6 Legal uncertainty and the making of maritime boundaries

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Uncertainty – be it understood as lack of information, lack of shared meaning, too much information, or inherent ambiguity of global politics – has often been cast in a negative light, as obstacles to understanding the world, fashioning appropriate policies, and avoiding conflict. In this chapter, I focus on a type of uncertainty that is habitually created in international lawmaking processes and manifests itself as either a lack of agreement on how an issue area should be governed, or multiple, and similarly authoritative rules and interpretations that compete to shape responses to specific legal questions. I argue that this *legal uncertainty* can indeed make cooperation more difficult for some actors by increasing the possibility of misjudgments and misrepresentations that prevent them from finding common ground. At the same time, it can encourage others to specify and lock in shared understandings, thereby insulating them to a certain extent from uncertainty. Uncertainty that arises in international law provides a unique opportunity to illustrate both possibilities.

In this chapter, I argue that both *multilateral lawmaking* (law made by states signing conventions) and *judicial lawmaking* (law made through the interpretations of international courts and tribunals) have effects that are often the opposite of what their makers intend. The diffuse nature of lawmaking authority and lack of hierarchy among the sources of international law routinely fosters *legal uncertainty*, which shapes state choices as well as patterns of interstate relations. This type of uncertainty has its roots in human activity – actions and decisions of actors involved in the making of international law, mainly states and international courts. It essentially stems from legal production, although it can be indirectly fueled by external developments insofar as these encourage actors to engage in further lawmaking. It is *ontological* in the sense that it concerns our inability to point to what the law is at any given moment in time, considering that different sources of law say different things.

I introduce and illustrate *legal uncertainty* in the context of maritime boundary making, which is the process by which a state defines the nature and extent of its jurisdiction in the sea by drawing boundaries between its maritime zones on the one hand, and the high seas and/or the maritime zones of a neighboring state on the other hand. The importance of law in the field of maritime boundaries, the variation in the sources of law as well as the various ways in which states used the rules and interpretations that became available to them, and the various ways in which states dealt with their boundaries under legal uncertainty make this domain

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an ideal one to study. The multilateral and judicial lawmaking processes resulted in multiple rules and interpretations that coexisted and often conflicted with each other. While these rules and interpretations provided a basis for states to justify conflicting claims, some pairs of states still managed to settle their boundaries by settling on one of the possible rules. Using a case study of the boundary delimitation between Mexico and the USA, this chapter illustrates how legal uncertainty operates as states seek to define their maritime boundaries.

The rest of this chapter is organized as follows: first, I define the concept of *international legal uncertainty* as a routine byproduct of international lawmaking, distinguishing it from related concepts, such as imprecision and ambiguity, and laying down its main features. Second, I propose a way of measuring this concept in the context of maritime boundary making. Third, I illustrate how legal uncertainty may affect prospects for successful maritime delimitation by focusing on the case of the maritime delimitation between Mexico and the USA. The final section concludes by discussing implications and future research directions.

International law in global politics

Conceptualizing and examining uncertainty in international lawmaking processes is important as international law and features associated with legal order have become pervasive in global governance. States have created international institutions for purposes as diverse as the regulation of international economic activities, protection of the environment, and the prosecution of international crimes. In many issue areas, states have delegated dispute resolution to courts and tribunals and committed themselves to be bound by their rulings. Against this background, scholars have sought to catalogue and analyze this increasing presence of international law in international governance under the heading of legalization (Goldstein et al. 2000). They have looked at features like obligation, precision, and delegation to address the various ways in and degrees to which states rely on the law to sustain international cooperation in different issue areas (Abbott et al. 2000). The rational design of institutions literature has similarly examined how states set up international institutions to solve specific problems of cooperation (Koremenos et al. 2001).

These contributions and the work they led to have greatly increased our understanding of the different ways in which international institutions and law can further and sustain cooperation. Yet, they have given too much power to the actors driving the legalization – states as well as international courts and tribunals. They have implicitly assumed that law, treaties, and judicial institutions are fine-tuned instruments that sustain interstate cooperation in accordance with their designers' preferences. This assumption is problematic because law, and especially international law, evolves in ways that evade its designers' control – actors may come together to create new law in multilateral treaties, but they can seldom control how that law will be understood, interpreted, and used by other actors, including courts and tribunals.

Several attempts to assess international law and its potential role in sustaining cooperation have been limited to assessing treaties and specific provisions therein.

Legalization scholars have suggested that *precision* is an important feature of international law, with variation along this dimension expected to affect actor choices and behavior. For these scholars, a 'precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation' (Abbott et al. 2000: 412). The literatures on rational design of institutions and the subsequent Continent of International Law (COIL) framework similarly use *precision* to 'refer to the exactness […] of [an agreement's] prescribed, proscribed, and authorized behaviors,' where the interest is mainly on textual clarity, and as a subsidiary matter, on completeness, mainly conceived of as the degree of detail (Koremenos 2016: 160).[1]

While precision may be well suited when talking about how specific and detailed treaties or provisions are, it is not adequate to describe a broader context of legal confusion where what the law requires is not self-evident to actors. Another group of scholars has suggested that this *ambiguity* is an important feature of global politics, including legal rules, with actors attributing meanings to concepts and obligations in a variety of ways (Best 2008; Widmaier and Glanville 2015). As highlighted in the introduction to this volume, such ambiguity brings along a multiplicity of interpretations. This may be fueled in part by textual underspecification, but other factors may well sustain divergent understandings of law.

Textually underspecified rules do not necessarily or immediately create a multiplicity of interpretations, however.[2] More likely to create such multiplicity are divergent authoritative interpretations that can be made of rules – which may be underspecified or not – or competing rules that may be championed against existing or emerging rules. Similarly, precise texts do not need to be coupled with a broader agreement on them. Although textually *precise* and *specific* rules may have a higher chance of commanding a consensus around how they should be understood, interpreted, and applied, this does not need to be the case. Rules that seem to be precise in the books may be muddled by incoherent application or become riddled with exceptions. What looks precise when it is agreed to may thus become subject to controversy over time. Ultimately, one needs an understanding of legal uncertainty that is not entirely – or even principally – determined by the text or attributable to unavoidable ambiguity. As I argue below, legal uncertainty mainly depends on how actors who have the authority to interpret and develop law may interpret and respond to the same text in different, inconsistent ways.

A more helpful understanding of the uncertainty of legal rules has been associated with the notion of *clarity.* Rules are considered to be *clear* when they allow states to 'understand what is permitted, prohibited or required by the law' (Abbott et al. 2000: 412). Huth et al. use the term *clarity* as a quality of a well-established rule (which can be a treaty rule or an international custom) – one that has seen consistent interpretation and application by states and other legal actors (2013: 94). Similarly, Franck makes reference to *clarity* in his definition of *determinacy* as 'clarity of the message transmitted by a rule to those to whom it is directed as a command' (1988: 721). The interest is in the clarity of a rule in light of what a

rule means to a specific audience, which may be affected by not only the textual expression of that rule but also commentaries and alleged applications thereof. These definitions seem to apply to messages contained in specific rules rather than a situation where there may be several clearly articulated rules, without it being evident which one is to be applied in a particular setting.

A related term that has been used in relation to legal uncertainty is that of *indeterminacy.* The question here is whether 'the existing body of legal doctrines – statutes, administrative regulations, and court decisions – permits a judge to justify any result she desires in a particular case' (Solum 1987: 462). When law is indeterminate, for every legal rule, one can find another that leads to a different, even the opposite conclusion (Solum 1987: 465). The implication is that rules are by themselves insufficient guides to the adjudicators. Projecting this to international relations, indeterminacy may plausibly have implications on how states will behave and justify their acts and legal stances. If indeterminacy is accompanied by a possibility of finding a counter rule for every legal rule, states may have a wide range of rules or interpretations to choose from to justify any course of action they may decide to take.

The concept of *international legal uncertainty* that this chapter proposes differs from these notions, as well as the conceptions of uncertainty in IR as laid out by the introduction to this volume. While it shares some common ground with uncertainty understood as too little information, too much information, a lack of shared meaning, and a multiplicity of interpretations, it is distinct from any of these ideal types. The conceptual discussion below will focus on this distinction, while preparing the ground for an example measurement and analytical strategy to assess the evolution and effect of legal uncertainty in the field of maritime boundary making.

Defining the concept of international legal uncertainty

A legally uncertain situation corresponds to one in which what the law requires is not evident. This type of uncertainty can be relevant in a domain of global politics that is not yet legalized to a sufficient extent. When this is the case, uncertainty stems from a *lack of shared meaning*, as discussed in the introduction to this volume. Moreover, what international law requires in a given question is also not evident when there are multiple, similarly authoritative takes on how international law governs that question. As legalization takes hold of an increasing number of issue areas, this form of legal uncertainty is more likely to arise. While legal uncertainty implies a *multiplicity of interpretations* that can be made of legal rules by states whose action is governed by those rules, what characterizes legal uncertainty as I define it is the fact that *authoritative* sources of law promote and interpret rules differently.

International legal uncertainty can thus be defined as the disagreement within and between various *sources of international law* with respect to what the law requires. The sources of international law have traditionally been recognized as the ones enumerated in Article 38 of the Statute of the International Court of Justice

(ICJ) (Kennedy 1987: 2–3), which enjoins the ICJ to apply the following when seized of a dispute:

a. international *conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international *custom*, as evidence of a general practice accepted as law;
c. the general *principles* of law recognized by civilized nations;
d. […] *judicial decisions* and the *teachings* of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(United Nations 1946, art. 38)

From the perspectives of the actors subject to law – mainly states – legal uncertainty arises when these sources promote conflicting prescriptions. This can occur in a number of ways. First, different sources of law may disagree on how to interpret a rule, perhaps because the rule is textually underspecified or changing circumstances encourage a different take on a rule inherited from the past. Second, sources may disagree on which rule is relevant in a given situation. Old rules may be argued to lose relevance given changes in circumstances and patterns of state practice, and new rules may be proposed in their stead, both sets of rules coexisting for a time in different conventions, practices, and judicial decisions. Finally, a situation of legal uncertainty may also arise when legal rules are lacking in a novel domain of action. These legal gaps may generate uncertainty if they are accompanied by incoherent state practice suggesting different understandings about how the new issue area could be regulated. We may think of this as a potential conflict between different rules or a competition between emergent customs with inconsistent prescriptions.

As defined here, *legal uncertainty* has three important characteristics: its *systemic nature*, its *temporal variation*, and its *exogeneity* with respect to state practice in the short run. Table 6.1 summarizes these features.

First, legal uncertainty is a systemic feature. That is, it operates at the level of a legal system – in this case, the international legal system. Saying that legal uncertainty is a feature of the system does not mean that the entire system itself is uncertain; there may be specific domains of international law that may be certain and others less so at a given time. This depends on whether the authoritative sources of law have said anything about them and how consistent their pronouncements were with regard to particular questions. Thus, it will be useful to examine legal uncertainty in specific domains that are limited to the considerations of the states acting within them, as I do here in the domain of international maritime boundary making.

Table 6.1 Main features of international legal uncertainty

Systemic	Specific to a treaty, provision, or case
Time-variant	Not constant
Exogeneous	Endogenous, generated or shaped by dyadic interaction

The systemic nature of legal uncertainty also reveals its primary concern for ontological uncertainty. In a given domain, uncertainty is about the actual (not hypothetical) difficulty of saying what law is, due to an objective legal void or a series of well-articulated rules and interpretations provided by the sources of international law. This difficulty is sustained by the lack of a final arbitrator of rules, interpretations, and meanings in international law. Instead, a variety of sources can make similarly authoritative claims about the law. This is the reason why multilateral and judicial lawmaking episodes can routinely generate legal uncertainty. As noted above, this ontological uncertainty is a feature of the entire system rather than a feature of an actor's difficulty in knowing or discovering what law is. Actors' primary concern is not in acquiring accurate knowledge about the law or discovering what the law is.

Second, legal uncertainty varies over time. In some periods legal rules emanating from different sources of law are consistent with each other. In others, new customs emerge while old customs erode; states take unilateral action or sign treaties reflecting different understandings of law, some of which may crystallize into new customs over time; and international courts and tribunals decide on cases in a manner that does not always follow treaty or customary law or in ways contradicting previous jurisprudence. Contradictions between some legal rules may be resolved over time and new contradictions may emerge. A lack of shared meaning and rules can be replaced by a multiplicity of interpretations as multilateral and judicial lawmaking attempts are made to bring order into state practice. Due to the lack of a clear hierarchy[3] among international legal sources, new input in the form of a new rule or interpretation does not lead to the extinction of old understandings. Instead, new input increases the set of rules and interpretations that states can choose from. Understood this way, uncertainty is built up over time through lawmaking that gives different – even if slightly – answers to the same questions.

Finally, legal uncertainty is exogeneous to the practice of and interactions between particular states. To be sure, legal uncertainty stems from human activity insofar as it is produced by human collectivities such as states and international institutions. State practice, which can be seen as the set of relevant state policies and actions carried out with the conviction that they are required by the law, creates and shapes customary law. States also make and interpret treaties. Thus, states are both the makers and receivers of international law. Institutions such as international courts and tribunals, for their part, use the authority delegated to them by states to interpret and develop law. Saying that legal uncertainty is *exogenous* is not attributing uncertainty to an external source, natural or physical. Legal uncertainty is *exogenous* with respect to any state or dyad taken individually precisely because it is a production of a collectivity over time.

Exogeneity does not mean that positions that states take do not feed into uncertainty. Berenike Prem in this volume shows how states that are against the development of a norm prohibiting autonomous weapons have sought to play up the uncertainty associated with the promises and risks associated with such weapons. As a result of an action of a group of powerful states, no prohibition against the use of such weapons has been codified. Uncertainty that is fostered here, however,

is not about what the law is. What distinguishes legal uncertainty from uncertainty about the effects of a weapon system is the former's insensitivity to actions or statements of states, which, on their own, do not have the authority to make international law.

Although lawmaking is insensitive to individual state opinions, a state's action can contribute to making law overall more uncertain. This, however, does not happen immediately. For instance, if a state adopts a new interpretation of a particular customary rule, it does not immediately make the law more uncertain. The law can indeed become more uncertain if this deviance changes state practice more widely, for instance, by being replicated by other states (Gould and Barkun 1970: 197). Similarly, an individual state can also play a role in filling a legal gap. Moore and Orchard in this volume provide an account of how this may happen in the case of norms about internal displacement due to climate change. When norms are not concrete enough to provide guidance to actors, some may be able to act as norm entrepreneurs and promote understandings to tackle this type of uncertainty. Rather than being mere norm takers, such actors can play a crucial role in challenging and promoting particular norms. More so than in norms, the production of international law is insulated from the actions of any individual state and often requires a formal intervention in the form of a treaty or a judicial ruling.

In short, what creates uncertainty is the production and promotion of different rules and interpretations by authorities that are entitled to provide them. These different rules and interpretations do not exist due to states interpreting the same texts differently. The texts and limited sets of established interpretations given to texts can be *objectively* inconsistent with each other. For instance, the provision "the default rule is X" contained in a multilateral treaty is clearly incompatible with a court ruling that holds that "there is no default rule." Both are clear statements that conflict with each other. States often choose between these two instead of adding their original interpretation; attempts to say "the default rule is Y" without any justification based on legal sources are likely to fail.[4] The multiplicity of interpretations is not created by any state that wills it. Only the interpretations backed by the authoritative sources of international law – international treaties and court judgments[5] – are part of the multiplicity, not individual views of the states. In the short run, then, states *endure* legal uncertainty.

Measuring legal uncertainty

If legal uncertainty is disagreement born out of legal sources being silent about what law is or different sources of law saying different things about what law requires, its measurement requires (a) the identification of relevant questions, and (b) coming to a judgment about the degree to which consensus existed with regards to each question in a given time frame. I focus on the question of the **maritime boundary delimitation methodology** that should be used to delineate areas subject to overlapping entitlements of two states. I approach this question by studying the prominent and tractable sources of international law – treaties, treaty negotiation records, and judicial decisions. I qualitatively assess the extent to which the

views identified in these sources are consistent with each other. I focus on instances of lawmaking where new responses were given to the questions concerning maritime delimitation as potential cut-off points for the degree of uncertainty.[6]

One category of potential cut-off points includes moments where *states come together to codify and further develop international law of the sea* on these points (such as the three UN Conferences on the Law of the Sea). Around such moments, we can reasonably expect disagreements to arise about what the current law is, how it is changing, and how it needs to change. Another set of potential cut-off points consists of *judicial decisions on maritime delimitation*. By interpreting and applying customary and treaty rules, courts and tribunals can create new laws that may conflict with the preexisting set of legal norms. A judicial decision may interpret a rule in a way that is clearly inconsistent with a treaty, with a previous ruling or with what legal scholars or practitioners think to be the correct interpretation. In addition to creating laws that may conflict with the law coming from other sources, judicial decisions can specify what customary law requires. The written statements of what custom is given by courts and tribunals may then clash with other interpretations implied in treaties or suggested by legal scholars.

In general, then, moments of lawmaking (multilateral or judicial) are especially susceptible to changing the coherence (or the degree of agreement) in law. I identify such cut-off points to create three periods, covering low, medium, and high uncertainty. At the higher end, we have a *high level of legal uncertainty*, when there are important inconsistencies within the set of rules and interpretations that make up the law of maritime delimitation, often accompanied by intense debates within the international legal scholarly community over how these inconsistencies should be resolved. At the other end, we have *low level of legal uncertainty*, where legal rules and interpretations emanating from various sources of law are broadly consistent with each other on the content and application of the law of maritime delimitation. In between these two, we may have a *medium level of legal uncertainty*, where certain areas of convergence are identifiable within the sources of law, but some more or less important questions remain debated. Table 6.2 summarizes these descriptions, and a narrative of the changes in the level of uncertainty follows.

Table 6.2 Ranking according to disagreement over the delimitation of maritime areas

Level	*Low*	*Medium*	*High*
	Sources agree on the default delimitation method and the factors that need to be considered in maritime boundary delimitation.	Sources disagree less and less over the delimitation method and relevant factors, coming to similar conclusions each time they make new input.	Sources disagree significantly over the delimitation method and/or factors that should be taken into consideration in maritime delimitation.
	1958–1969	1993–	1969–1993

1958–1969: A default delimitation rule and low legal uncertainty

The cut-off event in terms of changes in the legal uncertainty is the adoption of two of the four conventions resulting from First United Nations Conference on the Law of the Sea (UNCLOS-I), the Convention on the Territorial Sea and the Contiguous Zone (TSC), and the Convention on the Continental Shelf (CSC). Both the TSC and CSC contained similar provisions that suggested that a median/equidistant line would be drawn if parties did not agree otherwise and in the absence of special circumstances (or historical title, in the case of the territorial sea) (TSC 1958 Article 12, CSC 1958 Article 6). This rule of delimitation came to be known as the 'equidistance plus special circumstances rule' (Churchill and Lowe 1988: 184).

1969–1993: A rival delimitation rule and high legal uncertainty

The cut-off event preceding these times of high legal uncertainty is the 1969 ICJ judgment on *the North Sea Continental Shelf Cases*, where the ICJ rejected the obligatory nature of the equidistance rule for states that were not party to the 1958 CSC. It also came to more general conclusions about how maritime delimitation should be done, ruling that 'delimitation must be the object of agreement … arrived at in accordance with *equitable principles'* (ICJ 1969, para. 85, emphasis added). The core principles governing maritime delimitation thus became subject to inconsistent answers from two authoritative sources – treaty law, the 1958 CSC, clearly gave predominance to equidistance/median line, whereas the ICJ put forward a more flexible – and unpredictable – method of equitable principles. The ruling arguably prevented the equidistance rule from becoming customary and certainly gave arguments to a number of states that could benefit from a different rule.

Another important source of disagreement in these first years of the 1970s was the beginning of a great effort to produce a new multilateral treaty. The Third United Nations Conference on the Law of the Sea (UNCLOS-III) convened in 1973 with a mandate 'to adopt a convention dealing with all matters relating to the law of the sea' (UNGA 1973, para. 3). UNCLOS-III held 11 formal sessions between December 1973 and December 1982, during which all the questions related to the law of the sea were discussed with a view to adopting a unique document. Several disagreements arose during the negotiations, and although the nature and extent of maritime zones were agreed upon relatively early in the process, the disagreement over the delimitation rule lasted until the final years of the conference. In the end, states could only agree to a very vague rule, which shows the extent to which there were disagreements between those that supported "equidistance" as the method to use and those that looked for a more flexible rule in line with what the ICJ had ruled in 1969 – equitable principles (Tanaka 2015: 200–201). The text adopted in UNCLOS in 1982 did not help arbitrate between the two contending methods – equidistance and equitable principles. The provision included in the treaty concerning continental shelf delimitation was as follows:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> (UNCLOS, Article 83, para. 1)

An identical statement was adopted concerning the delimitation of the exclusive economic zone (UNCLOS, Article 74, para. 1). Instead of naming a specific, practical method, these provisions only mentioned "equitable solution" as a result to reach. As the ICJ put it in its *Libya/Malta* judgment, '[t]he Convention sets a goal to be achieved but is silent as to the method to be followed to achieve it' (ICJ 1985, para. 28). Consequently, it remained debatable whether this goal required the use of equidistance/median line at some point in the process or it was completely agnostic about the appropriateness of any particular method in the abstract.

In the years following the signature of the UNCLOS, the courts and tribunals seemed to take the second view. Throughout this period, when called on to delimit maritime boundaries, international tribunals would simply state that 'the delimitation of a […] boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result' (see, e.g., ICJ 1985 [Libya/Malta], para. 45). Thus, this period could be considered one with *high legal uncertainty* as different sources continued to give different answers about what maritime delimitation required – with sources elevating equidistance as the default rule conflicting with authoritative legal pronouncements that reject this status and instead promote equitable principles.

1994–2016: Low uncertainty as conflict among sources leaves way to compromise

The cut-off event preceding this time of low uncertainty is the ICJ's *Greenland/Jan Mayen* ruling in which the ICJ incorporated equidistance as the first step in maritime delimitation for coastal states with opposite coasts. It did so by noting that reaching an equitable solution required, as a matter of customary rule, beginning from an equidistant/median line, which could then be adjusted if relevant circumstances justified it (ICJ 1993, paras. 53, 54). From this event onwards, international courts and tribunals visibly began to coalesce around a method of maritime delimitation that helped resolve the disagreement between the hitherto contending principles of equidistance and equity and provided a more predictable situation for states seeking to delimit their maritime boundaries.

These decisions helped crystalize what came to be called the three-stage methodology (ICJ 2006, paras. 116–122). According to this, a court or a tribunal would first draw a provisional equidistant line. At the second stage, it would consider whether the existence of special or relevant circumstances would justify modifying the provisional line. Finally, at the third stage, the court or the tribunal would verify that the result of the two previous stages taken as a whole did not lead to any great disproportionality of maritime areas by comparison to the ratio of coastal lengths (Prescott and Schofield 2005: 25).

By being consistent with this method that poses equidistance as a first step in maritime delimitation, international courts, and tribunals have provided a degree of predictability to the law of maritime delimitation – predictability not only in the opinion of international law scholarship but presumably also from the perspective of negotiating states and their advisors.

Maritime delimitation under legal uncertainty

In times of *legal uncertainty*, it may well be harder for state expectations to converge around a narrow set of solutions that includes potential boundaries that do not fall far from either side's claims. Without such convergence, states may find it difficult to conclude delimitation agreements. Even when states are engaged in negotiations, they will first need to determine which legal principles are relevant to the drawing of their boundary before talking about other factors that may be taken into account to arrive at a line acceptable to both states. Thus, it may be expected that higher degrees of legal uncertainty are associated with lower rates of maritime boundary delimitation. However, it may also be the case that legal uncertainty pushes states to quickly delimit their boundaries so that they have a clear jurisdictional basis for their economic activities despite the uncertainties surrounding the law.

This empirical section briefly illustrates a way in which states may respond to legal uncertainty – by bilaterally settling on a rule and delimiting their boundary accordingly. I illustrate the workings of legal uncertainty in a case where states were able to sign a maritime boundary agreement in times of high legal uncertainty but were unable to ratify it until law became more settled.

Mexico–United States maritime boundary delimitation

The maritime boundary relations between Mexico and the United States are surprising in that they are marked by a series of delimitations agreed upon in an era of high legal uncertainty with regard to the extent of maritime zones and the rule for the delimitation of overlapping state entitlements in the sea. These delimitation agreements consisted of two treaties, signed in 1970 and 1978, and an exchange of notes in 1976. I will focus my analysis on possible factors that explain how states were able to keep their unilateral claims within limits that their neighbors would consider reasonable, averted potential disputes, and delimited a long maritime boundary over a period of 10 years marked by high legal uncertainty. I will also discuss how the ratification of the delimitation agreement was delayed by the interventions of actors who wanted to make the most of legal uncertainty by making more extensive claims.

In 1976, both Mexico and the USA extended their jurisdiction in the sea to 200 nautical miles. It is suggested that these two acts were the immediate drivers of the agreement that came later that year when the two states exchanged notes to establish provisional maritime boundaries (Sepúlveda 1983: 159–160).[7] These provisional boundaries were reaffirmed with the signature of a maritime boundary agreement on 4 May 1978. Mexico ratified the agreement the following year. US

President Jimmy Carter submitted this treaty – together with two other maritime boundary delimitation treaties signed with Cuba and Venezuela – to the US Senate in early 1979.[8] The Senate Foreign Relations Committee unanimously voted to transmit the treaty to the full Senate but requests for further study and concerns raised about the line drawn in the Gulf of Mexico delayed the process. The Senate finally gave its consent in 1997, and the treaty entered into force on 13 November 1997.

It is indeed surprising that a commonly and easily agreed upon maritime boundary emerged at a time in which states had a number of legal rules and interpretations to adopt, some of which would have given a broader area of jurisdiction to one or the other state in certain portions of the boundary. The 1978 treaty used the equidistance method and gave full effect to islands and low tide elevations, at a time when law was highly uncertain as to the appropriate method of maritime delimitation and the effect that should be given to islands. Smith and Colson (1993: 429) describe the apparent restraint of the parties as follows:

> Notwithstanding that there were differences between the two countries concerning the juridical nature of the zones and fishing rights, they nonetheless agreed not to exacerbate these differences by making claims of maximum legal advantage which would have led to a boundary dispute. […] Recognizing that pressing a maximum claim on one coast would work to the other side's advantage on the other, the governments agreed to adopt the same approach for each coast. This led to an overall agreement rather than a dispute on each coast.

The hearing before the Foreign Relations Committee while the treaty ratification was being discussed provides evidence that different delimitation methods were considered. A prominent scholar, Professor Hedberg, had proposed an alternative delimitation method that would have given the United States more in the Gulf of Mexico than what was agreed upon in the 1978 treaty. This method would have involved leaving Mexican islands off the coast of Yucatan not entitled to any continental shelf. Speaking against this suggestion, the deputy legal adviser reiterated the longstanding US policy in favor of the rule giving full effect to islands in delimitation:

> I don't think there is any doubt of it: from the point of view of the national interest of the United States, the security interest, the resource interest, and *control over as much area as possible*, *this principle* serves our general boundary position very well.
>
> (US Senate 1980, 21, emphasis added)

Speaking of the dangers of nonratification on the part of the USA, the deputy legal adviser pointed out that his 'greatest concern' would be that 'if left unresolved, [the matter] could become more contentious over time. […] a change in Mexico's position which conceivably would make it difficult for us to obtain jurisdiction [in

the Pacific]' (US Senate 1980: 21). Finally, he suggested that if the US position were to change in line with the principles laid out by Professor Hedberg, '[t]hat position would be rejected out of hand by Mexico as overreaching and not based on principles relevant to maritime boundary delimitation. We would have a serious bilateral dispute then in our relations with Mexico if we went in that direction' (US Senate 1980: 21). Finally, in a final attempt to justify the treaty, the adviser talked of a "trade" that was made whereby the use of the same principle giving full effect to islands favored one side on one coast and the other on the other (US Senate 1980: 23).

In this case, then, facilitating the agreement was the fact that neither Mexico nor the USA could rely on one rule that, if applied to that entire boundary, would result in a clearly more favorable result for them. The relevant rule was that of islands generating full maritime zones, and this rule favored both sides. This suggests that if states are favored by the same rules due to their geographies, they can well sign agreements even though uncertainty is high. If the USA wanted to ignore islands and low tide elevations in maritime delimitation, it would have gained in the Gulf of Mexico but lost in the Pacific. The coincidence in the value both the USA and Mexico gave to the principle, no doubt helped by economic prospects, seems to have prevented the pursuit of contending claims. For other countries, this may not be the case, and they deserve further study.

Although the treaty went ahead, one of the reasons that is given for the significant delay between the signature and ratification is the objections raised by Professor Hedberg, as noted above. The achieved certainty in law seems to have voided the objections by the time the Senate took up the ratification issue in 1997. During this latter hearing, Senator Chuck Hagel notes that '[i]nitially, there was some controversy over the methodology used to delineate the maritime boundary […] in the Gulf of Mexico,' but that, as he saw it, 'the delineation methodology […] has now been accepted by all sides' (US Senate 1997: 17–18). According to the 1997 hearing reports, the American Association of Petroleum Geologists (AAPG) also seems to have shifted its position and communicated this change by letter to the Foreign Relations Committee. It may be that the overall consensus over the delimitation rule obtained at the end of the 1990s left little opportunity for the AAPG to insist on Hedberg's alternative proposals, and their change of position may have given impetus to the ratification of the treaty.

The fact that there were several alternative rules and proposals considered during the UNCLOS-III – "tentative thinking" as Professor Hedberg had called it – provided room for calling the delimitation method used in the Gulf of Mexico into question. It plausibly raised questions in the minds of several senators about why, if delimitation methods more beneficial to the USA are available, a treaty giving away much that could have been otherwise controlled by the USA should be ratified. Future studies should consider how the existence of various competing rules can be relevant in the entire process of treaty making, from initial contacts between state officials to the exchange of ratification instruments. It would also be interesting to think about the mechanisms that may lead to delayed ratification – for instance, as the ratification procedure gives the opponents of the treaty another

chance to exploit the uncertainty in law to push forward their preferred solution. Such inquiries could usefully consider the composition of interests that can be voiced within a state – such as the views held by coalition partners, opposition parties, and lobby groups.

The case study illustrates the three important features of uncertainty: its *systemic* and *time-variant* nature, as well as its *exogeneity* to the actors. Although states have opportunities to pick and choose from existing, available rules that are the hallmark of high periods of legal uncertainty, they are rarely able to introduce their own preferred rules into the set of available alternatives from which they can then legitimately choose. Professor Hedberg vehemently advocated for his *sui generis* delimitation method, but what made the most difference were interventions from treaty making periods as well as case law, which followed their own evolution at the level of the legal system. The case study highlights the working of legal uncertainty and law more broadly as a systemic feature under which states – even a hegemonic power like the USA – must operate with little expectation that they can by themselves and as they wish use or change the law to their advantage.

Conclusion

This chapter has posed legal uncertainty as a useful concept to understand how states behave in an increasingly legalized world. It has proposed that international legal uncertainty is often a routine byproduct of the very processes by which international law is made and evolves. It has shown how legal uncertainty touches on broader understandings of uncertainty, especially lack of shared meaning and multiplicity of interpretations, while differing from them in important ways. Future work can make this concept more useful by theorizing and measuring legal uncertainty in other legal domains and in a more disaggregated manner. It can also assess the conditions under which actors can individually or collectively shape this uncertainty or make it irrelevant to their relations with other states.

The chapter shows how lawmaking may plausibly result in competition between and among rules and interpretations, and how increased legal production in terms of multilateral and judicial lawmaking affects the way in which states define their positions and engage in bilateral negotiations over their boundaries. It invites further thinking into the impact of law on conflict and cooperation processes. Future work could usefully consider in a more fine-grained manner how the various political, economic, and strategic interests of states interact with the incentives, opportunities, and constraints provided by laws and institutions that subtend state action. Although developed in the domain of maritime boundary relations, the theory I propose has implications for other issue areas where distributional and zero-sum issues arise, sometimes concurrently, and where laws are being made to guide states to a peaceful settlement. While the success of new legal rules in providing more certainty and higher likelihood of peaceful dispute management should not be taken for granted, it is also important to assess how states can nevertheless cooperate despite legal uncertainty by fixing meanings and obligations in a bilateral manner.

Notes

1 Operationally, the coders in the COIL project give precision scores for treaty texts based on their judgments on how precise the provisions of the treaty are. Provisions that prohibit a certain course of action are deemed more precise in general. In terms of completeness, which seems to be another concern, treaties that contain specific quotas and those that seem to be more detailed are also deemed to be more precise than shorter, broader agreements (Koremenos 2016: 160–162).
2 That being said, imprecision and underspecification could make it easier for legal uncertainty to arise by allowing different interpretations. Also, underspecification could be a sign of law being uncertain in a way, because states have been unable to clearly articulate what rights or obligations are implicated in a rule. In many cases, however, underspecified provisions are a design feature that are included in treaties to provide flexibility to states when necessary. It may well be that states want to keep their options open if unforeseen developments require them to deviate from law temporarily.
3 This does not mean that, in practice, some pronouncements hold more sway than others. That one rule comes to be seen as more authoritative than another may have to do with which source promoted it, when it was proposed, how consistent it is with existing rules and practices, and so on. Rules that are perceived as more legitimate can also have a greater authority claim. Yet, while a new rule or understanding promoted by a court may be considered wrong by many states and hold less sway in state practice, this does not mean that the rule proposed by a court does not become part of the law, available to be adopted and used by other interested states.
4 To be sure, once they agree that there is no default using which the dispute should be resolved, states can still disagree on how to resolve their dispute. Here the disagreeing parties will make appeal to extra-legal reasons.
5 Custom can be added here, although what an individual state interprets the custom to be does not reach the same level of authority that is gained when the custom is codified in a treaty or interpreted by authoritative international courts – most commonly, the ICJ.
6 Talking about uncertainty in degrees does not suggest that there is inevitably some legal uncertainty in every issue. There will be no legal uncertainty if there is no law that can be subject to multiple interpretations. In the case laid out by Prem in this volume, for instance, there is no law prohibiting the development and use of autonomous weapon systems; thus, the law is quite certain in what it permits. Law can be quite certain as well in the earlier periods of its development, before other legal sources begin weighing in.
7 The USA itself declared a 200-nm fishery conservation zone soon after in its Fishery Conservation and Management Act of 1976 (US Senate 1997: 25–26).
8 See the letters of submittal and transmittal, available at https://babel.hathitrust.org/cgi/pt?id=umn. 31951d03668329l;view=1up;seq=3

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