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Indo-China Border Dispute- The International Law Perspective

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ABSTRACT

The Indo-China Border dispute has gained significant attention in the recent past with the Galwan Valley clashes between the two countries. The boundary disputes between the India and China have existed for over 70 years now and there has been no resolution till date. The author through this article aims to give a detailed background into the border disputes between India and China and the reasons for such disputes. The author also discusses the jurisprudence of territorial disputes and the types of territorial claims. The author, then studies the jurisdiction of the International Court of Justice and the various boundary disputes adjudicated upon by the International Court of Justice. With this background, the author aims to analyse if there is a recourse in International Law to the border disputes between the two superpowers.

I. INTRODUCTION

In International law and relations, ownership of a territory is significant because sovereignty over a land defines what constitutes a State.²

The International law recognizes that the basis of national power of a country depends on the borders it shares with other countries which is very fundamental to the sovereignty of that nation. Therefore, International law suggests various measures for protection in the form of demarcation lines and of territorial integrity and exclusive control. Boundary dispute in itself is a very complicated issue which takes years to get resolved and sometimes remains unresolved and becomes a thorn in International relations of two countries. The boundary disputes are mostly concerning the sovereignty of a nation and include maritime border dispute, Exclusive Economic Zones related disputes. It is pertinent to note that borders of two countries are mainly located in remote areas far from the epicenter of a country and therefore benefitting economically from trade and commerce from another side of the border.

It is to be highlighted that the primary reason for border dispute between the two Asian Giants is the unilateral claim by China over Indian Territories because of undemarcated border which

¹ Author is an Advocate at Supreme Court of India.

² Sumner, B., 2004. Territorial Disputes At The International Court Of Justice. *Duke Law Journal*, 53, p.1779.

extends up to 4,056 km ranging from Union Territory of Leh and Ladakh in North to Arunachal Pradesh in North-East.

II. INDO-CHINA BORDER DISPUTES - A BRIEF OVERVIEW

Two major powers, one disputed Himalayan border. India and China blame one another over the confrontations over the last two months but why is that this is going on now and the way it could a trigger and interact these superpower countries into a military conflict, this can be precisely what the full world is contemplating about. India and China, both claim territory along the Himalayas (world's tallest mountain range) but the border dispute arose decades ago, and therefore the tension arises again. In the first week of May, Indian and Chinese military scuffled and stoned at one another within the Pangong Tso lake, Ladakh, India.

As per the Chinese, they are allegations over India that Indian military had trespassed the Chinese territory and accused them of establishing defence facilities, however, on the contrary, the Indian soldiers claim that they have been on their side and it is the Chinese who have mala fide intentions. As per the satellite images shared by the sources, it's visible both the edges, i.e., India and China are working upon their military defences along the line of Actual Control (LAC) which separates the two armies. After the Coronavirus COVID-19 pandemic and the scuffle, the relations between India and China are deteriorating and a matter of concern for world. China and India share one amongst the world's longest unmarked borders, and both have territorial claims over 3,500 kilometres of land. In 1962, the border war between India and China ended with no resolution, and there are several standoffs since then and majorly in 2017. Within the previous year, leaders of both countries met and decided to cool down the tensions between India and China.

China believes that in the pandemic, it's the proper opportunity for them to expand its influence over the disputed borders between India and China and to grasp the genus of the tensions between both the countries, it's necessary to understand a short factual background about the dispute between India and China.

In 1913, during the time of the British Indian Government, there was a tripartite agreement signed between three countries including India, China and Tibet and also the boundary was originally decided between India and Tibet. Initially, there was no dispute between India and China since the agreement was majorly signed between India and Tibet. However, unfortunately, with time, China took over Tibet's land in an illegal way and ultimately shared its border with India. After the unlawful invasion of Tibet by China, what was called Indo-Tibetan Boundary is thought as Indo-China boundary today.

China considers the treaty to be illegal because it considers Tibet to be China's part and so claims that treaty signed between British India and Tibet is against the law and holds no value since the treaty couldn't be entered into with Tibet knowing that it's part of China. China has further disputed the treaty considering that there's no existence of British India and Tibet anymore and on this ground solely, China doesn't acknowledge any reasonably treaty signed between India and Tibet with relevancy the boundary. China surprised the entire world by occupying Aksai Chin and by building a road through it. Aksai chin is 25 per cent of the total land of Jammu and Kashmir as is as big as 28 Delhi's together having a district about 40,000 kilometres. This episode was followed by intermittent clashes within the border war of 1962 inspired by the treaty signed between India and China in 1960 referred to as Pansheel treaty from which a famous slogan of "Hindi China Bhai Bhai" emerged out. The boundary that came into existence after the war came to be referred to as Line of Actual Control.

The disputed boundary between India and China is split into three sectors western, middle and eastern. The countries disagree on the precise location of the line of actual control in various areas, so much so that India claims that line of actual control is 3488 km long while the Chinese believe it to be around 2000 km long. Since the war, the two armies try to dominate by patrolling areas up to the respective perceptions of the line of actual control of an bringing them into conflict and resulting in incidents like those witnessed in Naku La in Sikkim, earlier this month. Nakula sector could be a pass at the height of over 5000m above mean water level within the State of Sikkim. It is located sooner than Cho Lhamu which is the source of river Teesta.

Towards the north, captured by China in the Himalayas the Pangong Tso lake maybe a 135 km long lake which is found in the Himalayas at the height of roughly 4350 m stretches out from India to China. One-third of the water body's stretch is in India control while the remainder of 90 km under Chinese control. This lake has a strategic significance because it lies in the path of Chushul approach, one of the main approaches that China can use for an offensive into the Indian held territory. The Indian assessment shows that a major Chinese offensive if it comes, will flow across both the north and south of the lake. During the 1962 war, this was where China launched its main offensive - the Indian Army fought heroically at Rezang La the mountain pass on the south-eastern approach to a Chushul Valley.

Thereafter in 1999 when the Army unit from the area was removed to Kargil for Operation Vijay, China took the opportunity to build 5 km road inside Indian territory along the bank of

the lake, and since then India has been very cautious with China invading further areas as they did with Pangong Lake. In 1999 Road added to the extensive network of roads built by Chinese in the area which connected with each other and G219 Karakoram Highway.

After all these incidences, many attempts have been made for relaxing the tensions between India and China border dispute. The re-approach meant between the two countries in 1976 enabled India and China to initiate high-level border talks in 1981 to find a solution to the vexed problem. After eight rounds the talks broke down in 1987. In 1988 following Prime Minister Rajiv Gandhi's visit to China, the joint working group was set up to look into the border problems. In 1993 the agreement of maintenance of recent tranquility alongside the line of actual control was signed, and India China expert group of diplomatic and military officers was set up to assist the joint working group. Subsequently, in 1996, the agreement on confidence-building measures in the military field along the LAC was signed and in 2003 to special representatives were appointed to find a political solution to the border dispute until 2009 these two special representatives had held 17 rounds of talks, but it seems they have not made much headway. Recently NSA Ajit Doval was appointed as special envoy for talks.

To conclude it is of great importance that both India and China must underline the importance of approaching the boundary question from the strategic perspective of India China relations and agreed that an early settlement of the boundary question serves the fundamental interest of both the countries. If ever there is or will be a historic opportunity for two Asian giants resolve the contested boundary it's now, an opportunity provided by the pandemic.

III. REASONS FOR BOUNDARY DISPUTE BETWEEN THE ASIAN GIANTS

Sovereignty over one's land has been a major factor for the face-off between the two Asian superpowers. Aksai Chin was earlier a part of Indian territory was encroached by the Chinese side in the year 1962 when both the nations fought at the Himalayas and later on China assimilated the Aksai Chin region into Chinese autonomous regions of Xinjiang and Tibet. Although the Aksai Chin region is no man land and is uninhabited since centuries being the other disputed territory lies south of the McMahon Line. Another bone of contention is the Indian State of Arunachal Pradesh which China considers as part of Tibet and was earlier referred to as Northern Eastern Frontier area.

In the current situation, India continues to assert that the McMahon Line is the legal border, while China has never agreed regarding the demarcation of the border, stating that Tibet was never independent. Around 1962, Chinese troops invaded the McMahon line and, during a one-month war, resulting in establishment of Line of Actual Control. The border scuffle escalated

the tensions between the nations into a second war in 1967, at the end of which India stated it had established a new "Line of Actual Control"; thereafter, no military casualties or death occurred until 2020. In 1987 and in 2013 potential conflicts over the two differing Lines of Actual Control were successfully de-escalated. A conflict involving a Bhutanese-controlled area on the border between Bhutan and China was successfully de-escalated in 2017 leading to casualties on both the sides of the Army. After that, multiple brawls broke out in 2020, escalating to dozens of deaths in June 2020.

The 1962 Indo-China war was fought in both of disputed areas. The agreement to resolve the dispute concluded in 1996 included "confidence-building measures" and other mutually accepted agreements.

The claims and counterclaims of China and India could be categorized under six major heads:³

- A. Agreements related claim;
- B. Acquiescence and estoppel related claim;
- C. Historic possession related claim;
- D. Physical and Geographical based claims;
- E. Claims concerned with the change of governments;
- F. Claims involving *rebus sic stantibus*

It is pertinent to note that one of the major reasons for territorial dispute between the two Asian superpowers is China's aggressive expansionist policy in order to further its interest and influence in the region, but that comes at the expense of violating the sovereignty of nations like India and other Asian nations bordering China. Not only land border disputes China also unilaterally claims shoals and reefs, which are there in countries like Australia, Japan and the Philippines. It has continuously violated and encroached upon the sovereignty of India at Indian Ocean turf, thereby escalating a major land and water conflict with India.

One of the major examples of Exclusive Economic Zone conflict brewing up between the two Asian superpowers is the Coast of Vietnam in the waters of South China wherein India's ONGC Videsh is involved in oil exploration in Vietnamese Exclusive Economic Zone and Chinese side is involved in aggressive patrolling and obstructing the exploration work done by the Indian company. The Chinese side considers the area as its own, and therefore it is arguing that no other state can conduct oil exploration in that area.

³ SP Sharma, The Indo-China Border Dispute: An Indian perspective (1965) 59 AJIL 16, 19.

IV. BOUNDARY DISPUTE- THE INTERNATIONAL LAW JURISPRUDENCE AND ICJ

Any boundary dispute is subject to competing for International territorial claims. Such claims can be roughly be categorized into nine types of territorial claims. Every State has to rely upon these major claims before the International Court of Justice.⁴ These 9 types of claims are as follows:

A. Treaty Laws:

A treaty justification is more legal in nature and it is more persuasive in nature before the International Court of Justice. Article 38 of the ICJ Statute mandates the Court to consider the treaty between two conflicting states while deciding the dispute. Treaty is in nature of a private contract.

B. Geography:

Geography poses a big problem in the demarcation of the borders. It is pertinent to note that mountain ranges, oceans, rivers, other water bodies have separated two states. These natural borders act as clear dividing line between two States.

C. Economy:

Economic reasons play an important role while a state asserts that a territory it is claiming is necessary for economic development and commercial purpose of that State.

D. Culture:

Culture provides a sense of belonging and a motivational factor behind a territorial claim by a State. Common language, kingship, religion or any other cultural factor defines a group of people living together, and therefore culture justification emboldens the ethnic nation argument.

E. Effective Control:

Many jurists believe that effective control over a territory is the *sine qua non* of effective territorial claim. It is pertinent to note that when a group has uncontested administration of land and its resident population, then such group is said to have effective control over that area.

F. History:

The historical claim is the most common form of claim over a territory. Such claims are based on historical first and possession and the duration of the possession over that territory. It creates an underlying claim over a territory.

⁴ The categorisation system of Prof. Andrew Burghart, The bases of territorial claim, 63 Geographical Re, 225 (1973).

G. Uti Possidetis:

Uti possidetis is a doctrine wherein newly independent states inherit the pre-independence administrative boundaries set by the formal colonial power.

H. Elitism:

When a particular minority group has rights and duties over a particular territory, such claims to the territory is often referred to as elitism claim.

I. Ideology:

Ideological reasons resemble claim of "Special mission" based in unique identification with the land and having exclusivist overtones.

Different types of territorial dispute may be brought before the ICJ either by way of referral through *compromis* between the two States or by compulsory jurisdiction. Article 38 of the ICJ Statute states that while deciding the disputes, the ICJ has to apply the following sources of law:⁵

- A. International Conventions both General and particular;
- B. International custom or customary law
- C. Law recognized by Civilized Nations;
- D. In accordance with Article 59 of the ICJ Statute.

ICJ may further decide the dispute under the principle of equity.

The ICJ played an important role in resolving land boundary disputes. The evolution of the territorial jurisdiction of the ICJ dates back to the initial year of ICJ, i.e., 1953. The ICJ has till now adjudicated around 8 cases of boundary disputes between various states.

A. Minquiers and Ecrehos (France/United Kingdom)

By way of the special agreement, the United Kingdom and France approached to the International Court of Justice with the dispute regarding the sovereignty of the island groups which were located in the English Channel between Jersey and the French mainland.⁶

After giving a fair hearing to the dispute between both the countries the court rejected all the arguments which were based upon disputed land grants and agreements of fisheries since there were no specifications of the border or a demarcation showing which islands were held by the

⁵ ICJ Statute, Note 8, art 36 para 1, 59 stat at 1060.

⁶ Minquiers and Ecrehos(France/UK), 1953 ICJ 47(Nov 2017).

kings of England and France respectively.

Due to the absence of valid claim on the treaty, the Hon'ble court noticed effective control arguments and was of the view that the British government had sovereign jurisdiction and local administration over Minquiers and Ecrehos due to which the court awarded the territory to the United Kingdom.

B. Sovereignty over certain frontier land (Belgium/Netherlands)

In this dispute, Belgium and Netherlands submitted a dispute to the International Court of Justice by way of a special agreement that had made the court in charge to decide upon which party had sovereignty treaty over specific border plots. The court was of the view that Belgium had not ceased to establish its rights over the border plots and was further of the view that encroachments of Netherlands were not sufficient to assert its rights, negating Belgium's claim. The court was of the view that the Acts of encroachment were major of a daily routine and were administrative in character which was performed by local officials and a consequence of inclusion by the Netherlands of the disputed plot is in its survey. In the end, the court awarded the territory to Belgium.⁷

C. Temple of Preah Vihear (Cambodia v. Thailand)

In this case, Cambodia had sued Thailand for infringing its sovereignty over its territory, which was majorly the land surrounding the ruins of the temple. However, Thailand negated all the allegations made on it regarding violations of Cambodian sovereignty and further asserted that the ruins were on the side of the common border. Upon adjudication of the dispute, the court rejected the arguments of tie since the maps indicated that the entire region of the temple became a part of Cambodia and was not a part of Thailand anymore.⁸

D. Frontier Dispute (Burkina Faso/Mali)

By way of a special agreement, Burkina Faso and Mali approached the International Court of Justice with a boundary dispute in 1983. The disputed region was earlier a part of French West Africa, and after decolonization, various countries had competing land claims when the land was divided into different and segregated independent states in 1960, upon which both the parties made claims based upon treaty law and effective control. However, the court examined and was of the view that no such title existed with the parties and the court halved the disputed territory based upon recognition of inconsistencies and loopholes in the record relied upon by

⁷ Sovereignty over certain frontier land(Bel/neth), 1959 ICJ 209-212.

⁸ Temple of Preah Vihear (Combodia vs. Thailand) 1962 ICJ 6, 9(June 15).

the states.⁹

E. Territorial Dispute (Libya/Chad)

Both the countries had a dispute over Aozou Strip, and by way of the agreement, they approached the court. The court vehemently rejected Libya's argument that the treaty of friendship and good neighborliness entered into between the parties in the year 1955 in no way established any kind of boundary between the two countries and the court was of the view that by reading the treaty it was clear that Libya was very clear about its boundary as per the treaty. The court also was of the view that since the treaty was based upon the question of the boundary, the court did not need to consider the title inherited from indie genius people of influence and the court and ruled in favor of Chad.¹⁰

F. Maritime delimitation station and territorial questions (Qatar v. Bahrain)

In the year 1991, Qatar initiated proceedings against Bahrain before the court to adjudicate disputes regarding the sovereignty of the chunk of land Zubarah, the Hawar Islands, Janna Island Which was located between the peninsula of Qatar and Bahrain. The court was of the view that Bahrain could not create a legitimate claim to territorial sovereignty and also rejected Qatar's claim of not have consented to British decision given in 1939 stating that islands were a part of Bahrain and because of this the court did not consider Qatar's argument based on colonial effectivities, original title, and geographic proximity.¹¹

G. Land and maritime boundary (Cameroon v. Nigeria)

In the year 1994 Cameroon Initiated legal proceedings against Nigeria intending to acquire sovereignty over the Bakassi peninsula and the lake shad region. Both the parties base their arguments upon treaties, history, effective control, and uti possidetis. In this dispute, the court completely rejected all the claims made by Nigeria and awarded the territory to Cameroon. The court also held that in frontier dispute, control by effectivities is subsidiary and cannot supersede a conventional title.¹²

H. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)

In this case both the parties Claimed the right over islands of Ligitan and Sipadan. During the analysis, the court relied upon the British Dutch convention of 1891 and found that the boundary in question was not addressed in the convention. Thereafter the court examined the

⁹ Frontier Dispute(Burkina Faso/ Mali), 1986 ICJ 554,556-57(Dec 22)

¹⁰ Territorial Dispute(Libya/chad), 1994 ICJ 6-8, 9(Dec 22)

¹¹ Maritime Delimitations and territorial questions(Qatar/Bahrain), 2001 ICJ 40,44,49-50

¹² Land and Maritime boundary (Cam/Nig), 2002 ICJ 303,342-44(Oct. 2010)

claims during the analysis the court relied upon the British Dutch convention of 1891 and found that the boundary in question was not addressed in the convention. Thereafter the court examined the claims of effectivities As a sole base of the judgment and held at Indonesia's claimed effectivities Were not offer regulatory or legislative character And the quote what's up the view that Malaysia's regulation Of commercial collection of turtle eggs and establishment of a bird sanctuary on the island were sufficiently administrative to demonstrate effective control.¹³

It is pertinent to note that the Permanent Court of Arbitration by virtue of Award dated 12th July 2016 trashed the territorial claim over much of the South China Sea more particularly the coast of Philippines. In scathing observation made by the members of the Permanent Court of Arbitration, China had violated the sovereign rights in its EEZ by obstructing the commercial maritime activities and oil exploration and by constructing artificial island. It was further observed by them that number Chinese vessels had unlawfully obstructed the fishing vessel of the Philippine. At its inception, several states were skeptical about the threat to their sovereignty from ICJ due to the all-powerful judicial body.

After the Galwan valley face-off between the two Asian powers last month there were voices for dragging China to ICJ. However, the same is easier said than done in view of limited jurisdiction of ICJ. The ICJ statute limits the purview of ICJ as the member need to submit their dispute to ICJ and thereby accept the jurisdiction of ICJ. India though recognizes the jurisdiction of the ICJ, in its declaration, it is made clear that India doesn't want interference of ICJ in matters pertaining to "limitation and delimitation" of its border or mediation or the status of its territory or matters concerning its border. However, in continuation of its aggressive policy, China doesn't recognize the compulsory jurisdiction of the ICJ. China has always been hesitant in accepting the International Tribunals and Courts when it comes to territorial issues. In fact, China has previously been resistant to accepting the authority of international bodies, specifically for issues relating to territorial disputes. One of the best examples of China's resistance is Philippines Sino Dispute wherein the Tribunal ruled in favor of the Philippines, however, the latter refused to abide by the award. Hence, even if the border dispute between India and China is consensually brought to ICJ for adjudication, the Chinese side is unlikely to accept a non-favourable verdict. Another way a dispute can be brought before the ICJ is through the United Nation Security Council (UNSC) can further direct a dispute to ICJ exercising its veto power to

¹³ Sovereignty over Pulau Litigan and pulau Sipandan (Indon/Malay.)2002 ICJ 625,630 (Dec 17)

call upon countries to settle a dispute before the body. This move by India would be resisted by China as it is a permanent member of the UNSC, and will definitely block the referral of the ongoing border dispute, as India has a stronger historical claim to different border regions, which the ICJ is likely to support.

V. BORDER DISPUTE RESOLUTION MECHANISM – THE WAY FORWARD

Every dispute between the two responsible states should be settled in terms of International law. International relations between two states are primarily governed by International law, and the disputes should also be settled in accordance with rules and regulations under International law. Peaceful resolution of the border dispute is paramount for giving effect to the meaningful border dispute settlement mechanism unless mandated by the UN Security Council for the use of force.

The Article 33 of the UN Charter clearly specifies that parties who are subject to boundary/territorial disputes which is likely to endanger International Peace and security should first make an effort to resolve their territorial dispute by way of mediation, negotiation, arbitration, other judicial modes. Whichever of these methods may be used, international law is the substantive criteria for solving a dispute.

Treaties play a major role in the resolution of boundary disputes, when there is an overlapping of sovereignty claim over a piece of land, it leads to territorial disputes. Therefore, proper legal interpretation of the treaties between the two states can very well resolve the boundary dispute in a peaceful manner.

The element of effectiveness will be considered in case neither of the parties has a treaty-based claim. In this context, international tribunals will be keen on what is known as "relative title" — which of the competing claims is stronger — rather than some absolute standard of title. Better proof to justify the claim by a party would be a major benchmark for the International Tribunals for considering the title over a piece of land.

States in conflict over territories may solve their disputes politically without going into legal arguments. Although, the same is subject to the disputed territory belonging to the two states which are fighting over the piece of area. The decision to demarcate the line of boundary rests entirely on the two states involved. It is to be kept in mind that the legal position of each State plays a major role while settling the boundary dispute with political will. It is further important to note that if any of the states accept the exercise of jurisdiction by another party and at the same time claiming sovereignty, the legal position of that State will be jeopardized.

Occupation and effective control over a territory are important for acquisition and exercise of territorial sovereignty over a piece of land. There are basically two modes of acquiring territory. A territory can be acquired by derivative mode a state gives a territory to another State. Such acquisitions are made by virtue of treaties. One of the prime examples of such acquisition is Indo Bangladesh land Swap agreement of 2014, wherein both the states some piece of land for each other. Another mode of acquisition is to occupy a terra nullius, a land which has not been controlled by any state. For a state to acquire sovereignty over such a land, it should first occupy it.

It is pertinent to note that both India and China have always refused any third-party arbitration or mediation or any interference from a third country in resolving the territorial disputes. Although the Indian Constitution and more particularly, Article 51(d) provides that all the International disputes should be settled by arbitration.

In the year 1963, India wanted to take China to ICJ for resolution of its border dispute through International Arbitration. However, the same vehemently opposed by the Chinese side. India accepted the ICJ's compulsory jurisdiction in the year 1974, unlike China, which was a permanent member of the UN Security Council. It is quite obvious and apparent that the Chinese side has always opposed the interference of the national and international judicial institutions in interpreting and applying international law and thereby resolving the boundary dispute as they fear all other small nations might join those International judicial institutions and try to settle their boundary disputes through International Tribunals.

With respect to the Indo China disputes, it is often remarked by various Indian Head of States from time to time that both economic powerhouses are responsible states and they are in direct contact for resolving their outstanding border disputes, and therefore there is no need of any third-party interference or any arbitration.

In December 2010 it was reiterated by both India and China that all the boundary disputes would be resolved through peaceful negotiations. At the same time, it was reaffirmed by both the countries that border dispute would be resolved in accordance with the 2005' agreement on political parameters for settlement of the boundary question'. It was further reiterated by both the states that the solution to the border dispute has to be 'political and strategic'.

VI. CONCLUSION

Although the resolution of the border dispute lies mainly in political will, International law has played a major role in bringing conflicting states to submit their disputes to international arbitration or tribunals or the ICJ which thereby creates the merit of depoliticizing an issue by

leaving it to a group of technical experts. It is very important to observe that as of 2010, more than 15 cases border disputes are pending before the ICJ. It is pertinent to note that China in the recent decades has increased its hegemony in the Asian region and is involved in border disputes with at least 14 countries, and it has always been a strong critic of International interference through various Tribunals and Courts and has been in blatant violation of International law and norms set by various International bodies. India, on the other hand, is a staunch follower of International law and has followed the same in settlement of various disputes, even though it refuses any interference from third parties in settling border dispute and harps more on one to one exchange for the settlement of border disputes, the prime example being Indo-China Galwan face off in Indian region of Ladakh. It is to be understood that with the rise of the two Asian superpowers, the idea of world order being more justice-oriented has relinquished and the same is now motivated by nationalistic interests.

China being the second-largest economy and a superpower will have to act more responsibly and in accordance with International law and norms in the resolution of boundary disputes instead of threatening its small neighbors.
