China's Use of International Law In Border Disputes: The Cases of India and the Soviet Union

Larry R. Schreiter
Indiana University School of Law, larry@schreiterlaw.com

Follow this and additional works at: https://www.repository.law.indiana.edu/iustitia

Part of the Asian Studies Commons, International Law Commons, International Relations Commons, and the Soviet and Post-Soviet Studies Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/iustitia/vol2/iss2/3

This Article is brought to you for free and open access by Digital Repository @ Maurer Law. It has been accepted for inclusion in IUSTITIA by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Introduction: International Law and China's Territorial Claims

Despite American "containment" in the fifties and sixties, China was nevertheless a major actor on the international scene. The loci of China's practice of international politics ranged from the Bandung Conference to its ideological foray into European politics following the Hungarian rebellion in 1956. Along with this activism in the international environment, China turned her attention in the late fifties to the question of gaining mutual agreements with her neighbors on the delineation and regulation of the boundaries. This concern brought about some marked changes in bilateral foreign policy, and required dealings of both an ideological as well as technical nature on a highly sensitive political matter, with limited success.

Burma and China, for example, reached an amicable settlement with no great difficulty, despite a history of Chinese provocations along the border, and the accession to power during the negotiations between the two sides of a Burmese rightist military regime. China concluded four other boundary agreements with neighboring countries between 1960 and 1964. But with India, China signed no agreements after the 1954 document regulating trade between India and the "Tibet region of China." Instead, thousands of incidents along the whole length of their boundary preceded the full-scale Chinese invasion of 1962. The Chinese withdrawal notwithstanding, no settlement has since ensued. And when the squabbling between Russia and China led Khrushchev to criticize Peking's handling of the Indian border dispute ("What are a few kilometers?") the Sino-Soviet disagreement regarding territorial issues emerged into public view with Peking's charge that Khrushchev was the first leader of the world Communist movement in history to support imperialist territorial aggression against a fraternal socialist country. The eventual widening of the schism to include revived frontier disputes found each party accusing the other of introducing to the debate "problems between states," escalating the intensity of the conflict. Six years of dispute preceded the 1969 clashes between the erstwhile Communist allies; these skirmishes
carried far more serious implications than those with India had, for a full-scale invasion of India involved only a small force, whereas along the enormous length of the Sino-Soviet boundary, both countries, maintained sizeable armies, although recent years have not seen a renewal of the fighting.

In these two unresolved border disputes, involving years of claim-making and justification, the government of the People's Republic of China (PRC) has often explicitly invoked concepts of international law to bolster its own contentions. In addition, the PRC has often disputed its opponent's arguments in the form of rebuttal of points of international law. The questions to be considered in this essay are whether the PRC applies different concepts of international law in dealing with these two boundary disputes, and if so, how these differences are to be construed. Does the concept of international law invoked vary with the political color of China's negotiating partner, that is, is the distinction drawn on the basis of dealings with a Communist as against a non-Communist government? Does the PRC offer or expect a different order of reciprocity as to views of rights and obligations flowing from international law with respect to the Soviet Union than that offered or expected with respect to India? If so, what are the origins of the difference? What can the disparity tell us about the function of international law when invoked by a revolutionary Communist state?

The Uses of "General" International Law and the Indian Border Dispute

International law derives meaning only through the study of relations between states. The problems of territory are a prime concern for international law, and the concept of boundaries has proved both durable and necessary. A boundary treaty is an agreement by two states to demarcate the physical line of division of sovereign actions from international interactions; such agreements are instruments of international legal standing with two primary functions: to provide an essential demarcation for the protection of territorial sovereignty, and to institutionalize a criterion by which to assess a neighbor's intentions, i.e. to provide a means of measurement of the expansion and contraction of power in the form of territory. In the absence of such agreements, a boundary may be considered to run along a "customary" line determined by the extent of each side's historical exercise of jurisdiction. The most authoritative source of materials from the Sino-Indian dialogue concerning the border and the development of each side's legally-based claims is the extraordinary exchange of letters that took place between Chou En-lai and Nehru from 1958 to 1961. The letter exchange began when Nehru, under the pressure of a growing number of border incidents, sought to draw forth a Chinese statement of their position on the boundary, an issue that Nehru claimed at the time not to have understood to be in dispute. In an important response on January 23, 1959, Chou En-lai pointed out that the Indian government had erred in assuming that the 1954 Agreement on Trade had implied the existence of a mutually acceptable border, since in the Chinese view, this document dealt with nothing outside of the Tibet issue. As to his own government's position on recurrent incidents along the border, Chou stated that the Sino-Indian border had never been delimited and therefore incidents would inevitably occur. Furthermore, not only had physical delineation never taken place, but the governments of India and China had never signed any agreement or treaty regarding the border. This statement surprised the Indian government, for they considered the Simla Conference of 1914 and the agreements signed between Indian and Chinese officials
at the regional level to be legal. This was a perfectly logical position to take, especially since just three years before in 1956, Chou made an offer publicly to recognize boundaries based on the old McMahon Line between China and both India and Burma on account of “friendly relations” existing between both countries and China. The offer was honored in the case of Burma, where the McMahon Line became the boundary stipulated in the agreement discussed above. But in the Indian case, Chou apparently expressed his government’s displeasure at Indian reactions to the suppression of the Tibetan revolt when, in response to Nehru’s inquiry, he replied that the McMahon Line is “a product of British aggression against the Tibet Region of China” which therefore “juridically cannot be considered legal. . . [because] it has never been recognized by the Chinese central government.” Thus in this instance Peking viewed the whole issue as a political question rather than a technically legal one; yet the Chinese view of the political content of the issue carries with it the convenient conclusion that the Indian claims cannot be construed as resting on solid legal bases. This is an illustration of the PRC’s disposition to trade agreement on the alignment of a boundary for political advantage; in line with the view of frontier questions as matters for political, not judicial, resolution. Nevertheless the Chinese did not demean international law or attack it on ideological grounds when it made an appearance in India’s claims. Rather the Chinese developed their claim on distinctly legal grounds, with Chou calling for the negotiation of an agreement upon the location of a customary boundary, the existence of which neither side could dispute. The necessity for negotiation arises from the fact that each side holds a very different view of the customary extent of its jurisdiction, and hence the location of the line itself.

In refuting India’s version, China concludes that its own version is based on objective fact while the Indian’s version derives from the legacy of British imperialism. An example of the type of “objective fact” on which the PRC bases its claim of Chinese “effective jurisdiction” over the western sector of the border appears in the Chou-Nehru Note of April 3, 1960. The note cites the Chinese ability between 1950 and 1958 to construct a road through Indian-claimed territory from Sinkiang to Tibet, and the Indian government’s inability to discover, much less control, the movements of “Chinese personnel and supplies which had busily traveled between Sinkiang and Tibet through this area.” The implication is clearly that India should simply abandon her claims, since the Sino-Indian boundary, a complicated matter left over by history, runs between two countries which were both “long subjected to imperialist aggression. This common experience should have naturally caused China and India to hold an identical view.” Chou’s point is that India should not resist the PRC’s efforts to consolidate the revolution in Tibet, which in large part was the purpose behind the undertaking of the Sinkiang-Tibet Highway construction. Although historical documents relating to the contended areas were in fact signed by the British governors of India and “local Tibet authorities,” such agreements were not valid, since local officials had no power to treat with foreign governments, Chou is making it known that what was not the case historically under imperialist administration is even more emphatically not the case since the Liberation. The matter of Tibet is a Chinese internal affair, to be dealt with by Peking with no interference from the direction of New Delhi.

Thus by giving or withholding border agreements, China rewards friendly nations (Burma) with a cessation of border incidents, and exerts pressure on other
governments which are reluctant to support, or are even actively opposing Peking's views in matters of concern. If these are tactical variations chosen to fit policy objectives rather than differences arising from the application of international law to substantively distinct legal circumstances, then their appearance accords with the view of Chu Li-lu, writing in Jen-min Jih-pao, that "international law is an instrument for settling international problems; if this instrument is useful to our country, to the socialist cause, or to the cause of peace of peoples of the world, we will use it . . . if it is disadvantageous we will not use it." That is, international law is a political instrument, useful only if it can undergo change according to circumstances, for "international law is . . . formulated not by a super-legislature but through agreement reached by the process of struggle, cooperation, compromise, and consultation." But if China wishes to correlate concepts of international law to the particular political situation, to the particular stage of struggle taking place, then serious contradictions arise when a dispute looms with her Communist neighbor, the Soviet Union.

The Soviet Border Dispute and "Socialist" International Law

Prior to the Sino-Soviet dispute, writers on international problems in China proclaimed that relations between socialist nations are a completely new kind of international relations because these countries are united by the ideals and objectives of Communism; conflicts of interests, or fundamental contradictions, neither exist in the present nor have existed in the past. Chinese theoretical literature, therefore, generally distinguishes conceptually the relations among Communist states from the relations between Communist and non-Communist states. The general international law which the PRC considers to regulate relations with non-Communist nations such as India is based on principles related to the sovereign equality of states, a doctrine to which the PRC vigorously subscribes. These principles of equality are embodied in the Five Principles of Peaceful Coexistence (mutual respect for sovereignty, territorial integrity, mutual nonaggression, non-interference in internal affairs, and equality and mutual benefit) showcased at Bandung, which taken with recognized practices of international law, comprise what China recognizes as general international law. But Peking takes the position that principles of general international law are inadequate and inappropriate for the conduct of affairs between socialist states. These relations are to be governed by "socialist" international law, which combines the same principles of equality (now designated Leninist) with the principle of proletarian internationalism.

For the PRC, the Five Principles of Peaceful Coexistence and the concept of proletarian internationalism constitute the two most fundamental doctrines of contemporary socialist international law. The joint Sino-Soviet view put forth at the Twentieth Party Congress in 1956 was that principles of peaceful coexistence (PCX) were the heart of bloc international policy, but that these did not apply to international relations within the socialist bloc. This action was prompted by events in Europe, necessitating a legal basis for the new relations the Soviet Union was undertaking with other socialist countries such as Hungary. The leading principle of the new socialist international law is proletarian internationalism. The implication of proletarian internationalism (PI) for international relations among Communist states therefore discounts by definition the possibility of aggression or interference in internal affairs. The principle of PI, viewed as an ideology and a definite type of relationship between national detachments of the working class
built on a voluntary basis, has become, since the proliferation of Communist states, the principle underlying the assumption of common interests among them. Likewise PI underlies the development of a concept of socialist international law which purports not to deny the independent rights of individual national detachments of the working class while preserving the "unity" of the international proletariat. Although PI does not restrict sovereignty, nevertheless, if general international law posits theoretical limits to the pursuit of national interests, socialist international law establishes more severely circumscribed limits, for by definition, the interests of two Communist states cannot be in conflict.

The evidence suggests that during the period of Mao's "Lean to one side" policy, the Chinese delayed bringing up the topic of border adjustments in light of a pressing need for Soviet diplomatic, military, economic, and technical aid, and Mao's own admiration for Stalin as leader of the world Communist movement. But within months of Stalin's death, the Chinese leaders attempted and failed to initiate a dialogue concerning adjustment of the Mongolian border during Khrushchev's visit to Peking. In 1957, during Chou En-lai's European tour, Khrushchev again refused to discuss territorial questions. And in 1960, when former head of state Liu Shao-ch'i attempted to raise the border question at the Moscow Conference of Communist Parties, Khrushchev ignored him. So when Khrushchev belittled Peking's concern over Indian "aggression", the Chinese delivered a blistering attack on the Premier's "adventurism and capitulationism" in the Cuban missile crisis. In answering, Khrushchev stated that his policy was pragmatic, and as such was comparable to Peking's own policy, which had hitherto pragmatically tolerated the continued presence of the ports of Hong Kong and Macao, both of which came into existence through the same treaties that gave Russia jurisdiction over areas now claimed by China. The Chinese response of March 8, 1963, found a way out of this logical dilemma, in a principle by which to attack the treaties in terms of sources of international law. Based on concepts borrowed from Russian legal thinking, this note makes the first public assertion that the treaties under which such concessions as were criticized by the Soviets had come into existence were "unequal." The inequality taints and invalidates the treaties, because the primary source of international law is agreement between states. Like the Soviet Union, the PRC accepts treaties and agreements as the major sources of international law; but the Chinese focus on the aspect of consent, a partner's willingness to be bound by an agreement at the time of signing, as the "ultimate source of its binding effect upon the parties." The assumption of sovereign equality is essential to the argument; but socialist international law holds that a new state acquires upon its creation the same rights the original states possessed when they created the prior law. New states thereby gain the right to review agreements entered into by its predecessor, and "decide whether it wishes to be bound by it or not. To refuse to permit ... review would contradict ... the principle of equality of states." Indeed, the Russian Communists soon after coming to power had repudiated treaties imposed by the Czars, and modern law books in the Soviet Union state that the first socialist state's abrogation of "unequal" treaties from the very outset was a major contribution to the growth of a socialist international law. In the November 1963 Note, the PRC insisted that with the Soviet Union, at least, the time had come for the "unequal treaties," subject to renegotiation by the Soviet's own concepts of international legality, and the borders defined in these treaties, to be redefined. The Soviets sharply attacked this view
arguing that because of their Chinese population the status of Hong Kong or Macao might properly be questioned; but to the contrary, the border with the Soviet Union must be distinguished since it "developed historically and was fixed by life itself, and treaties regarding the border cannot be disregarded." The Chinese reject this argument, for treaties are either equal or unequal and the latter undermine the most fundamental principles of international law (e.g., such as sovereign equality). They are therefore illegal and states have the right to abrogate such treaties at any time. Although the Chinese do not make explicit what constitutes equality, verbal reciprocity in the language of the treaty is not sufficient if "state character, economic strength, and the substance of correlation of the contracting states" are not taken into account. Thus for the PRC the relevant historical change in the Soviet case is that the two countries' Communist revolutions have created a situation wherein the Soviets, in Peking's view, should extend to their fraternal comrades the opportunity to relegate the treaties of the Czars to the garbage heap of history in accordance with the principle of PI. As a conciliatory measure, Peking was "willing" to respect the treaties as a basis for negotiations "guided by proletarian internationalism." The Chinese offered Moscow an easy settlement of the border question if only the Soviet side would take the same attitude as the Chinese government. Negotiations began on February 25, 1964, in Peking, but the Soviet delegation most emphatically did not share their host's views, and the talks broke off after more than three months without progress. Little movement in positions is to be found thereafter; a CPSU letter two years later defends the "historical borders" as having a firm international legal basis "stipulated in treaties signed by the governments of the countries." But this argument holds little persuasion with the Chinese, who equate the Soviet Union's efforts to emphasize formal sources of international law with those of bourgeois legal writers who intentionally attempt to deceive people into believing that bourgeois international law did not possess class character by citing flowery language of equality in nineteenth century treaties between exploiting imperialist powers. In the aftermath of Cultural Revolution purges, writers on law in China have ceased writing (after 1965) on topics of international law. However, an examination of the polemics accompanying the 1969 clashes along the Ussuri and Amur Rivers reveals no significant changes in the Chinese position on the illegality of the treaties or on the perfidy of the Russian leaders in refusing to abrogate and renegotiate them. The very concepts of socialist international law borrowed from the Russians had little effect towards breaking the stalemate, a failure shared by general international law in the Indian case.

**Conclusions on Law and Policy**

What conclusions are to be drawn from this examination of international legal concepts employed by the Chinese in border disputes? First, although the tactical variations pursued by Peking in these two disputes are expressed in terms drawn from general international law (India), and on the other hand from socialist international law (Russia), one cannot assume that this elasticity of principle implies a real duality in China's thinking in international relations. The obligations postulated for all nations by Chinese legal scholars are strikingly similar, whether arising from a general or a socialist construction of international law. The conclusion that seems warranted is that law is viewed as an instrument to be used, and varies with state policy.
Our examination shows, however, that the PRC expects an entirely different order of reciprocal views when dealing with a Communist government. Because of the Soviet Union's traditional primacy among the so-called “bloc” nations, and the historical contributions by Soviet writers and theoreticians to international law of principles which are held to comprise the basis of state relations between fraternal Communist countries, the Chinese government professes to be appalled at the refusal of the Russian revolutionary pioneers' successors to submit on the border question. The PRC's claims are grounded on the proposition that, as a matter of dogma, principles of international law as developed by Communist states are to lead the way to the construction of a higher order, an international system of socialist international law.44

Yet in this formulation of their border claims, the Chinese seem to forget, or more accurately ignore, the impact a few decades of development have had upon the views of the Soviets. The most incidental acquaintance with the history of twentieth-century Sino-Russian relations reveals that the famous 1920 Declaration of Lenin's Deputy Commissar for Foreign Affairs Leo Karakhan, which abrogated the unequal treaties with China, has long been considered inoperative by the Soviet Union. It appears almost as though the PRC is invoking outmoded Soviet doctrines of socialist internationalism, doctrines developed in a bygone era of Russian hegemony over the world Communist movement, to support China's claims to reassert sovereignty over her “irredenta” territories. The very voicing of the claims reflects the disintegration of the conditions which initially gave rise to the Soviet doctrines. So we observe China characterizing the Soviet reluctance to restore to China some 154,000 square miles of “historical” Manchuria, 169,000 square miles in Central Asia, and the territory north of the Amur River and east of the Ussuri River (the Soviet Maritime Province) as a betrayal of proletarian internationalism.45 The Chinese argue the proposition that from the principle of proletarian internationalism flow concrete rights and obligations for Communist states, and that as relations develop, these rights and obligations attain the status of international law.46 If this is not persuasive to the Russians, then they are “social imperialists,”47 as much as Tito was a “revisionist heretic” in denying that proletarian internationalism ruled out conflicts between Communist nations by definition.48

For the future, barring a catastrophic war on the Asian mainland, the PRC can be expected to continue to castigate the Soviet Union for its departure from what the Chinese consider to be unassailable dogma, while the Soviet Union will undoubtedly continue to be unmoved by China's arguments, basing its uninterrupted possession of the disputed areas on historical justifications. It is unlikely in this situation that the PRC will evolve a doctrine of international law, socialist or otherwise, that the Soviets will find compelling.
FOOTNOTES


2These were Nepal (10/5/61), Mongolia (12/26/62), Pakistan (12/28/62), and Afghanistan (11/22/63).


8The full texts of the letters have been published by the Indian government in the White Papers; see note 3 above.


10Letter from the Prime Minister of China [sic] to the Prime Minister of India, January 23, 1959, White Paper I, p. 52.


12White Paper I, p. 52.

13Watson, Frontiers, p. 18.

14Letter from Premier Chou En-lai to Prime Minister Nehru, September 8, 1959, White Paper II, p. 27 (emphasis added).


16Ibid.

17White Paper II, p. 27.

18Chu Li-lu, "Refute the Absurd Theory Concerning International Law by Ch'en Ti-ch' iang," Jen-min Jih-pao (People's Daily), September 18, 1957.

19Ibid. (emphasis added).


24Grzybowski, Soviet Public International Law, p. 19.
25Ibid.
27Ibid.
29Ibid., p. 69.
32Hsiung, Law and Policy, p. 27.
33Erickson, International Law, p. 36.
36Chiu, The PRC and Treaties, p. 97.
44Chiu, "Communist China's Attitude," p. 252.
46Grzybowski, Soviet Public International Law, p. 16-17.
47People's Daily calls them social imperialists, who "regard as theirs those places which Czarist Russian imperialism once occupied, and have made further claims for places which Czarist Russian imperialism failed to occupy. They are the new Czars of today." Jen-min Jih-pao March 11, 1969, English translation in Current Background 887, p. 22-23.
48Watson, Frontiers, p. 16.