china-call-vietnam-malaysia-philippines/>, last accessed 09 November 2018.

⁹⁸ Yi, Yang, ‘Commentary: Who Is Making Waves in South China Sea?’, *Xinhua* (19 October, 2018) http://www.xinhuanet.com/english/2018-10/19/c_137544013.htm#0-twi-1-16473-7250227817ecdff034dc9540e6c76667, last accessed 09 November 2018.

⁹⁹ Cited in O’Rourke, Ronald, *China’s Actions in South and East China Seas: Implications for U.S. Interests—Background and Issues for Congress* (Congressional Research Service, 1 August, 2018) at 25.

¹⁰⁰ See Jaishankar, Dhruva, ‘The Real Significance of the Quad’, *The Strategist* (24 October, 2018) <https://www.aspistrategist.org.au/the-real-significance-of-the-quad/>, last accessed 09 November 2018.

¹⁰¹ White (n 81) at 17.

4. The Rise of Geolegal Orders

Realignment of the balance of power in Asia, combined with a distinctive conception of law by its leading rising power, points to fragmentation of the rule of law fixed on a global equilibrium point. That potential transformation requires better theorisation and conceptualisation to comprehend the magnitude of structural change to international legal order. The dominant narrative of a unified international rule of law has a clearly understood structure in which diverse international legal rules and institutions are bound by common sources and secondary rules of interpretation exogenous to the regional distribution of power. The structure of a fragmented rule of law is more complicated in contrast and requires some understanding of the logic of subsystems nested within the larger global system of international law. In Krieger and Nolte's diagnosis, if "universality is an intrinsic feature of "the international rule of law", a shift to regional legal orders will imply significant changes, in particular where such a shift is accompanied by the creation of different legal standards".¹⁰²

This paper accordingly introduces the concept of *geolegal* power, which, analogously to *geopolitical* and *geo-economic* power within their own fields, establishes the logic of competitive territorially bounded actors restructuring international legal order. Historical examples of regional spheres of geolegal influence provide guidance on how to conceive the transformation of the Asian region under Chinese influence. In short, the structure of the rule of law is shifting from that of a single universal order to one of overlapping and competing *geolegal orders*.

a) Geolegal Power

The analytical concept of "geolegal" power captures the idea that not only do powerful states seek to foster geographical spheres of political and economic influence, but that geography has emerged as a significant independent variable explaining how law is being reshaped to wield influence across spatial dimensions. "Geopolitical" power is a foundational and familiar concept explaining competitive global politics, and has been supplemented in more recent years by the increasingly influential concept of "geo-economic" power as a related but distinct global logic. Edward Luttwak is credited with first describing geopolitical principles operating in the economic sphere as "geo-economics", which he defined as "the admixture of the logic of conflict with the methods of commerce – or, as Clausewitz would have written, the logic of war in the grammar of commerce".¹⁰³ Luttwak was observing shifting global power at the end of the Cold War and rising contestation in the economic sphere, which he concluded could not be reduced merely to the logic of commerce. Crucially he saw that "states and blocs of states" continued to dominate international relations and thus as "territorial entities, spatially rather than functionally defined, states cannot follow a commercial logic that would ignore their own boundaries".¹⁰⁴ This conforms to the logic of geopolitics more generally whereby: "Survival for each unit means preserving political independence and retaining control over a specific territory whose limits are defined by an imaginary line called a 'boundary'".¹⁰⁵ Moreover, Luttwak predicted that the trend toward

¹⁰² Krieger & Nolte (n 7) at 17-18.

¹⁰³ Luttwak, Edward N., 'From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce' (1990) 20 *The National Interest* 17 at 19.

¹⁰⁴ *Ibid* at 18.

¹⁰⁵ Spykman, Nicholas J., 'Frontiers, Security, and International Organization' (1942) 32 *Geographical Review* 436.

gloeconomics “will vary greatly” across regional contexts and different power configurations between blocs of states.¹⁰⁶

Geopolitical, gloeconomic and geolegal power each represent a domain of action attached to a unique system of logic (politics, economics, law), but which have been refracted through the competitive logic of geographically bounded interests.¹⁰⁷ Specifically this entails the re-emergence of zero-sum logic, where states seek to maximise gains in their own territories even if this results in sub-optimal outcomes across the system. Huntington made the case for US gloeconomic primacy after the Cold War in these terms by drawing a distinction between economic activity as merely enhancing “well-being”, in which absolute gains matter even if a rival gains more, and economics as a source of power, in which case relative gains are controlling.¹⁰⁸ Thus in the economic domain, gloeconomics redirects states to compete for relative advantage accumulating to a named state or regional bloc, even if that entails foregoing greater absolute gains and thereby accepting a suboptimal outcome when measured “without regard to frontiers”.¹⁰⁹ The recent prominence of geostrategic competition in all its dimensions has revived geopolitics and gloeconomics as more relevant than ever for describing current global trends,¹¹⁰ with that logic now providing important explanatory value to the reshaping of international law.

Competition for power through international law has long been observed in the literature, with the pithily termed “lawfare” becoming popular among US legal scholars and policymakers, and especially those holding more instrumental views about the value of international law.¹¹¹ The lawfare term was popularised in a 2001 essay by Major General Charles Dunlap, as US Deputy Judge Advocate General, and later defined to mean “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective”, including through exploiting US commitment to rule of law values.¹¹² Specifically, Dunlap observed “disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself”.¹¹³ Geolegal power captures these same competitive dynamics, but in the context of institutionalising strategic legal advantages as an important form of power, and using terminology more closely integrated with equivalent forms of power shaping global politics. It therefore encompasses forms of “hegemonial lawmaking”,¹¹⁴ in which interests are advanced within the norms and logic of a legal system.

¹⁰⁶ Luttwak (n 103) at 21.

¹⁰⁷ Vihma, Antto, ‘Gloeconomics Defined and Redefined’ (2018) 23 *Geopolitics* 47 at 48.

¹⁰⁸ Huntington, Samuel P., ‘Why International Primacy Matters’ (1993) 17 *International Security* 68 at 72.

¹⁰⁹ Luttwak (n 103) at 17, original emphasis.

¹¹⁰ Kundnani, Hans, ‘Germany as a Geo-Economic Power’ (2011) 34 *The Washington Quarterly* 31 at 40; Thirwell, Mark, ‘The Return of Geo-Economics: Globalisation and National Security’, *Lowy Institute Perspectives* (September, 2010) at 2.

¹¹¹ See Wittes, Benjamin et.al., ‘About Lawfare: A Brief History of the Term and the Site’, *Lawfare: Hard National Security Choices* (2010) <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>, last accessed 09 November 2018.

¹¹² Dunlap Jr., Charles J., ‘Lawfare Today: A Perspective’ (2008) 3 *Yale Journal of International Affairs* 146 at 146.

¹¹³ Dunlap Jr., Charles J., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Conference on Humanitarian Challenges in Military Intervention, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington D.C., 29 November, 2001) at 6.

¹¹⁴ See Brownlie, Ian, *International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff, 1995) at 49; Byers, Michael, ‘Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change’ (2003) 11 *The Journal of Political Philosophy* 171.

The rise in geolegal competition is evident not only in Chinese policy, but is equally reshaping US responses to the China challenge. Shifting rhetoric from the US government recognises the changed reality in explicitly naming the international legal and multilateral domain as one properly characterised by geolegal competition. The US National Security Strategy 2017 (“NSS”) observes that the “post-war order” of global institutions has been eroded by a complacency in which the US has “stood by while countries exploited the international institutions we helped to build”.¹¹⁵ Naming specifically China and Russia, the NSS continues:

These competitions require the United States to rethink the policies of the past two decades—policies based on the assumption that engagement with rivals and their inclusion in international institutions and global commerce would turn them into benign actors and trustworthy partners. For the most part, this premise turned out to be false.¹¹⁶

Similarly the US National Defense Strategy (“NDS”) sharpens the sense of competition over rulemaking in identifying China and Russia as “undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles and ‘rules of the road’”.¹¹⁷ Moreover the NDS asserts that “across land and sea, the Arctic, outer space, and the digital realm” institutionalised rules must be defended to keep “these common domains open and free”.¹¹⁸ The response is therefore that the US must “lead and engage” in the “competition for influence” within multilateral forums. Key allies have followed this lead in recognising the increasing role of competitive logics in the Asian region and the implications for law as a stabilising force. The Australian Department of Foreign Affairs and Trade (“DFAT”) noted in its 2017 Foreign Affairs White Paper that, whereas “the pursuit of closer economic relations between countries often diluted strategic rivalries”, the perceived return of “geo-economic competition could instead accentuate tension” in the Asian region.¹¹⁹ In light of these trends, DFAT subsequently announced the creation of a section devoted to promoting geoeconomic interests.¹²⁰ The return of competitive logic applies correspondingly to the rise of geolegal interests in the regional order, where the assertion of strategic advantages in the law threatens to transform rules into a source of tension rather than a force for harmonisation.

b) Geolegal Orders

Competition for geolegal power within the context of regional subsystems provides the logic for a restructured rule of law in which new orders of rules and institutions develop around fragmented equilibria. Such a trajectory needs to be distinguished from the more positively viewed emergence of “pluralism” in international law, in which international legal obligations are expressed through diverse regimes and institutions, but remain united by universal sources and secondary rules.¹²¹ Kennedy has defined the emergence of a “pluralist legal system” as one that “accepts a range of

¹¹⁵ The White House, *The National Security Strategy of the United States of America* (The White House, 2017) at 2.

¹¹⁶ *Ibid* at 3.

¹¹⁷ United States Department of Defense, *Summary of the 2018 National Defense Strategy of the United States of America* (United States Department of Defense, 2018) at 2, original emphasis.

¹¹⁸ The White House (n 115) at 40.

¹¹⁹ Australian Department of Foreign Affairs and Trade, *2017 Foreign Policy White Paper* (The Commonwealth of Australia, 2017) at 44.

¹²⁰ Adamson, Frances, *Shaping Australia’s role in Indo-Pacific security in the next decade* (2 October, 2018) <https://dfat.gov.au/news/speeches/Pages/shaping-australias-role-in-indo-pacific-security-in-the-next-decade.aspx>, last accessed 09 November 2018.

¹²¹ See Krieger & Nolte (n 7) at 7.

different and equally legitimate normative choices by national governments and international institutions and tribunals, but it does so within the context of a universal system".¹²² Observing the same trends Burke-White has sought to sketch a picture of a transformed "multi-hub" global legal order comprised of "a number of separate, but flexible, subsystems".¹²³ Essential to pluralism however is the vision of "a common system of international law engaged in a constructive and self-referential dialogue that consciously seeks to maintain the coherence of the overall system".¹²⁴ Here Burke-White distinguishes pluralism from the establishment of "fixed, fragmented regions" in which "the substance of international law would develop separately" and be imposed within each subsystem. He reassures this to be an unlikely scenario,¹²⁵ and yet Southeast Asia under Chinese influence increasingly resembles a rising *geolegal order* that has evolved from, but is no longer normatively coherent with global legal order.

A geolegal order is constituted by more than simple legal power – in the sense of formal declaration and consent by states to a doctrine or constitutional order. Rather it encompasses a geographical domain in which one or more states articulate and make effective distinctive international legal rights and obligations, while excluding other alternatives, through a combination of legal, political and economic power. Salter and Yin identify the EU as the exemplar of a regional power bloc determining the shape of legal order within a defined geographical space.¹²⁶ However, in principle at least, the governing laws of the EU should not constitute a geolegal order internally, since a fundamental purpose of the EU is precisely to overcome the competitive pursuit of absolute gains by territorially defined member states. The geolegal power of the EU is really only that competitive influence it wields as a bloc over legal rights and duties external to its borders. In particular, acceptance of forms of EU "external governance" by potential and candidate countries demonstrates effective geolegal power independent of formal legal obligations.¹²⁷ A functioning geolegal order is one in which a leading state (or bloc of states) is able to declare new or reinterpreted legal rules, which may or may not be coherent with the legal system operating outside its sphere of influence, but which are nevertheless used to constrain states for geographical advantage within the sphere of influence, even absent formal or consensual agreement.

The idea of law developing as fragmented orders has long been the subject of academic consideration, albeit according to alternative terminology and political purpose. Attempts to formalise such dynamics were encompassed by what Carl Schmitt termed the *Großraum*, and the older Monroe doctrine operating in the Americas, which informed his theorising.¹²⁸ President James Monroe declared the eponymous doctrine in 1823 that, thereafter, any attempts by European states to colonise the Western hemisphere would represent "a manifestation of an unfriendly disposition

¹²² Kennedy (n 26) at 977.

¹²³ Burke-White (n 9) at 5 & 24.

¹²⁴ Kennedy (n 26) at 977.

¹²⁵ Burke-White (n 9) at 56.

¹²⁶ Salter & Yin (n 129) at 826.

¹²⁷ Schimmelfennig, Frank & Ulrich Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) 11 *Journal of European Public Policy* 661 at 674-675.

¹²⁸ Elden, Stuart, 'Reading Schmitt Geopolitically: Nomos, Territory and *Großraum*', in *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos*, eds. Stephen Legg (Routledge, 2011) at 93; Meiertöns, Heiko, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press, 2010) at 47-50.

toward the United States”.¹²⁹ Although not a legal rule or regime, the doctrine and its various corollaries shaped the interpretation and application of international law within the sphere of US influence, including expanded rights for US military intervention under regional treaty arrangements.¹³⁰ Using the case of the Monroe Doctrine, Schmitt argued that “historically meaningful imperialism” is achieved not only through military, maritime, economic and financial dominance, but also through the “ability to determine in and of itself the content of political and legal concepts... A nation is conquered first when it acquiesces to a foreign vocabulary, a foreign concept of law, especially international law”.¹³¹ In these geographical spaces powerful “leading” states were sanctioned by the global legal system to direct interpretations and underlying understandings informing substantive meanings of international law.

To be clear, the purpose of revisiting Schmitt here is not to advocate his normative vision for international law. Schmitt was calling for the deliberate restructuring of global legal order into a number of co-equal *Großräume* as a “counterpoise to the dangerous ascent of liberal universalism”.¹³² There is scant evidence to support the supposition that an order of formalised geolegal orders would be any less susceptible to covert forms of imperialism than legal conceptions aspiring to universality.¹³³ Rather the purpose is to draw out the diagnostic value of his analysis for understanding how powerful states, and China in this case, seek to restructure the meaning and operation of law in geographically fragmented ways, and can do so without necessitating replacement of the entire system. It is worth noting that in their book Hathaway and Shapiro identify Schmitt as a villain against the progressive development of international law – entirely justifiably on the basis of his deep implication in providing intellectual cover to the rise of Nazi power.¹³⁴ However, in dismissing Schmitt’s *Großraum* concept as merely a “scrambled” attempt to “justify, or at least describe, Hitler’s new aggressive foreign policy”,¹³⁵ the authors overlook the more fundamental dynamics that incentivise a rising power to seek enclaves of fragmented legality that sustain equilibrium between its effective power and concept of rightful conduct.

Schmitt’s conception of regional orders was, like China’s declarations of legal understandings, a normative attempt to present a concrete alternative to the claimed universalism of US and Western led legal order. For Schmitt: “The *Großraum* remains a sphere of national independence. Only as such is it superior to universalist forms of domination, and consistent with peace”.¹³⁶ It is relevant that Schmitt specifically criticised the Stimson doctrine that is credited by Hathaway and Shapiro for creating universal prohibitions against China’s ability to enjoy territory illegally acquired in the

¹²⁹ Monroe, James, ‘Monroe Doctrine’, *The Avalon Project* (2 December, 1823) http://avalon.law.yale.edu/19th_century/monroe.asp, last accessed 09 November 2018.

¹³⁰ Vagts, Detlev F., ‘Hegemonic International Law’ (2001) 95 *American Journal of International Law* 843 at 846; Meiertöns (n 128) at 25-26.

¹³¹ Schmitt, Carl, *The Nomos of the Earth in the Interational Law of the Jus Publicum Europaeum* (Telos Press Publishing, 2006) at 18-19.

¹³² Hooker, William, *Carl Schmitt’s International Thought: Order and Orientation* (Cambridge University Press, 2009) at 133.

¹³³ Salter, Michael & Yinan Yin, ‘Analysing Regionalism within International Law and Relations: The Shanghai Cooperation Organisation as a Grossraum?’ (2014) 13 *Chinese Journal of International Law* 819 at 832-833.

¹³⁴ See Chapter 10 “Friend and Enemy” in Hathaway & Shapiro (n 29) at 295; Vagts, Detlev F., ‘International Law in the Third Reich’ (1990) 84 *American Journal of International Law* 661.

¹³⁵ Hathaway & Shapiro (n 29) at 329.

¹³⁶ Schmitt (n 131) at 23-24; Koskeniemi, Martti, ‘Carl Schmitt and International Law’, in *The Oxford Handbook of Carl Schmitt*, eds. Jens Meirhenrich & Oliver Simons (Oxford University Press, 2017) at 601.

SCS.¹³⁷ For Schmitt the Stimson doctrine was merely an extension of the Monroe doctrine, in the sense that the US, “ignoring the distinction between the western and eastern hemispheres, assumed the right to decide the justice or injustice of any territorial change anywhere in the world. Such a claim concerned the spatial order of the earth”.¹³⁸ These are objections that foreshadow the motives set out by China in contesting the application of globalised legal claims in its own sphere of influence. Just as the Monroe doctrine directed international law foremost within a sphere of US power, so it (and the Stimson doctrine) lose their force as US power is eclipsed by a competing leading power.

Distorting law as a vehicle for geographical power points to the defect inherent in any geolegal order, which is that they are enclaves of non-universal legal equilibria subject only to the self-judging standards of a leading power.¹³⁹ Historical examples include the Soviet Union’s so called “Brezhnev Doctrine”, as applied as a gloss on international law in 1968 to justify the invasion of what was then Czechoslovakia. In response to claims that Czechoslovakia was exercising a right of self-determination in attempting to withdraw from the socialist commonwealth, the Brezhnev Doctrine claimed that any such purported right “must damage neither socialism in their own country nor the fundamental interests of the other socialist countries nor the world wide workers’ movement”. An international legal right to “socialist self-determination” was therefore recognised within the sphere of Soviet influence, despite being incomprehensible to international law understood outside of that domain.¹⁴⁰ Similarly, expansive uses of the Monroe Doctrine by the US was used as a pretext to engage in the kinds of use of force that the International Court of Justice (ICJ) held to be illegal in the 1986 Nicaragua Decision.¹⁴¹ In each case the Soviet Union and the US were able to articulate fragmented development and interpretation of international legal rules, while leveraging preponderant power to guard claimed special rights against effective sanctions.

The analytical significance of conceptualising such fragmentation in the international rule of law is considered by Salter and Yin, who argue that “international law scholarship has to take seriously how particular and regionally demarcated spatial spheres have increasingly become the *de facto* conceptual basis for such law in its inevitable interaction with the historically changing geopolitics of international relations”.¹⁴² They identify the dynamic by which treating the ideal of sovereign equality as an empirical fact creates blind-spots in legal scholarship:

The United States and, as an emerging superpower, China whose zones of influence transcend their national borders, are not “states” in the same sense that the Vatican or Monaco are “states”. For this reason, Grossraum theory seeks to wake us up from the dream world of abstractions engendered by the traditional “equality of states” doctrine, incapable of recognising the significance and implications of such “extra-territorial” zones of influence

¹³⁷ Hathaway & Shapiro (n 29) at 166-167.

¹³⁸ Schmitt (n 131) at 307.

¹³⁹ Orakhelashvili, Alexander, ‘International Law and Geopolitics: One Object, Conflicting Legitimacies?’ (2008) 39 *Netherlands Yearbook of International Law* 155 at 190.

¹⁴⁰ Cited in Reisman, W. Michael, ‘Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice’ (1988) 13 *Yale Journal of International Law* 171 at 174; See Jorgensen, Malcolm, ‘The Cold War Foundations of Putin’s International Law’, *On Line Opinion* (28 March, 2014) <http://www.onlineopinion.com.au/view.asp?article=16167&page=0>, last accessed 09 November 2018.

¹⁴¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*. I.C.J. Reports 1986, p. 14. See Smith, Gaddis, *The Last Years of the Monroe Doctrine, 1945–1993* (Hill & Wang, 1995) at 201.

¹⁴² Salter & Yin (n 133) at 825.

as spaces of sovereign power irreducible to a single state. Rather legal scholarship must conceptualise the “eminence of a “leading power” as a regional superpower *co-constituting the order of that space*.¹⁴³

Attention can thus be turned to consider precisely how China now operates as a leading power within East and Southeast Asia “co-constituting” that space as a geolegal order.

5. The Chinese Geolegal Order

Rising Chinese geolegal power is already being institutionalised in the AIIB, which is headquartered in Beijing to finance development throughout Asia as a potential competitor to the Bretton Woods institutions, and through the ongoing RCEP negotiations, as an alternative to the TPP.¹⁴⁴ However, although these institutions provide a clear example of Chinese power increasing through regional rules, they do not thereby directly contribute to fragmentation in the rule of law. It is unexceptional to establish distinctive regional rules under treaty regimes that confirm the universality of underlying sources and secondary rules of interpretation.¹⁴⁵ Even where such agreements elect not to integrate universal standards, such as those relating to human rights or labour law, there is no necessary inconsistency with preserving a hierarchy of norms within a single universal system. Of more pressing interest in the present case are examples of formally universal international obligations – globalised multilateral treaties and customary international law – that have developed regional meanings and interpretations no longer reconcilable within the logic of a single universal legal system.

The possible development of a “Chinese Monroe Doctrine” reshaping the Asian legal order has long been debated.¹⁴⁶ Schmitt himself recognised the potential for China to establish itself as the centre of an Asian *Großraum* based on its power and particular ideology.¹⁴⁷ There is certainly no sense of a currently existing order based on the consent of states falling within its reach – the kind of regional social contract with China as suggested by advocates of a Chinese led *Großraum*.¹⁴⁸ Scott, however, concludes that Chinese actions tend to indicate that something akin to the Monroe Doctrine has developed, evident particularly in efforts to define and enforce rules within China’s sphere of influence.¹⁴⁹ Such trends may indicate an eventual attempt by China “to superimpose a regional legal regime of its own liking over that offered by UNCLOS”.¹⁵⁰ Jackson concludes that there is some justification for seeing the development of a “regional exclusion doctrine” despite explicit denials by Chinese officials of the Monroe analogy.¹⁵¹ Of particular note are the 2014 statements by President Xi Jinping that: “In the final analysis, it is for the people of Asia to run the affairs of Asia,

¹⁴³ *Ibid* at 825, original emphasis.

¹⁴⁴ Shaffer & Gao (n 95) at 181-182.

¹⁴⁵ Prost, Mario & Paul Kingsley, ‘Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?’ (2006) 5 *Chinese Journal of International Law* 341 at 343.

¹⁴⁶ Mearsheimer (n 70) at 367. For a review of references see Jackson, Steven F., ‘Does China Have a Monroe Doctrine? Evidence for Regional Exclusion’ (2016) 10 *Strategic Studies Quarterly* 64 at 84, n.2.

¹⁴⁷ Schmitt, Carl, *Theory of the Partisan* (Telos Press, 2007) at 58-59.

¹⁴⁸ See Salter & Yin (n 55); Salter & Yin (n 133).

¹⁴⁹ Scott, Shirley V., ‘China’s Nine-Dash Line, International Law, and the Monroe Doctrine Analogy’ (2016) 30 *China information* 296 at 303.

¹⁵⁰ *Ibid* at 306.

¹⁵¹ Jackson, Steven F., ‘Does China Have a Monroe Doctrine? Evidence for Regional Exclusion’ (2016) 10 *Strategic Studies Quarterly* 64 at 64.

solve the problems of Asia and uphold the security of Asia”.¹⁵² More directly, the state-run China Daily published a 2015 editorial observation that:

Historically, all global powers rose as regional powers before becoming global powers. In the early stages of its rise, the US implemented the Monroe Doctrine and focussed on Latin America; after World War II, the Soviet Union, which was growing in strength, took Europe as the focus. China will be no exception, so it too needs a successful neighbourhood policy first.¹⁵³

Setting aside questions of any formal or articulated doctrine, what is not in doubt is the emergence, as a political fact, of a clear Chinese sphere of influence in the sense of “international formations that contain one nation (the influencer) that commands superior power over others”,¹⁵⁴ and “which limits the independence or freedom of action of states within it”.¹⁵⁵

Among the most important features for understanding the nature of a rising Chinese geolegal order is that the division between global and regional legal orders is itself fragmented among different subject areas. China’s support for the “prevailing system is not a binary one: Beijing rejects some rules, accepts others and seeks to rewrite others still”.¹⁵⁶ It is well documented, for example, that China has emerged as one of the strongest defenders of globalised trading rules, and increasingly so relative to the free-trade scepticism of the Trump administration.¹⁵⁷ The reasons are easy to see where Chinese power is in fact enhanced by the universality of rules rather than the development of regional trading blocs. Thus, a geolegal sphere is not a hermetically sealed system in which a single geographical logic dictates all areas of international law. Rather it is emerging more narrowly in areas of law related to Chinese security and geopolitical interests. Schmitt noted that the traditional US interpretation of the Monroe doctrine was that “juridically it constitutes a zone of self-defence”.¹⁵⁸ In similar terms, China seeks to enhance its geolegal power by restructuring international law to establish a zone of self-defence, and therefore is concerned predominantly with the maritime domain. China’s primary geostrategic interest is to establish uncontested military power within its “near seas”, rather than global hegemony, and is thus applying geolegal power to shift states towards acquiescence to a regional maritime order. The primary objective of establishing “regional hegemony in east and south-east Asia”¹⁵⁹ does not require a rules-based order recognised as legitimate or effective beyond that geographical domain.

The prevailing assumption of universality in the maritime legal order is encapsulated in the explicit assertion by Western states and allies that international law is legitimate to the extent that it purposively promotes free and open maritime access. Advocates seek to ground the legitimacy of the status quo in historical declarations and practice, including the call in the 1941 *Atlantic Charter*

¹⁵² Cited in *ibid* at 74.

¹⁵³ Cited in *ibid* at 75.

¹⁵⁴ Etzioni, Amitai, ‘Spheres of Influence: A Reconceptualization’ (2015) 39 *Fletcher Forum of World Affairs* 117 at 117.

¹⁵⁵ Keal, Paul, ‘Contemporary Understanding About Spheres of Influence’ (1983) 9 *Review of International Studies* 155 at 156.

¹⁵⁶ Fontaine, Richard & Mira Rapp-Hooper, ‘How China Sees World Order’, *The National Interest* (20 April, 2016) <http://nationalinterest.org/feature/how-china-sees-world-order-15846>, last accessed 09 November 2018.

¹⁵⁷ Shaffer & Gao (n 95) at 178.

¹⁵⁸ Schmitt (n 131) at 281.

¹⁵⁹ See Layne (n 73) at 95.

intended as a “blueprint for the new international order”,¹⁶⁰ for a peace that “should enable all men to traverse the high seas and oceans without hindrance”.¹⁶¹ This understanding of the regional order persists in contemporary debates in which the US and its allies advocate for a “free and open Indo-Pacific region” defined by “freedom for all nations, large and small, to transit international airspace, international waters”.¹⁶² The link between the stated principles and international law was made explicit by US Secretary of Defense James Mattis in describing “a peaceful, prosperous and freer Asia with a free and open regional order defined by the rule of law”, and a world where “we settle things by international rule of law”.¹⁶³ Of particular significance in Mattis’ words is the emphasis on a unified regional order comprised of “a constellation of nations, each in its own bright star, *satellites to none*”.¹⁶⁴ Former Australian Prime Minister Malcolm Turnbull more explicitly warned that, without the “US-anchored rules-based order”, China may “seek to impose a latter day Monroe Doctrine...in order to dominate the region”.¹⁶⁵

In contrast to the “free and open” conception of maritime order is a Chinese vision structured around robust forms of sovereignty, in the sense of non-intervention in its self-referentially defined internal or external affairs. This understanding informs defensive Chinese responses to any external criticism of its territorial claims and control of claimed maritime zones, which it treats as forms of intervention contrary to its rightful legal entitlements. China explicitly commits to UNCLOS in terms that the “provisions of this universal treaty are applied consistently, in such a manner that does not impair rights and legitimate interests of States Parties and does not compromise the integrity of the legal regime”.¹⁶⁶ Yet the actual claims made by China remain entirely discordant with the understandings of the vast majority of non-Chinese international lawyers, who are engaged in legal argumentation against what appear as excessive maritime claims. Participants in this legal debate are thus condemned to talk past one another as they look to incompatible conceptions of rules and sources.

a) Emerging Rules of the Geolegal Order

Contours of the rising Chinese geolegal order are demonstrated especially in various degrees of fragmentation within three areas central to regional maritime order: freedom of navigation rights in maritime zones; the authority of third-party and judicial determination of maritime claims; and, the legal basis for territorial claims under UNCLOS. What classes these as examples of fragmentation in the rule of law is that they indicate, or even already confirm, the carving out of a regional order distinct from a unified system with common reference points for resolution. The

¹⁶⁰ Sands, Philippe, ‘Lawless World: International Law after September 11, 2001 and Iraq’ (2005) 6 *Melbourne Journal of International Law* 437 at 439; Ikenberry (n 66) at 160.

¹⁶¹ *The Atlantic Charter* 1941.

¹⁶² Mattis, James N., ‘Remarks by Secretary Mattis at Plenary Session of the 2018 Shangri-La Dialogue’, U.S. Department of State (2 June, 2018) <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1538599/remarks-by-secretary-mattis-at-plenary-session-of-the-2018-shangri-la-dialogue/>, last accessed 09 November 2018.

¹⁶³ Mattis, James N., *Press Gaggle by Secretary Mattis En Route to Indonesia* (22 January, 2018) <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1420752/press-gaggle-by-secretary-mattis-en-route-to-indonesia/>, last accessed 09 November 2018.

¹⁶⁴ *Ibid*, emphasis added.

¹⁶⁵ Turnbull, Malcolm, *Keynote address at the 16th IISS Asia Security Summit, Shangri-La Dialogue* (3 June, 2017) <https://www.malcolmtturnbull.com.au/media/keynote-address-at-the-16th-iiss-asia-security-summit-shangri-la-dialogue>, last accessed 09 November 2018.

¹⁶⁶ Ministry of Foreign Affairs of the Russian Federation (n 40).

emerging maritime order is constructed in the language and symbols of international law and is increasingly effective within the terms of China's sphere of influence. Yet it is disconnected from a system of universal norms and resembles a sphere of non-law when measured by legal standards external to the region.

aa) Freedom of Navigation

Understanding the dynamics of geolegal contestation emphasises that even ordinary legal contests, over interpretation of rules and doctrines, may mask more fundamental fracturing in the rule of law. The US and China are in agreement that UNCLOS and the customary law it codifies protect rights of navigation and overflight by ships and aircraft of all nations in the Exclusive Economic Zone (EEZ) – the area extending up to 200 nautical miles from a coastal state's shore or offshore islands, and in the 12 nautical mile territorial sea.¹⁶⁷ However the states are engaged in a much-publicised doctrinal debate over the proper interpretation of these rules, and what rights apply to certain classes of military operations and craft.¹⁶⁸ The US argues that Article 87 of UNCLOS provides for “freedom of navigation [and] overflight” in the high seas, and that by operation of Article 58 these rights are extended to the EEZ combined with “other internationally lawful uses of the sea related to these freedoms” – including military activities. Military vessels are likewise permitted to transit through the territorial sea without seeking prior authorisation, provided they do so consistent with “innocent passage”, in the sense of avoiding military activities.¹⁶⁹ In contrast China has argued, along with other objections, that because UNCLOS does not expressly permit military activities in the EEZ they therefore require consent of the coastal state.¹⁷⁰ Moreover military activities undertaken in the EEZ are said to violate Article 301 of UNCLOS prohibiting the “threat or use of force against the territorial integrity or political independence of any State” and the rule under Article 88 that “the high seas shall be reserved for peaceful purposes”. In addition, military ships must request permission to enter the territorial sea, irrespective of claimed compliance with rules of innocent passage.¹⁷¹

On its face this legal debate demonstrates an ordinary doctrinal disagreement between two states over the proper interpretation of an ambiguous legal norm. In that spirit Raymond cites this case as evidence that “rising states are more likely to seek changes around the margins rather than entirely new systems of rules”.¹⁷² Yet, as Roberts persuasively argues, although “these debates are styled as concerning international law, they reflect much deeper national and security interests of both states”.¹⁷³ By way of illustration, in 1939 the US led *Declaration of Panamá* declared that waters up to 300 nautical miles off the coasts of the American continent were thereafter “free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act

¹⁶⁷ UNCLOS, Art. 57.

¹⁶⁸ Houck, James W. & Nicole M. Anderson, ‘The United States, China, and Freedom of Navigation in the South China Sea’ (2014) 441 *Washington University Global Studies Law Review* at 443-449.

¹⁶⁹ Klein, Adam & Mira Rapp-Hooper, ‘Freedom of Navigation Operations in the South China Sea: What to Watch For’, *Lawfare* (23 October, 2015) <https://www.lawfareblog.com/freedom-navigation-operations-south-china-sea-what-watch>, last accessed 09 November 2018.

¹⁷⁰ Pedrozo, Raul, ‘Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone’ (2010) 9 *Chinese Journal of International Law* 9 at 29.

¹⁷¹ Zhang, Haiwen, ‘Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?’ (2010) 9 *Chinese Journal of International Law* 31 at 44-45.

¹⁷² Raymond, Greg, ‘Fragile and Fracturing or Evolving and Adaptive?’, in *The Centre of Gravity Series: Prospects for the Rules-Based Global Order*, eds. Greg Raymond et al. (June 2017) at 6.

¹⁷³ Roberts (n 27) at 316.

be attempted or made from land, sea or air”.¹⁷⁴ In circumstances where the US reserved for itself the power to define hostile acts, Schmitt concluded that the Monroe Doctrine had been transformed from one concerned with “the firm land of the Western Hemisphere, whereas the world’s oceans were presupposed to be free in the 19th century sense of the freedom of the sea. Now, however, the borders of America were drawn also on the sea. That was a new form of sea-appropriation, which destroyed earlier concepts”.¹⁷⁵ Although China’s claims do not rely upon any new legal instrument, the restrictive interpretation of UNCLOS draws back to an understanding of freedom of the seas and national sovereignty that cannot be reconciled with that of its global counterparts. Fractured foundations of law equally manifest in China’s unilateral declaration of an Air Defence Identification Zone over the East China Sea, and the serious concerns that an equivalent zone may be declared over the SCS, neither of which have a clear basis in a common system of international law.¹⁷⁶ The more sanguine view that China does not “wish to invent an entirely new system of order or a correspondingly new set of rules”¹⁷⁷ fails to recognise that ostensibly doctrinal disparities may ultimately stabilise as a new regional legal equilibrium nested within but distinct from the existing global order.

bb) Third-Party and Judicial Settlement

A second area where the international rule of law shows signs of fracturing is in respect of third-party and judicial settlement of maritime disputes. The principle that an international tribunal or court with properly exercised jurisdiction binds parties is critical to the formal universality and coherence of international law. Disruption to the political and legal foundations of that principle in Southeast Asia would provide compelling evidence of fragmentation. On 22 January 2013 the Philippines initiated its SCS case against China regarding maritime rights and entitlements, the status of certain geographic features, and the lawfulness of certain Chinese actions. China had made an earlier (and valid) 2006 reservation under UNCLOS excluding maritime boundary delimitation from dispute settlement procedures provided under the treaty. However, Part XV of UNCLOS, under which both countries were bound as members, sets out compulsory dispute settlement procedures for parties in respect of any dispute “concerning the *interpretation or application* of this Convention”.¹⁷⁸ The Philippines thus submitted that its dispute related to the interpretation of UNCLOS in relation to the status of certain maritime features, and not to substantive delimitation of maritime boundaries generated by those features.¹⁷⁹ China responded by refusing to partake in either the jurisdictional or merits stages of the proceedings, and argued in a “Position Paper” that: “The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention”; China and the Philippines previously agreed, through bilateral and multilateral

¹⁷⁴ ‘Declaration of Panamá’, *Foreign Relations of the United States Diplomatic Papers*, 740.00111 A.R./508 (3 October, 1939) <https://history.state.gov/historicaldocuments/frus1939v05/d60>, last accessed 09 November 2018.

¹⁷⁵ Schmitt (n 131) at 283.

¹⁷⁶ Lamont, Christopher, ‘Conflict in the Skies: The Law of Air Defense Identification Zones’ (2014) 39 *Air & Space Law* 187 at 195.

¹⁷⁷ Raymond (n 174) at 6.

¹⁷⁸ Emphasis added.

¹⁷⁹ See *The South China Sea Arbitration (the Republic of Philippines v. The People’s Republic of China)*, *Jurisdiction and Admissibility* (29 October 2015) 2013–19 PCA at [100].

instruments, to settle disputes via negotiation; and, the dispute constituted an integral part of maritime delimitation as excluded by China's 2006 reservation.¹⁸⁰

The PCA ruled on 29 October 2015 that it had jurisdiction to hear the case, in part because the substantive questions posed by the Philippines related to the status of disputed features, and not to delimiting any maritime boundaries they generated.¹⁸¹ The tribunal noted that, under Article 9 of Annex VII, the: "[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings".¹⁸² The PCA thus declared that, "China remains a Party to these proceedings, with the ensuing rights and obligations, including that it will be bound by any decision of the Tribunal".¹⁸³ Much has been written on the substance of the jurisdictional decision, including forceful criticisms that it was decided incorrectly and thus the later decision on the merits should never have taken place.¹⁸⁴ Yet, what is significant and clear for present purposes is that, as between these positions, it unquestionably fell to the PCA to determine its own jurisdiction, with any subsequent decision rendered binding in law.

On the basis of its own determination, China declared that its "rejection of and non-participation in the present arbitration stand on solid ground in international law".¹⁸⁵ This position is consistent with underlying conceptions of an international legal order that preserves robust sovereign prerogative, which was expressed in the 2015 declaration as the imperative that "all dispute settlement means and mechanisms are based on consent and used in good faith".¹⁸⁶ The Position Paper asserted that: "By virtue of the principle of sovereignty, parties to a dispute may choose the means of settlement of their own accord". In this case: "China has always maintained that they should be peacefully resolved through negotiations between the countries directly concerned". This self-judging interpretation was therefore "to the exclusion of any other means", including the UNCLOS regime, such that "the Philippines is debarred from unilaterally initiating compulsory arbitration".¹⁸⁷ Such an interpretation is almost impossible to reconcile with established understandings comprising a universal system of legal rights and duties. It does however accord with the fragmented development of the legal system into internally coherent but mutually incompatible legal orders.

Chinese legal positions on the SCS Arbitration Award were comprehensively set forth in May 2018 in a 500 page "Critical Study" for the *Chinese Journal of International Law*.¹⁸⁸ The Critical Study was produced by the joint efforts of some 70 Chinese scholars and is listed as having been authored by the government affiliated Chinese Society of International Law. It is clear from the tone of the work

¹⁸⁰ Ministry of Foreign Affairs of the People's Republic of China, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines', *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December, 2014) http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml, last accessed 09 November 2018.

¹⁸¹ See *The South China Sea Arbitration (the Republic of Philippines v. The People's Republic of China)*, *Jurisdiction and Admissibility* (29 October 2015) 2013–19 PCA.

¹⁸² *Ibid* at [11].

¹⁸³ *Ibid* at [114].

¹⁸⁴ See Klein, Natalie, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions' (2016) 15 *Chinese Journal of International Law* 403.

¹⁸⁵ Ministry of Foreign Affairs of the People's Republic of China (n 182).

¹⁸⁶ Ministry of Foreign Affairs of the Russian Federation (n 40).

¹⁸⁷ Ministry of Foreign Affairs of the People's Republic of China, (n 182).

¹⁸⁸ See Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17 *Chinese Society of International Law* 207.

that the scholars, like the Chinese Government itself, viewed the entire PCA process through a geolegal lens. Rather than recognising the forum as upholding universal standards, the award was said to “threaten to undermine the international maritime legal order”,¹⁸⁹ with the composition of the tribunal itself criticised from the beginning as corrupted by China’s geolegal competitors.¹⁹⁰ A subsequent editorial defence of the Critical Study’s academic integrity did not deny the Chinese Government connections, but rather emphasised that, since the Chinese Society of International Law “is particularly concerned with the issues”, the “status of the author in this instance may indeed be a plus in the endeavor to fully understand the awards”.¹⁹¹

On the jurisdictional issue specifically however, on which the editorial defence remained silent, Douglas Guilfoyle has rightfully pointed out that a:

blow to any semblance of academic neutrality in the book-length Critical Study is the one issue it studiously chooses not to address: China’s refusal to participate in proceedings. The Critical Study, while challenging almost every other paragraph of the award is entirely silent as to the Tribunal’s plainly correct finding that China – even if it disputed jurisdiction – was bound by its voluntary membership of UNCLOS to participate in proceedings.¹⁹²

What is significant about China’s declared legal position, and the refusal of relevant scholars to even acknowledge the disruption being brought to third-party and judicial settlement, is that it goes hand in hand with shifting foundations in the regional legal order. Going forward it is the 2014 Position Paper and not the PCA decision on jurisdiction that now more accurately describes the effective rules operating in the region on questions of jurisdiction. Jackson observes that Chinese insistence that international law allows them to resolve territorial claims in the SCS exclusively through bilateral negotiations amounts to “seeking to set up the rules of the game in Southeast Asia, just as... [the Monroe Doctrine] unilaterally asserted the rules of the Western Hemisphere”.¹⁹³ Any shift toward informalisation of dispute settlement will likely increase “hegemonic governance, decrease of legal accountability, and a lack of legitimation through democratic procedures”.¹⁹⁴ The competing jurisdictional arguments cannot be reconciled by appealing to a higher common legal norm or authoritative interpretation of sources. Rather, for future assertions of arbitral or judicial jurisdiction, there is a largely stable equilibrium of legal claims and power in China’s sphere of influence that exists side by side with the operation of international law in other regions of the globe.

cc) Territorial Claims under UNCLOS

The third and most striking maritime issue in which China is constructing a fragmented geolegal order is in its expansive territorial claims in the SCS. These are well known, and include various

¹⁸⁹ *Ibid* at [5].

¹⁹⁰ Allen-Ebrahimian, Bethany, ‘Beijing: Japanese Judge Means South China Sea Tribunal Is Biased’, *Foreign Policy* (21 June, 2016) <https://foreignpolicy.com/2016/06/21/beijing-japanese-judge-means-south-china-sea-tribunal-is-biased-china-philippines-maritime-claims/>, last accessed 09 November 2018.

¹⁹¹ Yee, Sienho, ‘Attention to the Chinese Society’s Critical Study and Our Standing Invitation to Respond’ (2018) 17 *Chinese Journal of International Law* 757 at 759, last accessed 09 November 2018.

¹⁹² Guilfoyle, Douglas, ‘A New Twist in the South China Sea Arbitration: The Chinese Society of International Law’s Critical Study’, *EJIL: Talk!* (25 May, 2018) <https://www.ejiltalk.org/a-new-twist-in-the-south-china-sea-arbitration-the-chinese-society-of-international-laws-critical-study/>, last accessed 09 November 2018.

¹⁹³ Jackson (n 153) at 77.

¹⁹⁴ Krieger & Nolte (n 7) at 12.

disputed islands, reefs, banks, and other features, including the Spratly Islands, Paracel Islands, and various boundaries in the Gulf of Tonkin.¹⁹⁵ Entitlements are defended in the language of international law through claims that variously rely on so-called “historical rights”,¹⁹⁶ and China’s asserted status as an archipelagic state.¹⁹⁷ The Chinese Foreign Ministry confirms that UNCLOS does “not restrain or deny a country’s right which is formed in history and abidingly upheld”.¹⁹⁸ In these cases China’s self-judging definition of the reach of its own sovereignty has manifested in sweeping claims, such as the 1947 “nine-dash line” by which China would effectively be granted preponderance over almost the entirety of the SCS. There is no need to recount and interrogate China’s detailed legal claims here, which are most recently and comprehensively set forth in the 2018 Critical Study.¹⁹⁹

What is important to note for present purposes is that, from the perspective of black letter legal analysis, the succession of arguments relied on by China have co-opted and mimicked known doctrines of law, and thus maintain a form of dialogue between the regional and global system of law. Yet the actual Chinese territorial legal arguments are impossible to reconcile with any external understandings of the relevant law. In the 2016 PCA case it was held that:

China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.²⁰⁰

Guilfoyle’s review of the 2018 Critical Study is especially direct, and responds to the customary law proposition that China has historically “made no distinction between islands and sea areas”²⁰¹ as follows:

The basic problem in putting forward a special Chinese theory or practice of historic rights over an integrated ocean space is that such a theory *cannot unilaterally bind other States*. This is simply not how the law of the sea – or, indeed, international law generally – works.²⁰²

Guilfoyle concludes that “China plainly wants to write a special set of rules on the law of the sea which apply only in its back yard and many in the Chinese academy appear determined to support this effort”. In short, China has reverted to a self-judging assessment of its own archipelagic status that does not accord with any ordinary or globally accepted understanding of rights afforded under UNCLOS. The kind of arguments being set forth by China in these cases are so incomprehensible to

¹⁹⁵ Council on Foreign Relations, *China’s Maritime Disputes* (2018) <https://www.cfr.org/interactives/chinas-maritime-disputes>, last accessed 09 November 2018.

¹⁹⁶ See Gao, Zhiguo & Bing Bing Jia, ‘The Nine-Dash Line in the South China Sea: History, Status, and Implications’ (2013) 107 *The American Journal of International Law* 98.

¹⁹⁷ Ku, Julian & Chris Mirasola, ‘The South China Sea and China’s “Four Sha” Claim: New Legal Theory, Same Bad Argument’, *Lawfare* (25 September, 2017) <https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument>, last accessed 09 November 2018.

¹⁹⁸ Jiang, Yu, *Foreign Ministry Spokesperson Jiang Yu’s Regular Press Conference* (15 September, 2011) <http://www.china-botschaft.de/det/fyrth/t860126.htm>, last accessed 09 November 2018.

¹⁹⁹ Chinese Society of International Law (n 190).

²⁰⁰ *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award (12 July, 2016) 2013-19 PCA at [278].

²⁰¹ Chinese Society of International Law (n 190) at [523].

²⁰² Guilfoyle (n 194).

external understanding of sources and doctrines that they resemble what Modirzadeh terms “Folk International Law”: “a law-like discourse that relies on a confusing and soft admixture of [principles] to frame operations that do not, ultimately, seem bound by international law”.²⁰³ Inability of orthodox legal scholarship to comprehend Chinese positions as anything other than “either flawed at a very basic legal level or which strain credulity”²⁰⁴ speaks to the fracturing of the rule of law such that there is no longer a common foundation on which positions can be reconciled within the logic of a single system.

b) Toward Equilibrium in the Geolegal Order

The contest over freedom of navigation, jurisdictional questions and territorial claims does not yet constitute a stable Chinese geolegal order, with conspicuous resistance by the US and a limited number of allies – including foremost through “Freedom of Navigation Operations (‘FONOPs’).²⁰⁵ The practice of sailing military vessels within 12 nautical miles in contravention of China’s claimed special territorial rights are, for the time being, a tangible reminder that the preferred Chinese order has not yet crystallised in the region. Yet as Chinese power increases, there are signs of fracturing in the resolve of Western allies. To date countries such as Australia have ruled out joining US forces in the FONOPs in light of their exposure to China’s regional power, and have instead restricted their contributions to less confrontational measures or words of support,²⁰⁶ while India and Malaysia have even provided support for Chinese interpretation of navigational rights.²⁰⁷ Such examples of hedging “underscore the gap” between preferences about order and “willingness to take steps to defend that order”.²⁰⁸ The dispute thus points toward a possible trajectory of more consequential fracturing of regional legal order as power continues to rebalance, and Chinese legal claims become both more assertive and less effectively contested.

In 2012, prior to the PCA ruling, the Philippines deployed navel assets to protect the disputed Scarborough Shoal, which provoked Chinese economic retaliation – ranging from tourism bans to leaving tonnes of banana imports rotting at port.²⁰⁹ After its success in the 2016 arbitral ruling, the Philippines has now effectively set aside the award according to recognition that, in its region, a universal understanding of international law no longer effectively “prescribes the interaction of nation-states and the defence of core interests”.²¹⁰ A so-called “modus vivendi” in the form of a

²⁰³ Modirzadeh, Naz K., ‘Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance’ (2014) 5 *Harvard National Security Journal* 225 at 225.

²⁰⁴ Guilfoyle (n 194).

²⁰⁵ Panda, Ankit, ‘Pentagon: Chinese Warship in ‘Unsafe’ Encounter with Us Destroyer During Freedom of Navigation Operation’, *The Diplomat* (2 October, 2018) <https://thediplomat.com/2018/10/pentagon-chinese-warship-in-unsafe-encounter-with-us-destroyer-during-freedom-of-navigation-operation/>, last accessed 09 November 2018.

²⁰⁶ Bisley & Schreer (n 22) at 314-315.

²⁰⁷ *Ibid* at 316; Burke-White (n 9) at 56.

²⁰⁸ Bisley & Schreer (n 22) at 316.

²⁰⁹ Ratner, Ely, ‘Learning the Lessons of Scarborough Reef’, *The National Interest* (21 November, 2013) <http://nationalinterest.org/commentary/learning-the-lessons-scarborough-reef-9442?page=show>, last accessed 09 November 2018.

²¹⁰ Rabena, Aaron Jed, ‘Duterte’s China Policy: Beyond Law’, *The Interpreter* (28 June, 2018) <https://www.lowyinstitute.org/the-interpreter/duterte-china-policy-beyond-law>, last accessed 09 November 2018.

joint development agreement with China may well yield material benefits to the Philippines,²¹¹ but from a legal perspective these constitute mere political concessions by China while leaving its legal claims undisturbed. Likewise, in 2018 Vietnam was prevented by China from drilling for oil in its own presumptive EEZ without any US or international response: “U.S. rhetoric rings particularly hollow when it trumpets the values of a rules-based order and then turns a blind eye while China bullies its neighbors”.²¹² Most conspicuously, the Association of Southeast Asian Nations (“ASEAN”) has now dropped criticisms of “land reclamation and militarization” long included in official statements, signalling a degree of acquiescence to the status quo.²¹³

Since 2002, hopes for managing tensions in the SCS have lain in the prospect of an ASEAN “Code of Conduct”, to stabilise competing claims pending substantive resolution. China has always agreed in principle to this initiative, but has successfully opposed granting treaty or otherwise legally binding status to any such code, which would not in any case apply to settlement of territorial or maritime delimitation disputes.²¹⁴ Moreover, China has progressively altered the very subject matter of a code by acquiring de facto possession of constructed islands that did not even exist 16 years ago, but which now alter parties relative bargaining positions.²¹⁵ Given the expressed goal to “further promote peace and stability in the region”,²¹⁶ China can increasingly make the case that a freeze on the status quo will ultimately be the approach most consistent with underlying objectives. China and ASEAN most recently agreed to a single draft negotiating text in August 2018, but in circumstances where the final text is more likely to bolster international law as a source rather than constraint on Chinese power.²¹⁷ Through its protracted strategy, China has steadily enhanced conditions for a code that augments its geolegal power to fragment the interpretation and operation of substantive legal rights. It has amply demonstrated this intent when relying on existing joint declarations with ASEAN to recast the Philippines’ exercise of jurisdictional rights before the PCA as instead a “breach” of legal obligations.²¹⁸

²¹¹ Pitlo III, Lucio Blanco, ‘Duterte’s Sea Game: Arbitration as a Means to an End’, *The Asia Maritime Transparency Initiative* (27 August, 2018) <<https://amti.csis.org/dutertes-sea-game/>>; Parameswaran, Prashanth, ‘Beware the New China-Philippines South China Sea Deal’, *The Diplomat* (17 August, 2017) <https://thediplomat.com/2017/08/beware-the-new-china-philippines-south-china-sea-deal/>, last accessed 09 November 2018.

²¹² Ford, Lindsey, ‘Promise Vs. Experience: How to Fix the ‘Free & Open Indo-Pacific’, *War on the Rocks* (10 April, 2018) <https://warontherocks.com/2018/04/promise-vs-experience-how-to-fix-the-free-open-indo-pacific/>, last accessed 09 November 2018.

²¹³ See Murdoch, Lindsay, ‘ASEAN ‘Framework’ on South China Sea Tiptoes around the Real Issue’, *Sydney Morning Herald* (7 August, 2017) <https://www.smh.com.au/world/asean-framework-on-south-china-sea-tiptoes-around-the-real-issue-20170807-gxqoap.html>, last accessed 09 November 2018.

²¹⁴ See Thayer, Carl, *ASEAN China: Framework of a COC* (6 August, 2017) <https://www.scribd.com/document/355938565/Thayer-ASEAN-China-Framework-of-a-COC-August-6-2017>, last accessed 09 November 2018.

²¹⁵ O’Rourke, Ronald, *China’s Actions in South and East China Seas: Implications for U.S. Interests—Background and Issues for Congress* (Congressional Research Service, 1 August, 2018) at 71-73.

²¹⁶ Thayer, Carl, ‘A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct’, *The Diplomat* (3 August, 2018) <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>, last accessed 09 November 2018.

²¹⁷ Thu, Huong Le, ‘The Dangerous Quest for a Code of Conduct in the South China Sea’, *Asia Maritime Transparency Initiative* (13 July, 2018) <https://amti.csis.org/the-dangerous-quest-for-a-code-of-conduct-in-the-south-china-sea/>, last accessed 09 November 2018.

²¹⁸ Ministry of Foreign Affairs of the People’s Republic of China, *Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 October, 2015) https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml, last accessed 09 November 2018.

In the actual contest to define and defend the regional rules-based order, there is no reasonable prospect of returning to the situation envisioned by a universal system of international law. The submission of the Philippines speaks to a broader dynamic in China's favour, which is the unwillingness of individual states to risk isolation when openly defying Beijing. This is a classic prisoner's dilemma, in which China isolates opponents until they submit to its rules whether legal or not. The core problem for the arbitral ruling, and the broader legal system it represents, is that they are now sufficiently detached from regional geopolitical power that China can openly assert alternative principles for allocating rights and resources that it designates as "law", and that these facilitate effective use of political power. As between the pronouncements of the PCA and the CPC,²¹⁹ the latter's account is increasingly the more accurate description of effective maritime rules operating in Southeast Asia.

6. Conclusion

The confluence of shifting regional power balances and competing conceptions of global order are driving decline in an international rule of law fixed on universal norms. Subjects of the rising Chinese geolegal order are instead increasingly incentivised to undertake decisions by reference to the "system" of rules and institutions called international law by China. That system cannot yet, and should not, be ordained with the status of law so long as it remains a system of self-judging edicts issued by China, and its subjects obey solely by virtue of political and economic self-interest. Yet, over the long term it has been the fate of effective rules-based orders for conspicuous applications of raw power to recede from view, and to be transformed into systems of normative obligation shaped by a leading global power.²²⁰ In this way the transformation of Southeast Asia according to the logic of Chinese geolegal power has all the elements of an embryonic system of law properly so-called.

Fragmentation occurring at the foundational level means that alternate legal claims assuming the universality of their own logic will increasingly talk past each other. Moreover, the future does not entail any reasonable prospect of reconciliation between competing conceptions of the international rule of law. Rather than seeking universality in global order, the current US president appears to reverse the previous administration's declaration that the "era of the Monroe Doctrine is over",²²¹ and now explicitly talks of reasserting the doctrine in its own hemisphere.²²² The gulf between alternative visions combined with shifts in power means there is neither sufficient political will nor means for key states shaping the legal system to seek or enforce reconciliation. Rather, the assumed equilibrium between power and purpose in the post-Cold War global order is fracturing in favour of a new nascent geolegal equilibrium in Southeast Asia, with the door opened for additional such equilibria to develop around other regional balances of power.

The compelling rationale for scholarly and policy accounts to recognise these dynamics is that there is now a fundamental mismatch between political dynamics on the ground as they are

²¹⁹ Communist Party of China.

²²⁰ See Grewe, Wilhelm G., *The Epochs of International Law; Translated and Revised by Michael Byers* (Walter de Gruyter, 2000).

²²¹ Kerry, John, 'Remarks on U.S. Policy in the Western Hemisphere, Organization of American States, Washington, DC', (18 November, 2013) <https://2009-2017.state.gov/secretary/remarks/2013/11/217680.htm>.

²²² Trump (n 53). See in particular: Bolton, John R., *Remarks by National Security Advisor Ambassador John R. Bolton on the Administration's Policies in Latin America*, Miami Dade College, Miami, FL (2 November, 2018) <https://www.whitehouse.gov/briefings-statements/remarks-national-security-advisor-ambassador-john-r-bolton-administrations-policies-latin-america/>.

relevant to international law and the strategic responses of international lawyers. Hathaway, Shapiro and Ikenberry's analysis of stability through universality overlooks the more complex dynamics by which China challenges the international rule of law. Installing a new "Chinese universality" in the rule of law is not a necessary condition for restructuring global order when merely disrupting presumptions of universality is a sufficient condition for doing so. There will be neither a "dramatic moment" of upheaval as described by Ikenberry, nor an attempt to "revolutionize or overthrow" the global order,²²³ and yet it does not follow that China accepts the "fundamentals of the system".²²⁴ Rather transformation of law will come through concerted application of geolegal power to break away limited but consequential parts of the system. It is a pyrrhic victory to argue that, although "China clearly wishes to establish an exception" to UNCLOS in the SCS, in these limited aims, "they will not pose a threat to the fundamental integrity of the international system".²²⁵ To fragment off pieces of global legal order in the most consequential security and geopolitical domains is precisely to erode the integrity of the international rule of law. Boyle describes the likely process by which existing global institutions "will remain intact, but their structures and policies will be retrofitted to suit the interests of newly dominant illiberal states". Moreover, "key concepts of the liberal order – such as self-determination, self-defence, democracy promotion and the 'responsibility to protect', among others – will be contested or reimagined by illiberal states with different interests".²²⁶

The reversion to geolegalism is cause to reappraise, but not necessarily to abandon the role of "universality" rhetoric and aspirations in law. The ideal of universality invariably entails some form of legal and normative fiction to mask hegemonic power, and yet it is useful to recall Koskenniemi's observation that universality "also operates as a polemical vocabulary that allows the indictment of those in power; without its idealism we could not even begin to distinguish between false and genuine universality".²²⁷ Common to the Monroe and Brezhnev doctrines was a core of imperialistic self-judging to determine the meaning and parameters of international law. So too is self-judging being institutionalised in the developing Chinese geolegal order. In 2014 Chinese Foreign Minister Wang Yi declared that:

China ardently hopes for the rule of law in international relations against hegemony and power politics, and rules-based equity and justice, and hopes that the humiliation and sufferings it was subjected to will not happen to others.²²⁸

Where the international rule of law is envisioned at its heart as a constraint on the absolute and arbitrary prerogatives of great powers, then a Chinese conception must be able to point to examples of China accepting restraints on the exercise of its own power and desire according to pre-determined rules and institutions. The logic and trajectory of the nascent order has amply

²²³ Nathan, Andrew J., 'China's Rise and International Regimes: Does China Seek to Overthrow Global Norms?', in *China in the Era of Xi Jinping*, eds. Robert S. Ross & Jo Inge Bekkevold (Georgetown University Press, 2016) at 189.

²²⁴ Rudolf, Moritz, 'China's Shadow World Order', in *Connectivity Wars*, eds. Mark Leonard (European Council on Foreign Relations, 2016) at 89.

²²⁵ Raymond, Greg V., 'Advocating the Rules-Based Order in an Era of Multipolarity' (2018) *Australian Journal of International Affairs* 1 at 5-6, citing Mazarr, Michael J., Timothy R. Heath & Astrid Stuth Cevallos, *China and the International Order* (Rand Corporation, 2018) at xii.

²²⁶ Boyle, Michael J., 'The Coming Illiberal Order' (2016) 58 *Survival* 35 at 40.

²²⁷ Koskenniemi (n 136) at 608.

²²⁸ Cited in Chesterman (n 65) at 953.

enabled expansive Chinese strategic interests consistent with rule *by law*,²²⁹ but demonstrates no acceptance of equivalent constraints. The project of a universal system of international law entails often irreconcilable visions for global order, but the process of perpetually interposing alternative legal ideals against one another remains the most effective force for uncovering hegemonic interests embedded in the rule of law.

Reflecting on current disruptions, James Crawford has described the international system as “a sort of layer cake” in the sense of having a “sedimentary formation”.²³⁰ According to this analogy:

At its base is a solid set of principles, norms and institutions: the fundamentals of the post-War global legal structure. It would be difficult for any state to effect a wholesale withdrawal from this solid base. It has survived the worst of the Cold War and many other international crises. We can have faith in those foundational layers. But... [t]he top layers, at least, are at risk of erosion in the current political climate.²³¹

Viewing the international rule of law as founded upon fragmenting equilibria turns this analogy and Crawford’s confidence in the structural integrity of law on its head. Geolegal challenges are directed at political assumptions and bargains constituting the very foundations of a universal legal order. As China continues to dredge artificial islands in the SCS and declare them as sovereign territory, the anchor of the international rule of law remains embedded in shifting sands.

²²⁹ van Nieuwenhuizen, Simone, ‘China’s “Rule of Law in International Relations”’, *The Interpreter* (1 August, 2018) <https://www.lowyinstitute.org/the-interpreter/chinas-rule-law-international-relations>.

²³⁰ Crawford, James, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *The Modern Law Review* at 2.

²³¹ *Ibid* at 21.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

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