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The Emotional Backdrop of Legal Discourses in South China Sea Disputes

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ABSTRACT

The China Sea connects as many coastal states as it divides due to the economic and strategic challenges it represents. It also embodies an area of confrontations between the Great American and Chinese strategies. Identifying with precision the differences that arise, requires an interest in the symbolic dimensions that surround them. This angle of analysis provides an opportunity to observe the functioning of international law and inevitably leads to a discussion of the emerging international order. The literature on the situation in the China Sea abounds, the singularity of this article is to approach it under the prism of the use of international law as revealing the psychology of an actor. To carry out this research, the authors use a pragmatic and critical approach to international law. The thesis defended shows that, contrary to a positivist and judicial approach to international law, elements exogenous to the law, the history and the psychology of an actor, influence the interpretation of existing norms.

Keywords: emotions; South China Sea; hegemony; territorial disputes; liberal/illiberal; international law; interpretation; elements exogenous to the law

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On 12 July 2016, the Permanent Court of Arbitration (PCA) issued a notable award on sovereignty disputes in the China Sea between the People's Republic of China (PRC) and the Philippines (Buszynski, 2017; Dupuy & Dupuy, 2013; Loja, 2018; Ma, 2018). The PCA verdict, which was unanimously adopted by the judges, denying any legal basis to the nine-dash lines, ruled in favour of the Philippine arguments, which confirmed the illegality of the PRC's claims, activities, and conduct in the South China Sea. However, this article will not provide a

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technical analysis of the reasons given by the arbitral tribunal. Its purpose is to take an interest in the symbolic dimension that surrounds them. This angle of analysis provides an opportunity to observe the functioning of international law and, in particular, the question of reconciling the multiple interpretations of its rules. These equally legitimate interpretations have their origin in the contradictions inherent in the international order (Bianchi, 2017, p. 136-145). It is therefore essential to deconstruct what guides the interpretation beyond the formal rules laid down by international law. In the case of the South China Sea arbitral award, the Chinese position can be understood according to two ideas revealing its state of mind: humiliation and a sense of insecurity.

The humiliation felt by the Chinese from the opium war, which will be discussed in the first section, justifies the abundant use of history by the PRC government. In the second section, we will propose a reading of the dispute in the South China Sea from the prism of Chinese insecurity. In a way far from the positivist and judicial view of the application of international law, the feelings and psychology of an actor thus provide a fundamental key to the contradictory interpretations of the various protagonists. That is why elements outside of the law contribute to a better understanding of international law. These lessons allow us to discuss, in the third section, the developments in the international order in the twenty-first century highlighted by the arbitral award of 12 July 2016.

Humiliation as a Justification For the Use of Elements Exogenous to the Law

While one of the interests of the award was to clarify the definition of islands under the law of the sea, the core of the dispute, decided by the PCA, was in fact the determination of sovereignty over the islands and islets of the disputed area (Pancracio, 2017). Under international law, a State claiming sovereignty, whether over land or sea territories, must have the capacity to prove the existence of territorial titles. The Chinese argument, despite its absence of the procedure, shows the importance attached to history and to China's place in it. This is indicative of China's representation of itself: a state (empire) whose greatness and centrality have been flouted by colonization and which must be restored in the present.

History as an instrumentalized 'source' of law

Paradoxically, at first glance, while China presents itself, in other areas, as an ardent defender of an inter-State order based on sovereignty, it would in this case call the international order into question by mobilizing history and fait accompli. The PRC's strategy, since the mid-1970s, has been to establish itself in the South China Sea by forcibly taking a foothold on disputed islands, organizing aggressive maritime maneuvers, building artificial islands and deploying civilian (airports) and military infrastructure (Fels & Vu, 2016).

Under positive law, the acquisition of a title where there is no clearly established document title can indeed be achieved through acts of sovereignty over the disputed

territory. These are effectivités, that is to say 'behaviours which show a certain effective control of the disputed territory' (Kohen, 1997, p. 561). Such effectivités may result from legislative, judicial and executive acts (taxes, etc.). In the absence of an indisputable title in the disputed territory, judges will then attach legal consequences to a factual situation. However, for this fact to become a title, effectivités must be peaceful and public [1]. Thus, the International Court of Justice (ICJ) rejects any idea of fait accompli, i.e. any unilateral change created by an occupation of territory by a State in violation of the rights of the sovereign State (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 par. 121). The case-law of the Court therefore leads to the condemnation of any infringement of the inviolability of frontiers, such infringement cannot affect the legal status of the territory (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 par. 195). Logically, the Court requires a return to the status quo ante in this case. In the Temple of Preah Vihear case, for example, the Court ordered Thailand 'to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' (Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962, p. 37). The jurisprudence of the ICJ has thus established as a principle that the document titling must always be preferred. This means that the Court will always seek the existence of such a title to establish a State's right of sovereignty. However, in the South China Sea, existing sources do not establish the existence of these securities (Jacques deLisle, 2017, p. 245).

The Court's conclusion therefore applies perfectly to the various Chinese occupations in these disputed territories: the PRC illegally occupies a number of islands in the South China Sea since it has no document titled and the use of force is inapplicable because it used armed force to occupy those territories.

In order to counter this legal reasoning, and in the absence of a title document that solidifies its sovereignty, the PRC will, using the theory of historical titles, argue that in the present case there is no violation of the sovereignty of another State since it is the real sovereign of those territories (Shen, 2002). The Chinese strategy, in order to demonstrate the validity of its sovereignty, is thus aimed at merging historical legitimacy with legal legitimacy. In carrying out this merger, its legal discourse uses the principles set out in international jurisprudence on land and maritime territorial disputes, focusing on the concept of historical rights.

Since 1947, the PRC has used, for its claims, the so-called 9 traits map. This map originated in the 1930s when the Chinese government opposed Western demands in the

[1] See the award rendered by Vittorio Emmanuele III in The Guiana Boundary Case (Brazil, Great Britain), 'in order to acquire the sovereignty of a region that is not within the domain of any State, it is essential to carry out occupation of it on behalf of the State that proposes to acquire domination; that occupation cannot be regarded as accomplished if not as a result of an effective, uninterrupted and permanent takeover in the name of the State, and that the mere assertion of the rights of sovereignty, or the manifest intention to make the occupation effective, cannot suffice', RSA, vol. XI, pp. 21–22.

South China Sea (Dutton, 2016, p. 57). However, the legal basis for its claims was never clearly stated, as the PRC was merely reasserting its historical rights in and over the disputed area. The South China Sea is thus conceived by the PRC as a Chinese lake (Jacques deLisle, 2012, p. 613). In its claims, however, the PRC uses the concepts of historical rights and historical titles without distinction and without defining them. However, these two concepts must be distinguished as recalled in the sentence of July 12, 2016. The arbitral tribunal states that 'The term "historic rights" is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty'. For their part, the historical titles relate to historical sovereignty over the claimed terrestrial and maritime spaces (In the matter of the south china sea arbitration, 2016, p. 96 par. 225).

In the concept of historical rights, title would thus be based on a temporal process that would demonstrate the gradual consolidation of power in a territory [2]; the legitimacy of the title derived from historical, geographical, temporal, social factors would, in a way, replace the legal basis of the title (Blum, 1965, p. 100-101). This is why the Chinese argument is based primarily on the archaeology and expeditions of the 15th century Admiral Ming Zheng He. These elements would establish, according to the Chinese government and academics, that China has recognized and dominated the entire region since the Han Dynasty (Jacques deLisle, 2012, p. 617). They also claim that China effectively exercised its sovereignty over the disputed islands by organizing naval patrols and expeditions in the region and placing these islands under the jurisdiction of local entities under the control of the Chinese provincial authorities (Jacques deLisle, 2012, p. 623).

The Chinese demonstration is complemented by all diplomatic documents showing its resistance to foreign claims in the region under consideration throughout the 'century of humiliation'. Thus, in Chinese discourse, recourse to history would be self-sufficient to establish Chinese rights. Chinese legal titles would find their foundation in history, as

[2] Award of the Arbitral Tribunal issued at the conclusion of the first stage of proceedings between Eritrea and the Republic of Yemen (territorial sovereignty and scope of dispute), decision on 9 October 1998, RSA, 1998, vol. XXII, pp. 209–332, para. 106: 'a historic title has another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence' and at para. 449 'The difficulties, however, arise largely from the facts revealed in that history. In the end neither Party has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of a historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision. And it must be said that, given the waterless and uninhabitable nature of these islands, and islets and rocks, and the intermittent and kaleidoscopically changing political situations and interests, this conclusion is hardly surprising'. Yehuda Z. Blum, Historic Titles in International Law, The Hague, Martinus Nijhoff, 1965, p. 335.

interpreted by the PRC, which would establish its 'obvious' sovereignty over all of these lands and maritime areas claimed in the South China Sea as heir to the Chinese Empire (Shen, 2002).

The purpose of this article is not to discuss the merits of this speech, although it may be noted that its arguments, as evidenced by both international jurisprudence, which rejects the idea of 'historical consolidation of titles' (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002, p. 303, par. 65), and the arbitral tribunal which rejected this vision, do not really win support. What is interesting about this speech is its foundation. It is based on an idealized and self-centred vision of the history of the region in which the South China Sea would have belonged for centuries and, until the arrival of Westerners in the 19th century, to the Chinese Empire. However, this interpretation reflects only very imperfectly historical reality. Not only is sovereignty over the islands of the South China Sea difficult to attribute to one 'state' rather than another, but above all the Chinese Empire withdrew from the disputed area for a relatively long period (from the 16th century) making claims of effectivités difficult (Haiwen, 2010).

History is thus instrumentalized in the service of policy predicated in power. The use of history by the PRC is indeed a reinterpretation of the past which makes it possible to usefully demonstrate the existence of its rights today. To do so, Chinese lawyers select only those sources that are favourable to them, ignoring contradictory sources, such as the fact that the region is marked by the perpetual challenge of all States bordering China's positions (Hayton, 2017). France, Vietnam, Taiwan and the Philippines protested against the Chinese claims of 29 May 1956 on the Paracels and Spratley Islands (Nguyen, 2018, p. 251).

What appears behind this historical discourse, which serves as the background to its legal argument, is the importance of representations, in the geopolitical sense, in China's formulation of its claims. Through them, China sees itself as the natural power of this area. The origin of these representations must be found in the traditional Chinese system of tribute, which placed the Empire (and now the PRC) at the top of a natural hierarchy allowing the maintenance of a regional order. From the foregoing, it can be inferred that Chinese legal discourse is based on two pillars, one legal and the other extralegal. The Chinese discourse on territorial disputes in the China Sea first assumes all the appearances of a coherent and reasonable legal argument based on positive law. However, this is merely the dressing of an argument based on history, particularly the period of humiliation experienced from the mid-19th century onwards. This systematic use of history in its legal discourse suggests that China seeks to avoid further humiliation while denouncing those of the past. Such a vision, however,

makes it difficult to conceal the instrumentalization of history in order to justify the transformation of Chinese vital interests into the source of its international rights.

Revisiting the past, key to understanding Chinese positions

Understanding the legal positions of each party in the South China Sea cannot be complete without taking into account the history of this region and the emotions associated with the humiliations of the past, and the sense of insecurity, linked either to the fear of an aggressive rise in Chinese power or encircling by American power. This fear of the PRC for its security is largely explained by a desire not to revive the 'century of humiliation', which represents a period of attack on honour and self-confidence.

This point is fundamental because it demonstrates that in international relations, behind the appearances of discourses based on law motives must be sought, linked to 'feelings' (Popovski, 2016, p. 184-203). This is what Todd H. Hall calls emotional diplomacy, which he defines as '[a] coordinated state-level behavior that explicitly and officially projects the image of a particular emotional response towards other states' (Hall, 2015, p. 2). The emotional foundations of Chinese legal positions lie in two areas inextricably linked to Chinese history and China's representation of itself: its position as a victim of the West and its desire to project the image of a peaceful and powerful state (Coicaud, 2016). It is therefore a certain idea of revenge that drives the PRC in the South China Sea (Lowenheim & Heimann, 2008), a revenge against the Westerners who have deprived it of its rights by imposing respect for the system of Western-European based international law.

The colonialist origin of the rules applicable in territorial matters explains why international law is still sometimes perceived by emerging powers as perpetuating a form of colonialism by imposing on them the respect for the 'rules of the game' in which they did not participate in creating and whose modification proves to be complex; international law would thus be a conservative instrument of domination (Anghie, 2014).

Positions relating to territorial disputes in the China Sea can thus be viewed from the perspective of its desire to 'decolonize' international law, i.e. to promote a 'transcivilizational' vision that takes into account all civilizations and cultures in its creation (Onuma, 2017; Pahuja, 2011). Indeed, the history of international law shows that international law is first and foremost a European law that has become American after the end of the Cold War. The end of unipolarity and American hegemony will certainly be reflected in the future in the field of international law, for China progressively, as the dispute in the South China Sea shows, affirms its willingness to set an alternative vision in this regard to that of the West (Langer, 2018; Wang, 2014). If this hypothesis proves to be correct, we could witness significant developments in international law. Even if an absolute association between the authors of the current Third World Approaches to International Law (TWAIL) and the Chinese vision of international law would be abusive, it must be noted that the Chinese resort to the main

thesis of this current: international law is a right of the dominant (Chimni, 2006). The strategic aim of this posture of the defenders of Western hegemony is to legitimize their undertaking of revising existing rules (Heritage & Lee, 2020, p. 14).

The law relating to the determination of borders and the settlement of territorial disputes also originated in the era of colonization in the principles of the European Westphalian order. This is why the ICJ rejects the theory of 'historical consolidation of titles.' Moreover, in the South China Sea, due to the application of the theory of timeless law, the actions of colonial powers in the 19th Century and the 'uneven' treaties led to a redistribution of document titles that frustrate the Chinese interpretation (Linderfalk, 2011) [3]. The Convention on the Delimitation of the Boundary between China and Tonkin on 26 June 1887 stated, for example, that 'the islands which are east of the meridian of Paris (by 105° 43'East longitude), that is, the north – south line passing through the eastern tip of the island of Ch'a-kou or Ouan-shan (Tra-Co) and forming the border are also attributed to China. The Gow-tow islands (Go-tho, Cô tô) and the other islands west of this meridian belong to Annam [4].' The exclusion of Chinese arguments is, however, the result of a particular vision of international law: positivism and its judicial application.

However, as Professor Yasuaki Onuma writes, international law is not limited to judicial use. It plays a role in the social process, especially because culture and representations shape discourses that are built on the basis of the words of international law (Onuma, 2017, p. 15). The critical current is therefore right to argue that the context (power, morality, culture, etc.) is within the law and not outside the law. It is therefore appropriate to unmask all its structures (Bianchi, 2017, p. 136–145).

A Sense of Insecurity: A Fruitful Framework for Interpreting the Conflict in the South China Sea

While in the economic field, the PRC accepts jurisdictional settlement of disputes, it refuses to do so in territorial disputes. This policy is explained by the symbolic burden attached to these disputes, which are directly linked to the state's sense of security. The Chinese refusal to participate in the judicial settlement of the dispute can thus be seen as a manifestation of fear linked to the anticipation of an adverse judicial outcome. Similarly, the

[3] Arbitral Award rendered on April 4, 1928, by Mr. Max Huber, between the United States and the Netherlands, in the dispute over sovereignty over the island of Palmas (or Miangas): 'A legal act must be assessed in the light of the law of the time, and not the law in force at the time when a dispute relating to this act' (http://www.haguejusticeportal.net/Docs/PCA/Ethiopia-Eritrea%20Boundary%20Commission/Island%20of%20Palmas%20French%20PCA%20final.pdf, p. 16

[4] Convention relating to the Delimitation of the Boundary between China and Tonkin on 26 June 1887, L. de Reinach, Collection of Treaties concluded by France in the Far East: 1684–1902 Paris, Ernest Leroux, 1902, p. 300–301.

vehement of their response to the sentence is akin to an eruption of anger justified by the belief in the injustice of the decision [5].

The triggering fear of the refusal of the jurisdictional settlement of the dispute

While China bases its foreign policy discourse, almost since the birth of the PRC, on peaceful coexistence (Focsaneanu, 1956) [6], and more recently on the need for multilateralism, it has refused to participate in the arbitration proceedings initiated by the Philippines (Ku, 2016). The existence of a close link between territorial disputes and sovereignty leads States to accept jurisdictional settlement only to the extent that it appears as a means of mitigating the political costs of possible territorial losses (Allee & Huth, 2006). According to Todd L. Allee and Paul K. Huth, recourse to a jurisdictional settlement allows governments to conceal land concessions or losses under a jurisdictional decision. It is also easier for them to justify them in the face of their public opinion than concessions which would have been granted in the context of bilateral negotiations.

However, these conditions are not met in the eyes of Chinese leaders who reject participation in the judicial settlement of the dispute. This refusal is based on two pairs of arguments. The first, more legal, explains the rejection of the judicial process because, in the eyes of the Chinese, the court's incompetence with regard to the matter of the dispute and the inability of the court to decide the case. This pair of arguments is also consistent with the Chinese culture of Li in which the judicial settlement is rejected in favour of a settlement between the parties (Pan, 2011). For example, since the beginning of the Twenty-First Century, China has negotiated with the ASEAN (Association of Southeast Asian Nations) countries the principle of the settlement of disputes in the China Sea through negotiation. In 2002, the PRC and ASEAN member States signed the Declaration of Conduct (DOC), which set out the principles for the settlement of disputes in the South China Sea. Since 2013, a Code of Conduct (COC) has been under negotiation. A single text was agreed in August 2018 and forms the basis for discussions between the PRC and the ASEAN States [7]. The second set of arguments is more political. The exclusion of the judicial remedy is motivated either by the State's distrust of the court or by the inability of the State to monitor the outcome of the

[5] The denial of jurisdiction of the tribunal is justified by the very subject matter of the dispute concerning the territorial sovereignty of certain maritime formations in the South China Sea, which is not covered by the Montego Bay Convention. The refusal is also based on the existence between the PRC and the Philippines of an agreement to settle their disputes in the South China Sea through negotiation and the exclusion of 'maritime delimitation disputes from compulsory arbitration and other compulsory dispute settlement procedures'. Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, 29 October 2015, paras. 133–139, pp. 45–48.

[6] It is based on five principles derived from the 1954 Treaty on Tibet between the PRC and India. These principles are: mutual respect for territorial integrity and sovereignty, mutual non-aggression, non-mutual interference in internal affairs, equality and mutual interests, and peaceful coexistence.

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process in an area of its vital interests (Chang, 2016). Chinese actions in the South China Sea demonstrate its strategic importance (traffic control, resources, counter-encirclement by the United States) and 'sentimental' value for China. Control of the South China Sea belongs to its vital interests, as it contributes to the defense and preservation of China's territory, sovereignty and history. For this reason, control of the South China Sea is unlikely to be the object of compromise and even constitutes a reason for the use of armed force. A judicial defeat would have weakened the PRC's power policy, the assertion of which has become increasingly visible since Xi Jinping's accession to the presidency (Boon, 2014). The negotiation of the COC can thus be understood either as an attempt to ensure peace and security in the region between regional States that de facto exclude the United States, or as a way for Beijing to impose a solution that is favourable to it, excluding any jurisdictional solution that might jeopardize its legal interpretations, by 'soft force'; soft power for the Chinese does not in reality mean merely the attraction of ideas, values, but the 'gentle' use of the material components of power as providing development aid (Chen, 2016, p. 356). China does this in three ways. The first is to put pressure on the States bordering the South China Sea to abandon or reduce their claims.

This pressure involves first and foremost a policy of financial benefits for the benefit of States that agree, at least in appearance, to conform to Chinese claims. China postulates that its economic power forces the States of the region to deal with it. Indeed, as soon as Rodrigo Roa Duterte came to power as the new Philippine president, , he did not use the legal 'victory' of the July 12, 2016 arbitration award, preferring to develop economic ties between the Philippines and China. The second is the use of armed force against states that violate its 'historical rights'. These military actions range from boarding fishing vessels operating in areas considered to be part of the PRC to genuine military operations against States. This is the case of Vietnam, which in 1974 and 1988 had to abandon some of the Paracels and Spratleys islands it occupied to the PRC. A first lesson in this dispute is that China complies with international rules as long as they do not infringe on or interfere with its sovereignty. In this way, it is fundamentally in favour of an international order based on a Westphalian vision. The protection of its sovereignty sets the limit on its cooperation and thus provides a guide to understanding and interpreting Chinese legal positions. Thus, China's refusal to participate in arbitration involving the South China Sea must be understood. This feeling of fear that its vital interests will be flouted by a court decision explains China's reaction to the sentencing.

Anger as a reaction to the feeling of injustice in the arbitral award

The refusal to recognize the slightest legal effect of the award has been discussed in a multitude of articles, since 2016, by Chinese scholars whose thesis is invariable: the court has ignored international law (Fu, 2019a, 2019b). Chinese leaders, relying on a Critical Legal Studies (CLS) argument that judicial decisions are in fact guided by preferences (political,

doctrinal, etc.), and the view of the international order of judges (Duncan Kennedy, 1998, p. 157-179), have also directly questioned the impartiality of court members accused of being inferior and playing the game of the United States. Finally, a major global media and diplomatic campaign was launched at the time of the award to reaffirm the rights of the PRC in the South China Sea [8].

This reaction can be understood as a manifestation of the diplomacy of anger which, according to Todd H. Hall, consists of 'an immediate, vehement and open demonstration at the state level in response to a perceived offence. It invokes the discourse of indignation and threatens a precipitous escalation – even violence – in the face of new violations' (Hall, 2015, p. 4). Chinese official reactions and articles by Chinese academics show that China wishes, through a policy of asserting power, to influence the interpretation of international law. The use of the concept of hegemony, as defined by Martti Koskenniemi as 'the technique for presenting something special (interest…) as a universal (value of the community)' (Koskenniemi, 2004, p. 197), provides invaluable assistance in the deconstruction of Chinese legal discourse. The Chinese argument on disputes in the China Sea can be viewed as an attempt to alter the philosophy of the law of the sea which has since Grotius been based on the freedom of the seas; an interpretation which was favourable to Western maritime powers. Chinese arguments, as well as their positions during the negotiations of the Montego Bay Convention, expressed their desire for a law of the sea allowing the appropriation of maritime areas (Colin, 2016).

The dispute in the South China Sea thus highlights the articulation of international law around major principles (sovereignty, equality, etc.) whose meanings are imprecise. The way of articulating them and interpreting them is in itself political. The choices made by States and judges are guided by policy or a vision of international law.

The Decision of 12 July 2016, Source of Lessons on The International Order of The Twenty-First Century

In addition to these technical contributions, the award of 12 July 2016 is fruitful for thinking about the international order of the twenty-first century. Indeed, this award is the manifestation, by intervening States, of the confrontation between the United States and China to impose their interpretation of international rules in order to establish their power. Therefore, far from the establishment of a universal international order, two particularistic

[8] https://www.reuters.com/article/us-southchinasea-china-idUSKCN0YB1EO

discourses confront each other to alter international law in favour of its promoters: the United States and China.

International law as a Chinese-American 'battlefield'

The study of the arbitral award of 12 July 2016 thus shows the relevance of the theses of Martti Koskenniemi and Guy Carron de la Charrière. States use and abuse legal discourse in order to justify their conduct under international law. Therefore, it appears more as a means of communication, a strategic instrument for States than a real instrument for disciplining their behaviour. The essential functions of international law are therefore to enable relations between States (relational dimension) and to base their discourse on their differences and global problems (discursive dimension). International law is thus a social construction resulting from interactions between international and transnational actors whose apprehension requires knowledge and understanding of the actors of the international system and their formal and informal interactions. It is from them that a true knowledge of the rule is born beyond its formal dimension. However, a clear understanding of the practice and the formation of international law, which are the result of these interactions, requires, contrary to a positivist approach, to give importance to the context (social, historical, emotional...). This relational dimension explains the discursive importance of international law as a common language for interactions between international actors. Two functions can be identified from the relational dimension of international law: a social function (life in society) and a 'legitimizing' function (strategic).

In its social function, international law aims, first of all, to prescribe a code of conduct dictating their behaviour to members of international society in order to enable their coexistence or cooperation (Onuma, 2017, p. 27). This dimension of international law makes it possible to structure international society over time by integrating the common interest of its members on the basis of the values and objectives defined by them (Allott, 1999). Its 'legitimizing' function, for its part, is intended to demonstrate that the position of an actor is in conformity with, or not, the legal norm and/or that it must be accepted in the light of fairness, justice, etc. The 'legitimizing' function is the discourse of the actors, which can be analyzed from two complementary angles. International law is used, first of all, to structure the discourse of each actor who dresses their interests with the words of international law that base their positions, not on their interests, but on their rights. The law thus serves the strategic project of each actor by showing both the legality and the legitimacy of his position. Secondly, the actors, by deconstructing international law or a particular norm, aim to challenge it as an instrument of the 'powerful'.

These two functions clearly appear in the China Sea dispute. International law is convened to pacify relations between riparian States and demonstrate the rights of each State. While it is common to argue that international law, as a common language for

communication between States, contributes to the prevention of armed confrontations, it should be considered that, in the classical Chinese philosophy, taken up by current authors, war is not limited to the use of weapons, it is a continuum that encompasses the before and after armed confrontation (Sisci, 2008).

This leads to support, on the one hand, the idea that international law is above all a relational element and, on the other hand, that law dresses the interests and positions of States within the framework of the rule of law and the Community. These interests and positions are based in part on the 'feelings' of the state or their interpretation by the government. This legal dressing of the interests and positions of States is made possible by the indeterminate content of international rules, which makes it necessary to interpret them, which, therefore, reveals their content when they are applied.

The 'legitimizing' function raises the question of how the same rule can be mobilized by both parties to a dispute. A first explanation would be to recognize that States, in their disputes, resort to judicial discourse in order to demonstrate, on the basis of the facts, that the rule is favourable to them; this explanation is primarily oriented to the past and is of interest only in cases where the case is discussed and decided before third parties. Two other explanations may be considered. First, the meaning of the international rule is undetermined a priori; its content would then be identified as it is applied in interactions between actors and their interpretations of it. This first track would demonstrate the living character of the law, but also its shifting character, contrary to the majority view which suggests that the rule imposes a priori conduct on States. The second track recalls the drift of the theory of just war when theologians recognized that the cause could be just for all belligerents. Applying this idea would lead to the recognition that the arguments of both parties are equally legitimate. Moreover, this indeterminacy, by allowing each State to legitimately assert its claims, would explain, according to Jacques deLisle, that international law not only failed to resolve the dispute in the South China Sea, but also constituted part of the problem (Jacques deLisle, 2017, p. 235–290).

These two tracks justify recourse to the critical theories of international law, which postulate that international law is political in the sense that power plays a major role in legal relations and that, in its dialectical dimension, norms do not give the solution, because a plurality of answers is possible in light of the legitimate arguments of each. Any interpretation, introduction of a legal term or creation of a new norm is a matter of decisions made by States and judges, which will have political influence. As Koskenniemi writes, 'the interpretation of legal terms is the political battlefield of States so that their vision is imposed; the particular interpretation is presented and is intended to be universal interpretation' (Koskenniemi, 2004, p. 197). Politics thus influences the creation of the law (influence from the outside of the law to the inside) and its interpretation, its implementation affects the international environment (influence from the inside of the law to the outside). In order to

grasp this dual movement, the notion of hegemony as defined by Koskenniemi makes it possible to understand and deconstruct the legal discourse of States.

The Chinese legal argument is thus based on well-established principles to demonstrate that it acts according to positive law. In so doing, Chinese discourse takes advantage of the indeterminate content of international rules in order to hide its interests and denigrate the legal positions of other protagonists (Jacques deLisle, 2017, p. 265). This fits perfectly into the vision of a strategic use of law (Lawfare) (Kittrie, 2016). This doctrine of Anglo-Saxon origin is, in our view, only a repeat of the thesis developed in 1983 by Guy de Lacharrère in his book La politique juridique extérieure, which showed how States use international law in their foreign policy (de Lacharrère, 1983); a thesis complemented by Robert Kolb, which adds a dimension to foreign legal policy aimed at strengthening the role of law in international relations (Kolb, 2015, p. 9). The choice of judicial means can thus be seen as a way for States to use the resources of the law to carry out their territorial policy, but also as their belief that respect for international norms is a structuring element of contemporary international relations.

The settlement of disputes in the South China Sea is a perfect illustration of the development of a certain confrontation between two discourses on international law and more broadly on the international order: classical liberalism pluralistic and respectful of State sovereignty and normative liberalism imposing a universalism.

The confrontation of two 'imperialist' discourses

The first of these discourses, liberal normativism, is based on the triptych democracy, human rights, and the market. It can therefore be regarded as an instrument in the service of (Western) Powers whose interpretation of principles would serve to perpetuate a certain form of domination according to the critical approach of international law. This conclusion is necessary because, as Ronald Dworkin has shown, the law cannot be irretrievably separated from morality.

This conclusion is reflected in the emergence of the liberal-illiberal state/state differentiation, which is reminiscent of that made in the 19th Century on the basis of the norms of civilization which included or excluded entities depending on whether or not they respected European rules. The function is now identical: to stigmatize states that do not respect liberal standards. As in the nineteenth Century, this distinction aims to impose rules on the world thought out in the West and suggests that the existence of a real international community depends on the conversion of all States to liberal ideas [9]. Liberal normativism thus implies ethical commitments (Dworkin, 2013, p. 455). These would imply, on the one hand,

[9] This refers to the idea of the end of history developed by Francis Fukuyama.

that the protection of States would derive from respect for certain values and, on the other hand, that 'liberal' states, in order to achieve liberal peace, would have to act to impose these values on other States (Buchan, 2013). It is clear from this vision that the international order would be deterritorialized, in the sense that the strict interpretation of sovereignty would have given way to a more communal, universal interpretation, that is, based on an identical meaning for all civilizations of international principles and norms.

This perspective, however, omits a divergent understanding of liberalism at the international level. To counter this discourse, the PRC proposes an interpretation of international law based on both a return to a more Westphalian vision of it governed by the principles of peaceful coexistence and respectful of cultural diversity enriched by the contribution of classical Chinese philosophy; the challenge of the liberal order normative approach by the 'emerging' would lead to a real democratization of international law. However, this discourse is described as illiberal, that is, based on the role of the State in the economy, on a certain protectionism, on a subordination of the individual to the interests of the State, on a limitation of his freedoms or at least on a non-increase of individual rights in the West, on a return to classical sovereignty, on a reinterpretation of international rules in a less Community sense (Arbatova & Dynkin, 2016)[1]. The term 'illiberal' originates from liberal writings, which thus contrasted a 'good' international order with a 'bad' international order that should be combated (Boyle, 2016). Yet, in the 'classic' interpretation of the international order advocated by the PRC, states are free to determine their political, economic and social systems. International law would then be neutral: it would make it possible to reconcile the existence of sovereign States. The (macro) neutrality of international law must be understood as the absence of a pre-established vision of the international order. Consequently, international law should not be normative (impose a vision) or merely express the interests of the most powerful. But, being the result of a construction resulting from the practice and will of States, international rules cannot achieve (micro) neutrality. This inability is based on the fact that they embody the concerns/compromises of the majority or at least the most powerful actors. These rules, far from being the work of a common will, would be the result of the reconciliation of the wills dependent on the state of international relations (Pan, 2011, p. 242). Hence, in a realistic view of international law, which focuses primarily on the diplomatic outcome, the PRC's attempt to impose the interpretation of international rules most favourable to its interests.

To that end, China wished to persuade States to agree with its interpretations by the attraction of its model. This acceptance, however, requires a shared vision that assumes the expansion of its soft power as an instrument for creating legitimacy. This spread, however, requires a culture, political values and a foreign policy that leads to the adherence of other States. That is why the PRC presents itself as a pacifist power defending the weakest states. The idea of Tianxia ('what is under Heaven'), proposed by Zhao Tingyang (Zhao, 2019), contributes to the rooting of this posture. This thesis illustrates the implementation of a soft

power driven by an ideational power understood as the power to impose one's vision of the world through the creation of ideas and concepts that guide the functioning of the international order (Onuma, 2017, p. 1). Tianxia presupposes, in fact, a common choice of peoples, and implies the idea of a harmonious world, which translates into the need to adopt a pluralistic, transcivilizational vision so that the interests of the world may pass before national interests (Tingyang, 2008). Two ideas emerge from this: legitimacy (real and not merely formal acceptance of the rules) and the need for a guiding principle, therefore, of an ethics. Although Tianxia is moving away by its unitary and non-technical philosophy, it is moving closer to the idea of global governance. However, this idea of Tianxia, which would lead to global rules, accepted by all, disregards the reality of international law, which is never neutral; it is in reality a new imperialism under cosmopolitan externalities. This Chinese imperialism is in no way different from the European or American versions of the international order. Like it, the Chinese vision of the international order appears as a 'non-universal universalism' (Zerelli, 2001).

Thus, while China presents itself as a 'facilitator leader', that is, a leader who enables the achievement of common goals from a win/win perspective, this vision is a rhetoric of power. Indeed, leadership involves proposing principles that are accepted or acceptable to the greatest number of people to govern international life and the acceptance of certain responsibilities in the march of the world (Chen, 2018, p. 39). For the moment, however, Chinese international actions (requests for rebalancing, etc.) are focused, above all, on satisfying its interests without really articulating a project for and for international society.

Conclusion

Behind appearances, in reality, both these discourses convey a dominant, nationalist vision of the international order. The Liberal discourse is above all a Western discourse which has historically justified colonization and then the imposition of an interpretation of international norms, particularly through political and economic conditionality. Chinese discourse can be analyzed as a return to the classical Chinese philosophy of domination. Clearly, these two discourses do not allow for a universal vision of the international order. However, they allow us to put forward some lines of reflection in order to understand international law differently.

As a first lesson, international norms and their interpretation cannot disregard the study of elements outside the law, whether they be history or feelings. This lesson raises, without answering it, the question of whether a universal vision is really achievable. In order to avoid nationalist discourse, one possible way would be to accept a pragmatic interpretation of international law. This would lead to an exit from the positivism/naturalistic and

idealist/skeptical debates on the one hand, and from the systematic opposition between the rules-based approach and the policy-based approach on the other.

On the basis of the critical lessons of Martti Koskenniemi that international law is neither neutral nor objective (David Kennedy, 2009; Koskenniemi, 2007), it must be recognized that the aim of the jurist in these circumstances would be to find the most acceptable solution in the circumstances of the case; there is not the application of a rule defined a priori, but a think about what needs to be done here and now. In view of the observation that, under international law, any legal decision is the product of political choices (Koskenniemi, 2007, p. 89), Michael J. Glennon proposes using pragmatism in the interpretation of that law (Glennon, 2010). The idea is to introduce a specific way of thinking, to approach international problems. For this author, the majority of questions in the international order and international law are based on cultural diversity, history, economy or the search for power or security. The pragmatic approach is designed to identify practical and non-ideological solutions. Pragmatism thus promotes an inclusive, non-normative vision, without denying the existence of a hierarchy in the international order and the role of power.

To achieve this, it is necessary to look at opposing conceptions without moralism in order to find a balance of interests at stake by reflecting on the direct, indirect, short-term and long-term consequences of the chosen solution. This search for balance is based on an analysis of the facts with a focus on complex causation, and on the context of the case (Glennon, 2010, p. 2-27). The advantage of pragmatism is that it is less interested in ideology than in problem solving (Schieder, 2000). However, the risk of such a vision is to become so arbitrary as to make international law a mere screen of State interests. Even if such a risk should not be denied, it illustrates a misinterpretation of pragmatism. Pragmatism can and should be based on principles of interpretation in order to avoid arbitrariness; pragmatism leads to the search for and application of a (minimal) ethics of international law. Any pragmatic approach thus requires clarifying the goals of the actors, of the international order and the values/principles that can serve as a guide, since they are acceptable to all (stability, justice…) (Wells, 2000).

In order to reconcile the interests of States and the protection of individuals, the interpretation should take into account the consequences of the choices made for international security. Since the end of the Cold War, the latter integrates the security of States – the protection of its sovereignty in particular against military threats, the classic vision – and human security – the emancipation of individuals, the contemporary vision –. This would be a means of reconciling interests in the South China Sea and elsewhere.

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