Comment

Can International Tribunals Maintain Impact in an Era of Great Power Competition? Arbitration and Coalition Building in the South China Sea

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I. Introduction

The international legal order is in upheaval. While some form of international law will endure even the combined consequences of a risen China's maritime expansion, Russia's territorial conquest or Trump's contempt for international organisations and predictable rules, it is unclear whether this international law will be more akin to an constitutionalised international legal order,[1] a liberal international order,[2] an authoritarian international law[3] that seeks to consolidate authoritarian rule at home and abroad or a mix of elements of them. While some are confident that fundamental norms of international law and some of law's basic functions for order will survive,[4] others expect courts and tribunals – central actors of international law in international relations – to play a much-reduced role.[5] It is easy to point to

1 Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009).

2 G. John Ikenberry, 'The End of Liberal International Order?', Int'l Aff. 94 (2018), 7-23; David A. Lake, Lisa L. Martin and Thomas Risse, 'Challenges to the Liberal Order: Reflections on *International Organization*', IO 75 (2021), 225-257.

3 Tom Ginsburg, 'Authoritarian International Law?', AJIL 114 (2020), 221-260.

4 Eyal Benvenisti, 'The Resilience of International Law in the Face of Empire', Just Security, 17 February 2025, <https://www.justsecurity.org/107820/resilience-international-empire/>, last access 8 May 2025; Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit? – Zur Ordnungsfunktion des Völkerrechts in einer Welt im Umbruch', Der Staat 62 (2023), 579-612.

5 Ginsburg (n. 3), 258.

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the fact that the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA) are in higher demand than ever and that some of this demand is a direct response to conflict, war or great power expansion.[6] But this increased activity says very little about the effects and impact of international adjudication in specific cases and about how to concretely identify and measure this impact.

This comment, turning to the South China Sea Arbitration of 2016[7] and based on detailed empirical research,[8] argues that the arbitral tribunal has gained politically meaningful effects on interactions in the South China Sea disputes. Crucially, even the high level of tensions in the past two years, consistent non-compliance and resolute actions of a great power could not diminish the award's impact.[9]

II. Great Power Claims Defied by Adjudication

In January 2013, the Philippines initiated arbitral proceedings against China under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS).[10] This decision was triggered by a change of the territorial status quo at Scarborough Shoal in 2012 and by a recognition that a clarification of permissible maritime claims is needed to address the complex entanglement[11] of territorial and maritime disputes with great power competition in the South China Sea.

China, however, rejected the tribunal's jurisdiction and did not participate in the proceedings.[12] The tribunal ruled that China's claims within the nine-

6 'World Court Faces "Unprecedented Number" of Cases. Interview with Phillipe Gautier', UN News 2024, <https://news.un.org/en/interview/2024/10/1155951>, last access 8 May 2025; Permanent Court of Arbitration, 'Annual Reports', <https://pca-cpa.org/resources/publications/>, last access 8 May 2025.

7 PCA, The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), merits award of 12 July 2016, case no. 2013-19.

8 Christian Schultheiss, Beyond Compliance. The Impact of the South China Sea Arbitration on the South China Sea Disputes (manuscript under review).

9 For the distinction between impact of law and compliance with law, see Lisa Martin, 'Against Compliance' in: Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013), 591-610.

10 United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 396.

11 Peter Dutton, 'Three Disputes and Three Objectives. China and the South China Sea', Naval War College Review 64 (2011), 42-67.

12 Government of the People's Republic of China, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' of 7 December 2014, <https://www.fmprc.gov.cn/eng/wjb/zzjg_663340/bianhaisi_eng_665278/plpbo/202405/t20240530_11322463.html>, last access 8 May 2025.

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dash line were incompatible with the law of the sea to the extent that these exceed the limits prescribed by UNCLOS.[13] It determined that any historic rights, if ever they existed, had been extinguished. Additionally, China could not lawfully use straight baselines to enclose the Spratly Islands and assert Exclusive Economic Zone (EEZ) or continental shelf rights based on them as a collective unit. Second, the tribunal assessed the legal status of specific maritime features under Article 121 of UNCLOS, concluding that none of the Spratly Islands nor Scarborough Shoal qualified as islands capable of generating an EEZ or continental shelf. Third, the tribunal found that several Chinese actions violated various further obligations, including restrictions on traditional Filipino fishing at Scarborough Shoal, destructive environmental practices such as harvesting giant clams in the presence of Chinese law enforcement agencies, unauthorised construction at Mischief Reef and risky and dangerous conduct of Chinese maritime law enforcement vessels.

China has repeatedly stated that it will not comply with the award.[14] China's insistence on claims beyond the normal territorial sea, EEZ and continental shelf is not in compliance with the award's major finding. Still, the literature discusses whether China complies with single points of the award.[15] This is not surprising as assessing compliance requires an understanding of a judgment's demands, an assessment of whether the facts satisfy these demands and 'how much compliance is enough'.[16] Non-compliance is

13 Lucy Reed and Kenneth Wong, 'Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China', AJIL 110 (2016), 746-760; Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study', Chinese Journal of International Law 17 (2018), 207-748; Christian Schultheiss, '"One of the First Matters to Be Addressed but Distinct" or "Distinct but Inseparable"? The Distinction Between Maritime Entitlement and Sea Boundary Delimitation in the Philippines v. China Arbitration', Asian Journal of International Law 11 (2021), 1-12.

14 Ministry of Foreign Affairs of the People's Republic of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines' of 12 July 2016, <https://www.mfa.gov.cn/eng/zy/gb/202405/t20240531_11367334.html>, last access 8 May 2025.

15 See for instance, Hao Duy Phan and Lan Ngoc Nguyen, 'The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions', Asian Journal of International Law 8 (2018), 36-50; Julian Ku and Chris Mirasola, 'Tracking Compliance with the South China Sea Arbitral Award: China's 2017 Summer Fishing Moratorium May Rekindle Conflict with the Philippines', Lawfare, 7 March 2017, <https://www.lawfaremedia.org/article/tracking-compliance-south-china-sea-arbitral-award-chinas-2017-summer-fishing-moratorium-may>, last access 8 May 2025; Bill Hayton, 'Denounce but Comply: China's Response to the South China Sea Arbitration Ruling', Georgetown Journal of International Affairs 18 (2017), 104-111.

16 Alexandra Huneeus, 'Compliance with Judgments and Decisions', in: Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014), 437-463 (444).

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illustrated by the China Coast Guard's repeated interferences with Philippine Coast Guard vessels at Second Thomas Shoal (a low-tide elevation China cannot legally claim), the occupation of Mischief Reef (a low-tide elevation China cannot legally claim), incidents in the Philippine EEZ and China's annual fishing ban,[17] where it applies to Philippine waters. It must be stated that not every incident is automatically an instant of non-compliance with the award. This situation of non-compliance, though, does not mean that the award has had no effects on interactions in the disputes, as the next section will show.

III. Impacts Despite Non-Compliance of a Major Power

Indeed, the award has had politically important impacts on Southeast Asian claimant states, China and non-regional countries. It is important to look at the Philippines not as a passive recipient of the tribunal's award. State and non-state actors from the Philippines and increasingly from other Southeast Asian countries not party to the arbitration struggle to give effect to the award because of China's non-compliance. The idea that impacts result from various efforts in post-adjudication interactions has also been observed in the case of regional human rights courts.[18]

The first impact is a convergence of the legal positions of Southeast Asian claimants. In a series of Notes Verbales in 2020, the Philippines, Vietnam, Indonesia and Malaysia have adopted essential elements of the arbitral award on permissible claims as their own legal positions.[19] These expressions were

17 Embassy of the Philippines in the United States, 'Press Release on China's Fishing Moratorium over the South China Sea' of 27 May 2024, <https://philippineembassy-dc.org/press-release-on-chinas-fishing-moratorium-over-the-south-china-sea/>, last access 8 May 2025.

18 Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi. (eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (Oxford 2024).

19 Permanent Mission of the Philippines to the United Nations, 'Note Verbale No. 000191-2020' of 6 March 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf>, last access 8 May 2025; Permanent Mission of Vietnam to the United Nations, 'Note Verbale No. 22/HC-2020' of 30 March 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf>, last access 8 May 2025 ; Permanent Mission of Malaysia to the United Nations, 'Note Verbale HA 26/20' of 29 July 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_29_MYS_NV_UN_002_OLA-2020-00373.pdf>, last access 8 May 2025; Permanent Mission of the Republic of Indonesia, 'Note Verbale No. 148/POL-703/VI/20', of 12 June 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf>, last access 8 May 2025.

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triggered by Malaysia's submission for an extended continental shelf.[20] While the Notes Verbales of Vietnam and Malaysia do not mention the award, adopting the award as their own legal positions is arguably more important. Thus, the award has provided something very consequential – a clarification of permissible claims that Indonesia, Malaysia, the Philippines and Vietnam share. Before the arbitral award was rendered, these four countries had no shared position on the maximum extent of legal entitlements in the South China Sea.

This convergence matters beyond legal dynamics as the second impact shows. The award has resulted *de facto* in a minimum demand of Southeast Asian claimants for negotiations with China. Minimum demand in this context means that it is unlikely that Southeast Asian claimants will accept an arrangement with China that is inconsistent with the award. The Philippines, for instance, terminated their negotiations on the joint development of oil and gas with China in 2022,[21] because these negotiations focused on joint development in a geographic area China cannot legally claim pursuant to the award. Indonesia's position explicitly excludes negotiations with China on boundary delimitation or related issues such as joint development in the above-mentioned note verbale. The recent joint statement of China and Indonesia[22] appears no exception to that even if its wording invited push-back.[23] Moreover, during negotiations for a code of conduct – a negotiation process about rules for conflict behaviour that has been ongoing for about 30 years – several Southeast Asian claimants have rejected provisions that would be inconsistent with the award. The arbitration therefore represents not only an individual but also a common minimum demand for multilateral negotiations. In other words, the award now amounts to a common baseline for the Philippines, Vietnam, Indonesia, and Malaysia in their negotiations with China from which they are unlikely to retreat.

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20 Malaysia, 'Malaysia's Partial Submission to the Commission on the Limits of the Continental Shelf' of 12 December 2019, <https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf>, last access 8 May 2025.

21 Department of Energy of the Philippines, 'DOE Statement on the Announcement of the Termination of Joint Oil and Gas Negotiations with China' of 25 June 2022, <https://www.doe.gov.ph/press-releases/doe-statement-announcement-termination-joint-oil-and-gas-negotiations-china>, last access 8 May 2025.

22 'Joint Statement Between the People's Republic of China and the Republic of Indonesia on Advancing the Comprehensive Strategic Partnership and the China-Indonesia Community with a Shared Future' of 9 November 2024, <https://english.www.gov.cn/news/202411/10/content_WS67301550c6d0868f4e8ecca9.html>, last access 8 May 2025.

23 Aristo Rizka Darmawan, 'Has Indonesia Fallen into China's Nine-Dash Line Trap?', The Interpreter 12 November 2024, <https://www.lowyinstitute.org/the-interpreter/has-indonesia-fallen-china-s-nine-dash-line-trap>, last access 8 May 2025.

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The third impact is that the clarification of permissible and non-permissible claims facilitates the Philippines' efforts to publicise incidents and garner international support. Third countries can more readily assess typical claim ameliorative activities of the China Coast Guard such as ramming or shooting with water cannons because a legal assessment of the question in whose waters an incident occurs is often possible. Manifestations of support for the Philippines can be seen in the greater readiness of countries from the Indo-Pacific and Europe to single out China or to provide security assistance.[24] A fourth impact is a certain isolation of China's legal position by the standard of expressions found in Notes Verbales to the United Nations (UN).[25] Whereas China was able to point to several countries that objected to the arbitral proceedings in the past,[26] all countries except China that have expressed an opinion on the South China Sea in Notes Verbales to the UN have expressed support for parts of the award.[27]

The common denominator of these four impacts – convergence, common minimum demand for negotiations, mobilisation of international support, and a certain isolation of China's legal position – is that the arbitration has brought the four Southeast Asian countries closer together than they used to be and has hence contributed to coalition building among them. This matters because the lack of cohesion among Southeast Asian claimants is one reason why the Association of Southeast Asian Nations (ASEAN) is considered 'strategically incompatible' to cope with the South China Sea disputes.[28]

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24 Sebastian Strangio, 'France, Philippines to Begin Negotiating Reciprocal Access Agreement', The Diplomat 26 April 2024, <https://thediplomat.com/2024/04/france-philippines-to-begin-negotiating-reciprocal-access-agreement/>, last access 8 May 2025; 'Philippines, Germany Commit to Reaching Defence Pact This Year', Euractiv 5 August 2024, <https://www.euractiv.com/section/china/news/philippines-germany-commit-to-reaching-defence-pact-this-year/>, last access 8 May 2025.

25 The Notes Verbales of Australia, China, France, Germany, Indonesia, Japan, Malaysia, New Zealand, the Philippines, UK, US and Vietnam are available at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html>, last access 8 May 2025.

26 AMTI CSIS, 'Who Is Taking Sides after the South China Sea Ruling?', Asia Maritime Transparency Initiative 15 August 2016, <https://amti.csis.org/sides-in-south-china-sea/>, last access 8 May 2025.

27 The US, France, Germany and the UK have recently reiterated their positions in the context of the Philippines' submission for an extended continental shelf. See the Note Verbale of the US of 5 December 2024 and the joint Notes Verbales of Germany, France and the UK of 10 March 2025, available at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_phl1_2024.htm>, last access 8 May 2025.

28 Evan Laksmana and Waffaa Kharisma, Safeguarding the Shared Maritime Domain Between Indonesia, Vietnam, and Malaysia (CSIS Event Report 2020).

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IV. High Levels of Tensions — Impact or Irrelevance of the Arbitral Award?

These impacts have emerged between 2020 and 2023. But tensions have reached a new level in the past two years: incidents have occurred more frequently, more intensely and within many parts of China's claimed nine-dash line simultaneously.[29] The most violent standoffs between China and the Philippines occurred at Second Thomas Shoal.[30] These standoffs prompted the United States (US) to offer more support and illustrate the potential of these disputes between the Philippines and China to result in a direct confrontation between the US and China.[31] This raises the question of whether these tensions have reversed the award's impacts or whether South-east Asian countries have nevertheless continued to build on the arbitral award in their interactions. The following zooms in on two concrete cases, namely the China-Philippines Understanding on Second Thomas Shoal and the Philippine Maritime Zones Act.

1. The China-Philippines Understanding on Second Thomas Shoal

Under the pressure of fierce confrontations, the Philippines has consented to an understanding with China on modalities for Philippine resupply and rotation missions to Second Thomas Shoal in July 2024.[32] Second Thomas Shoal is a low-tide elevation in the Spratly Islands that China cannot legally

29 Incidents with China Coast Guard vessels happened at Luconia Shoal, Sabina Shoal, the Natuna Islands, the Paracel Islands, Scarborough Shoal, and elsewhere inside the nine-dash line. According to Sari, some actions of Chinese vessels may have amounted to the use of force within the meaning of Article 2(4) of the UN Charter. Aurel Sari, 'Maritime Incidents in the South China Sea: Measures of Law Enforcement or Use of Force?', International Law Studies 103 (2024), 463-511.

30 Associated Press, 'Philippines Says It Won't Back down, but Won't Start War, after Clash with China', Voice of America 23 June 2024, <https://www.voanews.com/a/philippines-says-it-won-t-back-down-but-won-t-start-war-after-clash-with-china/7666757.html>, last access 8 May 2025.

31 Karen Lema, 'Exclusive: Philippines Turned down US Help amid South China Sea Tensions – Military Chief', Reuters 5 July 2024, <https://www.reuters.com/world/asia-pacific/philippines-turned-down-us-help-amid-south-china-sea-tensions-military-chief-2024-07-05/>, last access 8 May 2025.

32 Christian Schultheiss, 'Can China and the Philippines Save Their South China Sea Understanding?', The Diplomat 8 August 2024, <https://thediplomat.com/2024/08/can-china-and-the-philippines-save-their-south-china-sea-understanding/, last access 8 May 2025.

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claim pursuant to the arbitral award.[33] Does this understanding therefore contradict the idea that the award represents *de facto* a minimum demand for negotiations?

The Philippine presence on Second Thomas Shoal, one of the Spratly features, is the BRP *Sierra Madre*, a rusting ship intentionally run aground. This vulnerable Philippine presence is in constant need of resupply. If China succeeds in preventing resupply missions, the Philippines would be forced to withdraw from the shoal. Hence, Manila seeks to continue resupply and rotation. But China tries to ensure the Philippines does not fortify its presence. After acrimonious exchanges, China and the Philippines then announced an understanding on Second Thomas Shoal. While they immediately contradicted each other as to what they have agreed upon, several publicly reported resupply and rotation missions occurred suggesting the understanding is in place. The arrangement is not published but it appears to contain a previous notification model in order to deconflict resupply missions. The Philippines notifies Chinese authorities in advance about resupply missions and the China Coast Guard does no longer oppose Philippine resupply of the shoal.

As noted above, Second Thomas Shoal is a low-tide elevation and on the Philippine continental shelf. Legally, provisional arrangements of a practical nature such as this one are without prejudice to claims.[34] Therefore, even if this arrangement covers a geographic area China cannot legally claim, this does not imply that the Philippines acquiesced in the existence of Chinese maritime entitlements to this area. However, whether such an arrangement is inconsistent with the award is ultimately more a factual question than a legal one.[35] If China could use the arrangement to advance its claim to Second Thomas Shoal, for instance by delaying or withholding resupply, then it would contradict the award.[36] This arrangement, though, does not appear to allow that or to strengthen China's bargaining position in any other way. This is because the arrangement respects the Philippines need to resupply this shoal without allowing China to expand its presence. In sum, this arrangement does not undo one of the award's impacts. The Philippines remains unlikely to accept arrangements that are inconsistent with the award. This

33 PCA, *South China Sea Arbitration* (n. 7), para. 647.

34 UNCLOS, Articles 74 para. 3 and 83 para. 3; ICJ, *Minquiers and Ecrehos* (France/United Kingdom), judgment of 17 November 1953, ICJ Reports 1953, 47 (58-59).

35 Christian Schultheiss, 'Joint Development of Hydrocarbon Resources in the South China Sea After the Philippines Versus China Arbitration?', Ocean Dev. Int. Law 51 (2020), 241-262.

36 This appears to be the position of Antonio Carpio, a former Supreme Court Justice of the Philippines. Faith Argosino, 'Carpio Fears PH Pact on Ayungin Shoal May Expand China's Reach', Inquirer.Net 29 January 2025, <https://www.inquirer.net/426796/carpio-fears-ph-pact-on-ayungin-shoal-may-expand-chinas-reach/>, last access 8 May 2025.

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does not exclude the possibility of reaching cooperative arrangements altogether. But these arrangements must not result in factual vulnerabilities for the Philippines.

2. The Philippine Maritime Zones Act

The Philippine Maritime Zones Act was approved on 7 November 2024.[37] It defines the maritime zones of the Philippines. As the coordinates of the zones are not yet published, it is not possible to conclude to what extent these zones are defined in accordance with UNCLOS as stated in section 2. But two points should be mentioned about this act. First, section 5 of the act clarifies the Philippine claim to the so-called 'Kalayaan Island Group'. This is the Philippine name for some of the Spratly Islands over which the Philippines claims territorial sovereignty. Importantly, the act seems not to project an EEZ and continental shelf claim from the Kalayaan Island Group. It does also not claim an EEZ within the group where the features of this group are located beyond the EEZ as generated from the mainland baselines. This is important because when comparing this act with the submissions for an extended continental shelf of Malaysia in 2019,[38] the Philippines,[39] and Vietnam[40] in 2024, one trend becomes apparent. Malaysia, the Philippines, and Vietnam do not base their claims to continental shelves on features in the Spratly Islands but only on their respective mainland baselines. This is then concrete evidence of a further convergence of the positions of these three countries in accordance with the award.

However, it must be noted that this convergence remains limited. Malaysia has protested the Philippine Maritime Zones act and the Philippine submission for an extended continental shelf, because the Philippine con-

37 Philippine Maritime Zones Act of 7 November 2024, Republic Act No. 120641, <https://lawphil.net/statutes/repacts/ra2024/pdf/ra_12064_2024.pdf>, last access 8 May 2025.

38 Malaysia, 'Malaysia's Partial Submission to the Commission on the Limits of the Continental Shelf' (n. 20).

39 Republic of the Philippines, 'A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines in the West Palawan Region Pursuant to Article 76 of the United Nations Convention on the Law of the Sea', 14 June 2024, <https://www.un.org/depts/los/clcs_new/submissions_files/phl1/2023PhlEsDoc001Secured.pdf>, last access 8 May 2025.

40 Socialist Republic of Vietnam, 'Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea. Partial Submission in Respect of Vietnam's Extended Continental Shelf: Central Area (VNM-C)', 17 July 2024, <https://www.un.org/depts/los/clcs_new/submissions_files/submission_vnm_95_2024.htm>, last access 8 May 2025.

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tinental shelf claim is partly generated from the Philippine territorial claim to Sabah, which is generally recognised as a federal state of Malaysia.[41] Vietnam and China have also protested the Philippine submission for an extended continental shelf.[42] The effect of these protests is that the Commission on the Limits of the Continental Shelf (CLCS) will defer a recommendation on the Philippine's submission for an extended continental shelf. In accordance with annex I of its rules of procedure, the CLCS does not make recommendations about extended continental shelf submissions if these are about disputed areas.[43] This is therefore an example that shows how unresolved disputes between Malaysia or Vietnam and the Philippines hamper their submissions for an extended continental shelf and, ultimately, their dealings with China.

Second, section 14 of the Philippine Maritime Zones Act requires the Philippines to 'exercise all other maritime rights and jurisdictions in accordance […] with the South China Sea Arbitration'. A salient question emerges. Does this mean that any potential future arrangement between China and the Philippines that is not in accordance with the arbitral award would be a violation of that very act? It is difficult to answer this question in the abstract, as the act does not spell out any explicit conditions for such arrangements. But a recent decision by the Supreme Court of the Philippines gives some indication that provisional arrangements can violate the Philippine constitution.[44] In 2023, the Court declared the Joint Marine Seismic Undertaking (JMSU) unconstitutional on several grounds. The JMSU is a former joint exploration arrangement between China, the Philippines, and Vietnam covering a part of the Spratly Islands. It is premature to conclude that Philippine national law has enshrined the South China Sea Arbitration as a minimum demand for negotiations. But whether a provisional arrangement such as the JMSU or the one on Second Thomas Shoal is in accordance with the arbitral award or not clearly matters under Philippine domestic and constitutional law.

41 See the Note Verbale made available by the Commission on the Limits of the Continental Shelf at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_phl1_2024.htm>, last access 8 May 2025.

42 Note Verbale made available by the Commission on the Limits of the Continental Shelf (n. 41).

43 Commission on the Limits of the Continental Shelf, 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (2008), CLCS/40/Rev. 1, <https://documents.un.org/doc/undoc/gen/n08/309/23/pdf/n0830923.pdf>, last access 8 May 2025.

44 Supreme Court of the Philippines, *Bayan Muna Party-List vs President Macapal-Arroyo*, decision of 10 January 2023, G. R. No. 182734, <https://lawphil.net/judjuris/juri2023/jan2023/gr_182734_2023.html>, last access 8 May 2025.

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The two brief examples of the China-Philippines Understanding on Second Thomas Shoal and the Philippine Maritime Zones Act illustrate that not even a high level of tensions fuelled by China's insistence on maritime claims could reduce the award's impact. To the contrary, the legal positions of the Philippines, Malaysia, and Vietnam converged further and they were able to a limited extent to build on the award in their exchanges.

V. Concluding Reflections: Great Power Competition and the Continuous Relevance of Adjudication

The comment concludes with reflections on the likely-to-persist role of adjudication in an era of great power expansion and competition. As regards the South China Sea Arbitration, the tribunal's award gained impact through the activities and choices of some members of the international community that seek to give effect to the award. Before the award, Southeast Asian countries had no common position on the extent of acceptable legal entitlements in the South China Sea, they now have one. Southeast Asian countries had no common minimum demand for their bilateral and multilateral negotiations with China, they now have one. Whereas China could point to a few states that supported China's position, none of them has reiterated their support in Notes Verbales to the UN. While European Union (EU) Member States and EU institutions were reluctant to merely single out China in their statements on the South China Sea prior to the award, they have now joined a group of states that do so on a regular basis and provide limited security assistance to the Philippines. The award has become the common focal point of Southeast Asian and non-regional states on the disputes. The common denominator of these impacts is to have incentivised some coalition building between the (middle) powers of Southeast Asia and the wider Indo-Pacific and Europe.

The emerging coalition, however, remains limited and therefore less effective than it could be. Southeast Asian countries know much better what they do *not* want in their interactions with China as opposed to what they *do* want. Southeast Asian claimants have not yet developed a shared agenda for how the maritime domain should be governed in line with the arbitral award. This strongly weakens the potential of the coalition. Southeast Asian will not be able to get China to accept regional arrangements on marine natural resources, marine protected areas or maritime law enforcement that they cannot agree on themselves.

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China's dispute behaviour remains largely noncompliant and undeterred by the arbitral award. But the Chinese Communist Party still regards international law as a force to reckon with as illustrated by its Central Committee's call for strengthening 'discourse power and influence in international legal affairs, use (of) legal methods to safeguard our country's sovereignty'.[45] This is not surprising as not even China's sustained noncompliance and the high level of near-permanent incidents in 2024 could undo the arbitration's impacts. Few would therefore go as far as *Masala* and suggest that a realist foreign policy needs to 'free itself from the self-imposed shackles of international legal dogma'.[46] *Masala* has a point in that in German foreign policy discourse it is not uncommon to replace an argument about the benefits and costs of foreign policy decisions with an unspecified reference to international law. But the impacts of the South China Sea Arbitration illustrate that freeing oneself from international law is not a particularly realistic option.

Russia may have made a similar experience. As suggested by *Cuéllar* and *Hathaway* the decision by many states to support Ukraine financially and militarily may have been partly influenced by 'the ICJ's decision [at the provisional measures stage] that Russia's invasion of Ukraine was unlawful […]. International law often has force in this way – by shaping how states respond to one another's actions.'[47] Moreover, some suggested that the US suspended weapons delivery to Israel for a limited time and other countries reduced their deliveries[48] in the wake of the ICJ's indication for provisional measures.[49] Therefore, this comment's finding of politically meaningful impacts of arbitration beyond compliance may very well apply to further cases

45 CCP Central Committee, 'CCP Central Committee Decision Concerning Several Major Issues in Comprehensively Advancing Governance According to Law', VII 7, available in *China Law Translate*, 2014, <https://www.chinalawtranslate.com/fourth-plenum-decision/>, last access 8 May 2025.

46 Carlo Masala, *Weltunordnung* (3rd edn, C. H. Beck 2022), 157. Own translation.

47 Mariano-Florentino Cuéllar and Oona A. Hathaway, 'The International Court of Justice's Balancing Act', Carnegie Endowment for International Peace 2024, <https://carnegieendowment.org/posts/2024/01/the-international-court-of-justices-balancing-act?lang=en>, last access 8 May 2025. A decision at the provisional measures stage only indicates that a claim is plausible.

48 Zain Hussain, 'How Top Arms Exporters Have Responded to the War in Gaza', SIPRI Commentary 2024, <https://www.sipri.org/commentary/topical-backgrounder/2024/how-top-arms-exporters-have-responded-war-gaza>, last access 8 May 2025.

49 Oona A. Hathaway, 'Taking Stock of ICJ Decisions in "Ukraine v. Russia" Cases – And Implications for South Africa's Case against Israel', Just Security, 5 February 2024, <https://www.justsecurity.org/91781/taking-stock-of-icj-decisions-in-ukraine-v-russia-cases-and-implications-for-south-africas-case-against-israel/>, last access 8 May 2025.

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even if a demonstration of these impacts requires a detailed empirical analysis.

Finally, international law has served the Philippines as a useful instrument in its statecraft in the South China Sea. Clearly, no coalition can be built around a set of rules in which its members see no benefit. But the present case suggests limitations to a purely instrumentalist view of law and also offers some evidence against the idea of a movement towards hegemonic international law.[50] While it is true that great powers sometimes try to construct legal rules and agreements to increase their bargaining power, to consolidate expansion or constrain another country's responses, smaller and middle powers are little different, at least, from the point of view of great powers.[51] International law is not an instrument that is only in the hands of the powerful because the right to authoritatively interpret the law mainly remains with courts and tribunals. No amount of Chinese pressure has changed that in the case of the South China Sea Arbitration and, ultimately, it is the emerging coalition of states around the award that ensures this point. International law is also more than an instrument, because it follows its own logic – the logic of legal argument, claim and counterclaim, appeals to justice, practices of legality and contestation.[52] Mastering the legal logic may bring about a legal victory, but not necessarily compliance. To turn a legal victory into impact in interactions, various actors combine law with diplomacy (e. g., coalition building around an increasingly more specific common goal) and preparedness for conflict (e. g., investments in coast guard, navy and surveillance capabilities).

It is sometimes pointed out that scholarship needs to develop the methodologies to explore the various effects of great powers competition on international law.[53] This comment's analysis of the South China Sea Arbitration finds that non-compliance is not the end of international law. While a core function of international tribunals is to settle disputes and bring

50 Detlev F. Vagts, 'Hegemonic International Law', AJIL 95 (2001), 843-848 discussing Heinrich Triepel, *Die Hegemonie. Ein Buch von Führenden Staaten* (Kohlhammer Verlag 1938) and Carl Schmitt, *Positionen und Begriffe, im Kampf mit Weimar-Genf-Versailles – 19. Völkerrechtliche Formen des modernen Imperialismus* (1st edn, Duncker & Humblot 1932/4th edn Duncker & Humblot 2014).

51 Christian Schultheiss, Ocean Governance and Conflict in the East and South China Sea. Negotiating Natural Resources, Institutions and Power (Amsterdam University Press 2024).

52 Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge 2010); Max Lesch and Christian Marxsen, 'Norm Contestation in the Law Against War: Towards an Interdisciplinary Analytical Framework', HJIL 83 (2023), 11-38.

53 Sarah Nouwen et al., 'Call for Papers. Great Power Competition: What Difference Does It Make to International Law?', EJIL: Talk!, 20 October 2024, <https://www.ejiltalk.org/announcement-call-for-papers-joint-ejil-jiel-symposium/, last access 8 May 2025.

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about compliance, non-compliance does not imply a decision of a court or tribunal is without effect or consequence. Beyond questions of compliance and non-compliance, courts and tribunals can exert an impact on international negotiations and dispute interactions, not least, through the efforts of the members of the international community and these effects belong to an understanding of international law in times of changing international order.

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