

# China and UNCLOS: An inconsistent relationship



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## **Abstract**

This thesis focuses on explaining the inconsistent behavior of China in the South China Sea dispute from the distinct perspectives of existing international relations and international law theories. China both violates and respects different components of the United Nations Convention on the Law of the Sea (UNCLOS), so this is an ideal opportunity to test the explanatory value of these theories in this case. Therefore, this thesis will concentrate on answering the following research question: “What explains the Chinese paradoxical behavior with regard to the UNCLOS-framework?” This study adopts an in-depth, case study as research method and utilizes the notions and assumptions of the most relevant existing theories to answer the question. The goal is to deliver a valuable contribution to the literature about state compliance with international law and China's behavior in the South China Sea dispute. The conclusion is that a combination of the structural realist theoretical approach and the neoliberal institutionalist theory offers the most exhaustive and satisfying answer to the research question, as it addresses the most important elements that has driven the Chinese behavior, namely the rapid rise in economic and military strength together with the institutional weaknesses of UNCLOS.

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## **Introduction**

International law has been for a long time an integral element in the world of international politics. Its impressive historical development process highlights the overwhelming amount of progress it had achieved over the years: from loosely based informal rules to an explosive rise in formally established international legal institutions in a wide variety of issue areas.

International legal norms, practices and structures take an ever-increasing role in the way international relations nowadays is experienced by acting as the legal and legitimate foundation for governance and state interaction. Given this level of comprehensiveness and importance, it is essential to keep academically researching the behavior of states in relation to international law in general and more specifically to the compliance of individual states with a given legal framework. As mainstream theoretical approaches aim to produce compelling explanations behind certain actions or decisions of states, it is interesting to investigate to what extent they are capable in offering a greater understanding in the research puzzle of this thesis. This study concerns the seemingly inconsistent behavior of the Chinese government in the South China Sea dispute relative to the United Nations Convention on the Law of the Sea (UNCLOS). In this particular case, China both respects and violates different components of the UNCLOS by respectively attempting to fulfill the requirements for Exclusive Economic Zone (EEZ) exploitation rights and unilaterally claiming and militarizing disputed areas in the South China Sea. This created a complicated, yet important situation in which uncertainty about the motives behind the identified behavior encourages a test in the applicability of the aforementioned theories. This study will analyze the degree of theoretical explanatory relevance in this case by selecting the theories' key explanatory notions and apply them in this particular case.

This dispute also has potentially crucial real-world implications if one considers the great economic, strategic and political stakes involved in this conflict. The South China Sea is

vital for the sea routes directing from or to Europe and it possesses a great number of valuable resources, like rich fish stocks, oil and gas reservoirs. Moreover, the geostrategic position is essential considering its ideal location in between regional powerhouses, like Japan and the countries of the Association of South East Asian Nations (ASEAN). The one who dominates the waters also has an essential advantage in strategic terms. Lastly, the implications for UNCLOS from a legal point of view may not be overlooked. This case displays actions that could be influential to the credibility and value of the convention's legal jurisdiction. All these aspects make the South China Sea a highly important part of the world whereby any form of political upheaval surely could deliver tremendous implications to the balance in the region. Therefore, this study aims to be a valuable contribution to the literature on both the theoretical utility of mainstream theoretical approaches and China's behavior in the South China Sea conflict. As a result, this thesis will concentrate on answering the following research question: "What explains the Chinese paradoxical behavior with regard to the UNCLOS-framework?"

The thesis starts with an overview of the most relevant literature on the relationship between international law compliance and state behavior. This will be a mixture between the most important contributions from the international relations and international legal scholarships, as these fields have intensively researched this matter for a long time. The section will also include general hypotheses following upon the discussion of each of the respective theoretical models. These hypotheses will act as the foundation for the analytical section, which examines the relevancy of the theories in this case. Afterwards, a brief part about the institutional background of the UNCLOS and the dispute itself will be given in order to highlight the significance of producing academic research about this conflict. These parts will be succeeded by the methodology and the analytical component. At the end, the thesis will be completed with a conclusion that presents the most important and intriguing explanations and determine the most persuasive answer(s) to the research question.

## **Literature Review**

There is a great amount of literature about the relationship between state action and international law. Various scholars from different branches of academic disciplines, such as International Relations (IR), International Law (IL) and economics have intensively studied the conditions that are decisive in determining individual standpoints on internationally agreed legal norms (Dunhoff & Pollack, 2013, pp. 4-5). These academics try to offer insights on the general relevance, utility and functions of legal arrangements in international politics and aim to provide theoretical understandings on the way law affects state behavior. However, it is important to note that there is no universally agreed, coherent scholarship on state compliance with international law originating from the legal scholarship (Guzman, 2002, pp. 1826-1827). It is difficult to produce a general theoretical comprehension from this point of view, as the consolidation process, interpretation and enforcement of the laws are very different from national legal jurisdiction. As such, it is essential to continue developing this research framework on state compliance, especially considering the trend towards institutionalization and global governance. This section will predominantly cover the academic contributions from the distinct IR-perspective. It also briefly presents the works of the joint IR/IL-discipline and offers a sketch of the scientific articles on state compliance with legal arrangements. General hypotheses will be derived from each of the respective theoretical approaches to demonstrate the presupposed answer on the given research question. The discussion will follow the date of emergence of the works as the structure of the section.

The first approach that is going to be discussed is classical realism. This positivist, rational theoretical approach originates from the ideas of important figures, like Machiavelli, Thucydides and Hobbes and highlights the role of human nature in international politics (Burgstaller, 2007, pp. 96-97). Human beings are perceived as evil, selfish and constantly power seeking in their way of thinking, which subsequently is translated to their (political)

behavior. This theory aims to explain the world how it is and not how it should be, which contradicts the rather idealistic academic trend from the past. A human always seeks manners to pursue the enlargement of its power capabilities and personal interests as long as it will outweigh the benefits over the costs. The maximization of power is necessary for the manifestation and maintenance of state survival and security. The amount of relative power determines the interests and position of a state in the international system. The variation of power is made of materialistic aspects, like the population size, military capacities or the size of the economy. Idealistic principles and norms are insignificant when it comes to the shape of state behavior. International cooperation and formal arrangements have a solely instrumental function for states: They can be used as tools to extend a state's power capacity, but are incapable of constraining a state's behavior (Clinton, 2007, pp. 82-83).

This view could be applied in the context of international law as well. For example, Machiavelli's book *The Prince* pointed out that powerful princes (as a reference to modern states) do have the ability to neglect certain customary laws when it does not correspond to their wishes. However, it should be noted that they sporadically made use of it, because of the potentially severe consequences of violation for the short-term stability of the empires (Clinton, 2007, pp. 84-86). International laws are often based on customary laws that have been gradually established to serve the collective interests of states. The purposes of providing clarity and structure in the system is thought to be advantageous to all participating states. This is since a rules-based framework could significantly lower the costs of interaction, which in turn might be helpful in the pursuit of interests. As a result, states voluntarily opt to align their foreign policies with the most basic, functional principles and then consider violation when the calculus is favorable towards non-compliance. The turning point in this transition lies in the timing of events: it is regarded more profitable to act within the boundaries of the legal framework in the short to medium run, as it can deliver those

collective legal benefits. The decision to breach the agreed laws becomes a reasonable option in the long term after the legal jurisdiction is sufficiently expansive to block the wishes of the states. This makes international law dependent on the egoistic and self-interested behavior of states. As such, from a classical realist perspective can be the following hypotheses formulated:

H1: States consider international law as a useful and efficient tool to pursue the core political interests in the short to medium term. In the longer run is the rational cost-benefit analysis in favor of non-compliance.

This skeptical view could be further exemplified by the arguments given by other classical realist proponents. Hans Morgenthau, one of the most influential scholars of the realist paradigm, emphasized the supremacy of politics above international law (Voinea-Motoc, 1999, pp. 2-3). He was well aware of the moral goals international laws seek to deliver, but explained that the system in which international affairs take place made them insignificant. There is in contrast to national legal frameworks, no structural acceptance of legal norms in IR, which is required in order to make them universally valid. It misses an overseeing authority above the reach of the states that can enforce these rules and punish for non-compliance, for example through sanctions. This defining feature makes formal agreements, conventions and treaties always dependent on the interpretation and subsequent application by states. This implies that states themselves are the sole determinant for state behavior.

The classical realist school of thought not only dominated the IR-discipline for many years after World War II, but it also further estranged the ties with the international legal scholarship (Dunhoff & Pollack, 2013, p.6). The theory's descriptive and explanatory power correspond with the time's bipolar world system and its marginal role for international law. However, it should be noted that the start of the Cold War also coincided with the emergence of numerous academic responses that attempt to challenge the instrumental-only relationship



between IR and law. These international legal scholars aim to re-conceptualize the meanings behind 'law' and 'politics' and the interaction between them (Burley, 1993, pp. 207-208). They believe legal norms and politics have a much tighter relationship than (neo-)realists assume and reject the notion that law is exclusively a set of rules to constrain or guide behavior, but instead perceive it more as a process with more functions, like communication, monitoring and routinization.

There have appeared three main schools of thought within this trend of critique with the first and most comprehensive one being the policy science theory (Burley, 1993, pp. 209-210). This approach was initiated by Myres McDougal and Harold Lasswell and was focused on developing a new generation of lawyers that could act as policy makers. The views on global conflict have changed after World War II what opened up the opportunity to create a new international jurisprudence in which international lawyers with fitting public policy expertise could analyze and perhaps re-develop law. In this way, the presumably two distinct worlds are being bridged together. The second school, namely the systemic policy science, is related to the policy science, but does not agree with the strong substantive view of McDougal and Lasswell to create a community of shared values (Burley, 1993, pp. 211-212). Instead, it concentrated on the creation of systemic stability, as it is deemed more important in the time of a nuclear arms race. The scholars hoped through the presentation of the joint advantages of cooperation to form stable expectations from bureaucracies. The basic 'rules of the game' also needed to display the correspondence between a legal framework and national self-interests of states. Lastly, the pragmatic legal process approach where Abram Chayes was a prominent proponent, stressed the importance of improving the ways in which law could affect IR by observing existing cases (Burley, 1993, pp. 213-214). This study examined the legal process of a wide variety cases and wanted to point out the effectiveness or weaknesses of the respective observed elements. The outcome of the analysis needed to lead to greater

awareness among states about the functionalities of legal norms in international affairs. These early responses to realism attempted to re-invent the way states view law and its ability to create different outcomes, but each lack force to deliver compelling explanations.

There were also developments within the realist school of thought that replied to these academic efforts. The transformation to the new polarity has also contributed to the creation of modifications of classical realism. While legal scholars researched the effects of law on politics, IR-scholars were working on the impact the other way around. The law-originated Stanley Hoffman is one of the first academics that researched the postwar state of the international environment from a system theoretical perspective (Burley, 1993, pp. 215-217). More specifically, he analyzed the relevance of the type of world system (unipolar, bipolar and multipolar) on international law. He picked three cases from different time-periods and made a cross-comparative analysis to find out the differences and similarities. As a core realist assumption argues that law is a reflection of the power parity in the world, it is important to examine to what extent this applies per type of system. Hoffman discovered that the world's distribution of power determines the way states perceive legal norms and its overall development. The most powerful states are estimated to have been better balance off in comparison to a challenging multipolar one, which formed the latter's basis for (military) intergovernmental cooperation. He eventually admitted that there was a degree of consistency between the cases when it comes to law, but also stressed the necessity to further analyze this relationship.

In addition, other realist scholars worked on the further relevance of realism. Kenneth Waltz and John Mearsheimer both developed structural variations of the theory, which emphasized the structure as main explanation to state behavior rather than human nature (Guzman, 2002, pp. 1836-1837). The former is an advocate of the defensive-oriented form of neorealism and the latter is more concerned with the offensive variant. As the names suggest,

Waltz believes that states take a more conservative stance to reassure power and security. They build a strategy, which aims to maintain the status quo and defend their security position in the world. Regional hegemony is not necessarily a goal of powerful states, because the structure of the international system complicates the achievement of it and even penalizes it through reactions from other states. It is strategically more beneficial to strive for sufficient levels of power for the sake of a well-balanced international society. On the other hand, offensive realism is more into progressive change to pursue vital interests (Jütersonke, 2010, pp. 12-13). Powerful states seek (regional) hegemony to gain as much power, resources and security as possible in the world. Material factors, like the military strength, wealth and the land size determine the interests of states. A proactive foreign policy is necessary to protect the core interests of states. Despite these differences, the two forms both agreed on the little impact of law on state behavior. They regard international law as an epiphenomenon in IR and compliance as a coincidence to the self-interest of states. This corresponding element is illustrated in different manners, depending on the importance of case and the number of the stakes that are involved. The next two offensive and defensive neorealist hypotheses could be made:

H2: States seek regional hegemony and therefore take a proactive, expansionist geopolitical stance, like violating the international law to ensure its dominance in the region.

H3: The structure of the international system will encourage states to adjust to the changes in relative power, which may be illustrated by state behavior with international law.

Contemporary to the development of neorealism was the rise of a new contrasting paradigm: (neo-) liberalism. The classical variant of liberal theory is based on the (economist) concepts of free trade, economic specialization and liberal values from historic figures, like Adam Smith, John Locke and Immanuel Kant (Armstrong, Farrell & Lambert, 2007, pp. 87-89). Kant and Locke stressed the importance of a peaceful state of the world, as conflict and war

have negative consequences for all participants. Kant had brought forward the assumption that democracies do not go to war with each other. International cooperation is on the other hand important and should be promoted through formal and informal international institutions, because it offers mutual gains to all involved parties. States strive for these absolute gains, instead of relative ones what is in contrast to realism. International arrangements, such like international treaties, conventions and agreements could play an instrumental role in the facilitation of cooperative behavior by providing rules, norms and principles. Therefore, law has a substantive role in IR than being an exploitative tool of states.

Robert Keohane and Joseph Nye produced a further optimized version of liberalism, which especially attempted to explain the institutional developments during the Cold War (Burley, 1993, pp. 218-220). Even though (neo-) realism possess the theoretical ability to explain, describe and predict some major political events, the main point of criticism was the unexpected emergence of international organizations and the complex legal framework. These organizations were given the legitimate authority to operate and develop a (binding) legal jurisdiction in a specific issue area. Keohane and Nye stated that the realist notion of the exclusive instrumental use of international institutions had become obsolete, because states devoted substantial amount of efforts, time and money in their construction, which did not always coordinate to the given cost-benefit calculus. That is why the scholars formulated the neoliberal institutionalist theory, which focused around the pervasiveness and persistence of international regimes (a collection of rules, norms, principles and decision-making processes) in creating favorable conditions for multilateral cooperation (Armstrong, Farrell & Lambert, 2007, pp. 87-88). These conditions include aspects, like the implementation of incentives for compliance and reputational costs for cheating dictate the interactions between states. States are in this theory still regarded as rational, unitary actors, but initially seek non-military instruments to pursue interests. This could be exemplified by the rate of interconnectedness in

the world: the countries are heading towards a complex, economically interdependent environment of states in which cooperation, trade and information exchange are vital to the general development of states.

Therefore, it is essential to create the most-ideal circumstances in which cooperation is stimulated. International institutions are not only central in producing guidelines of behavior, but also possess the ability to direct state behavior (Burley, 1993, pp. 225-227). They are together with other non-state groups regarded as independent actors in the international system. Materialistic factors, like military and economic powers are no longer considered as the only sources of influence, but information access is deemed important as well. Information is instrumental, due to its natural asymmetrical distribution in the international system. The states that possess larger amount of information sit in a more dominant position in relation to their counterparts, so institutions also need to contribute to the construction of reciprocal relationships by accommodating channels of information. However, the degree of institutionalization is decisive to the level of impact an institution could exert on individual state behavior. This term refers to the capabilities of institutional characteristics, like the policy scope, legal framework and the room for interpretation in committing a state to the 'rules of a game'. The influence of an institution heavily relies on the quality of these characteristics. The relatively weaker institutions with low levels of legitimacy and international recognition are more susceptible to the might of powerful nations, because they do not possess the required institutional capacities to bind the states to the prescribed rules. States can consequently refuse the legality of the jurisdiction if they deem institutions as hindering and irrelevant in the pursuit of interests. Based on this theory, the next hypothesis can be postulated:

H4: The quality of the institutional characteristics explain variations in the compliance rate of states.

Over time, international institutions expanded and deepened their scope of influence, which prompted legal and political science scholars to intensify their analysis on state compliance with international law (Guzman, 2002, pp. 1830-1832). The various academics of both IL and IR tried to concentrate on identifying those conditions that determine compliance and non-compliance. Abram and Antonia Chayes presented the managerial model, in which coercive mechanisms are absent. Instead, this model focuses on an incentivizing manner of adherence to international law. They believe compliance could be stimulated when states fully realize the advantages in terms of the rational cost-benefit analysis and the incorporation of their self-interests. In addition, compliance could be encouraged when a general norm of adherence exists. These voluntary-based elements make enforcement measures unnecessary, which in turn could be invested in building comprehensive dispute-settlement organs or improving the institutional capacity. This model is especially useful in resolving coordination issues among participants, but it has difficulties in finding solutions for other problems, because of the lack of binding mechanisms. This model assumes that the interests of states are always assured in international agreements, but there is no institutional guarantee that this will hold over time. Otherwise, the institution could be seen as inflexible and biased if interests do not alter and remain rigid. Moreover, one should not expect that norms withhold states from violation when there are potentially more lucrative alternatives outside of the agreements. The absence of enforcing measures will make it easier for states to reconsider other methods for protecting the interests and more challenging to penalize misconduct. The next hypothesis can be formulated:

H5: States adhere to international laws if they fully acknowledge the advantages, consent to regulations and if there are no profitable alternatives available.

Harold Koh has therefore developed another legal theory on state compliance that instead centers on the transnational legal process (Guzman, 2002, pp. 1835-1836). This theory

focuses on the domestic or international interactions between state and non-state actors and the subsequent process of legal norms internalization. These norms originate from the ever-increasing interplay between these two entities in formal or informal meetings. Koh believes that the intensity of interaction between the two groups leads to the domestic internalization of norms derived from these discussions. This set of norms will eventually enhance state compliance with international law. However, the main logic that incorporation within domestic structures always materialize after discussions is to a certain extent inconsistent. It only applies when there is an overlap between domestic interests and international norms. The moment there is no correspondence then internalization will not occur. In addition, the norms themselves do not necessarily have to be in harmony with international law, as they could emerged from different sources of influence, like for example powerful states.

### **The case: UNCLOS and the South China Sea dispute**

The previous section discussed the most essential elements of the various theoretical approaches and displayed the enormous academic accomplishments IR and IL had achieved concerning the relationship between state behavior and international law adherence. This field of study will remain important in contemporary times, as the geopolitical circumstances continuously alter over time (Dunhoff & Pollack, 2013, pp. 26-28). The state of the relationships between involved actors and the role of international law are continuously on the change what motivate academic scholars to investigate the degree of applicability of the theories. The goal is also to produce recommendations or adjustments to ensure the theoretical relevance for cases in the future. As a response to this call, this thesis aims to be a meaningful contribution to the literature on the relationship between state behavior and international law compliance.

However, before jumping into the analytical part, one needs to understand the background of UNCLOS and the case itself to achieve a better understanding of the

inconsistent behavior of China. The origins of UNCLOS find its traces in the age-old customary laws on the use of international waters (Walker, 2011, pp. 198-200). The common principles, like the freedom of navigation or the emphasis on peaceful resolution regulated on an informal basis the behavior of states. These laws successfully managed to hold control for 3 centuries until the middle of the 20<sup>th</sup> century when technological advancements and the increased use of the oceanic seabed floors raised calls for more nautical regulations (Gates, 2017). The variation of economic utilization has drastically expanded from fishing activities to complex seabed mining projects. Therefore, states decided to hold conferences to discuss the possibilities of building a treaty that included a formal dispute-settlement mechanism and codified rules regarding the exclusive economic exploitation (Tuerk, 2017). After multiple negotiation rounds, more than 150 states of the United Nations (UN) agreed to sign the UNCLOS in 1982 with ratification set in 1994. There were supporting institutions created along with the introduction of the treaty, like the International Tribunal for the Law of the Sea (ITLOS), the International Seabed Authority (ISA) and the Commission on the Limits of the Continental Shelf (CLCS). All these institutions are created with the intention to help adjudicating interstate issues around maritime use.

The focus on this thesis revolves around an interesting turn of events initiated by China in the longstanding South China Sea dispute (Wang, 2016). China is since decades claiming the sovereign rights over the total maritime territory within the self-proclaimed Nine-Dashed Line in the South China Sea. These maritime claims are based on historical and legal foundations dating from the middle of the 20<sup>th</sup> century and presented China as the exclusive and legitimate holder of the rights to hold control and economically exploit the islands and surrounding waters in the region. These justifications of the claimed areas do not correspond with the rules regarding historical rights, as written down in the legal framework of the UNCLOS (Boon, 2014, pp. 491-492). Despite being a party to the convention since



ratification in 1996 and the clear stipulation of rules concerning this type of issues, Beijing still insists it possesses the rightful rule over the maritime area. Based on this decades-old assumption has China retained its stance on this multi-country dispute where Malaysia, Vietnam, Brunei, Taiwan and Philippines are involved as well. Apart from some small incidents, were there no frontal collisions with the other claimants and even diplomatic arrangements to resolve the matters were in the making. However, tensions has risen to great peaks especially since the start of the tenure of Xi Jinping in 2013. China took a more proactive perspective on this conflict, as exemplified by the recent militarization efforts and island-reclamation programs (Odeyemi, 2015, pp. 3-4).

It is interesting to examine to what extent the universal agreement and the comprehensive build-up of the UNCLOS framework is pertinent to the current case. The South China Sea dispute increasingly became the cause of conflict again the moment Beijing started actively engaging in the Spratly and Paracel islands. This contentious group of islands consists of very small almost uninhabitable islands, low-tide elevations and rocks, which each of them fall under their respective maritime entitlements (Mirasola, 2015). The Chinese reclamation plans are based on the belief that the transformation of low-tide elevations and rocks to full-fledged islands could ensure the rights to the territorial, contiguous seas, continental shelf and the EEZ, that extends the sea area a maximum 200 nautical miles further from the coast. These prospective plans simultaneously break the economic entitlements of the other involved nations in the region, as the Chinese sea claims overlap with their respective EEZs. These ongoing activities also disrupted the proposed diplomatic resolution plans and even motivated the Philippines in 2013 to file a case at the Permanent Court of Arbitration (PCA) under the legal umbrella of UNCLOS. This The Hague-based arbitrary tribunal ruled in favor of the Philippines in all presented issues, but China rejected both the outcome and the legal jurisdiction of the tribunal with uncertainty facing the future (Gates,

2017). The most recent chain of events, the high degree of unpredictability and the potential implications makes this an important case to analyze from a theoretical point of view and an empirical perspective.

### **Methodology**

The research design of the research project is going to be a qualitative, single case study analysis of the South China Sea maritime disputes (Bryman, 2016, pp. 66-68). This design is flexible, contextual and intensive-oriented, which suits my research plan. The flexible nature of the method gives me the freedom to exclude potentially less relevant aspects and pick the most relevant ones, which is important for the sake of specifying the scope of analysis. There is a wide array of literature and non-academic information available on this topic, ranging from official government documents to news reports, so selection is key. The South China Sea dispute requires a very context-based approach viewing the wide variety of actors, opinions, interests and sectors that are involved. In addition, a case study is suitable for the type of source I want to utilize (Bryman, 2016, pp. 70-71). The qualitative analysis will cover academic and formal sources, such like governmental documents, scientific articles, books and official statements. In terms of the data collection method, the majority of the sources are secondary ones. This type can easily be accessed through (online) news reports, (e-) libraries and websites. However, I need to be aware of the degree of objectivity of some of the government sources. They might be slightly biased in favor towards the origin of the source, which necessitate examination that is more careful. The research method of the thesis is process tracing, which attempts to generate causal inferences from the different types of sources and outcomes (Falleti, 2016, pp. 458-460). This method is ideal when one wants to conduct an in-depth analysis of a given process, as it should highlight the dynamics and key variables within a certain process.

I have presented five general hypotheses in the literature review segment of this thesis.

With these presupposed answers, I want to examine to what extent they correspond to the perceived contradicting behavior of China. Hence, I want to look at the key attributes and assumptions of each of the theories to find out their degree of explanation. For (classical) realism, I will be looking at the developments concerning the power parity in the region, as realism is a rationalist, systemic approach that emphasizes self-interests, relative power, the state as main actor and the importance of the cost-benefit analysis in the internal decision-making process. In relation to the dispute, the position of UNCLOS within the core interests of China and the other states will be considered from the perspective of the short or medium term to the longer one. This includes the geopolitical developments of the past few years, the economic significance of the South China Sea natural resources and the strategic relevance. The main sources of information are scientific articles, news reports and government declarations.

Furthermore, for the liberalist approach is the institutional build-up of the UNCLOS-framework essential to determine its role in the conflict. The information about the exact nature of the legal arrangements, the institutional capacity and its historical developments could be derived from academic articles written by legal or political science scholars and the convention itself. I have to assess to what extent the nature of the legal framework of UNCLOS corresponds to the compliant behavior of China degree by states and especially how the interpretation of the rules is constructed. I need to find out whether UNCLOS has ambiguous formulations in its convention, because this could lead to differences in the understanding of some of the rules and possibly lead to disagreement.

Lastly, in the managerial model is the voluntary participation of states a key factor in the compliance of states with international law. The acknowledgment of the universal benefits, the necessity of consent and lack of force should initiate a great and genuine rate of respect with international law and discourage violation. It is important to investigate the advantages of operating in accordance to UNCLOS over the alternatives outside from it. With this being

said, I will look at the potential costs of violating UNCLOS in terms of reputational costs or sanctions and examine whether states consider the issue of adherence in more terms than functionality.

## **Realism**

First, the foremost important classical realist notions and hypothesis will be discussed.

Following the hypothesis, the belief is that the short to medium term advantages of adherence is more beneficial than violation according to the cost-benefit analysis. This means that there needs to be examination of the beginning period of the UNCLOS and China's role. As earlier mentioned, the UNCLOS is based on customary laws with the freedom of navigation of the open seas as leading principle. The absence of the 200 nautical mile EEZ-rule was in the favor of the countries with a long coastline back then, such as China, as the smaller states were limited to the lesser attractive territorial waters. Therefore, the plans of extending the EEZ mostly came from small Third World-states that saw expansion via the convention as a legal manner to protect its maritime boundaries and economic interests. The intended EEZ-rule meant a major shrinkage of the maritime area of China, as the waters were suddenly enclosed to more states than before.

Despite the clear disadvantageous situation was China still a signatory to UNCLOS, due to the act of political compensation for the Third World (Wang, 2016). At the time, China was recovering from the implementation of the Cultural Revolution and was not an economic powerhouse like nowadays. The Chinese representatives respected the government's three-step state foreign policy consisting of anti-hegemony, support for the Third World and protection of the national interests. In the light of this strategy, Beijing decided to be supportive to the nations that had in turn aided the PRC in taking over the place of the Kuomintang-government in the Security Council in 1971. This very unusual decision was critical to the establishment of the UNCLOS 1982, as China made significant diplomatic

efforts in the build-up to the convention (Guzman, 2002, pp. 1853-1854). This decision seemed very odd if comparisons are drawn with contemporary times, especially considering the awareness of the negative consequences and therefore the relative costs. However, the diplomats followed the ideas of the state ideology and the respective core national interests. These core interests were centered on establishing a credible and strong presence for PRC in the realm of international relations (Yu, 2014, pp. 320-322). Therefore, China was not in the position to afford risks in its international reputation. China needed time in constructing diplomatic ties with other states at that time and perceived making improvements in their relationships as a more significant task than regional dominance.

Moreover, one need to look at the efforts China did in the run up to UNCLOS and shortly after. The contributions from the Chinese representatives was a combination of codifying existing international customary laws and incorporating innovative ideas (Yu, 2014, pp. 315-317). It addressed topics, like the rights for territorial seas, the international seabed and the EEZ. China was satisfied about its job in the construction process and especially in making this sector a more equal playing field for all nations (despite the indirect negative consequences for Chinese maritime interests). The great amount of efforts was certainly progressive and globally-oriented, but it was also to safeguard Chinese long term interests in the near future, as China deliberately missed out meetings to specify certain details of some of the articles, which left some important space for self-interpretation. The country created a cooperative strategy around the UNCLOS after its ratification in 1996. There were several methods to defend the interests within the convention, like by showcasing the historic fishing rights or by stipulating a hierarchy in the articles of the UNCLOS (Yu, 2014, pp. 324-325). By highlighting the historical significance of the South China Sea and China's role, it hoped that it could legally justify its expression of influence without getting less opposition than it hoped via assertive, unilateral measures.

However, the creation of the legal bases to assert sovereignty (one of the core long-term interests) hindered China's plan in the South China Sea dispute (art.15) (Fravel, 2011, pp. 299-301). China was not the only state that could utilize these legal norms to delimit its boundaries. The Philippines, Vietnam and Malaysia (partly) claimed the islands within the Nine-Dashed Line as well and pointed out the misconception of China that it had a special status in the region. They have rejected China's attempts to dominate the region via UNCLOS-rules and are reluctant to give up their claims. This caused the conflict to continue. One could therefore conclude that the idealistic and policy-related plans at the very beginning of UNCLOS (short to medium run) have worsened the position of China in the longer run, as they miscalculated the opposition from other states. This implies that the hypothesis of the classical realist theory does not correspond very well to the outcome of the case.

In terms of the defensive and offensive realism, one need to look at the balance of power in the region at the period from UNCLOS' inception to the intensification of the issues. The economic and military power of China had grown drastically during this period and China became the second most powerful state in the world (Wallace, 2014, pp. 133-135). According to this type of realism, it should mean that China gradually expanded its influence in the region in correspondence to the new structure of the international system. To a certain extent has China done this by systematically 'inviting' surrounding states to adjust to the new reality. Albeit outside the statutes of UNCLOS, but China has offered states to resolve the conflict in a bilateral or multilateral manners, as exemplified by the China Declaration on the Conduct of Parties (Storey, 2017, pp. 2-3) This multilateral proposal from 2002 was intended to project the intentions of China to resolve the matters in a peaceful, yet beneficial matter. It included all involved parties and behavioral guidelines in relation to the South China Sea conflict. The essence was to highlight China's new dominant position in a peaceful way what is supposed to be beneficial to all involved parties.

However, the unwillingness from the side of ASEAN to come up with progress with this project soon was an obstacle to the intended advancements China wanted to see in the region (Ba, 2011, pp. 272-274). The struggles to further develop the multilateral agreements and the rapprochement with China's rivals, like the United States (US) and Japan pushed China to shift to a different foreign policy strategy (Information Office PRC, 2011). The US was already losing terrain to the Chinese and in order to avoid more losses in terms of influence in the region, it presented 'A pivot to Asia' policy, which focused on intensifying the ties with (East) Asian countries. This potential threat to the Chinese plans in the region prompted them to opt for a new strategy (Goldstein, 2011, pp. 322-323). The time of delay and contain soon transformed to a policy of action and progress. In 2013, Xi Jinping presented a new foreign policy in which China's core interests, like territorial integrity and state sovereignty (including the dispute) needed to be protected and pursued in a more assertive manner (Zhang, 2014, pp. 74-75). China has re-shifted its focus on applying more direct ways to resolve the issues, which still had a peaceful character. This could be illustrated by the emphasis on intensifying bilateral ties between China and the claimant states. These bilateral agreements are specifically created to the demands of the partner states and in turn could be used to stick them to political commitments concerning the South China Sea dispute. This putted states into a complicated position in which they need to weigh self-interests against collective obligations. By doing so, Beijing hopes that states commit themselves to the contents of the agreements and not pursue their maritime claims (Fook, 2018, p.2). This approach reflects both the expansionist and hegemonic intentions of China in a peaceful and direct manner, which is in line with the new position in the international system. In the assumption that there will no consequences for their current actions, China is confident that it has all the rights to explore the islands and claim the EEZs in the near future.

To sum up, both the theories of structural realism gave a good view about the events

that happened in the South China Sea conflict. The structure of the international system and the shifts in relative power pushed China to act in a gradually expansionist manner. The defensive-oriented emphasized the reflection of the balance of power as main reason and the offensive variant focused more on achieving regional hegemony, which both was clearly applicable in this case.

### **Neoliberal Institutionalism**

The key assumption of this theory is the degree of institutionalization: the intrinsic quality of the institution can determine the rate of compliance of a state (Guzman, 2002, pp. 1830-1832). This includes the framework, the institutional scope and level of legitimacy. For example, if the framework is institutionally weak with almost no punishments for violation then it leads to low adherence levels. In relation to UNCLOS, one needs to be aware of the enormous number of subfields the institution wants to act as the legal framework. It ranges from the use of high seas to the rules concerning the local environment. These rules are not evenly well stipulated due to the lack of consensus in some areas during the construction process of the convention. Like mentioned, states deliberately non-cooperated during the talks when it became too difficult to meet a satisfying conclusion. As a result, some UNCLOS are very abstract and this (unintentionally) gives a great room for interpretation for states (Boon, 2014, pp. 491-492). On the one hand, this is necessary to make the laws adaptable to different circumstances and times. On the other hand, this means that the states themselves could determine how they perceive a rule instead of an overarching institutional authority. The legal jurisdiction is therefore very dependent on the view states have on them, which in turn could be translated to their real-life behavior.

Moreover, the role of independent state action is instrumental to the convention's legal jurisdiction (Wallace, 2014, pp. 151-152). The UNCLOS only functions as a facilitative actor and as a legal point of reference. The enforcement of the laws therefore depends on the states



themselves, because there are no binding consequences for non-compliance. The loss of international credibility might be seen as a potential penalty for violation, but this does not entail forceful measures. UNCLOS also explicitly emphasizes the preference to resolve maritime matters in bi- or multilateral ways by states and the use of UNCLOS-recognized costs as last resort (Boon, 2014, pp. 493-495). This reliance on state action originates from the age-old customs and the sensitive nature of some of the issues. The idea is that interstate diplomatic measures are more cost-efficient and does not harm the diplomatic ties, as lawsuits do. Hence, the decision to bring maritime disputes to the courts is very risky and not very common.

This room for interpretation and the critical role for states are also vital to the South China Sea dispute and the PCA-case. These aspects were key to the developments of the ongoing conflict. The issues concerning the South China Sea arbitrary case are predominantly based off articles 15, 74 and 121, which respectively refer to the sovereignty, maritime boundaries and the EEZs (Davenport, 2018, pp.79-80). The Philippines have addressed three issues in this case, namely the location of China's claims, the type of maritime features in the South China Sea and the Philippine right of navigation. These articles are articulated in a way so that the conceptualization of terms like 'sovereignty' and 'territory' plays essential roles. Sovereignty-related issues are not bound to UNCLOS-regulations if China made an appropriate reservation to it, which it actually did. This automatically meant that questions involving the location of the maritime claims are invalid to discuss (Boon, 2014, pp. 489-491). Nevertheless, PCA could give a non-binding clarification about these issues. The Philippines in turn still wanted to highlight the illegality of the Chinese island-building activities. These islands cannot be entitled to EEZs, as the reclamation programs artificially turned rocks into islands. They needed to be naturally formed in order to receive the 200-mile exploitation rights as this was narrowly framed in article 121. This issue was indeed declared illegal

together with the third set of addressed issues (Gates, 2017). The Final Award of the court stated that China had unjustly overlapping maritime claims, which effectively deprived the states in the region of their economic rights. Despite this hard statement, China rejected the verdict of the Tribunal by stating that it did not recognize the legal jurisdiction of the court. China insisted that it was following the rules as stipulated by UNCLOS, because it initially tried and still wants to settle these maritime issues down via bilateral manners, as UNCLOS stimulated (Mangosing, 2018). The maritime area in the South China Sea belongs to China and it will continue to pursue its core regional interests (EEZs) according to its interpretation of UNCLOS and without such interference of others. Considering the inability of UNCLOS to enforce punishments, it is very likely China continues on this path.

These wide differences in framing and interpretation form the basis of the legal problems the UNCLOS currently has. There is too much space for interpretation about critical issues, which made the UNCLOS obsolete and almost irrelevant in this format. Further development of the legal jurisdiction is necessary to make it more effective and increase its legal reputation. Looking back to the hypothesis, it is quite clear that the level of institutional capabilities hugely determine the rate of compliance. The abstractness of particular rules, the lack of enforcing measures and the room for interpretation makes it relatively easy for powerful states to overlook the rules of UNCLOS when this is seen as an obstacle to the pursuit of interests.

### **The managerial model**

The key assumption of this theoretical model is that institutions must provide profitable incentives for voluntary compliance of states in order to generate a high level of international law adherence (Guzman, 2002, pp. 1830-1832). This model could be assessed by comparing the long-term developments of two similar states in terms of economic, political and military strength, whereby one does have followed UNCLOS and the other has rejected it. In this way,

one could view the actual benefits and disadvantages. An ideal comparison could be drawn between the US and PRC, whereby the former one is not a member of UNCLOS since its inception (Gallo, 2016). The US have voluntarily distinct itself from the legal arrangements of the UNCLOS, as it did not agree with the equal distribution of seabed revenues under the lead of the ISA. The US demanded for adjustments to this particular rule, but UNCLOS still included it in its ratification in 1994. The US wanted to have more control over its water resources and therefore opted to only comply with the leading and binding informal norms of UNCLOS, like the EEZ, but without having the ability to be challenged to court for misbehavior (Ba, 2011, pp. 275-276). This is a very profitable situation, especially for a superpower, because there were no severe threats in the field of international reputation. As discussed earlier, the only form of punishment for non-compliant behavior is the reputational costs of losing credibility in the eyes of the international community. The US feels certainly not threatened of a potential decline in its reputation, as it possessed back in the 90s already hegemonic powers (Hossain, 2013, pp. 112-114). These powers could be exercised to coerce the states who dismissed the US for non-cooperation with UNCLOS.

China is in terms of economic and military power similar to the US, but is formally entitled to the legal jurisdiction of UNCLOS. As illustrated by previous sections, China initially needed to be aware of the potential consequences of violating UNCLOS (Wallace, 2014, pp. 133-135). It incorporated the framework in its strategy to pursue regional interests in the South China Sea and later became under pressure, as it needed to find legal justifications for its island-building activities. Moreover, China needed to continuously provide support for the administrative sections of UNCLOS by sending representatives and collect data. These considerations costs substantial amount of efforts, time and money, which the US did not have to think about in the meantime.

The initiatives to promote compliance coming from the UNCLOS itself is non-existent,

as the convention and its corresponding structures heavily depend on the participation of signatories themselves (Yu, 2016, pp. 219-221). The proposed facilitation of the legal jurisdiction was present to all parties of UNCLOS, but was in fact working against China. These channels helped the Philippines to receive the necessary information to be used in the arbitration case. It seemed like a good idea for China in the early period to be a member of UNCLOS to gain international recognition, but progressing in time it became more and more an unnecessary hindrance to its pursuit of interests with the rejection of the arbitration case as clear example. A withdrawal from the UNCLOS is perhaps a reasonable possibility in the near future if does not offer China the wished benefits.

## **Conclusion**

Looking back at the analytical section, there are many significant insights that can be derived from examining the South China Sea dispute from a theoretical point of view. The classical realist theoretical model emphasized the influence of the Chinese political state ideology as main explanatory to its active involvement in the construction process and the miscalculation on the longer run. The structural versions both highlighted the economic and military developments China underwent since UNCLOS-ratification in 1996 as clarification for the behavioral pattern. From a neoliberal institutionalist perspective, one should realize that the intrinsic institutional characteristics of UNCLOS is considered as main driver to the inconsistency. Lastly, the managerial model stressed the absence of clear benefits and the presence of a suitable alternative (in the form of US stance) as explanations to the Chinese behavior.

All these theories acknowledge the unique situation in which China joined the UNCLOS, the developments in the medium run and the situation right now. However, the structural realist and neoliberal institutionalist theories together possess the most explanatory value in delivering a compelling answer to the research question. As the question assumes a

two-dimensional nature of the event then the answer has to be the same. The former theory acknowledges the significance of the economic and military developments China underwent since the ratification of UNCLOS in 1996. China is adjusting to its new, stronger position in the international system and is displaying its recently grown powers by slowly exerting its military presence in the region. This does not necessarily mean it has to do it by force alone, as exemplified by the bilateral agreements. In order to adjust to the changes in power parity, China has to violate some of the laws of the UNCLOS. On the other hand, the neoliberal institutionalist theory emphasizes UNCLOS' institutional weaknesses as an explanation for the Chinese-interpreted compliance to UNCLOS. The great room for interpretation, the lack of enforcing measures and the central role for the parties offer China the opportunity to explain its behavior from its point of view. In its eyes, it does not violate the UNCLOS-framework, because it still seeks bi- or multilateral manners outside of the legal jurisdiction to resolve the dispute, as stipulated by UNCLOS. To conclude, China cleverly utilizes the rules within UNCLOS itself to justify its recent activities and clearly violates other components to adjust to its influential position in the region.

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