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International Law in Times of Transition: Contestation of Legalities and Reconceptualization in the South China Sea Case[1]

Direito internacional em tempos de transição: Contestação de legalidades e Reconceitualização no caso do Mar do Sul da China

Derecho internacional en tiempos de transición: Desafío de legalidades y reconceptualización en el caso del Mar Meridional de China

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Abstract

Chinese claims over the South China Sea, a decisive issue in the international scenario of the 21st century, are perceived by some IR scholars as one of the country's threats to international peace

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and security. The analysis of official documents published by China's Ministry of Foreign Affairs to justify the country's position on the SCS, however, revealed a sophisticated legal strategy that challenges this view. By focusing on cartographic, historical, and linguistic evidence to validate its claims, China seems to pursue an international law-based trust-building strategy through an alternative concept of legality.

Keywords: South China Sea, South China Sea Islands, Legal Arguments, Trust-Building Strategy, Contestation Of Legalities.

Resumo

As reivindicações chinesas sobre o Mar do Sul da China, decisivas para a conjuntura internacional do século XXI, são vistas por alguns estudiosos de RI como uma das ameaças do país à paz e segurança internacionais. A análise de documentos oficiais do Ministério das Relações Exteriores para justificar a posição chinesa sobre o MSC, porém, revelou uma estratégia jurídica sofisticada que contestaria esta visão. Ao se concentrar em evidências cartográficas, históricas e linguísticas para validar suas reivindicações, a China parece adotar uma estratégia de construção de confiança baseada no direito internacional por meio de um conceito alternativo de legalidade.

Palavras-chave: Mar do Sul da China, Ilhas do Mar do Sul da China, Argumentos Legais, Estratégia de Construção de Confiança, Contestação de Legalidades.

Resumen

Las reivindicaciones chinas sobre el Mar de China Meridional, decisivas en la realidad internacional del siglo XXI, son vistas por algunos expertos en RI como una de las amenazas del país a la paz y seguridad internacionales. Sin embargo, el análisis de documentos oficiales del Ministerio de Asuntos Exteriores para justificar la posición china sobre el MCM reveló una sofisticada estrategia jurídica que disputa esta visión Al centrarse en pruebas cartográficas, históricas y lingüísticas para validar sus reivindicaciones, China parece adoptar una estrategia de construcción de confianza basada en el derecho internacional mediante un concepto alternativo de legalidad.

Palabras-clave: Mar De China Meridional, Islas del Mar de China Meridional, Argumentos Jurídicos, Estrategia de Construcción de Confianza, Desafío de Legalidades.

1. Introduction

Published anonymously in 1609, "The Free Sea" (*Mare liberum*) is the famous monograph written by the Dutch author Hugo Grotius (1583-1645) — whose authorship was claimed in 1614 (Vervliet 2009). This small political pamphlet was part of a larger legal opinion prepared in 1604-1606 for the government of the Dutch United Provinces — the "On the Law of Prize and Booty" (*De iure praedae*), not published until 1868 (Vervliet 2009) — and argued, in brief, a "rule of that part of the law of nations which they call primary", for him, a rule "self-evident and immutable, to wit: every nation is free to travel to every other nation and to trade with it" (Grotius 2009, 25).

The background around Grotius' pamphlet indicates some political and economic foundations of the legal argument in his monograph towards a positive value of a free sea (*mare liberum*) to the detriment of a closed sea (*mare clausum*) (Casella 2014). If such a position — for which his monograph cannot be overlooked — is at the basis of contemporary international legal regulation of the seas (Casella 2012), one should not ignore that his argument was developed then to build confidence in the legality of 'the right which the Dutch have to carry on Indian trade" (Grotius 2009, LXVI) — as the subtitle of the text itself emphasizes.

Grotius tried to reconceptualize some legal and political concepts in force at that time, with the purpose to find international law-based solutions for concrete issues faced by his country in international affairs by the time he wrote (Kaltenborn 1847; Preuß 1918). As a legal scholar conscious about his own academic role in a specific transitional moment of international law, he conducted a struggle through words to re-imagine, politicize, and transform international relations and its legal framework (Bernstorff and Dann 2019, 5).

Four centuries after the first publication of *Mare liberum*, contemporary Chinese government has recently presented and reaffirmed its claims over the South China Sea (SCS) Islands (hereinafter *Nanhai Zhudao*) as belonging to the traditional sphere of influence from China over adjacent sea waters (Odgaard 2022). While recent publications regard such a movement as a threat to current international law and international relations (Odom 2012; Malik 2013), we understand that, by moving away from the prejudice informed by such "China threat theories" (Deng 2008), it is possible to further analyze and understand the approach of the Chinese government towards *Nanhai Zhudao* in accordance with different — and more academic — terms.

Just as occurred by the time in which Grotius' *Mare liberum* was written, international law and international relations are again facing a transitional moment in which the foundations of legality itself are being challenged, discussed and under dispute in their own legal terms (Bernstorff and Dann 2019, 11). In this situation in which legal concepts are being mobilized and reconceptualized, the claim over *Nanhai Zhudao* seems to be part of a bigger post-Western agenda of contesting the prominence of European foundations of international order — not by means of military force, but by a different strategy: suggesting and creating new meanings of legality beyond European civilizational patterns (Abdenur 2016; Stuenkel 2015; 2016).

It is thus within this broad context of engaging in a re-imagination of the legal foundations of international order and in the re-definition of the limits of legality that this paper proposes to examine official statements from the Chinese government on the SCS. The idea is to broaden the debate concerning this discussion and to highlight that, rather than defending or impairing the legal validity of Chinese claims over *Nanhai Zhudao*, it is important to understand that the strategy adopted by China is based on a different concept of legality.

We argue that, by focusing on cartographic, historical, and linguistic evidence, China resorts to another civilizational legal paradigm to validate its claim. We understand that China is following the idea of rule-based international order outside the traditional international legal framework for regulating the seas derived from the European foundations laid down after the publication of *Mare liberum*. However, we also understand that such an approach is more complex than a simple violation of international law or a mere excuse to resort to the use of force to settle disputes — as done by European imperial powers in the past. Indeed, this paper argues that China is mobilizing an ideational discourse in its official position papers to deal with the issue within legal terms, in order to reconceptualize the international law of the seas — and not to breach it. By emphasizing this ideational foundation of Chinese arguments over *Nanhai Zhudao*, we understand that it would be possible in future research to shed light on parts of PRC's agenda in the SCS.

This paper is thus divided into four parts. In the first section (2.), the PRC's papers will be presented with an explanation of the analytic key to interpret and classify the main arguments and grounding of Chinese position. The second session (3.) presents the three documents analyzed (3.1) and systematizes the ideational discourses of Chinese strategy on its claims to *Nanhai Zhudao* (3.2)

in three different narratives diffused in the beginning of the 20th century: history (3.2.1), literature and naming (3.2.2), and cartography (3.2.3). The third section (4.) argues that the ideational foundations of Chinese claims to *Nanhai Zhudao*, on the one hand, can explain perceptions of threat by neighboring countries and key players (such as the United States), but, on the other hand, can also clarify the civilizational foundations of the terms in accordance with PRC's present intentions and commitments in the region. With this, the section concludes by arguing that Chinese intentions in the SCS should be further analyzed and continuously monitored for a more precise and academic overview, instead of being regarded in accordance with a bias based on "China threat theories".

2. Materials and Methods

The Ministry of Foreign Affairs of the PRC have issued eight documents from 2014 to 2022 concerning Chinese interests in and claims to *Nanhai Zhudao*.[4] There are two main documents, identified as position papers, in which Chinese legal arguments and historical claims become evident: they are the *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*, from 7 December 2014, and *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea,* from 13 July 2016.

4 The documents were found through a Chinese Ministry of Foreign Affairs' portal, called The South China Sea Issue, in the section "Position Paper". The portal is available at: <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/>. The documents analyzed were: (i) 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; (ii) 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; (iii) Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines; (iv) Statement of the Ministry of Foreign Affairs of the People's Republic of China on Settling Disputes Between China and the Philippines in the South China Sea Through Bilateral Negotiation; (v) 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; (vi) Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea; (vii) China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea; and (viii) China Stays Committed to Peace, Stability and Order in The South China Sea.

The analysis focuses on these two main documents, as they better illustrate the intentions and arguments of the Chinese government about *Nanhai Zhudao*, alongside with the *Communiqué* on 23 March 2022 in response of a US study (*Limits in the Seas No. 150*), in which the SCS Arbitration Award is described as a case of "judicial excellence", statement that contradicts China's position that the document is "null and void". The three documents are going to be briefly covered in the next section before we discuss the ideational foundations of Chinese claims to *Nanhai Zhudao*.

The main legal arguments presented in the official documents published by the Chinese government were depicted in accordance with the following table:

Table 1. Structure of the Analytic Key

Argument	Type	Subargument	Grounding	Theme	IL Source	Document	Norm	EiF – CN	EiF – INTL

One of the arguments will be presented in detail to illustrate the method adopted and to indicate how the official discourse of the Chinese government is embedded in ideational elements. By identifying them, a different strategy undertaken by the Chinese government is revealed: one that does not necessarily focus on the dispute itself, but on the legal recognition of its historical position over *Nanhai Zhudao*.

By making the distinction between "Procedural" and "Substantive" type arguments, the analytic key enforces the idea that the position of the Chinese government oscillates between two different axis: one, based mainly on the juridical process itself, attempts to show that the arbitration lacks jurisdiction and that its Award is "null and void"; the other, however, is more directly tied to claim from the Chinese government itself, in a way that consolidates and intends to present a legal justification of the historical position of the country over the SCS. Considering the purposes of this paper, the argument indicated in this example will be one of "Substantive" type.

Argument. Despite being mainly addressed to question and criticize the Filipino initiation of the arbitration, the 2014 Position Paper also contains arguments related to the claims of the Chinese government over *Nanhai Zhudao*, such as: "China has indisputable sovereignty over the South China Sea Islands (the *Dongsha Islands*, the *Xisha Islands*, the *Zhongsha Islands* and the *Nansha Islands*) and the adjacent waters" (China 2014, 1).

Type. The argument, in which it is stated the "indisputable" character of China's sovereignty over the SCS Islands, is defined as a "Substantive" one in terms of International Law, since it draws from the essence of the issue, that is, sovereignty over a group of islands.

Subargument. A subargument is a complementary way to understand the position presented by the Chinese government in its official statement. In this sense, the 2014 Position Paper did not present subarguments; however, the 2016 Position Paper, for instance, indicates that "*Nanhai Zhudao* are China's inherited territory" (China, 2016), an argument which will be further discussed.

Grounding. The foundations of the argument were grounded on subjects such as (i) millennial activity in the region and post-war consolidation of claims (historical); (ii) official maps (cartographic); and (iii) state acts and declarations (legal). The exhibition of the argument will focus on the latter type, since it fulfills all the columns of the table, and more particularly on the grounding that follows, due to its relation to Chinese interests and intentions on the SCS:

> Both the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 expressly provide that the territory of the People's Republic of China includes, among others, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands. (China 2014, 1)

Theme. The grounding, which resorts to RPC's documents that have stated Chinese sovereignty over *Nanhai Zhudao*, is, as already mentioned, a legal one.

International Law Source. Based on the International Court of Justice (ICJ)'s Statute definitions of sources of International Law (Art. 38) the grounding would not apply, since it does not fit into the definitions from the Court. However, there is a debate on whether state practice could be seen as one legitimate source of international law for custom-formation (Kammerhofer 2004).

Document. The documents mobilized by the argument were the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992. These two documents, alongside with the Exclusive Economic Zone and Continental Shelf Act of 26 June 1998, are the cornerstone of Chinese legal positions on the sovereignty of the SCS Islands, being of utmost importance to the understanding of the country's intentions.

Norm. The provisions cited in the Paper derive, respectively, from the first paragraph of the 1958 Declaration and Article 2 of the Law of 1992, even without an open mention from Chinese argumentation.

Entry into Force – China (EiF – CN). Date in which the norm has started to produce effects domestically. For the documents mentioned above, the dates are 9 September 1958 and 25 February 1992.

Entry into Force – International (EiF – INTL). Date in which the norm has started to produce effects at the international level. Since both documents here indicated were promulgated by the Government of the PRC, it is not possible to say when they entered into force at the international level.

3. Claims over *Nanhai Zhudao* in Official Documents from the Chinese Government

3.1 The Three Statements of China's Ministry of Foreign Affairs

From the eight documents issued by China's Ministry of Foreign Affairs, three of them are relevant to this paper: the 2014 and the 2016 *Position Paper*, and the 2022 *Communiqué*. The first two summarize the position of the Chinese government on the SCS disputes — mainly the judgement by the Permanent Court of Arbitration (PCA) and the legal foundation of its position on historical, cartographic, and juridical reasons —, while the latter contextualizes current legal disagreements between the United States and the PRC over the region.

The *2014 Position Paper* is a central legal piece to understand the perspective from the Chinese government regarding the dispute with the Philippines and it depicts Beijing's position concerning the main legal points that surround the Arbitration initiated in 2013 by Manila. The arguments therein are mostly structured on procedural points based on the 1982 United Nations Convention on the Law of the Sea (UNCLOS), arguing that the dispute could not be initiated because the Court had no jurisdiction over the matter, insofar as it dealt with territorial boundaries on the region. Although a procedural argument, it resorts to history to challenge the competence of the PCA.

Unlike the previous document, the *2016 Position Paper* does not intend to argument that the PCA had no jurisdiction over the matter. Published shortly after the Court's Award, it presents historic arguments which would pave the

legal foundations of the Chinese claims over *Nanhai Zhudao*. Despite stating that the Award is "null and void", this official document attempts to certify China's sovereignty over the region through historical, legal, diplomatic, cartographic, and linguistic evidence of the country's continued activity in the SCS. The arguments therein are the main source of the ideational dimension of these claims and illustrate Beijing's intentions over *Nanhai Zhudao*.

Finally, the *2022 Communiqué* was a response from the Chinese government to the study published on 12 January 2022 by the US Department of State (*Limits in the Seas No. 150*), whereby US authorities consider the 2016 Award as a case of "judicial excellence". According to the *2016 Position Paper,* the Chinese government considers the Award "null and void" and, for this reason, besides criticizing US political — and military — agenda towards the region, the *2022 Communiqué* restates the foundations presented by the Chinese government to affirm its sovereignty over *Nanhai Zhudao*.

3.2 Chinese Ideational Discourse in the Official Documents

The *2016 Position Paper* presents one of the most emblematic arguments at the basis of the claim from the Chinese government over the SCS and its islands: "*Nanhai Zhudao* are China's inherited territory" – which is classified, in accordance to the analytic key above indicated, as an argument of "Substantive" type, since it does not deal with the procedural matter of the dispute, but with the dispute over the islands' sovereignty. This historical approach was first introduced in China's Law on the Exclusive Economic Zone and the Continental Shelf — promulgated on 26 June 1998, in which it is stated that "the provisions of this Law shall not affect the historic rights enjoyed by the People's Republic of China" (Art. 14) (Zou 2001).

The core of this argument can be understood as indicating that the country had acquired rights over SCS and its islands a long time ago, at a past (although imprecise or unclear) moment, due to several activities engaged over the area millennia ago. To put it differently, the argument presented by the Chinese government aims to sustain that the country has acquired (what international law calls nowadays as) sovereignty over this region even before the legal foundations of current international law of the seas was established by European legal scholars in the 17th-18th centuries or the UNCLOS in the 20th century. For this reason, the document tries to confirm this position by depicting different kinds

of historical foundations to sustain the legality of the claim from the Chinese government over this territory.

3.2.1 History

The historical argument of effective occupation is presented as follows:

> China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them, thus establishing sovereignty over Nanhai Zhudao and the relevant rights and interests in the South China Sea (China 2016, 2)

The subsidiary argument consists of four records of international recognition of Chinese occupation of the islands by other countries: the United Kingdom, France, Japan, and the United States.

The first record is a publication from the China Sea Directory in 1868 issued by the Lord Commissioners of the Admiralty of the UK. In this document, it was observed that Hainan fishermen were found upon *Zhenghe Qunjiao* of *Nansha Qundao* (Spratly Islands) and that fishermen upon Itu-Aba were "more comfortably established than the others" (China 2016, 3). The second record is a publication from the French magazine *Le Monde Colonial Illustré*, dating from September 1933, in which it states that "Only Chinese people lived on the nine islands of *Nansha Qundao* and that there were no people from other countries". It is also argued that the document also described some of the artifacts found over some of the islands, such as worship stands, thatched cottages and wells (China 2016, 3).

Finally, the *2016 Paper* mentions a Japanese novel, *Boufuu No Shima* (Stormy Island), published in 1940, and *The Asiatic Pilot*, Vol IV, published by the US Hydrographic Office in 1925, as documents recording Chinese fishermen living and working on *Nansha Qundao* — the main group of islands in the SCS (China 2016, 3).

By mentioning these records, the *2016 Paper* tries to present historical and literary evidence of an international recognition of a long-time series of China's activities and sovereignty over *Nanhai Zhudao*. It is also an important recollection of memory, which is in accordance with a certain idea of "imagined community", since it portrays these fishermen as belonging and pertaining to a Chinese idea

of the region — a value probably not disseminated at the time of the records (Anderson 1983; Hayton 2019).

3.2.2 Literature and Naming

The *2016 Paper* also resorts to literature and linguistics. Indeed, by showing that China has named the islands in different periods of history, and that there are registered books on the naming systems, it tries to consolidate with additional evidence the foundations of the claim from the Chinese government over the region. There is, indeed, a *quasi*-naming-battle regarding islands in the SCS: the Spratly Islands, for example, are named *Kalayaan Island Group* by the Philippines and *Nansha Qundao* by the PRC.

The argument about the development of a naming system from Chinese fishermen is presented as follows:

> The Chinese fishermen have developed a relatively fixed naming system for the various components of Nanhai Zhudao in the long process of exploration and exploitation of the South China Sea. (...) *Geng Lu Bu* (Manual of Sea Routes), a kind of navigation guidebook for Chinese fishermen's journeys between the coastal regions of China's mainland and Nanhai Zhudao, came into being and circulation in the Ming and Qing Dynasties, and has been handed down in various editions and versions of handwritten copies and is still in use even today. It shows that the Chinese people lived and carried out production activities on, and how they named Nanhai Zhudao. Geng Lu Bu records names for at least 70 islands, reefs, shoals and cays of Nansha Qundao (China 2016, 2).

In this sense, the document mentions historical literature chronicles from different periods of Chinese history that record the "activities of Chinese people in the South China Sea". The examples date back to the Eastern Han Dynasty (25-220), passing through the Song (960-1279) and the Ming (1368-1644) Dynasties, and end up into the Qing Dynasty (1644-1911). Furthermore, both *2014* and *2016 Papers* mention that "The activities of the Chinese people in the South China Sea date back to over 2,000 years ago" (China 2014, 1; China 2016, 1). The document has also mentioned the adoption, by western navigators, through navigation guidebooks and charts published in the 19th and 20th century, of names given by Chinese people to *Nanhai Zhudao* (China 2014, 2).

3.2.3 Cartography

Maps are also regarded as an important part of the construction of the idea of nation and belonging of the SCS Islands to the PRC (Hayton 2019). Resorting to history, internationally recognized maps and administrative records, the *2016 Paper* intends to reveal that China has exercised sovereignty over *Nanhai Zhudao* for a long period of time. In this sense, it makes a recollection of several official maps, dating back to 1755, in which *Nanhai Zhudao* is marked as Chinese territory (China 2016, 3), and also mentions internationally recognized maps, such as the *Standard World Atlas* from the Japanese Government in 1951 (China 2016, 4) and the *Global Sea-Level Observing System Implementation Plan 1985-1990* from the 14th Assembly of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (Unesco) (China 2016, 5).

The discussion about a map-based argument to sustain the claim from the Chinese government over the SCS requires to briefly recall the debate about the nine-dash line — also known as the U-shaped line. Dating back to the first half of the 20th century[5], the nine-dash line argument — sometimes misinterpreted as an attempt of the PRC to incorporate the most part of the South China Sea, including its water column — is a significant example of this symbolic construction of space belonging to a community. There are important records of Chinese scholars attempting to legally justify the existence of the nine-dash line based on the notion of historic rights (Jinming and Dexia 2003; Zou and Liu 2015). In this sense, by raising cartography as the basis of China's claim over the region, the *2016 Paper* establishes a dialogue with the idea of the nine-dash-line:

> China's Committee for the Examination for the Land and Sea Maps, which was composed of representatives of the Ministry of Foreign Affairs, Ministry of the Interior, Ministry of the Navy and other institutions, reviewed and approved the names of individual islands, reefs, banks and shoals of *Nanhai Zhudao*, compiled and published *Zhong Guo Nan Hai Ge Dao Yu Tu* (Map of the South China Sea Islands of China) in 1935 (China 2016, 4).

5 As a recent renovation of Chinese position *vis-à-vis* SCS, the Ministry of Natural Resources published, on August 28, 2023, the "new standard" national map with a ten dash-line that repeats the nine-dash claim and includes claims to the east of the island of Taiwan and to India's north (Nguyen 2024). For more information, see also Ma, Zhenhuan. 2023. "2023 edition of national map released". China Daily. < https://www.chinadaily.com.cn/a/202308/28/WS64ec91c2a31035260b81ea5b.html > .

The Brief Account of the Geography of the South China Sea from 1947 follows the 1935 Map, in which it resumes the Kuomintang's efforts to establish a historical and solid ground on which the government will claim sovereignty and denounce foreign occupation:

> On the basis of a new round of geographical survey of *Nanhai Zhudao*, the Chinese government commissioned in 1947 the compilation of *Nan Hai Zhu Dao Di Li Zhi Lüe* (A Brief Account of the Geography of the South China Sea Islands), reviewed and approved *Nan Hai Zhu Dao Xin Jiu Ming Cheng Dui Zhao Biao* (Comparison Table on the Old and New Names of the South China Sea Islands), and drew *Nan Hai Zhu Dao Wei Zhi Tu* (Location Map of the South China Sea Islands) on which the dotted line is marked. In February 1948, the Chinese government officially published *Zhong Hua Min Guo Xing Zheng Qu Yu Tu* (Map of the Administrative Districts of the Republic of China) including *Nan Hai Zhu Dao Wei Zhi Tu* (Location Map of the South China Sea Islands) (China 2016, 4).

4. Identity and Menace

Considered the basis of contemporary international legal regulation of the seas (Casella 2012), *Mare liberum* was written and published in a particular moment of the Netherlands' history: the struggle for political independence from Spain (Casella 2014, 334-5) — at that time, unified with Portugal under the Iberian Union (1580-1640) (Muñoz-Arraco 1998). In this sense, the movement towards political emancipation included armed conflicts against Spain and the seizure of former Portuguese colonial territories overseas (Megiani 2016), as means to dismantle the Spanish Empire (Rocamora 1993) and to access material resources necessary to consolidate its independence (Casella 2014). A twelve-year truce among the parties was celebrated in 1609 — which might explain the publication of the monograph (Vervliet 2009), but a final agreement for independence was reached only in 1648 by the Münster Treaty (Neuhaus 1991), alongside the broad European framework of political disputes at that time (Litschauer and Jambor 1974).

The background around Grotius' pamphlet unravels some political and economic foundations of the legal argument he constructed in his monograph towards a positive value of a free sea (*mare liberum*) to the detriment of a closed sea (*mare clausum*) (Casella 2014). Rather than simply seeking to justify

by law Dutch's movement towards a better political and economic placement in 17th century European disputes (Casella 2014), the legal defense of waging war against "those who violate that most undoubted law of nature, the right to carry on Indian trade" (Grotius 2009, 155) had also a civilizational foundation. After all, his work sought to build confidence in the legality of "the right which the Dutch have to carry on Indian trade" (Grotius 2009, LXVI) — as the subtitle of the text itself emphasizes.

Indeed, Grotius sustained that such a situation entitled this nation to "fight boldly, not only for your own liberty, but for that of the human race" (Grotius 2009, 151). However, the justification of the simultaneous use of force and of international law (Onuma 2016) to enable navigation through the maritime trade routes with the Indian subcontinent (Embree and Wilhelm 1990) and Southeast Asia (Villiers 1993) had complementary goals: (i) to divide these territories among European imperial powers (France, Netherlands, Portugal, Spain and the United Kingdom) (Alexandrowicz 2017), (ii) to dismantle the long standing Chinese, Hindu and Islamic influences over these territories (Alexandrowicz 2017; Onuma 2016), and (iii) to give to these European powers a permanent and stable access to maritime routes (Alexandrowicz 2017) — whereby, as Grotius himself did recognize, "the Arabs and the Chinese have traded continuously with the Indians through several centuries" (Grotius 2009, 141).

Mare liberum meant thus more than a legal justification to ensure among European powers, even by the use of force, the freedom of seas for "the common benefit of mankind" (Grotius 2009, 155). It was also a justification, based on European civilizational tradition, to open the seas for the legal, political, economic and military influence of European powers over territories and over long known trading routes. These included the ones under the sphere of influence of China (Gernet 1985), which was put under the umbrella of European international legal order (Alexandrowicz 2017).

The arguments drawn from China's official papers on the SCS disputes are mainly defined as ideational and subjective: they portray claims over *Nanhai Zhudao* based on a pre-existing Chinese's concept of sovereignty — that is, spheres of influence — over the islands due to historical, literary, and cartographic evidence (Odgaard 2022) — a region, by the way, regarded as such in Western literature at least since the end of 13th century, after the first publication of Marco Polo's famous book *Il Milione* (Polo 2003).

Be as it may, it is important to emphasize that these arguments are not inadequate or illegitimate to international law. Rather, it is the contrary: the analysis above shows that it is indeed an organized effort of compiling textual evidence, record of international recognition of Chinese history in the SCS, and maps. In this sense, the PRC presents to the international community a signal of its commitment to international norms and institutions. If Beijing's refusal to accept the 2016 Arbitral Award seems to be regarded as a bad signal, yet it is important to acknowledge the government's efforts to address and debate the issue in legal terms — as it is shown in the Chinese Society of International Law (2018) extensive critical study on the Award. Furthermore, the ideational value of its addressing does not necessarily indicate it lacks legal basis and legitimacy, or that it intends to violate the international legal regime for the seas.

More importantly, though, is the analysis of the Chinese discourse in its ideational agenda: China mobilizes the idea of the "Chinese people" and of its longstanding activities in *Nanhai Zhudao*, not only to legitimize its claims, but mainly to consolidate narratives of the islands' belonging to the country and its invaluable importance to Chinese history.

The notion of a Chinese maritime geobody in the SCS enlightens the process in which space is being portrayed and built to serve a national discourse. The interchangeable notion of identity and geobody politics in Ataka (2016) clarifies the idea that the SCS disputes do not reside only on geopolitical terms: strategic and energetical interests aside, there is an important subjective dimension in the way China addresses its policy in the region.

It could be argued, then, that the SCS has a significant role in consolidating Chinese national discourse, not only due to its relevance in 21st century international politics but to the sense of belonging of these territories — most of them inhabited — to an idea of the Chinese people and its history. The identity in construction *vis-à-vis* the SCS, however, does not need an antagonist to stand still (Lebow 2008), since it resorts to evidence and recollection of facts of its own history.

Nevertheless, Chinese attempts to engage in this construction of a maritime geobody in the SCS do not date from millennia as its activities in the region. The modern origins of the Chinese claims to the SCS can be traced back to the beginning of the 20th century (Hayton 2019), revealing that the narrative constructed also had a programmatic and instrumental orientation, not merely a natural tendency towards the *de jure* control of *Nanhai Zhudao*. In the context

of rising nationalism amidst foreign powers' invasions and interferences in the Middle Kingdom, the nature of the claims can be traced:

> China's maritime geobody, a collective psychological attachment to offshore islands, emerged through several stages during the early twentieth century. In early 1909 there was almost no interest in the fate of these faraway features among either officials or the general population. Forty years later, officials and agitators alike could declare them to be an intrinsic part of the national corpus. Part of this process was a consequence of imperial China's transition into a new world of theoretically equal nation-states, but part of it was the result of decisions taken by particular elites to use the new nationalism to legitimize their political positions (Hayton 2019, 164)

So-called "China threat theories" — more xenophobic narratives than proper scientific theories — can be perceived as a simplistic and inaccurate account of China's position over the issue. While preoccupied in emphasizing perceptions of threat by neighboring countries and by Western powers — such as the United States, they do not pay proper attention to the terms of the legality invoked and mobilized by China in its claims over *Nanhai Zhudao*.

China's rapid development has been widely studied in IR and Political Science fields, and especially among U.S. scholars, it has been regarded with suspicion and reluctance. Central to this debate are the books written by professors John J. Mearsheimer (2001) and Samuel Huntington (1996). Huntington, a former professor at Harvard University, looks at distinct civilizations through the optic of a "cultural realism" and the possibilities of their confrontation. In his view, Chinese Confucianism is the single main threat to Western civilization — that is, the liberal democracy as epitomized in Western Europe and the U.S. From a different perspective, focused on power politics, Mearsheimer, a lecturer at the University of Chicago, dedicates one chapter of his account of offensive realism to analyze China's rise and the country's inevitability to follow the same path as other great powers, that is, to seek regional hegemony (Mearsheimer 2001, 361). Huntington and Mearsheimer have settled the basis for a large production in IR academia on China's rise and its threat to the *Pax Americana*.

Yong Deng (2008) identifies three Chinese versions of the genesis of the "China threat theories", situated in different time periods and locations, but recognizes an official version commonly accepted by Chinese analysts that traces

the beginning of the China threat theories to the end of 1992.[6] The explanation would be "a confluence of factors" (Deng 2008, 104) whereby Deng Xiaoping's "Southern Tour" led to the economic rise of a unified China — which began to be feared, and to the halt of a prognostic of a "China collapse". As another landmark for the factors, Deng (2008) cites the passing, in February of that year, of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992, cornerstone in Chinese legal address of its claims to *Nanhai Zhudao* (Deng 2008, 105).

Khalid Al-Rodhan (2007) classifies the claims from U.S journalists, strategic thinkers, and scholars as "speculative at best" (Al-Rhodan 2007, 63), drawing attention to the possibility of the "China threat" being a self-fulfilling prophecy, as its thesis influences policy makers in Washington to make decisions that could lead to increasing tensions.

Andrej Krickovic and Chang Zhang (2020, 221) offer a different analysis of the Chinese rise through the lenses of status-seeking theory and a comparison with Russia, standing against the idea that the country's ascent will lead inevitably to conflict. The authors argue that Russia's aggressiveness can be explained by the idea of a declining power, losing prestige and position in international politics. China, on the other side, would have much to lose in a confrontational stance against the United States, and, therefore, would be more cautious and diplomatic to solve tensions.

Regarding Chinese activities in the SCS, there is a literature — mainly authored by Western scholars — analyzing China's intentions and strategies in the region and using terms as "assertive" (Fravel 2011; Holmes and Yoshihara 2009) to refer to the country's actions in the SCS disputes and by picturing it as a cornerstone of U.S.-China's rivalry in the 21st century (Buzsinksy 2012). However, Chinese actions concerning its claims over the SCS do not seem to meet these "China threat theories". Rather, it seems that the authors who defend this idea do not try to take the legal arguments of the country seriously and

6 The first one is attributed to an August 1990 article by a professor at Japan's National Defense Academy and was addressed in a Beijing Review article (Deng 2008, 104) from 1997. Another is traced back to Xu Xin, former president of the China Institute for International Strategic Studies and former deputy chief of the People's Liberation Army (PLA). Xu was at a symposium hosted by Heritage Foundation, in Washington, DC on August 25, 1992 when a U.S. Assistant Secretary of Defense alleged China was responsible for sparking an arms race in the Asia-Pacific region, with the notion of "threat" being amplified in the following month by the former U.S. ambassador to China, James Lilley, in Hong Kong, where he criticized China's military expansion (Deng 2008, 104).

simply use past European behavior towards the law of the seas (territories and maritime trade routes) to understand the position of the Chinese government over SCS. It is thus important to understand PRC's actions and interests without such pre-established biases in order to evaluate the terms of the legality invoked and mobilized by the country in its official documents.

In other words, "China threat theories" bias the analyses, as they try to project European legal, political, economic and military past experiences over the strategy for now undertaken by the Chinese government over the SCS. By doing that, they hinder the possibility of understanding a much deeper and more important movement: the ideational contestation of the European foundations of international law of the seas — without violating international law. To a certain extent, and even though with differences, the Chinese government seems to follow a similar strategy undertaken by Grotius in his *Mare liberum*.

In this sense, while European civilizational discourse seemed to have resorted to legal discourse to justify the use of force to support the seizure by former European imperial powers of territories and maritime trading routes under Chinese, Indian and Islamic influences, Chinese government seems — at least for now — to be moving away from such an approach. Indeed, after learning the traditional international legal discourse inherited from European expansion, the country appears to be developing legal arguments in other terms (historic rights) and stating its position through international legal discourse, in order to affirm new legal foundations for international law.

The analysis above suggests that, by invoking non-European identities to guide its legal claims over *Nanhai Zhudao*, the Chinese government is proposing, not the violation of international law, but its reconceptualization on another civilization paradigm, without departing from the idea of a rule-based international order. If there is a threat, it seems not to be directed against a specific neighbor or country, neither via the use of force, nor via the violation of other international legal standards; rather, it appears to be an ideational contestation of European legality and its foundations of international law.

5. Conclusion

The present article intended to depict China's arguments and official claims to *Nanhai Zhudao* considering the international law debate on the control of the

seas, which dates to the 17th century. Hugo Grotius' *Mare liberum* has established the foundations of a legal reasoning towards the maritime spaces that endure and resound until today. The legal validation of the Dutch expansion, however, laid consequences on the political and territorial disputes that today arose in the SCS.

In his analysis of the consequences of European expansion in the SCS and its relationship with boundaries, Hayton (2014) states that: "The transition from fluid frontier to fixed frontline laid the foundations for the current conflict in the South China Sea" (63). This is in line with what Odgaard (2022) argued in respect to this clash of concepts: different understandings of sovereignty fighting to prevail. The article attempted to shed light on the historical differences between China's perspective on international law and its key concepts and to argue that its abiding to international norms today does not mean that the country does not mobilize idiosyncratic elements that compose its understanding of international law and politics.

Wang Tieya (1997) tries to historically assess Chinese relationship with international law, and how the country understands some of its cornerstone principles, rooted in its experience with the "unequal treaties" of the 19th century. While explaining Chinese understanding and interpretation of terms as *rec sic stantibus*, *pacta sunt servanda*, or even in its account on China's "Five Principles of Peaceful Coexistence", the legal scholar clarifies the country's intentions and ways with which it will demand and position itself in the world. Tieya's account can also shed light to PRC's resorting to ideational arguments through a recollection of historical, literary, and cartographical evidence: by doing that, the country attempts to consolidate the idea of *Nanhai Zhudao* belonging to the Chinese people, reaching to subjective mobilization of its own people and their identity.

There is, of course, a pragmatic dimension tangible to those arguments and records: the Chinese government argues that the disputes initiated by the Philippines are unlawful and that PCA has no competence — therefore the Award is "null and void". The attempt to exclude the PCA's competence through the notion of historic rights is also an effort to oppose Filipino claims over *Nanhai Zhudao*.

China's activities in and legal claims to *Nanhai Zhudao* are a topic of great discussion and prolific production. We have tried to contribute to this discussion by providing an overview of the most recent official communications from the Chinese government about the matter and its bigger implications on identity formation, alternative understanding of international norms, and possibilities of

peaceful ways to address the disputes. The debate here engendered does not intend to exhaust the analysis of China's policies towards the SCS, on the contrary: it expects to encourage further thinking about the nature and implications of Beijing's claims and how attached they are to ideational, yet legally plausible, values.

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