

Sino–Indian Attitudes to International Law: of Nations, States and Colonial Hangovers

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Abstract

Behind China's and India's different attitudes to international law lie China's semi-colonial and India's colonial past. Indeed, Asia's colonial past is central to the many cartographic hangovers that have remained between China and India and China and its neighbours in the South China Sea. While India has adhered to the British colonial position since 1947, China has denounced colonial treaties since 1920. However, China and its publicists' acceptance of even post-colonial treaties, such as the Vienna Convention on the Law of Treaties (VCLT) and the UN Convention on the Law of the Sea (UNCLOS), is selective and political.¹ Such an attitude strategically suspends international law's primary sources. Contrarily, India and its courts have not just adhered to these colonial treaties, but the Indian courts have also upheld customary laws as common law. The 1954 Agreement on Trade and Intercourse between the Tibet Region of China and India (*Panchsheel Treaty*) is often said to embody the Sino–Indian post-colonial engagement.² The functional role of this 1954 Sino–Indian treaty, however, remains overstated, although, recently, a Sino–Indian joint statement acknowledged the positive role of bilateral agreements since 1954. This article compares the attitudes to international law in China and India based on (i) their construction of sovereignty since 1947–9; (ii) their mutual engagement via the 1954 *Panchsheel Treaty's* bilateralism and the politics of colonial maps; and (iii) Sino–Indian approaches to the sources of international law.

Key words: sovereignty; cartographical hangover; colonial boundaries; sources of law; post-colonial treaties; cartographical aggression

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1 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) (VCLT). UN Convention on the Law of the Sea, 1833 UNTS 3 (1982) (UNCLOS).

2 Agreement on Trade and Intercourse between the Tibet Region of China and India, 299 UNTS 57 (1954) (*Panchsheel Treaty*).

Introduction

If for constructivists [postcolonial states like India] are new and Western and all the rest are deficient and derivative, for [civilizationalists, China, for instance] old non-Western nations exist with even deeper and more authentic roots. Both theories of civilizations and theories of [state] typically ignore complexity, heterogeneity, and historical process—precisely what the materials from premodern . . . Asia compel us to acknowledge.³

A conversation between China and India today is of the nature of a dialogue between a limited civilizational-state—particularly in the South China Sea but Westphalian sovereignty for the rest of the world—and a postcolonial Westphalian state; overzealous observers even imagine *Eastphalia* in the teeth of abundant political behaviour to the contrary. Perhaps not so surprisingly, China advances its civilizational claim that is pigeonholed in the framework of the Asia-wide notorious Westphalia. Indian government, by contrast, embraces Westphalian statism. While China's civilizationalism dwells upon historical scarcity for strategic ambiguity, India's state building is based upon historical surplus from colonialism.

Sovereignty, nevertheless, remains the dominant idiom of international law in the twenty-first century. The idea of sovereignty as understood today developed in Europe after the Treaty of Westphalia in 1648. When colonialism steamed into Asia years later, European powers and Japan re-parcelled almost all of Asia between them. Japan visited an Asian brand of colonialism on China, as China also had to sign humiliating and unequal treaties with Britain.⁴ India was for the most part colonized by Britain, although Portugal and France also had a share of it. There has always been a competition among all of the post-colonial States since their birth or rebirth, not just China and India, in their use of pre-colonial and colonial history.⁵ The ongoing territorial disputes among Asian states on the determination of their land and maritime boundaries are clearly the product of both colonialism and the Westphalian notion of sovereignty.⁶

China was undoubtedly a sovereign monarchy before the Nanking Treaty of 1842.⁷ Its position as a subject of international law in the Hague Peace Conference of 1919 was less anomalous than India's. While China had treaty relations with Japan and the Western powers, although unequal, India has been a fully colonial territory since 1857 mostly of

- 3 S Pollock, *The Language of the Gods in the World of Men: Sanskrit, Culture, and Power in Premodern India* (Univ California Press 2006) 34–5.
- 4 Treaty of Peace China-Japan, 17 April 1895, 181 Consol TS 217, art 2(b); J van MacMurray, *Treaties and Agreements with and Concerning China: 1894–1919*, volume 1 and 2 (Carnegie Endowment 1920); see generally Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives' (1990-II) 221 *Recueil des cours* 195.
- 5 In March 2015, Bolivia said her 'plurinational' nature 'acknowledges [t]he precolonial existence of indigenous nations and peoples and its ancestral domain over the territories'. *South American Silver Ltd v Bolivia*, UNCITRAL, PCA Case no 2013-15 (31 March 2015) 9, para 35.
- 6 *Chinese Government's Appeal to the League of Nations*, Foreign Office Files for China, 1938–48, Doc FO 371/23470 (1939) 295–7; New Zealand, *Sino-Japanese Conflict: Report of Proceedings at the League of Nations and "Nine Power" Conference* (Government Printer 1938) 1–4.
- 7 CH Alexandrowicz, 'The Continuity of the Sovereign Status of China in International Law' (1956) 5 *Indian YB Intl Aff* 84.

Britain, with minor Portuguese and French colonial possessions on India's west and east coast respectively.⁸ The status of about 600 native kingdoms between 1857—the year the British Crown nationalized the East India Company—and 1947—the year of India's decolonization, legally speaking—has been a subject of scholarly and legal debate since the 1930s.⁹

In 1947, India and Pakistan were born as twin dominions by an Act of the British Parliament—the Indian Independence Act.¹⁰ Notably, only a year before the Indian independence, the legal advisor of the British Foreign Office, W.E. Beckett, prepared a confidential opinion on the obligation of a future Indian government. For Beckett, India's case from a legal point of view was one of '[s]tate succession in the matter of treaties' as in the case of 'Norway-Sweden and Denmark-Iceland' and not that of 'Austria-Hungary'.¹¹ Similarly, in 1949, Phillip C. Jessup, later a member of the International Court of Justice (ICJ), was asked to prepare the China white paper in an attempt to explain American policy in China to the American public, who were thunderstruck by the Communist victory in Asia.¹²

Soon after independence in 1947, India began working on the consolidation of her territories. However, her territorial consolidation was guided by the Indian Constitution of 26 January 1950, which implored the Indian State in Article 51(b) to 'maintain just and

8 Upendra Baxi, 'Law of Treaties in the Contemporary Practice of India' (1965) 14 *Indian YB Intl Aff* 137, 176; LT Lee, 'Treaty Relations of the People's Republic of China: A Study of Compliance' (1967) 116 *U Penn L Rev* 244. RP Anand, 'The Formation of International Organizations and India: A Historical Study' (2010) 23 *Leiden J Intl L* 5; Tong Lam, 'Policing the Imperial Nation: Sovereignty, International Law, and the Civilizing Mission in Late Qing China' (2010) 52 *Comp Stud Soc'y & Hist* 881, 883; Phil Chan, 'China's Approaches to International Law since the Opium War' (2014) 27 *Leiden J Intl L* 859; Li Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order' (2001) 5 *Singapore J Intl & Comp L* 314, 315. Prabhakar Singh, 'Indian International Law: From a Colonized Apologist to a Subaltern Protagonist' (2010) 23 *Leiden J Intl L* 79, 81.

9 When the princely state of Hyderabad in 1949 appointed Eagleton, an American lawyer, to advise on Hyderabad's status within international law, Eagleton said 'whatever limitations may have existed upon the sovereignty of Hyderabad, they were limitations imposed by Britain, not by India'. Clyde Eagleton, 'The Case of Hyderabad before the Security Council' (1950) 44 *AJIL* 277, 281; Cf Taraknath Das, 'The Status of Hyderabad during and after British Rule in India' (1949) 43 *AJIL* 57, who criticized lawyers, Indian and British, for their role as hired gun of the Indian princely states. Much later, the Indian Supreme Court in the *Raja Harinder Singh* case said 'native States in India... [w]hile their relations with the Crown were governed by treaties, though initially on terms of equality, [when] the British Crown in India became paramount, the relationship between it and the Rulers became unequal.' *Raja Sir Harindar Singh v Commissioner of Income Tax*, MANU/SC/0242/1971, para 6; *Madhav Rao Scindia v Union of India*, MANU/SC/0050/1970, para 157; Cf *State of Tamil Nadu v State of Kerala*, MANU/SC/0425/2014, para 62, where the Indian Supreme Court clarified in 2014 that the 'accession of Indian States to the Dominion of India did not extinguish those States as entities'.

10 *State of Gujarat v Vora Fiddali Badruddin Mithibarwala*, MANU/SC/0031/1964, para 191.

11 WE Beckett, 'State Succession in the Matter of Treaties: Obligation of a Future Indian Government' in *Future of French and Portuguese territories in India*, Foreign Office Files for India, Pakistan and Afghanistan, 1947-64, Doc FO 371/67725 (1947) 1-10, para 2.

12 A Waldron (ed), *How the Peace Was Lost: The 1935 Memorandum: Developments Affecting American Policy in the Far East—Prepared for the State Department by Ambassador John van Antwerp MacMurray* (Hoover Institution Press 1992) 5.

honourable relations between nations' and to '(c) foster respect for international law and treaty obligations'. When the Indian Constitution listed both 'treaty obligations' and 'international law', it essentially referred to international law's two primary sources—treaty and customary law—that the Indian state should respect. Adding further clarity, in the *Rosiline George* case, the Indian Supreme Court made plain that India had inherited the treaty obligations of the British Raj.¹³ And, while India did honour some 627 treaties made by the British Indian administration,¹⁴ the Indian court noted much later in the *Abu Salem* case, while accepting the 1978 Vienna Convention on Succession of States in Respect of Treaties as a customary law, that the 1978 convention implores states to look at the text of the relevant treaty that accompany change of sovereignty and then ascertain 'the intention of the State concerned as to the continuance or passing of any rights or obligations under the treaty concerned.'¹⁵ However, Jawaharlal Nehru, India's first prime minister, would denounce such colonial treaties in public speeches.¹⁶ Clearly this Nehruvian sentiment was for political consumption alone.

However, according to Judge Xue Hanqin, China's case, legally speaking, is one of change of government but without the loss of international personality. Therefore, she thinks that the normal change of government does not apply in China's case.¹⁷ Thanks to Wellington Koo, a diplomat and later a judge of the ICJ, China has actively used *rebus sic stantibus* since the 1920s to renegotiate colonial treaties.¹⁸ The receding of the colonial tides between 1947 and 1949 exposed the cartographical differences between India and China in relation to the determination of the boundary between China and India—the McMahon Line.¹⁹ While China has held on to *rebus sic stantibus*, the division of the Indian subcontinent defeated *uti possidetis*.

Yet these Chinese and the Indian post-colonial moments did not entail a defeat of the Western conceptions of international law due to the political and structural constraints of state building. Little wonder, while the accepted definition of sovereignty is pre-colonial, its application through state practice is post-colonial both in quality and quantity. Judge Xue

13 *Rosiline George v Union of India*, MANU/SC/0618/1994, paras 10 and 22. But scholars have since the 1960s also noted the discriminatory nature of colonial treaties between Western colonial companies and native rulers in the Indian subcontinent. CH Alexandrowicz, 'The Discriminatory Clauses in South Asian Treaties in the Seventeenth and Eighteenth Centuries' (1957) 6 Indian YB Intl Aff 126.

14 MK Nawaz, 'International Law in the Contemporary Practice of India: Some Perspectives' (1963) 57 ASIL Proceedings 279; Baxi (n 8) 163; *Rosiline George* (n 13) paras 10, 22.

15 Vienna Convention on the Succession of States in Respect of Treaties, 1946 UNTS 3 (1978), in *Abu Salem v State of Maharashtra*, MANU/SC/0694/2010, para 13.

16 J Nehru, 'Reply to Debate on Goa in Lok Sabha, July 26, 1955' in *India's Foreign Policy: Selected Speeches, September 1946–April 1961* (Publications Division Ministry of Information and Broadcasting, Government of India 1983) 113.

17 Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (Pocketbooks of the Hague Academy of International Law 2012) 23–4; Xi Jinping, *The Governance of China* (Foreign Languages Press 2014) 285, 286, 322, 375, 394.

18 Koo used *rebus sic stantibus* deftly at the 1921 Washington Conference. Wellington Koo, 'Introduction' in Ting-Young Huang (ed), *The Doctrine of Rebus Sic Stantibus in International Law* (Comacrib Press 1935); Chan (n 8) 859–92, 874.

19 For the views of one of the diplomats involved the Sino-Indian conversation, see TS Murti, 'Boundaries and Maps' (1964) 4 Indian J Intl L 367, 388.

rightly notes that for Europeans, Westphalia 'by now is over 360 years old, but for non-European countries, particularly for the Asian and African countries, it is only 60 years old.'²⁰ Quite evidently, sovereign equality was most certainly the primary concern of the post-colonial nations.²¹ Judge Quintana in his opinion in the merits of the *Right of Passage (Portugal v India)* case went so far as to say that '[w]e must not forget that India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since.'²² However, Judge Quintana, of course, must not have written in support of the expansionism of post-colonial nations. It is no less significant that in the same case judge Koo found an extremely strong 'local custom' in favour of a colonial Portuguese right based on the prior colonial practices.²³

During the 1950s and 1960s, India recovered Portuguese Goa by force and French Pondicherry by a treaty, even as China attempted to recover 'one China' with a combination of force and treaties. In addition, India, like China, consolidated the native princely kingdoms both by negotiations and force.²⁴ According to the 1947 Indian Independence Act, 'all treaties between the British Crown and the princely states and persons holding authority in the tribal areas lapsed.'²⁵ On 26 January 1950, when the Indian Constitution came into force, its Article 51 clearly laid down the adherence to substantive and procedural international law as part of the directive principles of Indian policy.²⁶

As the world's most populous nation, China's absence from the United Nations (UN) from 1949 to 1971 was unfortunate.²⁷ The question, however, was one of *de jure* recognition of governments. At the UN, Taiwan's nationalist government (ROC) sat as the *de jure* Chinese government. On 25 October 1971, the UN General Assembly decided 'to restore all its rights to' the People's Republic of China (PRC) and 'to recognize the representatives of its Government as the only legitimate representatives of China' to the UN.²⁸ China's

20 Xue Hanqin, 'Chinese Observations on International Law' (2007) 6 Chinese J Intl L 83, 84.

21 RP Anand, 'Sovereign Equality of States in International Law' (1986-II) 197 Recueil des Cours 9.

22 *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, Merits [1960] ICJ Rep 6, 95 (dissenting opinion of M Quintana). In 2015, Bolivia resonates Quintana's view in *South American Silver Limited v Bolivia* (n 5) 9, para 35.

23 *Right of Passage over Indian Territory* (n 22) 54, paras 1, 5, 11, 19, 20, 21 (separate opinion of Judge VK Wellington Koo). British '*opinio juris sive necessitatis*', according to Judge Koo, led to an 'implicit recognition on the part of the British authorities of a local custom for permitting passage between Daman and the enclaves'. Ibid 63.

24 J Nehru, 'Letter of 15 April 1948' in Madhav Khosla (ed), *Letters for a Nation from Jawaharlal Nehru to His Chief Ministers 1947-63* (Allen Lane 2014) 201ff. The State of Junagarh became part of India by the cession of sovereignty. The Dominion Indian Government had the full authority to acquire new territories by cession vide Section 3(3) of the Indian Independence Act, 1947. *State of Orissa v Rani Ratna Prabha Devi*, MANU/OR/0068/1961 (Narasimham, CJ).

25 Indian Independence Act 1947, 10 and 11 Geo 6, ch 30, ss 7(a), 2(b).

26 See ITLOS Judge PC Rao, *The Indian Constitution and International Law* (Taxman 1995) ch 1.

27 Nehru even detested the US policy of supporting the 'reactionary Kuomintang regime in China'. See Nehru, 'Letter of 1 August 1951' in Khosla (n 24) 212, 214.

28 'Questions Relating to Asia and the Far East, Representation of China in the United Nations' (1971) 25 YB UN 126. The PRC debuted in the UN Security Council during the Indo-Pakistan war as China went on to cast her first veto against the admission of Bangladesh. *Admission of New Member Bangladesh, Veto by China*, UN Doc S/10771 (25 August 1972).

performance at the UN since 1971, like India's since 1947, has been two pronged: justifying ongoing national unification and Third World leadership.

The dichotomy between India's political and legal behaviour, perceived or actual, has meant that, as Professor Chimni points out, 'the principal dilemma of post-colonial international law scholars in India was to decide the extent to which post-colonial states should remain within the established boundaries of international law.'²⁹ More recently, Anthony Carty and Foizia Lone also think that, whereas 'unequal treaties' fuelled the anti-colonial and nationalist sentiments in the Indian subcontinent, India has continued to adopt a positivist Western-style territorial sovereignty.³⁰ They have accused India of lacking 'originality in its approach to international law', in its persistence with 'the western approach', and in 'shy[ing] away from dealing with the real problems'.³¹

Recently, China has made claims of 'historic rights' in the South China Sea.³² In December 2014, China claimed sovereignty over certain islands for exactly '2,000 years', a time period that perhaps cannot be understood with the lens of Western colonization at all.³³ Today, India thinks of itself not only as an ancient nation but also as a modern sovereign, albeit cartographed by colonialism. The PRC, on the other hand, sees itself as an ancient civilization that ought to recover its ancient territories to construct its sovereignty in a Westphalian sense,³⁴ which is why, perhaps, Chinese scholars maintain that China's 'national unification has not yet been fully achieved'.³⁵

Therefore, while China has never been in favour of the resolution of land and maritime boundaries by arbitration or international courts, India has been relatively more willing.³⁶ For instance, on 20 December 2013, India accepted the award of an arbitral tribunal that Pakistan had instituted under the 1960 Indus Waters Treaty.³⁷ A year later, in July 2014,

29 BS Chimni, 'International Law Scholarship in Post-Colonial India: Coping with Dualism' (2010) 23 *Leiden J Intl L* 23.

30 A Carty and FN Lone, 'Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes' (2011) 19 *Asia Pacific L Rev* 95, 101.

31 *Ibid.*

32 *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2014) para 8 <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 15 February 2015 (*China-Philippines position paper*).

33 *Ibid* para 4.

34 Let alone history, Gao and Jia even cite poetry, *Shi Jing* (475–221 BC), as 'standard appellation in Chinese for the South China Sea ever since' in the defence of the Chinese claim. See Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107 *AJIL* 98, 100. Indian writers took a similar approach in the 1960s, when they cited scriptures in relation to claims to the Himalayas. Krishna Rao, 'The Sino-Indian Boundary Question and International Law' (1962) 11 *ICLQ* 375. On history, law and sovereignty in Asia, see Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (Yale Univ Press 2014) 13–14. Cf *Global Agenda and Programme of Action for Dialogue among Civilizations*, UNGA Res 56/6 (21 November 2011).

35 Zhongqi Pan, 'Managing the Conceptual Gap on Sovereignty in China–EU Relations' (2010) 8 *Asia Europe J* 227, 229.

36 Xue (n 17) 60–5. Cf Hitoshi Nasu and D Rothwell, 'Re-Evaluating the Role of International Law in Territorial and Maritime Disputes in East Asia' (2014) 4 *Asian J Intl L* 55.

37 *In the Matter of the Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA, Final Award (20 December 2013) <http://www.pca-cpa.org/showpage.asp?pag_id=1392> accessed 15

the India-Bangladesh maritime arbitration under the UNCLOS awarded a chunk of the sea to Bangladesh, which India welcomed.³⁸ Not long afterwards, in June 2015, India ratified the 1974 Land Boundary Agreement with Bangladesh, settling the boundary between Bangladesh and India.³⁹ As such, India is using a combination of third party dispute resolution and bilateralism to solve maritime and land boundary disputes with her neighbours.

However, in April 2015, in the text of the draft Indian Model Bilateral Investment Treaty, India added a *Calvo clause* favouring local remedies in Indian courts for foreign investors over international arbitrations.⁴⁰ Article 51(d) of the Indian Constitution asks India to 'encourage settlement of international disputes by arbitration'. However, an originalist view of the Indian Constitution's *travaux préparatoire* would mean (i) that 'international disputes' should refer only to inter-state disputes and not to those between investors and states and (ii) that Article 51(d) is after all only a directive principle of Indian policy.⁴¹

The PRC almost always cites the five principles of peaceful co-existence in its political statements as well as in its statements before international courts and in bilateral statements.⁴² In the Chinese position paper of December 2014 that was directed against the institution of arbitration by the Philippines for a dispute in the South China Sea, the PRC maintained that it was striving for a solution with respect to both 'disputes of territorial sovereignty and maritime delimitation' by way of, *inter alia*, 'negotiations on the basis of equality and the [f]ive [p]rinciples of [p]eaceful [c]o-existence.'⁴³ For China, the 'disputes of territorial sovereignty' concern, *inter alia*, India, while the reference to 'maritime delimitation' concerns its South China Sea neighbours.

Both China and India are today involved in a number of international disputes. Therefore, a comparison between the attitudes of international law as understood and deployed by China and India awaits lawyers and policy makers. In this article, the comparison of the approach to public international law of China and India stands on three prongs:

- i. the Sino-Indian use of history in their construction of sovereignty;

February 2015. Indus Waters Treaty <<http://wrmin.nic.in/writereaddata/InternationalCooperation/IndusWatersTreaty196054268637.pdf>> accessed 5 September 2015.

38 *In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*, PCA, Award (7 July 2014) 25, 26 <http://www.pca-cpa.org/showpage.asp?pag_id=1376> accessed 9 February 2015.

39 India is not claiming any compensation for additional areas going to Bangladesh. The Constitution (119th Amendment) Bill, 2013 received the presidential assent on 2 June 2015. Land Boundary Agreement <http://mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf> accessed 5 September 2015.

40 Model Text for the Indian Bilateral Investment Treaty, 11 April 2015, art 14.3 <https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> accessed 31 July 2015.

41 However, the secretary of the government of India once maintained that this article was included in the draft 'on the basis of a couple of statements made in the Constituent Assembly which did not display adequate understanding of the system of settlement of international disputes.' Prabhakar Singh, 'India before and after the *Right of Passage Case*' (2015) 5 *Asian J Intl L* 176, 177. After the *Indo-Pakistan Western Boundary (Rann of Kutch) case* (1968) 17 *Rep Intl Arbitral Awards* 1-576, India was even more insecure about international arbitrations. But since then it has been much more forthcoming than China *vis-à-vis* international tribunals.

42 Xue (n 17) 36, 40, 63, 213.

43 *China-Philippines position paper* (n 32) para 87.

- ii. the 1954 *Panchsheel* Treaty's bilateralism, the politics of colonial maps, and the Sino-Indian approach to international courts and adjudication; and
- iii. the Sino-Indian approach to the sources of international law.

The following sections examine, first, the construction of sovereignty by China and India since 1947–49 and, next, how the 1954 *Panchsheel* Treaty—a post-colonial, but edifying accord on peaceful coexistence between India and China—did not functionally help China and India co-exist peacefully. The Chinese monetary reform that devalued the Tibetan currency led to the down-spiralling of economic ties in the Tibet region, only to be overshadowed by the subsequent political hostilities and the eventual Sino-Indian war of 1962.⁴⁴ The next section of this article discusses the politics of maps in the post-colonial Sino-Indian state building that expose the approach of both countries towards international law. The final section compares the approach of China and India to the sources of international law, both primary—treaties and customary law—and subsidiary. In order to do so, it is imperative to discuss the *South China Sea* dispute on maritime boundaries (treaties) and the claims of 'historic' right therein as well as the ongoing Sino-Indian boundary settlement efforts (customary law).

The value and role of history in international disputes: a comparison of the Sino-Indian construction of sovereignty

The most important similarity between China and India, Professor Sornarajah says, is '[a] shared colonial experience in which foreign investment and international trade were the basis of subsequent political domination.'⁴⁵ That said, States often advance history as an argument when (i) legal arguments retrieved from colonial accords are too weak to justify sovereignty that feeds on nationalism and (ii) they do not want an adjudication of inter-State disputes by international courts or tribunals. After all International courts can neither step into the shoes of historians nor rely upon the historians of disputant States; neutral history is illusive. In actual disputes before international courts, historical claims and sympathetic colonial past do not determine the outcomes of territorial disputes.⁴⁶

Even before India's independence, Indian jurists and writers had begun to problematize the very meaning of colonialism and foreignness in international law.⁴⁷ Such a progressive

44 CM Walker, *Colombo Conference on the Sino-India Border Dispute, 14 January 1963, FC 1061/21*, Foreign Office Files for China, 1957–66, Doc FO 371/170670 (1963) 1–5.

45 M Sornarajah, 'India, China and Foreign Investment' in M Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (CUP 2010) 132–66, 135.

46 It is noteworthy here that publication of a map by Malaysia had precipitated the *Pedra Branca* case, which Malaysia lost on the ground of effective control or *effectivité*. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12. In *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)*, [2002] ICJ Rep 625, para 126–49, the ICJ concluded that Malaysia has title to Ligitan and Sipadan on the basis of *effectivités*.

47 *The International Tribunal of the Far East, Dissenting Opinion of Justice Pal* (Kokushu-Kankokai 1999) 701. Judge Pal thought the Western colonialism is the same as Japanese colonialism if not more and therefore held the Japanese to be not guilty. Naturally Pal was a hero in Japan and disliked in China given the Japanese atrocities in Nanking during the Second World War. A parallel could be drawn between Judge Pal and Judge Koo as they were both nationalists. While Pal,

anthropo-legal reading by Indian writers notwithstanding, the Indian State's position on Goa in the 1960s is exactly the same as the Chinese position on self-determination in 2009. While responding to the Kosovo issue at the ICJ, China said that self-determination is primarily restricted to situations of 'colonial rule or foreign occupation'.⁴⁸ However, historical claims by international lawyers—Chinese, Indian, or European—should be taken with a huge grain of salt. Judge Alvarez in the *Minquiers* case wrote that the task of the ICJ 'is to resolve international disputes by applying, not the traditional or classical international law, but that which exists at the present day and which is in conformity with the new conditions of international life.'⁴⁹ Subsequently, branding the nationalist efforts to invoke history as 'scholarly failings', Upendra Baxi warned against taking intellectual decolonization too far: '[T]he tendency, so often manifest,' he wrote in 1972, 'to discover the genesis of anything significant in the doctrine or development of the law of nations to Indian traditions cannot always be treated with a gentle bemusement.'⁵⁰ In order to eliminate the role of colonialism from international law, a decade later, James Fawcett asked whether the reference to history should not 'be reduced or eliminated in a number of international law contexts.'⁵¹ Fawcett's argument presented a patent disagreement from what Henry Strakosch had to say about the role of history in law.⁵²

After the Second World War, the UN Charter intended to organize the life of Western and developing countries alike, but with five powerful nations, including China, in the UN Security Council. A diplomatic communiqué of 1958 exposes the reality of the UN as a highly political body with a Western core—the UN Security Council—and a non-Western periphery—the UN General Assembly. The Portuguese Permanent Representative to the UN said to the Australian diplomat Sir Owen Dixon, UN Representative for India and Pakistan, that on the Goa question 'a majority of the Council would be in sympathy with the Portuguese, whereas in the General Assembly things might go against the Portuguese'.⁵³ The PRC has been a member of the UN Security Council since 1971 and, thus, is a privileged Asian nation that ought to lead by example.

In 1961, the West accused Nehru of invading Goa after the ICJ ruled in the *Right of Passage (Portugal v India)* case.⁵⁴ Therefore, like China's statement of December 2014 in

wrote before India became independent, Koo sat in the ICJ when the PRC was not in the UN. Subsequently, Rama Rao pointed to the imperial past of both Russia and China that had predated Japanese and Western colonialism. TS Rama Rao, 'Need For a Universal Law of Nations and the Means to Achieve It' in RP Anand (ed), *Asian States and the Development of Universal International Law* (Vikas Publications 1972) 182. More recently, Dutta says that China 'has often consciously blurred the distinction between what was no more than hegemonic influence, tributary relationships, suzerainty, and actual sovereignty.' S Dutta, 'Revisiting China's Territorial Claims on Arunachal' (2008) 32(4) *Strategic Analysis* 549, 554.

48 Written Statement of the PRC to the ICJ on the Issue of Kosovo (16 April 2009) 4, para (a) <<http://www.icj-cij.org/docket/files/141/15611.pdf>> accessed 15 May 2014.

49 *The Minquiers and Ecrehos Case* [1953] ICJ Rep 47, 73.

50 Upendra Baxi, 'Some Remarks on Eurocentrism and the Law of Nations' in Anand (n 48) 6.

51 James Fawcett, 'The Judicial Use of History' (1980) 18(2) *Indian YB Intl Aff* 3, 12.

52 Henry Strakosch, 'The Law As a Category of History' (1966–7) 15/16 *Indian YB Intl Aff* 3.

53 'Letter of AR Moore, May 15, 1958', Foreign Office Files for India, Pakistan and Afghanistan, 1947–64, Doc DL 1024/2, FO371/135944 (1958) para 1.

54 *Case Concerning Right of Passage over Indian Territory* (n 22) 6.

relation to the ongoing *South China Sea (Philippines v China)*⁵⁵ arbitration, India issued a position paper in 1960, while the ICJ was deliberating on the *Right of Passage* case.⁵⁶ However, while India was rejecting the contentions of Portugal, a colonial power, China's opposition today is to the Philippines, a product of Spanish, American, and Japanese colonialism. This makes all the difference when China has itself sought to offer a legal meaning to colonialism in its Kosovo statement. However, scholars drew an analogy between Nehru's rejection of Zhou Enlai's condemnation of the imperialist McMahon Line, with India's contention 'that no vestiges of colonial rule should remain on their territory' in relation to Portuguese possession.⁵⁷

Not long afterwards, the issue of territorial division would come before the Indian courts in the *Berubari* opinion. In this case, which the Indian Supreme Court delivered fortuitously the year the ICJ ruled in the *Right of Passage* case—the Court essayed that the Indian Constitution allows for the integration of disparate territory 'not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of Indian territories.'⁵⁸

A decade later, in pointed contrast to the *Berubari* opinion of Justice Gajendragadkar, Chief Justice Hidayatullah authored a stronger post-colonial, if not a nationalist, view of international law in the *Monterio* case, saying that 'events after the Second World War have shown that transfer of title to territory by conquest is still recognized'. If 'cession after defeat can create title', Justice Hidayatullah stated, 'occupation combined with absence of opposition must lead to the same kind of title.'⁵⁹ However, in May 1968, Sir Francis Vallat from the British Foreign Office thought otherwise: '[T]he Indian acquisition of Goa by force was contrary to the United Nations Charter and unlawful.'⁶⁰ Only a few months earlier, on the issue of the recognition of India's legitimate control over Goa, Sir James

55 *The Philippines v The PRC*, the UNCLOS, PCA (2015) <http://www.pca-cpa.org/show-page65f2.html?pag_id=1529> accessed 6 Sept 2015.

56 After an amendment in the Portuguese constitution Goa had become Portugal's 'ultramar province'. Naturally, the entry of the Indian armed forces in Goa constituted invasion under both Portuguese law as well as the UN Charter, art 2(4). Ministry of External Affairs Govt of India, *Goa and the Charter of the United Nations* (Government of India Press 1960) 1.

57 LC Green, 'Legal Aspects of the Sino-Indian Border Dispute' (1962) 9 *China Q* 193, 197. Today China's argument with neighbours in the South China Sea and India puts hegemonic influence, tributary relationships, suzerainty and actual sovereignty into a single basket of Westphalian sovereignty. This is arguably akin to Portugal's colonial argument of claim of sovereignty at the ICJ about the villages that the native Indian *Marathas* had contracted out to the Portuguese for putting down revolts. *Case Concerning Right of Passage Case over Indian Territory* (n 22) 38. However, Wright opined that a 'military take-over of Goa by India' was of legal importance, primarily because it indicated 'a major difference between the East and the West in the interpretation' of UN law. Quincy Wright, 'The Goa Incident' (1962) 56 *AJIL* 617.

58 *In Re: The Berubari Union and Exchange of Enclaves Reference under Article 143(1) of the Constitution of India*, MANU/SC/0049/1960, para 33. MK Nawaz, 'The Doctrine of Outlawry of War' (1965) 13(1) *Indian YB Intl Aff* 80.

59 *Rev Monterio v State of Goa*, MANU/SC/0140/1969, para 25. The action of the Indian Dominion Government, 'however arbitrary, [is] not justiciable in the municipal courts'. *State of Saurashtra v Ismail Haji*, MANU/SC/0178/1959 (Hidayatullah, J), para 17.

60 'Sir Francis Vallat's Letter of 6 May 1968', Internal Political Affairs of Goa, Daman and Diu, Foreign Office Files for India, Pakistan and Afghanistan, 1965–71, Doc FCO 37/266 (1967–8) para 2.

McPetrie had disagreed with Sir Francis, saying that ‘the decision to accord or withhold *de jure* recognition must finally be a decision of policy’ and not that of law.⁶¹

It is not difficult to see that Justice Hidayatullah was flirting with a reinterpretation of international law in a post-UN world. He debunked the use of history to establish India’s title of Goa, even as he made it a point to deviate from the ICJ’s ruling in the *Minquiers* case: ‘It is hardly necessary to try to establish title by history traced to the early days as was done in the *Minquiers and Ecrenos* [sic] case by the ICJ.’⁶² Justice Alvarez’s separate opinion in the *Minquiers* case perhaps influenced Justice Hidayatullah where the former decried ‘excessive importance to historic titles’ by the parties without ‘sufficiently tak[ing] into account the state of international law or its present tendencies in regard to territorial sovereignty’.⁶³ China and India in the 1960s appear to have had a similar, if not the same, self-image of an ancient nation with large territories.⁶⁴

China, the executive, and the making of sovereignty

Despite the common depiction of China as an aggressive State, China has been ‘less belligerent than leading theories of international relations might have predicted for a state with its characteristics’.⁶⁵ China has been ‘willing to offer territorial concessions despite historical legacies of external victimization and territorial dismemberment that suggest instead assertiveness in conflicts over sovereignty’.⁶⁶ Furthermore, Ben Saul notes that ‘[f]or China, the flashpoints of Tibet, Taiwan and the South China Sea can all be explained by a proper analysis of China’s title to territory under international law’.⁶⁷ Saul further suggests that the war over the disputed Himalayan borders ‘cannot be seen as an aggressive or acquisitive war of territorial expansion’.⁶⁸ Rather, for Saul, the Sino-Indian conflict displays ‘a more conservative Chinese effort to assert and defend sovereignty over presumed Chinese territory, in a factually complex situation marked by unclear historical titles and confusion on the ground about India’s intentions’.⁶⁹

That said, the PRC’s claim to *sui generis* ‘historic rights’ for the ancient Chinese nation betrays Saul’s analysis. How could the non-ancient States that decolonization has birthed, which do not have the same claim to continuity dating back to 2000 or more years as does the PRC, live peacefully with such a claim? The hostility for the rule of law during the Cultural Revolution and executive actions indeed shape China’s current notion of

61 ‘McPetrie’s Letter of 19 January 1968’, Internal Political Affairs of Goa, Daman and Diu, Foreign Office Files for India, Pakistan and Afghanistan, *Ibid* para 12.

62 *Monterio* case (n 59) para 26 (emphasis added).

63 *The Minquiers and Ecrehos Case* (n 49) 73 (declaration of Judge Alvarez).

64 MOU between India and China on Compilation of an Encyclopaedia on Indo-China Cultural Contacts, File no CH11B0025 (10 May 2011) art 1.

65 MT Fravel, ‘Power Shifts and Escalation: Explaining China’s Use of Force in Territorial Disputes’ (2007) 32(3) *Intl Security* 44, 45.

66 *Ibid* 45.

67 B Saul, ‘China, Natural Resources, Sovereignty and International Law’ (2013) 37 *Asian Stud Rev* 196, 201.

68 *Ibid* 203.

69 *Ibid*.

sovereignty.⁷⁰ Article 142 of the PRC's General Principles of the Civil Law provides that if the PRC concludes or accedes to any international treaty that contains provisions differing from the PRC's civil laws, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations.⁷¹ According to Zhongqi Pan, the Chinese views on sovereignty can be categorized into four aspects.⁷² The PRC:

- prefers to interpret sovereignty as an entitled right;
- prefers to see sovereignty as inseparable and non-transferable;
- asserts that the principle of sovereignty remains the guiding principle of international relations; and
- holds sovereignty dear as the mother principle that directs China's foreign policy.

Chinese scholars claim that in the PRC sovereignty and the rule of law have reached a synthesis since its admission to the UN in 1971.⁷³ Indeed, the UN has blended the idea of territorial sovereignty with the equality of states so that the UN has become more than the sum of its parts. Bing Bing Jia, however, goes so far as to suggest that sovereignty's importance as a fundamental principle of international law is under-appreciated outside of China.⁷⁴ According to him, the integration of China into the international legal order since 1971 has been a voluntary, but measured, process.⁷⁵ Today, China is an active member of over 130 international organizations.⁷⁶ It considers itself a developing country and, like other countries, claims to uphold the principles of sovereignty, independence, and territorial integrity.⁷⁷

India, courts, and the making of sovereignty

Sovereignty in India has been a product of parliamentary, executive, and judicial cohabitation. India's political post-colonialism in 1947 did not entail an automatic legal post-colonialism due to the continuity of the common law. The reasons are structural. Therefore, before and after the Indian Constitution came into force in 1959, the Indian courts treated international law as treaty, as well as customary, law due to the common

70 The PRC between 1971 and 1984 did not nominate any candidate to the bench of the ICJ largely due to its inexperience with international law and hostility to any notion of a rule of law generated during the Cultural Revolution. Chan (n 8) 887. As a result, publication of legal journals were not allowed between 1965 and 1971. S Ogden, 'Sovereignty and International Law: The Perspective of the People's Republic of China' (1974) 1 NYU J Intl L & Pol 1. Even today, the Chinese 'avant-garde scholarship' is critical 'of the liberal rule of law ideology.' S Seppänen, 'Ideological Renewal and Nostalgia in China's "Avant-garde" Legal Scholarship' (2014) 13 Wash U Global Stud L Rev 83, 92.

71 General Principles of the Civil Law of the People's Republic of China (12 April 1986) art 142 <www.civillaw.com.cn/english/article.asp?id510S> accessed 9 March 2015.

72 Zhongqi Pan (n 35) 227.

73 Bing Bing Jia, 'A Synthesis of the Notion of Sovereignty and the Ideal of the Rule of Law: Reflections on the Contemporary Chinese Approach to International Law' (2010) 53 German YB Intl L 11, 12.

74 Bing Bing Jia, 'China And International Law' (2013) ASIL Proceedings 346.

75 Ibid.

76 Ibid.

77 Ibid.

law. For example, in the *Maganbhai* case, the Indian Supreme Court ruled that unless Indian law is in conflict with an international treaty, the treaty must stand.⁷⁸

At the time, Narayana Rao argued that although 'treaty making is an executive function, it is not exclusively so under principles of modern constitutional law'.⁷⁹ Rao attempted to show 'that the Indian Parliament has the right, authority and competence to participate in the treaty making function through the process of prior approval of treaties.'⁸⁰ It is an agreed precept of law in India that if, in consequence of the exercise of the executive power, rights of the citizens or others are restricted or infringed or laws are modified, the exercise of power must be supported by legislation in the Indian Parliament.⁸¹ And the Indian courts have the power to decide the nature of an executive decree. Even so, India places an equal emphasis on sovereignty.⁸² Justice Chinnappa Reddy in the *Gramophone Company* case examined 'whether international law is, of its own force, drawn into the law of the land . . . overrides municipal law in case of [a] conflict.'⁸³ He asserted that when municipal and international law run into conflict, 'the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves.'⁸⁴

The Indian courts are emboldened by the fact that, from time to time, the Indian executive consults the court for legal opinions on sovereign matters. For example, in the *Berubari* opinion, which was an opinion given by the Indian Supreme Court on a request by the then Indian president, the Court said that foreign agreements and conventions could be made applicable to the municipal laws in India upon suitable legislation by Parliament in this regard. The Indian Supreme Court in *Berubari* gave a judicial interpretation of Indian sovereignty:

[I]t is an essential attribute of sovereignty that a sovereign state can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a foreign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner-State in favour of another State. ... Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself.⁸⁵

On their part, the Indian courts have essayed ideas of 'judicial sovereignty'.⁸⁶ Recently in the *GVK Industries* case, while curtailing the power of 'absolute legislative sovereignty'

78 *Maganbhai Ishwarbhai Patel v Union of India*, MANU/SC/0044/1969. The Indian Supreme Court subsequently noted in the *Rosiline George* case that '[t]here is no rule of public international law under which the existing treaty obligation of a State automatically lapse on there being an external change of sovereignty over its territory'. *Rosiline George v Union of India* (n 13) para 22.

79 K Narayana Rao, 'Parliamentary Approval of Treaties in India' (1960-1) 9/10 Indian YB Intl Aff 38.

80 *Ibid.* Indian legislature can 'vary or negative a contract' made by the executive. V Ramaseshan, 'State Contracts in Indian Law' (1964) 13(1) Indian YB Intl L 275, 280.

81 *Republic of Italy v Union of India*, MANU/SC/0059/2013, para 77.

82 Singh (n 41) 176ff.

83 *Gramophone Company of India Ltd v BB Pandey*, MANU/SC/0187/1984, para 3.

84 *Ibid* para 5.

85 *Berubari Opinion* (n 58) para 34.

86 *MV Elisabeth v Harwan Investment & Ors*, MANU/SC/0685/1993, paras 13, 89 (Thommen J); *Supreme Court AOR/ SP Gupta v Union of India*, MANU/SC/0073/1994, para 83 (Pandian J);

in view of Article 51 of the Indian Constitution, the Indian Supreme Court penned against any extraterritorial lawmaking by the Indian Parliament, stating that ‘claim[ing] the power to legislate with respect to extra-territorial aspects’ would amount to ‘claim[ing] dominion over such a foreign territory, and negation of the principle of self-determination of the people’.⁸⁷

In India, the courts are not only the arbiters between international law and domestic laws, but they are also extremely progressive in applying international conventions to which India might not even be a party. As such, the Indian courts have frequently consulted the corpus of international treaties to import international legal norms to strengthen local norms.⁸⁸ For instance, in 2011, the Indian Supreme Court stated: ‘While India is not a party to the Vienna Convention [on the Law of Treaties, 1969] the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also’.⁸⁹

However, at the same time, the Indian Supreme Court is judiciously cautious in that, ‘if the [P]arliament has made any legislation which is in conflict with international law, then Indian Courts are bound to give effect to the Indian Law’.⁹⁰ Nevertheless, in the ‘absence of a contrary legislation, municipal courts in India would respect the rules of international law’.⁹¹ The Indian approach to international law envisages the strong role of the Indian judiciary to the question of international legal obligations and sovereignty.

The China–India dogfight since 1954

In 1954, India and China signed the *Panchsheel* Treaty.⁹² It is said to incorporate the five principles of peaceful co-existence, which China uses rather frequently as her way of handling international relations. Between 1956 and 1964, the Indian government published white papers reproducing the notes, memoranda, and letters exchanged between India and China from 1954 onwards.⁹³ The white papers are an accurate window into the ensuing dogfight between China and India that expose the mistrust between the two governments on some of the most basic issues of international law, not the least of

O Konavalov v Commander, Coast Guard Region and Ors, MANU/SC/1550/2006, para 16; *MV Mariner IV (a Foreign Flag Vessel) v Videsh Sanchar Nigam Ltd*, MANU/MH/0484/1998, para 9. PB Mehta, ‘The Rise of Judicial Sovereignty’ (2007) 18 *J Democracy* 70, 78.

87 *GVK Inds Ltd and Anr v Income Tax Officer and Anr*, MANU/SC/0163/2011, paras 48, 40.

88 VG Hegde, ‘Indian Courts and International Law’ (2010) 23 *Leiden J Intl L* 53.

89 *Ram Jethmalani and Ors v Union of India*, MANU/SC/0711/2011, para 60.

90 *National Legal Services Authority v Union of India*, MANU/SC/0309/2014, para 53.

91 *Ibid.*

92 *Panchsheel* Treaty (n 2). Similarly, Myanmar and China also signed agreements to adhere to these five principles. Government of the Republic of the Union of Myanmar, *Foreign Policy: The Five Principles of Peaceful Co-existence* <<http://www.mofa.gov.mm/foreignpolicy/fiveprinciples.html>> accessed 15 February 2015.

93 Published in ten volumes (I–X), these white papers were titled *Notes, Memoranda and Letters Exchanged and Agreements Signed between the Governments of India and China* (Indian Ministry of External Affairs, various years) (*White Papers*).

which is the value of the *Panchsheel* Treaty as a legal text as opposed to a political statement.⁹⁴

Soon after the signing of this bilateral treaty, some of the issues on which both the governments began to differ were, *inter alia*, a lack of good faith in the treatment accorded to the Indian trade agencies in Tibet, the treatment of the Indian consul General in Lhasa,⁹⁵ the treatment of Chinese Trade Agencies in India,⁹⁶ the privileges offered to the Chinese missions whether reciprocal or equal with other foreign missions,⁹⁷ and state responsibility.⁹⁸ Of these issues, the devaluation of the Tibetan currency, causing loss to Indian businessmen dealing in the Tibetan currency, led to enriching discussions on the issues of treaty violation *vis-à-vis* the 1954 *Panchsheel* Treaty and customary international law, international law's primary sources.⁹⁹

A memorandum given by the Indian ambassador to the Ministry of Foreign Affairs of China on 25 August 1959 stated: '[C]ustomary transactions between Indian Traders and Tibetans inside the Tibet region used to be settled in Indian or Tibetan currency'.¹⁰⁰ After July 1959, Chinese paper currency was declared a 'legal tender and standard money in the Tibetan region'. Soon afterwards, the Tibetan currency was devalued in terms of the Chinese currency. China then directed Indian traders to exchange accumulated Tibetan coins and Chinese silver dollars at a new rate fixed for Chinese currency. India noted: '[A]ll Indian traders in the Tibetan region stand to lose 75% of their accumulated stock of Tibetan currency as a result of currency devaluation'.¹⁰¹

India made a request of the Chinese government that 'the customary practice should be allowed to continue and that arbitrary measures, such as, for example, demands for the exchange of currencies already held by the Indian traders should not be enforced'.¹⁰² Since Indian traders had no previous intimation of the new orders relating to currency in the Tibet region, India argued that they may be allowed to take with them the accumulated reserve of Tibetan coins or Chinese silver dollars.¹⁰³ China replied that 'monetary measures are matters within the scope of a country's sovereignty'.¹⁰⁴ An acrimonious exchange followed. China accused India of not understanding correctly the great significance of China's currency reform, to which an unimpressed India gave the name 'monetary

94 See External Publicity Division Ministry of External Affairs, Government of India, *Panchsheel* <http://www.mea.gov.in/Uploads/PublicationDocs/191_panchsheel.pdf> accessed 15 February 2015. WF van Eekelen, *Indian Foreign Policy and the Border Dispute with China* (Martinus Nijhoff 1964) 194: 'Nehru misjudged Chinese intentions and consented to the [1954] agreement which offered respectability to China while receiving in return only the vague precepts of *Panchsheel*.'

95 Indian Memorandum of 4 November 1962, reprinted in *White Papers* (n 93) vol VIII, 117; India's Note of 24 January 1963, reprinted in *White Papers* (n 93) vol IX, 169–70.

96 Chinese Note of 9 September 1960, reprinted in *White Papers* (n 93) vol IV, 94.

97 Chinese Note of 2 December 1961, reprinted in *White Papers* (n 93) vol VI, 227; Chinese Note, reprinted in *White Papers* (n 93) vol X, 54, 55.

98 Chinese Note of 2 February 1962, reprinted in *White Papers* (n 93) vol VI, 256.

99 Indian Ambassador's Memo to the Chinese Foreign Ministry, 25 August 1959, reprinted in *White Papers* (n 93) vol II, 74.

100 *Ibid* 74–5.

101 Indian note of 17 September 1959, reprinted in *ibid*, 87.

102 *Ibid*.

103 Chinese Note of December 10, 1960, reprinted in *White Papers* (n 93) vol V, 60–1.

104 *Ibid* 61.

manipulation'.¹⁰⁵ Between the two operative currencies—Chinese paper currency and Tibetan currency—the devaluation of only the latter *vis-à-vis* the Chinese paper currency did not impact the holders of the Chinese currency. However, it left the holder of the Tibetan currency poorer. Rama Rao considered such action to be a 'patent case of economic aggression'.¹⁰⁶

India accused the PRC of a lack of good faith in adhering to the 1954 Treaty almost in a way that was similar to China's accusation of the Philippines' lack of good faith in failing to keep the South China Sea issues bilateral, citing Sino-Philippine agreements and the 1954 *Panchsheel* Treaty.¹⁰⁷ Thus, the 1954 *Panchsheel* Treaty, often projected notionally as an Asian approach to international law, is functionally overstated. During the *Panchsheel* Treaty negotiations, Nehru wrote to the Chinese premier that '[n]o border questions were raised' and that India was 'under the impression that there were no border disputes between our respective countries'.¹⁰⁸ Nehru, who was also a lawyer trained in the West, took the Treaty to be legal in the Western legal sense. For China, it simply was—and continues to remain so in 2015—a political document for bargaining bilaterally and not a treaty that would be subjected to interpretations by international courts. Nehru surely over-evaluated the importance of the *Panchsheel* Treaty when he said 'we thought that the Sino-Indian Agreement, which was happily concluded in 1954, had settled all outstanding problems between our two countries'.¹⁰⁹

Between 1954 and 1959, the mutual trust between China and India went from bad to worse in relation to Indian business in Tibet and China's Cultural Revolution. It is notable that in 1951 China had signed the 17-point agreement with Tibet's local government for the latter's peaceful liberation.¹¹⁰ Therefore, India's welcome of the Dalai Lama, head of the Tibetan government, in 1959 only added fuel to the fire. Simla Agreement had Tibet as one of the parties, on the basis of which China would not agree to the valid conclusion of the Treaty.

105 Ibid.

106 TS Rama Rao, 'The Sino-Indian White Papers and Some Incidental Questions of International law' (1964) 13(1) *Indian YB Intl Aff* 191, 251, para 2.

107 *China-Philippines position paper* (n 32) 84. In limited ways, the map dispute in the *Preah Vihear* case simulates Sino-Indian cartographic history. However, unlike Cambodia and Thailand, the PRC accepts colonial international law with a huge grain of salt. *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits [1962], ICJ Rep 6. For the PRC, smaller post-colonial nations stand to benefit from colonial international law, as much of their contours were cartographed by colonial administration as in the case of *Preah Vihear* temple's position and ownership deriving from such accepted location based on colonial maps. In fact, former ICJ Judge Keith had in 1967 speculated that the behaviour of Cambodia and Thailand in *Preah Vihear* case exhibited such Asian nations' embrace of colonial international law as against any Asian vision of international law. KJ Keith, 'Asian Attitudes to International Law' (1967) 3 *Australian YB Intl L* 1, 23.

108 Nehru's Letter to the Chinese Prime Minister, 14 December 1958, reprinted in *White Papers* (n 93) vol I, 48.

109 Ibid.

110 Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet (23 May 1951).

China, India, and their cartographic hangover: post-colonial national building and the politics of maps

An immediate international issue between India and China after their independence was cartographical. In a letter written on 15 November 1954, Prime Minister Nehru broached his cartographical anxiety to the chief ministers. He noted the content of his conversation with Zhou Enlai: 'I referred to Chinese maps which still showed portions of Burma and even of India as if they were within Chinese territory. So far as India was concerned, I added, we were not much concerned about this matter because our boundaries were quite clear and were not a matter for argument.'¹¹¹ However, when Nehru received Zhou Enlai in Delhi in 1956, replying to Nehru's invocation of the *Panchsheel* Treaty, Zhou Enlai said that 'the McMahon Line was a product of the British policy of aggression against the Tibet Region of China . . . it cannot be considered legal [and] it has never been recognized by the Chinese Central Government.'¹¹² The general question of delimiting and establishing the boundary ought to be negotiated 'through mutual consultations and surveys'.¹¹³

Beijing thus refused to agree on two grounds: (i) that the McMahon Line was 'a product of British policy of aggression against the Tibet Region of China' and that, therefore, (ii) China could not consider it 'legal since no Chinese Central Government had ever ratified the Simla Convention.'¹¹⁴ New Delhi subsequently retreated from her previous position that the boundary was clearly and formally delimited to the view that it was mostly delimited by treaty and other international agreements and somewhat determined by custom and geographic principles.¹¹⁵ The claims and counter-claims of China and India could be put under six headings.¹¹⁶

- i. claims relating to agreements;
- ii. claims regarding historic possessions;
- iii. claims concerning acquiescence and estoppel;
- iv. claims based upon physical or geographic conditions;
- v. claims involving *rebus sic stantibus*; and
- vi. claims concerning change of governments

Nehru 'examined the basis of the determination of the frontier between India and the Tibet Region of China' to note that '[i]t is true that this frontier has not been demarcated on the ground in all sectors'.¹¹⁷ He was nonetheless 'surprised to know that this frontier was not accepted at any time by the Government of China.'¹¹⁸ The traditional frontier, Nehru said, 'follows the geographical principle of watershed on the crest of the high

111 Nehru, 'From a letter dated 15 November 1954' in Khosla (n 24) 245.

112 Letter from the Chinese Prime Minister to Nehru, 23 January 1959, reprinted in *White Papers* (n 93) vol I, 53.

113 Ibid.

114 Ibid; SP Sharma, 'China's Attitude to International Law with Special Reference to India—China Border' (1970) 6(8) *China Rep* 68.

115 AA Stahnke, 'The Place of International Law in Chinese Strategy and Tactics: The Case of the Sino-Indian Boundary Dispute' (1970) 30 *J Asian Stud* 95, 102.

116 SP Sharma, 'The India—China Border Dispute: An Indian Perspective' (1965) 59 *AJIL* 16, 19.

117 Nehru's Letter to the Chinese Premier, 22 March 1959, reprinted in *White Papers* (n 93) vol I, 55.

118 Ibid.

Himalayan range, but apart from this, in most points, it has the sanction of specific international agreements between the then Governments of India and the Central Government of China.¹¹⁹ The Chinese agreements with Myanmar, Nepal, and Pakistan (occupied Ladakh) all followed the watershed principle along the Himalayas and were consistent with the topographical flow of the agreed boundary in Sikkim and the McMahon Line in Arunachal. China argued that in Arunachal alone this flow was broken.¹²⁰

More specifically, the question of Tawang and China's reluctance to adhere to the watershed in Arunachal Pradesh came up. If China claimed that Arunachal Pradesh was a southern part of the Tibet Autonomous Region, then India could not, within the meaning of the 1954 Agreement, accept that Tibet was within China.¹²¹ India's formal position on Tibet, which was articulated in 1954 and then again in 2003, was 'a tentative and unilateral diplomatic offer that can only be sustained and the circle completed once China recognizes Arunachal as part of India.'¹²²

China's use of maps with her neighbours has been strategic. Examples abound. First, the Indian Ministry of External Affairs in 1958–59 found that the 'Government of China ha[s] quoted unofficial maps published by Hayward in 1870 and Robert Shaw in 1871, as well as an article by Hayward, to prove their contention that the traditional eastern boundary of Ladakh lay where the Chinese maps are now showing it.'¹²³ Second, it was also notable that during negotiations with India, China 'kept circulating old maps that made sweeping claims based on old imperial conquests, it did not pursue them during the negotiations and finally settled for a more limited territorial adjustments.'¹²⁴ Third, maps have also become central in relation to the *South China Sea* dispute. The PRC's notion of its sovereign territory since ancient times, now advanced through various maps and the nine-dotted line, has been the reason behind some of the newer disputes in the South China Sea.

In May 2009, the Chinese government communicated two *notes verbale* to the UN Secretary-General requesting that they be circulated to all UN member States. The map referred to in China's *note verbale* depicted nine line segments (dashes) encircling waters, islands, and other features of the South China Sea. If the PRC accepted the position previously taken by the Republic of China in the South China Sea, China would then step into India's shoes in accepting the McMahon Line drawn by the British during the colonial period. More particularly, Zhihua Zheng has stated that during the Second World War, the South China Sea:

to some extent, was reduced to the internal waters of the Japanese empire because Japan controlled southern China, the Philippines, northern Borneo, the coastal land of Malaysia,

119 Ibid.

120 Dutta (n 47) 569: 'There is also some truth in the Chinese criticism that it did not consistently apply the watershed principle.' See van Eekelen (n 94) 164.

121 Dutta (n 47) 549ff. China's territorial claims on India in 2014, the deepening of the China–Pakistan alliance in 2015 and a shift in China's position on Kashmir in 2014–15 has led to a hardening of India's position on Tibet. See India's former foreign secretary's views. R Sikri, 'The Tibet Factor in India-China Relations' (2011) 64 *J Intl Aff* 55.

122 Dutta, *Ibid* 554.

123 Ministry of External Affairs of the Government of India, Sino-Indian Boundary in the Ladakh Sector, in Nagendra Singh and MK Nawaz, 'The Contemporary Practice of India in the Field of International Law (1960)—I' (1961) 3 *Intl Stud* 65, 70.

124 Dutta (n 47) 575.

and all islands to its south, and directly controlled French Indochina and the Kingdom of Siam.¹²⁵

Just as ‘Japan’s attitude to the ownership of the South China Sea islands after the World War II has particular implications in international law, and can, to a large measure, reflect the original ownership of these islands’, Britain’s ownership of India and the drawing up of the boundary ‘can, to a large measure, reflect the original ownership’ and authoritative drawing of the boundary. As such, China’s strategic use of ancient history and maps drawn up by the ROC and the nine-dash line that was delivered to the UN in 2009 on the South China Sea might allow China’s neighbours to accuse it of cartographic aggression today.

Third party arbitration of Sino-Indian disputes and courts and tribunals

As discussed earlier, Article 51(d) of the Indian Constitution encourages settlement of international disputes by arbitration. As early as October 1963 in a note to India on the issue of ‘[s]o-called international arbitration’ about land and territorial issue, where India allegedly contemplated taking the matter to the ICJ, the Chinese foreign ministry said it was nothing but India’s ‘clumsy attempt’ to ‘disguise its unreasonable stand of dodging direct negotiations’.¹²⁶ Ten years later in 1974, India accepted the ICJ’s compulsory jurisdiction, unlike China, which was permanent member of the UN Security Council.¹²⁷ China’s underlying approach to international courts and tribunals is visible in the assertion of the Chinese foreign minister, Wang Yi, on 24 October 2014, when he advised ‘the national and international judicial institutions to avoid overstepping their authority in interpreting and applying international law’.¹²⁸ With respect to the Sino-Indian disputes, the Indian prime minister, while speaking at the Council of Foreign Relations in New York during the same month, said: ‘China and India are in direct talks, and that is why there is no need for a separate arbitration.’¹²⁹

125 Zhihua Zheng, ‘Legal Effect of Maps in Maritime Boundary Delimitation: A Response to Erik Franckx and Marco Benatar’ (2014) 4 *Asian J Intl L* 261, 275–6. Pasha L Hsieh, ‘The Discipline of International Law in Republican China and Contemporary Taiwan’ (2015) 14 *Wash U Global Stud L Rev* 87 ff. Byron Tzou, *China and International Law: The Boundary Disputes* (Praeger Publisher 1990) 7–8.

126 *Chinese Foreign Ministry’s Note, 18 October 1963, FC 1061/125*, Foreign Office Files for China: 1957–1966, Doc FO 371/170675 (1963) 9, 10, para 3. In May 2015, India’s former law minister, Ram Jethmalani, urged the Modi government to refer the long-pending India–China border dispute to the ICJ for a decision. See Jethmalani, ‘Refer India-China Border Row to International Court’ *The Hindu (Mumbai)* (15 May 2015). China is opposed to any international arbitral decision due to the ‘critical date’ principle by virtue of which any occupation or control after the critical date would not have any legal force. China is therefore making claims of effective control in the South China Sea along with claims of ‘historic title’.

127 India Swaran Singh, Minister of External Affairs, *Declarations Recognizing the Jurisdiction of the ICJ as Compulsory* (18 September 1974) <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=IN>> accessed 14 February 2015.

128 Wang Yi, ‘China: A Staunch Defender and Builder of the International Rule of Law’ (2014) 13 *Chinese J Intl L* 635.

129 Answer to Question no 10, Transcript of Indian Prime Minister’s conversation at Council on Foreign Relations, New York (1 October 2014).

Earlier on 13 December 1991, China and India had signed a memorandum on the resumption of border trade along with the protocol on entry and exit procedures on 1 July 1992.¹³⁰ In June 2003, China and India ‘recalled the historical depth of their friendly contacts’ during the official visit of the then Indian Prime Minister Vajpayee.¹³¹ Among other memoranda, the two countries signed the memorandum of understanding for ‘expanding border trade’, reiterating their trade commitments made in 1991–92.

India was one of the first states to recognize the ‘one-China’ policy as India stated in the 2003 Sino–Indian Declaration on Principles for Relations and Comprehensive Cooperation.¹³² The 1954 bilateral Treaty was a step taken by the two States to acknowledge China’s control of Tibet. Up until 2000, China had a general inclination to settle territorial claims and sovereignty issues with India politically as a bargain rather than on contested historical and legal evidence.¹³³ This fact is rather significant given China’s new claims of ‘historic titles’. By virtue of the 2003 Declaration, both countries ‘agreed to each appoint a Special Representative to explore from the political perspective of the overall bilateral relationship the framework of a boundary settlement’.¹³⁴ This bilateral Declaration stated that ‘[t]he Indian side recognizes that the Tibet Autonomous Region is part of the territory of the People’s Republic of China and reiterates that it does not allow Tibetans to engage in anti-China political activities in India’.¹³⁵ China ‘express[ed] its appreciation for the Indian position’ reiterating the PRC ‘is firmly opposed to any attempt and action aimed at splitting China and bringing about “independence of Tibet”’.¹³⁶

In the recent past, a joint communiqué of December 2010 reiterated the Sino–Indian commitment on resolving boundary questions through peaceful negotiations.¹³⁷ The two sides reaffirmed their commitment to the 2005 ‘agreement on political parameters for settlement of the boundary question’.¹³⁸ Admittedly, for both of the countries, the solution has to be ‘political and strategic’.¹³⁹ On 17 January 2012, an agreement between India and the PRC established a working mechanism for consultation and coordination on India–China border affairs.¹⁴⁰ In February 2015, the Indian External Affairs Ministry said India

130 Memorandum between the Government of the India and the Government of the PRC on Expanding Border Trade, reprinted in *Documents Signed between India and China during Prime Minister Vajpayee’s Visit to China* (23 June 2003) art III.

131 Ibid.

132 Declaration on Principles for Relations and Comprehensive Cooperation between the India and the PRC (23 June 2003) (in Hindi, Chinese and English) (Sino–Indian Declaration).

133 The absence of the reference to ‘sovereignty’ in the International Ministerial Conference on Dialogue among Civilisations—Quest for New Perspectives, which was held in New Delhi on 9–10 July 2003, only a month after India’s visit to China is also notable.

134 Sino–Indian Declaration (n 132) para 18.

135 Ibid para 18.

136 Ibid.

137 Joint Communiqué Issued during the Visit of Chinese Premier Wen Jiabao, New Delhi, 16 December 2010 reprinted in AS Bhasin (ed), *India’s Foreign Relations—2010 Documents* (Public Diplomacy Division Ministry of External Affairs 2010) 1086.

138 Ibid 1089, para 10.

139 Ibid.

140 Agreement between the Government of the Republic of India and the Government of the People’s Republic of China on the Establishment of a Working Mechanism for Consultation and Coordination on India–China Border Affairs, Doc CH12B0194 (17 January 2012); Fifth Meeting of

and China 'have made considerable progress in the establishing and expanding defence contacts and exchanges, including across our border'.¹⁴¹ And on 'the boundary question', the Modi government 'is committed to exploring an early settlement'.¹⁴² The Indian government has evidenced this commitment by settling India's border with Bangladesh in June 2015. It is also notable that the Chinese president in 2014 talked about an 'appropriate' resolution of boundary disputes.¹⁴³

In May 2015, a China-India joint statement 'acknowledged the positive role of the Agreements and Protocols' signed between the two countries 'so far in maintaining peace and tranquillity in the border areas'.¹⁴⁴ The declaration reaffirmed the common determination to seek a 'political settlement of the boundary question'.¹⁴⁵ Quite notably, China and India have linked internal self-determination with trade in their agreement in 'support[ing] local governments of the two countries to strengthen trade and investment exchanges, with a view to optimally exploiting the present and potential complementarities in identified sectors'.¹⁴⁶ Although China has revitalized its posturing on the territorial dispute with India by publicly raising its claims over India's northeastern state of Arunachal Pradesh, including the issuance of stapled visas to the residents of Arunachal and Kashmir,¹⁴⁷ the May 2015 conversation between the two nations has signalled a move towards positive, productive, and friendlier relations.¹⁴⁸

China's outstanding issues with regard to its territorial sovereignty and maritime boundaries and its incomplete national unification are the most likely explanations for (i) China's refusal to accept any third party dispute resolution; (ii) China's statements before both the ICJ and the International Tribunal on the Law of the Sea (ITLOS); and (iii) China's position paper on the *Philippines v China* arbitration.¹⁴⁹ In relation to the ITLOS advisory opinion in *Case No 21*, which came out on 3 February 2015, China's written statement said that 'there is, at present, no provision in the UNCLOS that can serve as a

the Working Mechanism for Consultation and Coordination on India-China Border Affairs (10 February 2014). See Memorandum of Understanding between India and China on Strengthening Cooperation on Trans Border Rivers, Doc CH13B1904 (23 October 2013).

141 External Affairs Minister's Remarks at the Launch of the 2nd India-China Media Forum, Beijing (1 February 2015) <http://www.mea.gov.in/Speeches-Statements.htm?dtl/24748/External_Affairs_Ministers_remarks_at_the_launch_of_the_2nd_IndiaChina_Media_Forum_Beijing> accessed 14 February 2015.

142 Ibid.

143 President Xi quoted in <http://news.xinhuanet.com/politics/2014-09/18/c_1112539054.htm> accessed 14 February 2015.

144 Joint Statement between India and China during the Indian Prime Minister's Visit to China (15 May 2015) para 10.

145 Ibid para 11.

146 Ibid para 14.

147 Dutta (n 47) 549-81.

148 Memorandum of Understanding between India and China on Cooperation in the Peaceful Use of Outer Space, Doc CH14B1162 (18 September 2014) <<http://www.mea.gov.in/TreatyDetail.htm?1162>> accessed 14 February 2015; Work Program between India and China, Doc CH13B0829 (20 May 2013) art 2 <<http://www.mea.gov.in/TreatyDetail.htm?792>> accessed 14 February 2015.

149 *China-Philippines position paper* (n 32).

basis for the advisory competence of the full bench of the ITLOS'.¹⁵⁰ In July 2015, Chinese officials have had to react to newspaper editorials that have criticized China's strategy in the *South China Sea* issue.¹⁵¹

Sino-Indian approaches to the sources of international law: a comparison

In a position paper dated December 2014, China stated: 'There exists an agreement between China and the Philippines to settle their disputes' in the South China Sea 'through negotiations'.¹⁵² China is saying exactly what India had said of the Portuguese in the *Right of Passage* case before the ICJ.¹⁵³ India had accused Portugal of not complying 'with the rule of customary international law requiring her to undertake diplomatic negotiation' before starting the dispute.¹⁵⁴ Although their arguments were the same, China and India quoted different sources; while the former cited the existence of a treaty with the Philippines, India invoked customary international law.¹⁵⁵ Notably, both treaties and customary law are primary sources of international law, but not for China.

While, within international law, custom and treaties are both seen as primary sources, 'China puts the first two primary sources in a hierarchical structure; that is to say, international treaties are followed by international custom'.¹⁵⁶ In many Chinese laws, the term 'international practice' is used instead of 'international custom'.¹⁵⁷ In fact, the term 'international custom' is not mentioned at all, and no legal interpretation has yet been given.¹⁵⁸ Junwu Pan interprets 'international practice' used in Chinese law to include 'international custom'. Therefore, customary international law, he concludes, is inferior to international

150 Written Statement of the PRC on 26 November 2013, reprinted in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case no 21, para 94(b) <<https://www.itlos.org/cases/list-of-cases/case-no-21/>> accessed 14 February 2015.

151 Foreign Ministry Spokesperson Lu Kang, Remarks on the US Statement about Issues Relating to the Arbitration Unilaterally Initiated by the Philippines (24 July 2015) <<http://www.fmprc.gov.cn/ce/ceng/eng/fyrth/t1283808.htm>> accessed 14 February 2015; Zhu Haiquan, 'China-Philippines Dispute' *New York Times* (28 July 2015) A22.

152 *China-Philippines position paper* (n 32) s 3.

153 *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, Preliminary Objections [1957] ICJ Rep 125.

154 *Ibid.*

155 Statute of the International Court of Justice, 33 UNTS 993 (1945) art 38(1) a, b.

156 Junwu Pan, 'Chinese Philosophy and International Law' (2011) 2 *Asian J Intl L* 233, 240. Hungdah Chiu, 'Chinese Views on the Sources of International Law' (1987) 28 *Harv Intl L J* 289, 295-96. Since 1949, China has used a Soviet theory of sources of international law. The Soviet scholars have treated the concept of custom as *pacta tacita*. See K Grzybowski, 'Soviet Theory of Treaties' in SK Agrawala (ed), *Essays on the Law of Treaties: With Special Reference to India* (Orient Longman 1969) 201-5; Grigory Tunkin, 'General Theory of Sources of International Law' (1979) 19 *Indian J Intl L* 474; Xue (n 17) 25. It is noteworthy that in 2014, the ICJ accepted the validity of even tacit agreements. *Maritime Dispute (Peru v Chile)*, Judgment [2014] ICJ Rep 36 para 91.

157 *Ibid.* 241.

158 *Ibid.*

treaty in the Chinese legal hierarchy.¹⁵⁹ However, China sees British treaties as symbols of colonialism, the McMahon Line included.

Similar to its position on the role of customary international law in the *Right of Passage* case, India has retreated from treaty stipulation in Sino-Indian boundary issues and has chosen to use customary behaviour. In a sense, India's lack of clarity or even confusion on the role of colonial treaties has been exposed. This begs the question whether India's acceptance of colonial treaties was simply a default position, and, as such, when a colonial treaty is questioned India will, like China, renegotiate using the logic of *rebus sic stantibus*. However, the VCLT specifically excludes *rebus sic stantibus* from boundary-establishing treaties.¹⁶⁰

The UNCLOS is not a colonial treaty. Yet, however 'comprehensive and ambitious' the UNCLOS might be for Bing Bing Jia, it 'does not exhaust customary law in this area.'¹⁶¹ He extends his argument with an example, saying that the UNCLOS, for instance, does not 'deal with the acquisition of territorial sovereignty over land, including islands and rocks'. In its subsequently published position paper, China takes a similar line of argument. In relation to the *South China Sea* dispute, Jia was 'struck by the existence of historic rights that Chinese nationals have enjoyed unopposed over the centuries both in the sea and on the islands enclosed by it'.¹⁶² He explains this further: 'Evidence of such rights, including habitation on the islands, is unmatched by that of any of the neighboring countries.'¹⁶³

Two observations ought to be made here. First, within the doctrine of sources of international law, the position paper is a somewhat tacit case of Chinese publicists determining the applicable international legal arguments for the PRC¹⁶⁴ and, second, while China has rejected colonial treaties using *rebus sic stantibus*, Chinese writers have bypassed post-colonial treaties such as the UNCLOS as being applicable in the *South China Sea* dispute on the ground of such treaties not exhausting all customary law. It is true that the UNCLOS does not address questions of sovereignty over land territory. Based on the principle that the land dominates the sea, the UNCLOS states that coastal states assume such sovereignty. However, how far this sovereignty can be extended into the sea is governed by the UNCLOS.

In the December 2014 position paper, China argued for a 2,000-year-old possession claim to bypass the application of the UNCLOS. While evading the legality of an international convention that was not a product of colonialism China offers a joint exploration of the disputed area as the only political way forward.¹⁶⁵ China's suspension of sources of

159 Ibid.

160 See VCLT (n 1) art 62 (2A.a).

161 Jia (n 74) 347.

162 Ibid.

163 Ibid.

164 Notably M Wood, Special Rapporteur, *Draft Conclusion 14, Judicial Decisions and Writings, Third Report on Identification of Customary International Law*, ILC 67th Session, UN Doc A/CN.4/682, para 67 says: '[W]ritings... may serve as subsidiary means for the identification of rules of customary international law.' Before the 2014 *China-Philippines position paper* (n 32), some such arguments have been made in Gao and Jia (n 34), who were Chinese publicists. S Talmon and Bing Bing Jia, *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing 2014).

165 Hayton (n 34) 253. However, both Vietnam and the Philippines do not want to jointly develop so as not to give up sovereignty by doing so. Hayton thinks the PRC is 'not interested in joint development except in other countries' claimed EEZs'. Ibid.

international law, colonial treaties, and the allegedly non-exhaustive customary law of the UNCLOS allows China to move to 'historic titles', which many say is China's policy of 'strategic ambiguity'.¹⁶⁶ Others maintain that the 'vagueness of the legal terminology' by the PRC 'raises the issue of whether that very vagueness is being used as an element of political strategy'.¹⁶⁷ The UNCLOS leaves no historic residual rights 'that China could rely upon to support a claim to jurisdiction over natural resources in and under water inside the nine-dash line'.¹⁶⁸

As said before, China jettisons colonial treaties as bad sources and considers customary law to be inferior to treaty law. Building on that, Chinese publicists today argue for a *de novo* void in postcolonial treaties, like the UNCLOS, which they think constitutes an 'open invitation for customary law to fill' gaps that favour China.¹⁶⁹ A leading proponent of this view, Bing Bing Jia, maintains that 'separateness' of these two primary sources of international law, custom and treaty law, 'is at times blurred, but shall always be maintained'.¹⁷⁰ However, while China questions primary sources of international law, in the Kosovo affair it alluded to the decision of the Canadian domestic court, a subsidiary source of law.¹⁷¹ This is strategic as well as symbolic because the Chinese settlement policy in Tibet and Canada's policy in Québec is similar in opposition to India's in Kashmir.¹⁷²

Notably, India has defined its territory explicitly using the UNCLOS.¹⁷³ In *Italy v India*, Chief Justice Altamas Kabir stated: '[T]he Exclusive Economic Zone continues to be part of the High Seas over which sovereignty cannot be exercised by any nation.'¹⁷⁴ That said, the Indian government in *Italy v India* argued that Article 56 of the UNCLOS, which was relied upon by Italy, is not exhaustive.¹⁷⁵ India questioned Italy's approach in relying on the UNCLOS as the primary source and on the provisions of relevant Indian law, submitting that Italy's approach was 'contrary to the precepts of [p]ublic [i]nternational [l]aw'.¹⁷⁶ Apparently China and India seem to have a functionally similar approach to the UNCLOS. However, the Indian courts often correct the government's position, and this remains the main difference between China and India.

166 R Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' (2013) 107 AJIL 142, 156; Hayton (n 34) 59.

167 F Dupuy and P-M Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2012) 107 AJIL 124ff.

168 Beckman (n 167) 158; L Damrosch and B Oxman, 'Agora: The South China Sea, Editor's Introduction' (2013) 107 AJIL 95.

169 However, Xue says: 'China neither treated such treaties simply as a matter of succession nor totally rejected them'. Xue (n 17) 32; Jia (n 74) 347.

170 Bing Bing Jia, 'The Relations between Treaties and Custom' (2010) 9 Chinese J Intl L 81.

171 China referred to the decision of a Québec court before the ICJ to define the limits of self-determination. Written Statement of China in *Kosovo* Advisory Opinion (n 48) 6, para 3: 'Judicial decisions', domestic and international both, 'may serve as subsidiary means for the identification of rules of customary international law'. M Wood (n 164) para 67.

172 Just as China encourages non-Tibetan Chinese to settle in Tibet, Canada is issuing citizenship to those interested in settling in Québec. See Singh (n 41) 186.

173 See the Model Text for the Indian Bilateral Investment Treaty (n 40) para 1.17

174 *Italy v India* (n 81) para 96.

175 *Ibid* para 62.

176 *Ibid* para 39.

In *Pakistan v India* in 2013, India, while reminding the Tribunal about the 1960 Indus Water Treaty being the main source of law to be applied, accepted the use, to the extent necessary, of '(a) [i]nternational conventions establishing rules which are expressly recognized by the Parties (b) [c]ustomary international law.'¹⁷⁷ In particular, the Indian courts have accepted the VCLT as a customary international law.¹⁷⁸ Taking this argument further, the World Trade Organization (WTO) Appellate Body report in the June 2015 case of *Importation of Certain Agricultural Products* recorded India's argument in the panel report that the Code of the World Organisation for Animal Health is a 'treaty' and, therefore, 'its interpretation must be governed by the customary rules of interpretation of public international law reflected in the Vienna Convention.'¹⁷⁹ This view of the Indian government in *India – Importation of Certain Agricultural Product* is significantly different from its view in *Italy v India*, where India did not take the UNCLOS to be the primary law. The difference is that while in the latter case India was arguing before its domestic court, in the former case it was arguing before an international court.

Conclusion

In 2015, both China and India found themselves in a bind before international courts in relation to the UNCLOS against the Philippines and Italy respectively. Like China in the *South China Sea* case, India is expected to make the arguments of sovereignty in the *Enrica Lexie* case.¹⁸⁰ Leading up to this case, there have been multiple opportunities to compare the approaches of China and India to international law. Such opportunities range from China's position paper of December 2014 on the *South China Sea* arbitration, its written statement in the ITLOS advisory opinion delivered in March 2015, as well as a concept note at the UN Security Council entitled *Maintenance of International Peace and Security* on 2 February 2015.¹⁸¹ For India, it began with the reply to China's concept note at the UN Security Council on 23 February 2015.¹⁸² Subsequently, in June 2015,

177 *Pakistan v India* (n 37) para 110.

178 Ibid 60. The Supreme Court's approach to the VCLT (n 1) has led to a trickle down to various high courts. *Awas 39423 Ireland Ltd and Ors v Directorate General of Civil Aviation and Ors*, MANU/DE/0832/2015.

179 *India—Measures Concerning the Importation of Certain Agricultural Products*, Appellate Body Report, WT/DS430/AB/R (4 June 2015) 30, para 2.58.

180 *The "Enrica Lexie" Incident (Italy v India), Request for Provisional Measures*, Order, Case No 24, ITLOS (24 August 2015) 26 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_24_-_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf> accessed 14 Sept 2015. This provisional ruling has produced one separate and five dissenting opinions where the ITLOS ordered Italy and India to both 'suspend all court proceedings and refrain from initiating new ones which . . . might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render'. Like the Chinese scholars in 2015, Indian courts have said that '[t]he development of maritime law has shown that it was not created as a definite all inclusive body of law.' *Islamic Republic of Iran v MV Mehrab & Ors*, MANU/MH/0489/2002, para 18.

181 The PRC's concept note in the UN Security Council, *Maintenance of International Peace and Security: Reflect on History, Reaffirm the Strong Commitment to the Purposes and Principles of the UN Charter*, UN Doc S/2015/87 (3 February 2015).

182 Statement by Ambassador Asoke Kumar Mukerji, Permanent Representative of India to the UN at the UN Security Council Open Debate on 'Maintenance of International Peace and Security:

two instances—the WTO Appellate Body report in *Certain Agricultural Products* and the Indian prime minister's visit to China—have demonstrated India's approach to international law.

India, while replying to China's concept note, has alleged that the UN Security Council's activism is cutting into the scope of the UN General Assembly.¹⁸³ India has noted that the Council's invocation of the purposes and principles of the UN Charter are 'selective, to suit the national interests of powerful member states'.¹⁸⁴ The Security Council's decisions 'on issues not directly linked with maintaining international peace and security', India said, 'cannot encroach upon the jurisdiction of the General Assembly, where all of us are equally represented'.¹⁸⁵ To India, the issue of terrorism offers a prototype of a typical relationship between the Security Council and the General Assembly. Before the Security Council, on 23 February 2015, India said that the 'listing of the perpetrators of the most heinous of terrorist crimes is subject to whims of powerful member states'.¹⁸⁶

In 2006, China had deposited with the UN Secretary-General a written declaration that China excludes from 'compulsory dispute settlement' disputes in respect of which the UN Security Council has the competence.¹⁸⁷ A combined reading of the PRC's declaration to exclude matters that are with the Security Council from 'compulsory dispute settlement' and India's accusation of the Council's expansion of agenda and activism thus pits the PRC against India. In the first place, the PRC seems to crystalize a *sui generis* concept of sovereignty with 'historic titles'. Sitting in the UN Security Council, China, along with the other four states, has enlarged the agenda of the Security Council, effectively expanding the number of issues that can be excluded from 'compulsory dispute settlement' involving China and UN General Assembly members that China has territorial and maritime disputes with. In the General Assembly, India stated that '[w]e welcome those delegates which have taken initiatives and settled their maritime boundaries'.¹⁸⁸

Let alone colonial treaties, China selectively accepts even post-colonial treaties such as the UNCLOS and the VCLT. In addition, China often cites the accession to the WTO and the subsequent amendment of about 3,000 by-laws within China as an example of China's compliance with international law.¹⁸⁹ Chinese nationals sit on various international judicial bodies, such as the ICJ, and ITLOS that deliver decisions that are third

Reflect on History, Reaffirm the Strong Commitment to the Purposes and Principles of the Charter of the United Nations' (23 February 2015) para 3.

183 Ibid para 3.

184 Ibid.

185 Ibid.

186 Ibid para 4. In June 2015, China blocked India's bid at the UN against Pakistan for releasing the mastermind of attack in Mumbai terrorist attack Zaki-ur-Rehman Lakhvi on the grounds of the lack of sufficient information.

187 Pursuant to UNCLOS (n 1) art 298; *China–Philippines position paper* (n 32) para 58.

188 Statement by the Delegation of India at the Twenty-Fifth Meeting of States Parties to the UNCLOS, 1982, New York (12 June 2015) para 5.

189 Xue (n 20) 83ff. Comparatively, however, as Julia Qin says, '[a]lthough India's share in world trade is less than a quarter of China's, India has played a much larger role than China' in the WTO system. Julia Ya Qin, 'China, India and WTO Law' in Sornarajah and Wang (n 45) 167, 205.

party in nature. Yet China does not show faith in third party dispute resolution of its own disputes.¹⁹⁰

And China's approach is not wrong. Why drag a matter to a court in a faraway land and pay a heavy fee for litigation? However, what if this is the only option left to smaller nations in order to stop powerful nations riding roughshod over them. A majority of the countries that sit in the UN General Assembly have their claims of sovereignty based completely on decolonization-induced post-colonialism and not on historic titles deriving from the *ancien régime*. China's 'historic title' argument has started a line of arguments where, unwittingly, China lends itself to critique since its use of history ranges from 100 years in the Simla Agreement of 1914 to 2,000 years in the *South China Sea* dispute. Can India rub off on China? This question might seem patronizing as it assumes India to be more compliant of international law than China is. However, with the exception of human rights issues, compliance of international law today is simply a statistical question.