

The India-China Border Question: An Analysis of International Law and State Practices

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ABSTRACT

Over the years, India has attempted to find political as well as legal solutions to its border dispute with China; these efforts have met with little success. This paper argues that the reason a resolution to the India–China border issue remains elusive is the inadequate understanding—and enforcement—of International Law. It examines the sustainability of China’s position, as well as its general approach to International Law, its interpretation of treaty laws, and the factors that allow legal instruments to be misinterpreted. Finally, the paper discusses India’s current approach to the dispute, highlighting existing issues and offering suggestions for moving forward.

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INTRODUCTION

The Vienna Convention on Law of Treaties of 1969 (VCLT) is the fundamental instrument that regulates all treaties between states, as well as their disputes. It codifies different historical approaches, state practices, and generally accepted behaviour of states for the purpose of resolving crises due to a clash of interests between two states. However, the VCLT has often either failed to contain disputes or facilitated the gross misinterpretation of existing laws, which is detrimental to international and bilateral relations. Disputes over territorial claims often figure prominently in the discourses concerning criticism of treaty laws.^a One fundamental reason is that within a treaty law,¹ multiple elements are applicable to the same issue. Treaty arrangements are merely statements of acceptance of legal obligations and the manner in which the breach of such obligations should be addressed; the specific mechanisms are left to be decided by successive treaties or protocols.^{b,2} However, principles of customary law, *uti possidetis*,^c effective control,

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- a A significant number of cases that the ICJ receives are over territorial disputes. It is equally true that while various judgements of ICJ have, over time, given a judicial recognition to several norms and principles to be applied in cases of territorial disputes, their effectiveness is limited to the subject matters over which the rulings were delivered. Beyond that, judgements of the ICJ have not been served as a guide for the states to resolve their dispute. See *Fisheries Case, 1951 (Norway v. UK)* and *Temple of Preah Vihear 1961 (Cambodia v. Thailand)*.
- b A framework agreement is a type of legally binding treaty that establishes broader commitments for the parties and leaves the setting of specific targets either to subsequent or more detailed agreements (e.g. protocols) or to the national legislation.
- c *Uti possidetis* is a general principle under International Law, which recognises the transferability of sovereignty over a territory from an existing state to a new state. This principle finds its major application in the decolonisation process, where removal of colonial administration leads to the setting up of a new government, unless a treaty forbids it. The objective of the principle was articulated by the ICJ in *Frontiers Case, 1986 (Burkina Faso/Mali)*: “It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.” [Para 20]

and the principle of historic rights are *sine qua non* to fill the gaps in law that a codified treaty may not have adequately addressed or to guide states where a treaty is altogether absent.³ Thus, a state’s subjective interpretation and application of principles may clash with globally accepted standards.

The frequent face-offs between India and China must be viewed in this backdrop. Despite several formal agreements and protocols intended to amicably address the India–China border dispute, the two countries have not been able to resolve the conflict, whether legally or diplomatically. Since 1993, the two have entered into a series of bilateral arrangements that ultimately proved futile, causing experts in international relations to question the effectiveness of treaties in addressing complicated realities.

Map 1. The Location of the India-China Border Row in the Western Sector



Source: BBC⁴

In mid-2020, China and India found themselves engaged in another long military face-off on the western sector of the Line of Actual Control (LAC). Following allegations of massive Chinese military build-up on their side of the western sector of the LAC in April 2020, both nations accused each other of violating the status quo on the border. This conflict took a violent turn in the intervening night of 15–16 June 2020.^{5,d} On 18 June 2020, in response to the questions raised in media and by opposition parties on why soldiers involved in the Galwan Valley clashes were unarmed, Foreign Minister S. Jaishankar stated, “Troops always carry arms ... [However, the] longstanding practice (as per 1996 & 2005 agreements) [is] not to use firearms during face-offs.”⁶ This, along with questions raised regarding the legal and physical character of the LAC, became significant issues in the aftermath of Galwan—the first such escalation since India and China’s mutual acceptance of the treaty obligations under the 1996 Agreement on Confidence Building Measures in the Military Field.^{e,f} The situation has prompted a serious re-evaluation of the Indian interpretation of, and approach to treaties and International Law.

LINE OF ACTUAL CONTROL: LEGAL STATUS

Effective diplomacy between nations is contingent upon a combination of ethical and political conduct and the tactical use of treaty laws. Often,

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- d While both sides refrained from using firearms, other means of attacks were employed.
 - e The Agreement of 1996 was an improvement on the Tranquillity Agreement of 1993, since the latter only provided for mutually recognisable ways to limit military activities on the border, whereas the former expressly forbade any transgression or misuse of military capabilities against the other. The 1996 Agreement made it unequivocally clear that pending the resolution of a dispute, military capabilities should not be used to threaten the peace in the region.
 - f While the conduct of militaries and border perceptions on both sides have often led to local frictions, the events of Galwan Valley incident stood out, with soldiers having been killed on both sides.

political conduct depends upon the efficiency with which diplomats interpret and convince the opposite side on treaty matters. Over the decades since 1950, India and China have adopted divergent approaches to the boundary question. For one, China does not acknowledge the McMahon Line as the Line of Actual Control, perceiving it as a violation of the principle of “historic rights” and an injustice⁷ done by British Imperialism.⁸ Thus, since late-1950s, China has advanced its own delineation of the LAC as the *de-jure* legal boundary, claiming a significant portion of Aksai Chin within its territory. For its part, India does not grant legal recognition to this version of the LAC^h nor to China’s claims over Aksai Chin. Thus, the LAC remains a functional concept inasmuch as it serves to avoid military confrontation between patrolling forces of the two sides.^{i,8} India expressly recognises the LAC for the

g The McMahon Line was an outcome of a tri-partite treaty arrangement, known as the Simla Convention, between Britain, Tibet and China concluded in 1914 at present-day Shimla (India). The genesis of the treaty could be traced back to Younghusband’s Tibet Expedition of 1904, which was the consequence of Tibet’s refusal to acknowledge the boundary understanding that the British were trying to reach in the frontier region. The Agreement delineated the boundaries between British Indian Empire and Tibet along its entire West–East Frontier. Following upon the Anglo–Russian Convention of 1907, where under Article 2, both Russia and Britain agreed to recognise Chinese suzerainty over Tibet, Article 2 of the Simla Convention had given a conditional recognition to China, stating clearly that Tibet will not be annexed and converted into a Chinese province. The Chinese resentment over the McMahon Line is due to this conditional clause in the Agreement, which it believes compromised its actual sovereignty over Tibet and enabled British India to acquire territories it perceived as Tibet’s, and therefore China’s.

h Article 6 of 1993 Tranquillity Agreement specifically mentions that the “Agreement does not prejudice” the respective “positions on the border question” of either side. Article 6 must be read with Article 1 of the same treaty, which requires both sides to strictly observe the LAC only for the purpose of avoiding unnecessary military confrontations “pending an ultimate solution to the boundary question.”

I From the mid-1980s, patrols of either side would often come in close contact at the LAC. The Sumdorongchu standoff was a major event in a series of face-offs. This event was followed by then Prime Minister Rajiv Gandhi’s visit to Beijing in 1988, where it was agreed that both sides would negotiate a boundary settlement, and that pending, peace and tranquillity would be maintained along the border. The 1993 Tranquillity Agreement and its follow-up treaties were a culmination of this understanding.

limited purpose of maintaining peace at the border and containing the dispute from affecting other aspects of Indo-Sino bilateral relations, but not as a cessation of its sovereign claim beyond this line.^{j,9} It has referred to legal instruments and cartographic evidence to assert its claim, as well as a general assertion that its position has been “historically clear.”¹⁰

The origin of the LAC can be traced to the letters written by then Chinese Premier Zhou Enlai to Indian Prime Minister Jawaharlal Nehru in 1959, in which he broadly defined the border between the two countries, without any proper scale.¹¹ Later, China sought to legalise the LAC during Zhou’s visit to India in 1960¹² and again after the 1962 War.¹³ Exercising its right to rebut,^k India has consistently rejected this Chinese conception.¹⁴ It remains a matter of conjecture as to whether China intended to unilaterally give the LAC a legal status or wanted to create conditions wherein India would be compelled to accept it.

Under the general principles of International Law, unilateral declarations have a legal character and the Law of Treaties has dealt at length with questions on such declaration by states. However, unilateral declarations that affect the rights of other states must follow a two-stage test to be legally accepted: first, there must be a unilateral statement by a state actor that affects an international character of a subject matter; second, such declaration must be either accepted by a party interested in it or should go unchallenged.¹⁵ Thus, the Chinese

j In its official press release, the Ministry of External Affairs (India), unequivocally stated, “India has never accepted the so-called unilaterally defined 1959 Line of Actual Control (LAC). This position has been consistent and well known, including to the Chinese side.” It further went on to note that the agreements entered into by both sides are intended only to reach a common understanding over LAC, which had yet to materialise.

k A practice in international relations where one state rejects a unilateral claim made by another.

conception of the LAC does not have a strong basis under International Law, since India has expressly rejected it.¹

The nomenclature, too, challenges the legal validity of this LAC. While both sides claim Aksai Chin as part of their sovereign territory, the term “*Actual Control*” can be interpreted to mean that China accepts two boundaries with India: One, within which it exercises actual sovereignty, which extends up to the traditionally believed western boundary of Xinjiang Province; and another that goes beyond it and covers the Aksai Chin region. Based on this duality, the literal interpretation of the term, “*Actual Control*” would suggest that Aksai Chin only serves the purpose of supporting logistical and military activities in the region. Thus, Chinese intentions in this regard seem to be motivated not by the fundamental traits of sovereignty in the demarcated region (since it does not exercise effective control over it), but to serve its interests in traditional Chinese territories.

The International Court of Justice (ICJ), in the case concerning the Temple of Preah Vihear, rejected Thailand’s arguments on its effective control over the disputed territory, where it had argued that its acts on the ground were “evidence of conduct as a sovereign.”¹⁶ According to the ICJ, the acts concerned were exclusively those of local provincial authorities, which were “very few [and] routine,”¹⁷ and therefore “difficult to regard ... as overriding and negating the consistent and undeviating attitude”¹⁸ of the opposite party (Cambodia). Extrapolating from this judgement, China’s “conditional sovereignty,” too, has limited legal consequence under International Law without substantiation that it exercises effective sovereignty over the region and that all constitutive elements of the state apply to it as elsewhere in China.

1 This can be contrasted with the Shimla Agreement of 1972, which attributes a legal character to the Line of Control (LoC) between India and Pakistan as a recognised international boundary.

China's conduct relating to the LAC presents two additional issues. First, China has never been consistent with its own perception of the LAC. Analysts have argued that its conception of the LAC has shifted over the years,¹⁹ which makes it fail the internationally accepted standards for a claim of sovereignty and invalidates China's claims of continuity and historical right. Second, through official statements and bilateral agreements, China has often accepted the LAC as a tool to determine the point up to which forces of the two sides can conduct patrolling activities. In a letter to leaders of Asian-African countries explaining his reasons for declaring war with India, Zhou Enlai notes, "The line of actual control is not equivalent to the boundary between the two countries. Acknowledging and respecting the line of actual control would not prejudice each side's adherence to its claims on the boundary."²⁰ Military conduct—such as frequent face-offs between patrolling parties, attempts to change the status quo, and setting-up of temporary military build-ups—has further contributed to the differences in perceptions and the eventual disregard for the LAC. Indeed, there is a visible departure from what the Chinese leadership had initially proposed in the way its military has carried out activities in the bordering areas. In 1959, the Chinese government suggested that "the armed forces of both sides withdraw 20 kilometres from LAC along the entire Sino-Indian border and halt patrols."²¹ However, by the mid-1970s, the People's Liberation Army (PLA) "no longer stayed 20 kilometres behind the Chinese version of the LAC in all places,"²² with physical scuffles becoming more frequent in the last few years.

The 1993 Tranquility Agreement shows that in bilateral matters, the LAC is merely a limit on border patrolling, and not a validation of border claim. Article 1 of the Agreement categorically states, "Pending an ultimate solution to the boundary question" the two sides shall "strictly observe ... the LAC." According to Article 4, "References to LAC in this

Agreement do not prejudice their respective positions on the boundary question.” These Articles, together with Zhou Enlai’s statement, suggest that China acknowledges the duality in their border approach. Thus, in the absence of any mutually agreeable instrument conferring sovereign rights to China, the LAC can legally be considered a line meant only to avoid face-offs.

PRINCIPLE OF HISTORIC RIGHTS AND DWINDLING CLAIM OF SOVEREIGNTY

China has often invoked the principle of “historic rights” to assert its claim over Indian territories, e.g. the claim to the South China Sea (SCS).²³ On 19 June 2020, Zhang Yongpan, a scholar with the Chinese Academy of Social Sciences, referred to instances of territorial control by the Qing Dynasty (1644–1911) and Western literature as a justification for Chinese claim over Galwan Valley.²⁴ This claim was soon followed with a statement from the Chinese Foreign Ministry asserting its sovereignty over the Valley.²⁵ However, claims based on the “principle of historic rights” are often riddled with ambiguities and challenges, since the sources and references from history books do not always translate into exact cartographic output and may not necessarily be true.

Nonetheless, the Courts and Tribunals have recognised the importance of this principle and used it as basis for laying down certain parameters for determining sovereign claims. In an arbitral proceeding between Eritrea and Yemen, the Permanent Court of Arbitration (PCA) suggested that the constitutive elements for the historical title are: *first*, that it has so long been established by common repute that its common knowledge is sufficient; and *second*, that possession has continued so long as to have affected legal title.²⁶ In the Fisheries Case (UK v. Norway),

the ICJ discussed the geographical aspect of historic rights while determining the rights of Norway,²⁷ tacitly acknowledging the geographical factor as essential to historic rights. Significantly, the court also accepted the UK's argument that the success of "historic rights" is contingent upon the exercise of sovereignty over the disputed territory if "the necessary jurisdiction over them [exists] for a long period without opposition from other States," a kind of *possessio longi temporis*.²⁸ According to the International Law Commission (ILC), an "express public statement" from the state that a practice is permitted, prohibited or mandated is a "clearest indication" that it has avoided or undertaken such practice "out of a sense of legal right or obligation."²⁹

These judicial tests can be applied to China's claims of territorial sovereignty. For example, the reign of the Namgyal Dynasty (1460–1842) over Ladakh, including the disputed region,³⁰ shows that Ladakh may have never been part of Ancient China, countering China's assertions based on the Qing Dynasty. Moreover, considering the inaccessible terrains of Aksai Chin, a scientific survey would not have been possible in that era, making any historical references to these territories mere conjecture. Indeed, the assertion that "Galwan Valley" finds references in "Western literature" is unfounded, since the term "Galwan" is of recent origin, named after one local "Ghulam Rasool Galwan," who was part of a British expedition team in 1899.³¹ The principle of historic claim should be supported by a set of historical facts such that "they logically lead to a right to historic possession,"³² and China's claim over the territories disputed with India do not meet this standard.

Specific attention to the development of Chinese claim on the region is still warranted for a more nuanced understanding. In his letter to Zhou Enlai, written in 1958, Nehru states that there never existed any

border issue between the two countries and that the Sino-Indian Agreement of 1954 sorted out any conflict there might have been. He further states, “No border question was raised at that time.”³³ In the same letter, Nehru points out that during his visit to China that year, he spoke with Zhou of “some maps” he had seen, “which gave [the] wrong borderline between the two countries.”³⁴ He reminds Zhou of their conversation: “These maps were really reproductions of old pre-liberation maps, and you [Zhou] had no time to revise them.”³⁵ According to the letter, Zhou’s response led Nehru to believe that the maps under question were a non-issue. In 1956, when Zhou visited India, Nehru prepared a note of conversation on the McMahon Line, which took place between them and which he later shared with Zhou. This note captures three important points:³⁶ first, Zhou’s assertion that he had “never heard of this [McMahon] Line;” second, though in his opinion this Line was not fair, being a product of British imperialism, McMahon Line was considered an accomplished fact; and third, the Chinese Government’s opinion that because of the friendly relations that existed between China, India and Burma, “they *should give recognition* to this McMahon Line.”^m The letter and the note combined create the impression that any issues regarding the India-China border were simply due to administrative laxity.

It was only in January 1959, in a letter written to Nehru, that Zhou first raised the border issue,³⁷ using two arguments in its favour: that China had constructed a road in Aksai Chin in 1956 and that there was no signed treaty or agreement on the Indo-China boundary between the two states.

This change in Zhou’s stance led to a series of events that culminated in the War of 1962. While the Chinese government may have always

m Emphasis added.

been latently uncomfortable with the McMahon Line, the sudden shift in attitude shows an apparent lack of continuity in their claim over Aksai Chin. Zhou first raised the issue with Nehru more than a decade after India's independence, challenging the assertion that China has always maintained its claim over Aksai Chin. Indeed, until 1959, Zhou had seemingly accepted the McMahon Line as an international border. Zhou's stance may have changed due to a gradual realisation of the strategic purpose the Aksai Chin region served. This is supported by the fact that China has only occasionally made the claim of sovereignty on disputed regions, and often when conflict escalates between the two nations, such as immediately after the War of 1962. In 2020, Galwan Valley became its newfound focus.³⁸

However, in the absence of any periodic claim or recognition of international character, the physical presence of Chinese armed forces in the Aksai Chin region can well be perceived as an "illegal occupation," in violation of Charter of the United Nations and purposive reading of other relevant instruments including the 1907 Hague Regulations, and the 1949 Fourth Geneva Convention and its 1977 Protocol.³⁹

BORDER MANAGEMENT AND PRACTICES: INTERPRETATION OF TREATY LAWS

Article 2 of the VCLT defines *treaty* as an "international agreement" between states in written form and governed by International Law. A Commentary on the Draft Articles on the Law of Treaties (1966) stipulated that the term *treaty* in the Draft is a "generic term"⁴⁰ covering all forms of *international agreements*, which must be in writing. Significantly, the Draft Commentary also observed that while a *treaty* may connote a "single formal instrument," "there also exist international agreements, such as exchanges of notes, which are not a

single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an agreed minute or a memorandum of understanding, could not appropriately be called formal instruments, but they are undoubtedly international agreements subject to the law of treaties.”⁴¹ The VCLT gives a holistic or generalist approach to a treaty instrument by including within it any agreement that two sovereign states enter into with the intention to be legally bound by it. Thus, the Convention essentially recognises a common law principle on the law of contract,⁴² wherein two parties while entering into an agreement agree to certain rules and procedures to be followed in their conduct, a breach of which may invite a liability.

In furtherance of these principles, India and China have entered into several legal treaties aimed at ensuring clarity on the border dispute. The need for such arrangements arose from the frequent border face-offs and their potential impact on other aspects of India-China relations. One of the first of the many treaties between India and China was the Tranquillity Agreement of 1993, followed by the Agreement on Confidence-Building Measures in 1996, the Agreement on Establishing a Working Mechanism on Border Affairs in 2012, and the Agreement on Border Defence Cooperation in 2013. In 2005, a Protocol to the 1996 Agreement was implemented to give it a structural shape.

In addition to these legal instruments, the two nations have conducted several informal summits in recent years, primarily aiming to establish an understanding of the border dispute, based on loose adherence to the strict rules of legal formality. These include “Wuhan Spirit” and “Astana Consensus,” both focusing on principle-based approaches to tackling border issues and seeking to reinvoke existing treaty laws.

Of all the treaty instruments, only the 2012 Agreement was concerned with diplomatic methods, while others focused on military aspects. Contrary to expectations, however, these instruments have only created a wider space for misinterpretations, with successive treaties failing to objectively address the issue of face-offs. The established mechanisms do not include measures to pre-emptively tackle a conflict, only allowing a *post-facto* conflict resolution. This limitation in the treaty arrangements is the main reason that China has unilaterally altered the status-quo, attempting to renegotiate from a new position.

Following the Galwan Valley clash—the first violent face-off since the signing of the 1996 Agreement, with casualties on both sides—important questions were raised: Why were the Indian soldiers unarmed? What made the Chinese military interpret the 1996 Agreement as allowing them to attack with modified wooden staves and iron rods stacked with nails and spiked wires wound around them?⁴³ Were they selectively reading the 1996 Agreement to interpret that since Article 4 specifically mentions that “neither sides shall open fire,” they could resort to other methods of violence and, in doing so, felt no need to refer to Agreement’s Preamble and Paragraph 4 of Article 4?

The intent of the 1996 Agreement was to avoid violence during face-offs, and as the conventional wisdom suggests, military-led violence comes mainly through the use of firepower. Consequently, the authors of the Agreement chose to use the term “military capability” to make it unambiguous that any instrument used by armed forces must be avoided during a confrontation. Additionally, the Protocol of 2005 categorically stated that “neither side shall use force or threaten to use force” and “refrain from any provocative actions.” Mainstream discussion vis-a-vis border conflicts has often been confined to the 1996

Agreement, with the 2005 Protocol being largely overlooked.ⁿ The manner in which the Chinese military conducted itself in the Galwan Valley clash is indicative of the extent to which the terms of treaties can be misinterpreted to suit the motives of the party concerned, disregarding the original intent of the Agreement. Treaty laws are frequently misinterpreted to justify wrongful acts committed by a state. International practices show that “treaty interpretation” has always been with a two-pronged approach: an interpretation by the state party to the treaty; and one by the dispute-resolution forum, such as the ICJ or the PCA. Indeed, interpretations by parties to the treaty are invariably backed by claims, mainly done through diplomats, who are not necessarily acquainted with law. By contrast, international tribunals and judicial organs are squarely concerned with the law, and they evaluate claims within the parameters of codified laws and general principles. The difference in approaches between the two can result in two directly contradictory pictures for the same issue. Evidence suggests that states usually resort to judicial intervention only as the last option, favouring diplomatic methods to overcome contentious issues. Thus, in the absence of adequate judicial guidance, treaty misinterpretation becomes an overwhelming issue in international relations.

n The international community has a general inclination to overlook, though not avoid, protocols. They are a follow up of the treaty convention, laying down procedural aspects depending upon the substantive aspects of the latter. As such, a protocol gives an objective shape to a legal instrument and is, therefore, of much consequence. However, the prevailing understanding in state practices seems to consider protocols as mere annexures to the principal law, not worthy of much scrutiny, since it just elaborates on what the principal law has already stated. Protocols are often invoked with great zeal only in judicial proceedings, where lawyers have the burden to both substantively and procedurally assert the correctness of their claim. The inaction on the part of treaty allies to actively refer to protocols, especially in their conduct, reflects upon the incautious nature of their approach towards international relations.

Article 31 of the Vienna Convention on Law of Treaties states that a treaty should be interpreted in “good faith” where “ordinary meaning” must be “given to the terms of the treaty in their context and in the light of its object and purpose.” The ICJ has acknowledged Article 31 as constituting International Customary Law.⁴⁴ The rule is based on the maxim of *pacta sunt servanda* (agreements must be kept), which makes a treaty binding upon the signatories. Moreover, ‘good faith’ is a general principle in International Law, since it is a norm-creating principle that has existed ever since states started entering into legal obligations in their international relations. The VCLT simply codified this ancient principle.

The Agreement on Confidence-Building Measures (1996): Scope and Limitations

The 1996 Agreement lays down the general rules of border security and confidence measures, with the 2005 Protocol building upon those rules to provide a procedural safeguard. However, both instruments are marked by a lack of objective rules for maintaining tranquillity, with sufficient scope for misinterpretation that can be exploited by either party. For instance, Article 4 of the Protocol, which deals with on-ground military face-offs, does not provide a procedure in the event of a breach. It simply makes a provision for the cessation of activities, the return of troops to base, and the initiation of consultations through diplomatic and military channels to avoid escalation. Moreover, the Protocol does not stipulate any time limit or format for the discussion or the preferred interlocutor in such a situation. The 2020 Indo-China skirmishes have shown that longer durations of discussions do not only delay resolution but also threaten the peace process.

In comparison, Article 3 provides a systematic procedure in the case of an alleged air intrusion across the LAC and fixes a time limit for

communication and for conducting an investigation. It lays down the provisions for a mutually agreeable reduction and limitation in military forces on the LAC, including a mandate for reducing armaments in the region near the LAC. However, since the 2005 Protocol does not lay down rules for this Article, a lack of consensus allows the two sides to go to any extent during face-offs, putting the entire peace process in jeopardy. While Paragraph 3 of Article 3 requires the exchange of data between the two nations on the reduction and limitation of militaries and armaments, there is no evidence that this has been undertaken. Indeed, Article 3 has never been properly implemented on the ground, with both India and China ensuring the maximum physical presence in the LAC.

CHINESE DIPLOMACY AND ITS LEGAL OBLIGATIONS

China's behavioural aspect, too, warrants scrutiny to understand the consequences of Chinese actions in its performance of international obligations. Its approach is either an assertive defiance of the widely accepted general principles of International Law, or simply a way to avoid being party to any treaty-based obligations. Two separate and recent instances illustrate this.

1. China rejected the jurisdiction of the Permanent Court of Arbitration in the SCS case by advancing its own understanding of International Law. The suit was filed by the Philippines in the PCA, to adjudicate on the territorial disputes over the SCS. However, China rejected the PCA's jurisdiction on two grounds: first, that the jurisdiction of the PCA could only be invoked by the ASEAN, not an individual member country;⁴⁵ and second, that the matter being that of sovereignty, not exploitation of right, made it unfit for arbitration.⁴⁶

2. China recently stated that it may not be legally bound by the Sino–British Declaration on the status of Hong Kong. Zhao Lijian, the foreign ministry spokesperson in China, interpreted the Declaration as “China’s statement of policies, not commitment to the U.K. or an international obligation as some claim.”⁴⁷

Common to both instances is an assertion that prioritises sovereignty over international obligations. Scholars of International Law have noted that China’s understanding of *sovereignty* is “conservative, if not obsolete.”⁴⁸ Sovereignty is now considered fluid, having evolved in terms of concept and theme, especially since the restructuring of world order post World War 2. However, many developing countries still consider it inviolable due to the overarching nature of domestic institutions there, unlike supranational institutions that influence the conduct of developed countries, such as the European Union and United Nations.⁴⁹ Moreover, since International Law is often perceived as a largely Western conception, China does not feel obligated to follow it exactly. This has been a long-held Chinese position, dating back to Zhou Enlai’s era, and may be considered both a reaction to and suspicion of Western activities.

The development of modern International Law has often been attributed to juristic writing, which developed in Europe. *De Jure Belli Ac Pacis* (1625) by Hugo Grotius was the first concerted effort in the West to lay down rules of conduct for states, distinct from the diplomatic methods used in international relations. However, the evolution of International Law was an exclusionary practice, focused on regulating the conduct of “Western Christian civilisation.”⁵⁰ By the mid-19th century, there was an increasing need to accommodate the Ottoman Empire to balance the challenges posed by Imperial Russia. As Japan forced itself into this exclusive club after defeating both China (1895)

and Russia (1905), the idea of International Law became more accommodative, and the phrase “Western Christian civilisation” was replaced by “civilised nations.”⁵¹ However, even as Western International Law became more accommodative, it faced a severe challenge from the rise of the Bolsheviks and the substitution of Imperial Russia with the Soviet Union. Since the Bolsheviks perceived law as an instrument of capitalist society and a will of the ruling class,⁵² the Soviets repudiated⁵³ all old treaty arrangements, except the international rights that their predecessor had entered into with other states. The Soviet approach later served as a guiding principle for China’s stance that International Law is a product of the West.

During the 1950s when British imperialism was weakening, two strands of International Law had developed: one led by Americans and Western Europe, dubbed variably as Realism or Neo-liberalism; and the other led by the Soviet Union, dubbed as Marxian Perspective or Soviet Approach. Since China regards the Western ideology as an adversary and Khrushchev’s idea of Communism as a distortion, it felt the need to develop its own strand of International Law. This sentiment was also shared by several other recently liberated Asian and African countries, including India, and came to be known as the “Third World Approach to International Law” (TWAIL).^{p,54} While the fundamentals were initially the same, with the objective being to counter Neo-liberal International

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- o The Bolsheviks subscribed to a Marxian social order, viewing the economic system (or substructure) as defining the forces and relations of production, which predetermines the nature of its own superstructure, including the law.
 - p For developing countries, the inviolability of sovereignty is essential in the existing world order, with international organisations such as the IMF and the WTO dominating international relations and politics. Developing countries perceive such institutions as objects of developed countries, which intend to impose their will indirectly upon the developing world and influence the domestic institutions there. The TWAIL is based upon this discourse.

Law, the methods and perceptions gradually became divergent, especially regarding the notion of sovereignty and the idea of “collective good.” For instance, the Nehruvian approach was driven by *collective belief*, collaborating with the international community, while China’s approach became increasingly assertive and internally focused. The Chinese perception of International Law is arguably reactionary, with the government deliberately fuelling claims and counterclaims to suit its needs. Thus, China has largely ignored the attempts made by expert groups (comprising both military and strategic experts) since 1993 at amicably resolving its border dispute with India.

During then Indian Prime Minister Vajpayee’s visit to China in 2002, under the NDA-I regime, both governments agreed upon a set of parameters for enabling cross-border socioeconomic and cultural interactions. Both sides were also expected to exchange maps of the contested borders at the western sector of the LAC⁵⁵ to bring further clarity in the border perception of the two nations and resolve the areas of dispute. Only the maps on the middle sector of the LAC were exchanged and a memorandum⁵⁶ signed, of which Articles 1, 2 and 3 enabled the opening of Nathu La and Changu in Sikkim, for cross-border trade. An agreement on this sector of the LAC could be reached as both sides had a similar perception of the LAC. The following year, another meeting took place to exchange the maps of the western sector of the LAC. However, upon viewing India’s map, then Chinese Vice Foreign Minister Wang Yi returned it without giving a reason.⁵⁷ In doing this, China thwarted any possibility of a resolution to the unending border dispute.^q

q The Ministry of External Affairs in its official press release had categorically blamed China for being uncooperative in the border resolution process. It noted: “the two sides had engaged in an exercise to clarify and confirm the LAC up to 2003, but this process could not proceed further as the Chinese side did not show a willingness to pursue it.” See official spokesperson’s response to media query: <https://www.mea.gov.in/response-to-queries.htm?dtl/33074>

China's practical approaches regarding International Law has unravelled another problematic aspect. In areas where it perceives potential challenges to its freedom in international actions, the state deliberately avoids entering into treaty agreements. If it does sign an agreement, China ensures that the nature of the treaty is either shallow—which allows for favourable interpretations—or it uses enabling mechanisms to exclude itself from certain obligations. Two instances illustrate this aspect of Chinese legal diplomacy. First, in its official statement released after the PCA's judgement on the SCS dispute, China cited its Declaration of 2006, by which it had excluded itself from the compulsory dispute settlement mechanism procedures of UNCLOS, disputes concerning others, maritime delimitation, historic bays or titles, and military and law enforcement activities.⁵⁸ Exclusion from *maritime delimitation* allows China the power to refuse to be taken to international tribunals by other states without its own consent. Second, despite several of its rivers flowing internationally, China is reluctant in entering into any treaty with its downstream neighbours. Likewise, its treaties with India on border questions, as argued earlier, allow immense space for multiple interpretations. For instance, in Galwan Valley for instance China has recently staked claim over a portion of territory that was previously undisputed and where patrolling parties have never clashed.

RECOMMENDATIONS

In light of China's political and diplomatic approaches to international issues in general, and to the India–China border dispute in particular, India must re-evaluate its approach, especially where it concerns China. The following are some aspects that India must address.

1. India's official responses to Chinese assertions are quick, but they often lack substantiation. For instance, while the Indian Ministry of

External Affairs (MEA) rejected China's claim over the Galwan Valley, asserting the Indian position to be "historically clear,"⁵⁹ it did not cite any sources that could have made the argument more convincing. Indeed, the historical aspect was subsumed within the general statement made against the Chinese assertion. On the other hand, China worked aggressively to establish the historical link through its think tank, the Chinese Academy of Social Sciences, and cited several sources. Thus, the MEA's statement comes across as a mere counterclaim, without grounds for a positive assertion. India must recognise the impact of a carefully crafted and argumentatively strong statement and not limit itself to a reactionary, defensive position.

2. There is a dearth of experts on International Law in India, who can counter Chinese interpretations. The interpretations of the various agreements in the Indo-China matter have come mainly from journalists, retired army personnel and strategic experts, who are ill-equipped to provide authoritative interpretations of legal instruments. These interpretations are premised more on factual circumstances such as geography and ground-level military positions, instead of the application of law with an understanding of principles and practices. It is imperative that India reform its legal studies to incorporate a national perspective of International Law instead blindly adhering to Western norms, and foster a practical understanding of international relations.
3. In the field of international relations, Indian think tanks must expand their scope and include experts on International Law. This can help in two ways. One, a knowledge-based, well-researched expert opinion on a particular issue can prevent unfounded and irrelevant discourses. Two, the informal character of think tanks can provide the government with an alternative narrative, allowing

it to make indirect assertions, claims and counterclaims, which would be difficult to do in an official capacity. Moreover, a think tank can help in formulating a distinct approach to International Law from a uniquely Indian perspective.

CONCLUSION

The resolution of the Indo–China border dispute will be a complex process, especially considering the Chinese position and approach. This paper has attempted to understand China’s behaviour in the context of International Law and examine how India should mould its approach in response. Being a member of the UN Security Council and a dominant global economy, China’s power-based approach poses a challenge to a rules-based global order; International Law alone, particularly treaties, cannot defend against this.

India’s international conduct has always been dominated by formal approaches, such as making petitions, dossier submission, and fulfilling treaty laws. However, this has not served it well, since Chinese approach is either conservative or in defiance of established traditions and norms. It is pertinent for India to explore alternative avenues to more effectively address the boundary problem. The success of any treaty arrangement is contingent upon its favourable interpretations, and a successful foreign policy must first and foremost contain a conflict. India must shed its idealistic approach and re-evaluate its foreign policy towards China to align it with the ground realities. 

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