

SYMPOSIUM ON AUTHORITARIAN INTERNATIONAL LAW: IS AUTHORITARIAN INTERNATIONAL LAW INEVITABLE?

INTERNATIONAL LAW AS HEDGING: PERSPECTIVES FROM SECONDARY AUTHORITARIAN STATES

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Tom Ginsburg's important article comes at a critical time. The COVID-19 crisis has spurred heated debates about political regimes vis-à-vis countries' bureaucratic capacity. Political regime type is the core independent variable in Ginsburg's conceptualization of *authoritarian international law*—a global projection of authoritarian states' domestic politics.¹ This essay echoes Ginsburg's insightful observation but complicates it by shifting the focus to the less-known perspectives of secondary authoritarian countries. I use a matrix case study of two smaller states, Vietnam and Cambodia, on two prominent issues, the South China Sea (SCS) and the Belt and Road Initiative (BRI), to demonstrate small states' effort to use international law to “hedge” big powers. As the case studies show, small authoritarian states, not unlike other small states, prefer a pluralist vision of international law, even if they may at times embrace the alternative model offered by big authoritarian powers. These states thus have an important, perhaps unexpected, role to play in preserving the pluralist international legal order and mitigating the hegemonic tendencies of authoritarian international law.

International Law as Hedging: Two Case Studies

Hedging is an act of self-preservation for weak states.² Though scholars differ in their definitions, they generally agree that the goal is to keep equidistance and avoid overreliance on any particular external power.³ Motivated by regime survival, less powerful states tend to favor a pluralist global order to leverage competing “offers” from big powers.⁴

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¹ Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221, 228 (2020).

² Hedging is characterized as a middle ground between the two realist poles of bandwagoning, i.e., hitching to a great power, and balancing, i.e., counteracting a great power through alliance. Darren Lim & Zack Cooper, *Reassessing Hedging: The Logic of Alignment in East Asia*, 24 SEC. STUD. 696, 697 (2015); see generally Stephen M. Walt, *Alliance Formation and the Balance of World Power*, 9 INT'L SEC. 3 (1985) (theorizing bandwagoning and balancing as two main strategies for small states).

³ See Lim & Cooper, *supra* note 2, at 709 (noting that smaller states deliberately send “ambiguous alignment signals”); Eric J. Labs, *Do Weak States Bandwagon?*, 1 SEC. STUD. 383, 393 (1992) (noting that weak states “prefer above all to remain non-aligned”); EVELYN GOH, *MEETING THE CHINA CHALLENGE: THE U.S. IN SOUTHEAST ASIA REGIONAL SECURITY STRATEGIES* viii (2005) (noting the goal to “cultivate a middle position that forestalls or avoids having to choose one side at the obvious expense of another”).

⁴ See William Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L. L.J. 1, 32 (2015) (characterizing power centers as “hubs” and noting that competition among hubs empowers non-hubs with choices); Harlan Grant Cohen,

International law, like all law, is Janus-faced: despite criticism of its Western and colonial roots,⁵ it has played an undeniably pivotal role in small states' resistance to superior powers,⁶ though often in subtle ways.

In studying how small authoritarian states employ international law, I have chosen one of the most prominent boundary disputes (the SCS) and one of the most ambitious economic projects (the BRI) because they bring to the fore small states' acute sensitivities toward power asymmetry. As demonstrated below, the case studies highlight nuanced modes of dispute resolution and resistance that simply cannot be captured by the aggregate data used in Ginsburg's article.⁷ Though both Vietnam and Cambodia are developing, authoritarian countries with similar geopolitical concerns, Cambodia is more dependent on and closely aligned with the resident great power, the People's Republic of China (PRC, or China).⁸ This critical factor influences how each state evaluates its regime survival risks and drives its engagement with the international legal order.

South China Sea Dispute

The SCS dispute highlights Vietnam's and Cambodia's judicious engagement with international law as a way to push back against China's maritime ambition, while seeking to isolate SCS tensions from otherwise dense Sino economic and political ties. As expected, Vietnam was much more anxious than Cambodia. In its bid to protect its maritime interest, Vietnam departed from ASEAN's long-standing principle of regional harmony to advocate for a multilateral approach.⁹ As ASEAN's 2010 chair, it zealously, if informally, encouraged regional outsiders such as the United States, Japan, and Australia to intervene.¹⁰ Vietnam's effort appeared successful when then-U.S. Secretary of State Hillary Clinton declared at the ASEAN Regional Forum that the United States had "national interests" in the freedom of navigation in the region.¹¹ U.S. intervention put pressure on the PRC to restart committee-level meetings at ASEAN, rather than maintain its preferred method of bilateral dialogues.

Unlike the Philippines, Vietnam has so far stopped short of fully availing itself of international legal institutions, but that measured approach might be changing. Vietnam's March 2020 note verbale, the latest in a series of note

Multilateralism's Life Cycle, 112 AJIL 47, 49, 55 (2018) (noting that more widely dispersed power increases the negotiating leverage of less powerful states).

⁵ For a critique from Global South scholars, see generally B.S. Chimni, *Third World Approach to International Law: A Manifesto*, 8 INT'L CMTY L. REV. 3 (2006). For a critique from the Chinese and socialist perspectives, see generally Hungdah Chiu, *Communist China's Attitude Towards International Law*, 60 AJIL 245 (1966).

⁶ See, e.g., Robert Keohane, *Lilliputians' Dilemmas: Small States in International Politics*, 23 INT'L ORG. 291, 291 (1969) (noting small states' "using the United Nations as a forum and a force and claiming nonalignment as an important diplomatic innovation").

⁷ See Ginsburg, *supra* note 1, at 234–41.

⁸ The method used is thus "most similar" case design. See generally Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Politics*, 109 AJIL 475 (2015).

⁹ As an oft-quoted Vietnamese diplomat pithily summed up, "Sino-Vietnamese relations will be meshed within the much larger regional network of interlocking economic and political interests. It is an arrangement whereby anybody wanting to violate Vietnam's sovereignty would be violating the interests of other countries as well. This is the ideal strategic option for Vietnam. It is also the most practical." Carlyle Thayer, *Sino-Vietnamese Relations: The Interplay of Ideology and National Interest*, 34 ASIAN SURV. 513, 528 (1994) (quoting Ambassador Nguyen Hong Thach, *Vietnam-China Ties: A New but Not Easy Era*, BUS. TIMES (Singapore) (Dec. 31, 1992)).

¹⁰ Not all of the "ASEAN Way" diplomacy was forsaken. To avoid direct confrontation, official ASEAN statements were all carefully edited to leave out any explicit reference to China's maritime ambition, leaving it to individual countries to raise the issue in their own remarks. INTERNATIONAL CRISIS GROUP, *STIRRING UP THE SOUTH CHINA SEA II: REGIONAL RESPONSES* 23–25, 28–29 (2012).

¹¹ Hillary Rodham Clinton, Secretary of State, *Remarks* at the National Convention Center, Hanoi, Vietnam (July 23, 2010) ("The United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea.").

verbale battles, laid out, for the first time, its legal position, including an acknowledgement of the UN Convention on the Law of the Sea (UNCLOS) as the “sole legal basis” for dispute resolution.¹² Significantly, by articulating a legal basis for Vietnam’s position, the note verbale ostensibly seeks to fulfill the “exchange of views” prerequisite for submitting to an UNCLOS tribunal’s jurisdiction—a signal that Vietnam is laying the groundwork for a possible future claim.¹³

Even Cambodia, deemed the PRC’s “client state,” has felt some need to distance itself from China’s strongman maritime stand, following backlash both at home and abroad. As ASEAN’s 2012 chair, it came under fire for thwarting Vietnam and the Philippines’ push for a unified regional position on the dispute, resulting in ASEAN’s first-in-history failure to produce a joint statement and sparking criticism of the organization’s waning relevance.¹⁴ Cambodia, however, did sign on to ASEAN’s latest joint statement, crafted by Vietnam but endorsed unanimously by other member states, which explicitly affirms, for the first time, that “UNCLOS sets out the legal framework within which all activities in the oceans and seas must be carried out.”¹⁵ Though it sounds rather mild and without direct reference to the *Philippines v. China* arbitration, the joint statement marks ASEAN’s hard-won unified rejection of China’s territorial claim.

The SCS disputes thus demonstrate the nuanced modes of dispute resolution that small authoritarian states utilize. Subterranean to formal mechanisms (and therefore, uncaptured by official data), these modes are nonetheless tethered to the democratic-led international legal order, occupying the space *between* the formality of international adjudications and private negotiations.

Belt and Road Initiative

Unveiled in 2013, the BRI is China’s globe-wrapping megadevelopment project that promises lucrative infrastructure investments from Asia to Africa.¹⁶ Structured as a series of bilateral agreements with host countries, the BRI institutionalizes less formal dispute resolution norms, including negotiation, mediation, and diplomacy, that are germane to authoritarian international law. With its scale and scope, the BRI inevitably will have an impact on the international legal order—though, as one scholar argues, at least for now, the PRC is more interested in regional legal harmonization through the form of transnational law, rather than in either domestic law transformation or global legal export.¹⁷

Despite the BRI’s enormous financial attraction, Vietnam has displayed certain degrees of ambivalence toward the project. Its cautious stand, unsurprisingly, stems in part from potential ramifications for the ongoing SCS

¹² See [Note Verbale No. 22/HC-2020](#) from the Permanent Mission of the Socialist Republic of Viet Nam to the UN Secretary-General (Mar. 30, 2020); see also [The Legal Implications of Vietnam’s Note Verbale Protesting China’s Claims in Relation to East Vietnam Sea](#), TUOITRE NEWS (May 17, 2020) (interview with the president of the Vietnam Society of International Law).

¹³ See [UN Convention on the Law of the Sea](#) art. 283(1), Dec. 10, 1982, 1833 UNTS 397; *The South China Sea Arbitration* (Phil. v. China), PCA Case No. 2013–19, [Award](#) para. 160 (July 12, 2016) (“Article 283 requires parties to exchange views on the means of settling their dispute.”). See also U.S. Asia Law Institute, [Vietnam’s New Approach to the South China Sea Disputes](#) (May 27, 2020).

¹⁴ John Ciorciari, *A Chinese Model for Patron-Client Relations? The Sino-Cambodian Partnership*, 15 INT’L REL. ASIA-PACIFIC 245, 263–65 (2014).

¹⁵ Chairman’s [Statement](#) of the 36th ASEAN Summit (June 26, 2020); see also Jerome A. Cohen, [ASEAN Takes a Subtle Stance Against China’s Maritime Claims](#), JEROME COHEN.NET (June 30, 2020).

¹⁶ See Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, J. INT’L ECON. L. (forthcoming 2020).

¹⁷ Matthew Erie, *Chinese Law and Development*, 62 HARV. INT’L L.J. (forthcoming 2021) (noting that BRI deal structures ensure that PRC companies operating overseas can monopolize bids on loans made by Chinese banks and elect to resolve disputes outside local courts, thus insulating BRI investments from local laws).

conflict, particularly because the BRI's Maritime Silk Road passes through disputed water.¹⁸ As with the case of the SCS dispute, Vietnam sought a multilateral approach. It aggressively pursued free trade strategies, joining the now-Japan-led Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the rival Regional Comprehensive Economic Partnership, and, most recently, the European Union-Vietnam trade and investment agreements. The latter set up a permanent dispute resolution mechanism, with tribunal members appointed in advance by the EU and Vietnam, and incorporate the rules on transparency recently adopted by the UN Commission on International Trade Law.¹⁹ The agreements, once effective, will supersede existing bilateral investment treaties concluded between EU member countries and Vietnam. This makes Vietnam one of the first countries to sign up for the new multilateral investment court mechanism and marks a significant, proactive change in the single party-state's engagement with formal international institutions.

Compared to Vietnam, Cambodia's heavy dependence on Chinese investments for poverty reduction, long seen as a measure of legitimacy for Prime Minister Hun Sen's regime survival, naturally leads to its strong embrace of the BRI. Even then, Cambodia's initial enthusiasm was tamped down due to concerns about debt distress risk and anti-China public discontent. The PRC's monopoly on investment in several key sectors in Cambodia—Chinese companies, many of which are state-affiliated enterprises, own around 90 percent of textile firms and nearly all hydropower plants in Cambodia—has long caused tension in domestic politics.²⁰ As China also receives the largest share of land grants for economic development, displacement caused by BRI-related infrastructure development continues to cause tension.²¹

One consequential development of the BRI for authoritarian international law is the establishment of the China International Commercial Court (CICC) as a possible venue to resolve BRI-related disputes. Characterized as a “multi-door,” one-stop-shop tribunal guided by “Fairness, Professionalism, Convenience,” the CICC integrates traditional litigation services with a broad menu of dispute resolution choices, including mediation, arbitration, and negotiation.²² Officially an organ of the Supreme People's Court of China, the CICC also features an expert committee comprised mostly of foreign experts, who are authorized to serve as mediators and advise CICC judges (all of whom are Chinese judges) on foreign and international law.²³ This direct, if limited, incorporation of international elements into the CICC allows it to stay competitive in a dense landscape of international

¹⁸ See PHAM SY THANH, SANG KIEN VANH DAI CON DUONG: LUA CHON NAO CUA DONG NAM A? [THE BELT AND ROAD INITIATIVE: WHAT ARE SOUTHEAST ASIA'S CHOICES?] 273 (2019) (“Vietnam's BRI stand hinges more on its security and strategic calculation rather than its economic needs.”).

¹⁹ See [EU-Vietnam Investment Protection Agreement](#) art. 3.38 (Tribunal); *id.* art. 3.39 (Appeal Tribunal); *id.* art. 3.46 (Transparency of Proceedings). For a critique of different models of investment dispute resolution, see Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018).

²⁰ [Ciorciari](#), *supra* note 14, at 263–65; Thomas Lum, *Cambodia: Background and U.S. Relations* 13–15, CONG. RES. SERV. (Jan. 28, 2019).

²¹ Vannarith Chheang & Heng Pheakdey, *Cambodian Perspective on the Belt and Road Initiative* (National Institute for Defense Studies Joint Research Series No. 17, 2019).

²² As a side note, the movement toward less formal dispute resolution, while certainly promoted by the BRI, appears to be a global trend rather than one driven by authoritarian states alone. The Singapore Mediation Convention, for example, was proposed by the United States and signed by forty-six countries, including democracies such as the United States, India, and South Korea. See Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L. J. 1, 1 (2019).

²³ In this aspect, the CICC appears to deal head-on with the problem of judging unfamiliar foreign law, an issue that the U.S. judiciary struggles with, as pointed out in Mark Jia, *Illiberal Law in American Courts*, 168 U. PENN. L. REV. (forthcoming 2020).

commercial hubs²⁴ and mitigates, to some extent, skepticism of the CICC's neutrality.²⁵ Yet, Supreme People's Court President Zhou Qiang's recent statement affirming the "absolute leadership" of the Chinese Communist Party over the judicial system, including strict implementation of the rules requiring judges to report and seek political inputs on "major matters," may further calcify concerns about political control over BRI disputes.²⁶ As scholars of authoritarian courts have documented elsewhere, this will likely replicate a "bifurcated" system of dispute resolution, wherein "professional justice serves the vast majority of ordinary cases, while [politicized] justice caters to a range of exceptional cases."²⁷ Having implemented similar systems, Vietnam and Cambodia are well positioned to appreciate the precariousness of such a dual-track court when BRI-related disputes will inevitably arise. These countries—and by extension, other similarly situated authoritarian states—thus have reasons to be skeptical of the BRI and its associated legal mechanisms. Any economic and political solidarity gains would have to be weighed against the costs of already-brimming domestic discontent and shifting regional dynamics.

Conclusion

Authoritarian international law, insofar that it facilitates hegemonic tendencies by great authoritarian powers, should be concerning not only for the democratic-led status quo, but also for weaker authoritarian states. As smaller authoritarian states seek to engage with global players across the political regime aisles, often in nuanced ways, they can play an under-appreciated role in preserving the pluralism of international law. In this sense, Ginsburg's observation may be indicative of relative power dynamics as much as it is about a state's domestic constitution.

²⁴ See, e.g., Matthew Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225 (describing the rise of "new legal hubs", including in Hong Kong, Singapore, Dubai, China, and Kazakhstan, that house courts, arbitration centers, and mediation services in a one-stop-shop destination).

²⁵ See, e.g., *A Belt-and-Road Court Dreams of Rivalling the West's Tribunals*, ECONOMIST (June 6, 2019) (noting that other international commercial courts typically employ judges from several countries to signal their independence).

²⁶ Susan Finder, *Supreme People's Court's New Vision for the Chinese Courts*, SUPREME PEOPLE'S COURT MONITOR (May 4, 2020); Susan Finder, *Signals in the 2019 Supreme People's Court Work Report to the NPC*, SUPREME PEOPLE'S COURT MONITOR (April 22, 2019).

²⁷ Fu Hualing & Jason Buhi, *Diverging Trends in the Socialist Constitutionalism of the People's Republic of China and the Socialist Republic of Vietnam*, in SOCIALIST LAW IN SOCIALIST EAST ASIA 135, 152 (Fu Hualing et al. eds., 2018). On bifurcated judicial systems in authoritarian regimes, see RACHEL STERN, *ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE* 229–30 (2013) (describing China); Kathryn Hendley, *"Telephone Law" and the "Rule of Law": The Russian Case*, 1 HAGUE J. ON RULE L. 241 (2009) (describing Russia); Trang (Mac) Nguyen, *In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts*, 32 HARV. HUM. RTS. J. 147 (2019) (describing Vietnam).