

The Sino-Indian Boundary Question and International Case Law
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A question that is often raised is that if both India and China find it difficult to come to terms over the boundary question; why do the two countries not approach the International Court of Justice [ICJ] for a legal opinion? That China is unequivocally adamant that it will never go to the ICJ is rather well known, but what are the reasons for China to adopt such a strident posture? And has India ever attempted to persuade China to go in for international legal opinion on the boundary question?

On 10 December 1962, Nehru speaking in the Lok Sabha and in a subsequent letter to Prime Minister Zhou Enlai dated 1 January 1963, offered to refer the whole Sino-Indian border dispute for a decision, on merits, to the International Court of Justice [ICJ] at the Hague; which Nehru termed as an 'impartial' World Tribunal. Perhaps Nehru was aware that earlier also when the British Envoy to China, Sir John Jordan had challenged the then Chinese Vice-Minister Chen Lu in December 1919, to submit the 'whole Tibet question' to the League of Nations, Chen Lu had responded that 'China had no faith in the League of Nations; in this as in other matters, might was still right' [emphasis added].

On 20 April 1963, Zhou in response to Nehru's offer flatly turned down Nehru's proposal on the grounds that 'complicated questions involving sovereignty, such as the Sino-Indian boundary question, can be settled only through direct negotiations between the two parties concerned and absolutely not through any form of arbitration.' Earlier on 26 October 1946 the then Chinese government, contrary to the position taken by PM Zhou in 1963, had informed the UN Secretary General that China recognises ipso facto the compulsory jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2 and 3 of the statute of the ICJ [emphasis added]. However, as soon as the People's Republic took the Chinese seat in the UN, including the permanent seat in the Security Council, the Government of the People's Republic on 5 December 1972 completely repudiated the previous commitment of its predecessor Chinese government. The People's Republic of China [PRC] Government informed the UN Secretary General that China 'does not recognise the statement made by the defunct Chinese government on 26 October 1946' [emphasis added]. The reasons for the Chinese government to renege on previous international commitments are obvious. These are examined in some detail in the subsequent paras.

Firstly, China is not confident that its claims on the boundary dispute with India can withstand international judicial scrutiny. Its legal case is far weaker than India's. China knows that in the ICJ, claims by parties based on treaties are particularly persuasive and that this rule holds good even when agreements are unclear or incomplete. The ICJ ruling in the boundary dispute in the case of the dispute between Thailand and Cambodia [The Preah Vihear case] is highly relevant. In it the ICJ held that in the interests of 'certainty, stability and finality of frontiers a map, even if it is an unsigned map, is valid evidence [emphasis added]. But the more important point accepted by the ICJ was that as Thailand had not expressed any dissent for a long period of time, this constituted tacit acceptance, acquiescence of the map [emphasis added]. The ICJ held that even though the map had no 'binding character', nevertheless since there was 'no reaction from the Siamese [Thai] authorities, they must be held to have acquiesced' [emphasis added]. Further the ICJ added that 'a party...which by its silence maintained an attitude manifestly contrary to the right it is claiming before an International Tribunal, is precluded from claiming that right' [Vinire contra factum proprium non valet]. Thus held Justices Alfaro and Fitzmaurice of the ICJ, 'silence is tacit recognition' [1962, ICJ].

The position of China with regard to the McMahon map and the McMahon Line is uncannily similar to that of Thailand. China never protested or raised the issue of the McMahon map or the McMahon Line from the time it was signed on 3 July 1914, till Zhou formally raised it with Nehru in his letter of 23 January 1959. For years China's main concern had been not the McMahon Line, but the boundary between Outer Tibet and Inner Tibet. Even after the People's Republic was established in 1949, the new government of China never raised the issue till considerably much later. China was well aware of Nehru's statement made in the Indian Parliament that 'map or no map, McMahon Line was our boundary.' They were aware of the provisions of the Indian Constitution [6th Schedule] explicitly incorporating NEFA within India. When India expelled the Tibetans from Tawang as late as 1951, China said nothing and never protested. Thus by its conduct and the silence that it maintained, China indicated acquiescence or estoppel.

Thus if we are to go by the ruling of the ICJ in the Preah Vihear case and if this is then taken as a precedent, China's case in the eastern sector [McMahon map, McMahon Line], becomes completely untenable as per international case law. There are other similar decisions that confirm the ICJ judgment [Alaska Boundary Dispute, 20 October 1903, The Guatemala-Honduras Boundary Arbitration, The Anglo-Norwegian Fisheries Case 1951, The Case Concerning Sovereignty over Certain Frontier Land 1959]. It is for this reason that China denounced the internationally recognised principle of estoppel as 'absurd.'

Secondly, China is aware that some of the maps published in China, including official maps, have shown the Sino-Indian boundary alignment as largely conforming to the Indian version. The important maps so listed are: [1] A 6th Century Chinese map showing the Kuen Lun mountains as the southern limits of Sinkiang [2] Map from Nei fu yu tu, 1760 [3] Hsi yu tu chih, 1762 [4] Ta ching hui tien, 1818 [5] Hsin chiang chih lueh, 1821 [6] Hsi yu shui tao chi, 1824 [7] Hsin chiang tu chih, 1911 [8] Official Chinese map of 1893, handed over by a Chinese government official Hung Ta Chen to British officials [9] The Peking University Atlas published in 1925 and [10] Postal Atlases of China of 1917, 1919 and 1933. During the 1960 Official-level talks with the Chinese, the Indian side produced 36 official Indian maps and 8 official Chinese maps to support its case. The Chinese could refer to only 13 official Indian maps and none to official Chinese maps to support its case. Thus international case law, as it exists, is not favourable to China's position, particularly as it pertains to the McMahon Line. Even when the occasion so demanded that in order to maintain its claims China should have expressed its reservations; China faltered and never expressed its dissent on the McMahon Line map till much later.

Even in the Western Sector after the establishment of the People's Republic in 1949, the Chinese position continued to be legally full of contradictions and confusion. Take the case of the Chang Chenmo valley between the

Lanak la [pass] and Kongka la [pass]. In 1950, a map published in People's China showed the whole of the Chang Chenmo valley as within Indian Territory. In 1951, the 'New Map of China' showed an alignment cutting across the Shyok valley. Similar was the position in maps published in 1953 and 1956 which showed a part of the Chang Chenmo valley in India. And to add to the confusion, PM Zhou wrote to Nehru that the alignment shown in 1956 in Chinese maps was the correct alignment of the Sino-Indian boundary; whereas Chinese officials in 1960 produced yet another version! The Chinese tried to cover-up this obvious discrepancy by accusing India of 'trying to exaggerate the divergences of delineation of Chinese maps.' If there were no divergences, as claimed by the Chinese authorities, then why did Chinese officials not say in the Official Level 1960 Boundary talks that the position as indicated by Zhou in his letter of 17 December 1959 to Nehru stands, i.e., the 1956 line. Why did they then have to produce yet another, a 1960 version? The fact is that it was only at the 6th Meeting of officials held on 27 June 1960 that for the first time the Chinese submitted an authorised map showing its version of the whole alignment of the Sino-Indian boundary [emphasis added]. Did the People's Republic of China established in 1949 not know where its boundaries were till then? What would the ICJ have made of this?

Another important reason why the Chinese hesitate to go to the ICJ is that it would open up the debate on whether Tibet has an international personality or not and whether it was capable of entering into agreements on its own. Much of the Chinese case on the Sino-Indian border is actually Tibetan. If the ICJ were to rule, as the International Commission of Jurists had done, that Tibet had an independent personality and that between 1911 and 1950 it was free from any vestige of Chinese control; that would seriously upset the Chinese position. The so-called 'liberation' of Tibet in 1950 would then be labelled automatically as an 'invasion' and Tibet an 'occupied country'. China can under no circumstances even remotely risk such an outcome.

Some foreign apologists of the Chinese contend that the Chinese turned down Nehru's offer to refer the boundary issue to the ICJ due to the presence of a Taiwanese judge on the bench of the International Court of Justice.¹ This reasoning is rather odd, for the Taiwanese judge on the International Court of Justice was none other than the redoubtable Wellington Koo. It is well known that Wellington Koo had fought all his life for the territorial integrity of China. Koo was often lauded as one of the builders of modern China and despite serving the Republic of China [Taiwan], was to receive a personal invitation from Mao to visit China in February 1972.

The Taiwanese have been as adamant as the PRC government regarding China's position on the McMahon Line. At the end of October 1962 the Taiwanese authorities released a statement that 'the so-called McMahon Line is a line unilaterally claimed by the British during their rule over India. The Government of the Republic of China has never accepted this line of demarcation and is strongly opposed to the British claim.'² It was very noticeable that when the US recognised the McMahon Line as the international border, the Taiwanese Embassy in Washington issued one of its very rare 'Protest Notes' to the United States Government. In fact Li Zhongren, the former acting President of the Nationalist [KMT] government on mainland China, wrote to the New York Times [NYT] in November 1962 as follows :-

"The Chinese, including those not on the mainland, feel that the border issue has transcended mere ideological differences: it has become something involving their territorial sovereignty as well as their national integrity and honour. No Chinese, regardless of political beliefs, will ever subscribe to the validity of the McMahon Line."

The undeniable fact is that even up to present times, the Taiwan Chinese authorities remain even more forthright and adamant in pushing the Chinese case than their political opponents sitting in Beijing. It was apparent that not to go to the ICJ was just an excuse, for the real reason was that the Chinese knew of the weakness of their case. And it was convenient to utilise the myth of a Taiwanese Judge on the ICJ.

The Chinese were never enamoured of International Law for as the People's Daily [18 September 1957] explained in an article entitled 'Refute the Absurd Theory Concerning International Law' that :-

"International law is one of the instruments of settling international problems. If this instrument is useful to our country, to socialist enterprise, or to the peace enterprise of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to socialist enterprises or to the peace enterprises of the people of the world, we will not use it and should create new enterprises to replace it [emphasis added]."

Further, the Chinese never displayed much respect for the ICJ then and instead hurled abuse on this international institution with the People's Daily of 27 July 1966 accusing the ICJ of being a 'shelter for gangsters.'

However, times change and so do policies of governments. In more recent times the Chinese have adopted more pragmatic policies towards the ICJ. In 1986 a conference was convened in Shanghai by the Chinese International Law Association where several stake holders deliberated on China's policies towards the ICJ. By 1989 the Chinese government was confident enough to give up its policy of 'blind reservation' on all questions relating to the jurisdiction of the ICJ. By 1989 China was also confident enough to take part with other P-5 Security Council members to discuss ways of 'strengthening' the ICJ and by 1994 a Chinese judge [Shi Jinyong] was serving on the ICJ. Many eminent Chinese scholars of international law such as Professor Huang Deming and Dr Zhu Fenglan have now begun to opine that as China needs peace to develop, peace needs law and law needs the courts! Most have suggested that the international juridical system needs to be strengthened.

Yet, in one important respect Chinese policy has not changed at all. On questions relating to national interest, such as land and maritime boundary issues, China still prefers bilateral negotiations and consultations and is not inclined to submit these to international tribunals for decisions. China has made clear that except for the above, China will not make any 'reservations' on ICJ jurisdiction pertaining to international treaties, covenants, conventions that it signs; particularly those relating to the fields of Commerce and Trade, Science, Technology, Aviation, Environment, Transportation, Culture and other related fields.

Presently, serving on the ICJ bench are a Chinese judge and an Indian Judge. Even if both countries were to shy away from making a formal reference for obvious reasons; should they not think in terms of making an informal

reference to test the efficacy of their respective cases? Informal international legal advice so received, may not be made public; but it just might help in building a momentum towards a final solution.

Endnotes

1. Neville Maxwell, India's China War [London : Jonathan Cape, 1970], p. 432.
2. Ibid, p. 386.

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