TERRITORIAL DISPUTES AT THE INTERNATIONAL COURT OF JUSTICE

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INTRODUCTION

In international law and relations, ownership of territory is significant because sovereignty over land defines what constitutes a state.[1] Additionally, as Machiavelli suggested, territorial acquisition is one of the goals of most states.[2] The benefits of having territory, though, are only as great as a state's borders are clear, because a state's boundaries must be well defined for the modern state to function.[3] In many cases, however, these boundaries are subject to competing international territorial claims.[4] Such claims can be generally divided into nine categories: treaties, geography, economy, culture, effective control, history, *uti possidetis*,[5] elitism, and ideology.[6] States have relied on all nine categories to justify legal claims to territory before the International Court of Justice (ICJ). The most

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1. *See* PAUL GILBERT, THE PHILOSOPHY OF NATIONALISM 91 (1998) ("To claim a right to statehood is to claim a right to *some* territory over which the state can exercise political control."); John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 REV. INT'L POL. ECON. 53, 53 (1994) (asserting that "the clear spatial demaraction of the territory within which the state exercises its power" is one aspect of political theory definitions of the state).

2. *See* NICOLÒ MACHIAVELLI, THE PRINCE 25 (W.K. Marriott ed., J.M. Dent & Sons 1938) (1513) ("The wish to acquire is in truth very natural and common . . . ."). This principle is the state-level extension of human territoriality, or the "spatial strategy to affect, influence, or control resources and people, by controlling area." ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 1 (1986).

3. GILBERT, *supra* note 1, at 92. *See generally* MALCOLM ANDERSON, FRONTIERS: TERRITORY AND STATE FORMATION IN THE MODERN WORLD 1–36 (1996) (describing the historical and modern importance of frontiers).

4. International territorial claims are claims to particular territory made by a state either seeking sovereignty or affirming its preexisting sovereignty over that territory.

5. *Uti possidetis* is the doctrine under which "old administrative boundaries will become international boundaries when a political subdivision achieves independence." BLACK'S LAW DICTIONARY 1544 (7th ed. 1999). For example, the external boundaries of the United States after achieving independence—based on the preindependence colonial boundaries—reflected the *uti possidetis* principle.

6. For a discussion of these categories, see *infra* Part I.

common claims are cast in terms of effective control of the disputed territory, historical right to title, *uti possidetis*, geography, treaty law, and cultural homogeneity.

This Note examines the interplay and hierarchy among these nine justifications in the outcomes of land boundary cases adjudicated by the ICJ to determine whether one particular justification is dispositive—or, at the minimum, highly determinative. This analysis of the case law indicates that no single justification operates as the decision rule in the court's boundary dispute jurisprudence, and that the court manifests a hierarchical preference for treaty law, *uti possidetis*, and effective control, respectively.[7]

Part I discusses the nine categories of justifications for territorial claims; their evolution in geography, political science, and the law; and their application in certain areas of particular interest here. Part II presents an analysis of the ICJ's land dispute jurisprudence with regard to the bases for territorial claims set out in Part I. Part III argues that the ICJ uses a tripartite hierarchy when it analyzes territorial disputes. Part IV critiques this hierarchy in light of modern territorial disputes.

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7. This Note considers only a small segment of all territorial disputes and only one means of international dispute resolution, addressing only those disputes adjudicated by the ICJ. For an examination of why states choose international legal processes for the resolution of territorial disputes, see generally Beth Simmons, *See You in "Court"? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes*, *in* A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 205 (Paul F. Diehl ed., 1999).

Furthermore, this Note considers only land disputes; it does not consider maritime disputes, maritime boundary delimitations, or disputes over islands in which the crux of the legal question derives from the law of the sea. The nine traditional categories of justifications for territorial claims apply uniformly only to land disputes.

Several scholars distinguish between territorial disputes and border disputes. *See, e.g.*, A.O. CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW 6 (1967); NORMAN HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 25 (1945); R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 14 (1963); SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 21–28 (1997). For the purposes of this Note's inquiry, the difference is immaterial. Border disputes and territorial disputes both involve, at their core, sovereignty over disputed land. The ICJ's judgments in several cases bear out the interdependent nature of these two issues. *See, e.g.*, Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 12 (June 15) ("To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States . . . ."); Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 212 (June 20) (examining the frontier between Belgium and the Netherlands in a territorial sovereignty dispute); *see also* SHARMA, *supra*, at 26–27 (reviewing cases "confirming the interdependent nature of the two categories").

I. JUSTIFICATIONS FOR TERRITORIAL CLAIMS

Cases may come before the ICJ, an independent subsidiary organ of the United Nations,[8] by referral through a *compromis* (special agreement) between two or more states,[9] by a treaty provision committing disputes arising under the treaty to the court,[10] or by the parties' statements of compulsory jurisdiction.[11] Under Article 38 of the Statute of the International Court of Justice (Statute), when deciding cases "in accordance with international law," the court applies the following sources of law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[12]

Furthermore, if the parties agree, the court may decide a case under equity principles, *ex aequo et bono*.[13]

Territorial claims before the ICJ usually fall within one of the above four categories. Treaty claims are the easiest to assert, because the existence of a treaty is easier to prove than the existence of customary international law, which requires evidence of state practice and *opinio juris*,[14] or the existence of the highly enigmatic general

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8. *See* Statute of the International Court of Justice, June 26, 1945, arts. 1–2, 16–20, 59 Stat. 1055, 1055, 1057, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm [hereinafter ICJ Statute] (providing for the independence of the court and its judges).

9. *Id.* art. 36, para. 1, 59 Stat. at 1060. *See generally* Jonathan I. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987) (reviewing the scope of the ICJ's compromissory jurisdiction).

10. ICJ Statute, *supra* note 8, art. 36, para. 1, 59 Stat. at 1060.

11. *Id.* art. 36, para. 2, 59 Stat. at 1060.

12. *Id.* art. 38, para. 1, 59 Stat. at 1060.

13. *Id.* art. 38, para. 2, 59 Stat. at 1060; *see* BLACK'S LAW DICTIONARY 581 (7th ed. 1999) (defining "*ex aequo et bono*" as "according to what is equitable and good"). In the drafting of the Statute, the expressions "equity," "justice," and "*ex aequo et bono*" were used interchangeably. MASAHIRO MIYOSHI, CONSIDERATIONS OF EQUITY IN THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES 14 (1993). It appears that this would permit the court "to avoid the application of law and decide *ex aequo et bono* instead." *Id.*

14. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 23–24 (1953) ("In Article 38 . . . custom is used in a strict sense, being

principles of law "recognized by civilized nations."[15] However, in the absence of treaties, litigants must resort to claims based on the other three international law categories, and to nonlegal or political claims. Among the several categories into which scholars classify these justifications, the most common nine are treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology.[16] Although several claims may cross lines between categories, this Note attempts to place claims in the category that best describes the underlying justification for sovereignty. This Part proceeds by discussing each of the nine categories as they have evolved in geography, political science, and law.

A. Treaty Law

As compared to the other bases for territorial claims, the treaty justification is more legal in nature—that is, it is less emotionally persuasive than an historical claim might be. Nevertheless, claims based on treaty law are particularly persuasive at the ICJ because Article 38 of the ICJ Statute obligates the court to consider treaties. Moreover, through treaties parties agree to relinquish their historical or other claims to the property subject to the treaty. Thus, it is no surprise that treaties (unless defective) are binding on the parties that have ratified them.

The purpose of many treaties is much like that of private contracts.[17] For both, the chief goal of the relationship is "to create

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conformed to what is a general practice among States accepted by them as law."). *Opinio juris* requires that the state behavior result from a sense of legal obligation. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 46–47 (4th ed. 2003).

15. ICJ Statute, *supra* note 8, art. 38, para. 1, 59 Stat. at 1060.

16. This Note adopts, with certain modifications, the categorization system of Professor Andrew Burghardt, *The Bases of Territorial Claims*, 63 GEOGRAPHICAL REV. 225 (1973), who presents seven categories of territorial claims: effective control, historical, cultural, territorial integrity, economic, elitist, and ideological. Professor Burghardt's categories are defined broadly enough that they provide ready application to the ICJ's jurisprudence. As this Part demonstrates, this Note expands upon Professor Burghardt's classification and further develops some of his categories. Professor Burghardt is a political geographer best known for his work on Burgenland, Austria. For alternative systems, see NORMAN J.G. POUNDS, POLITICAL GEOGRAPHY 252–59 (2d ed. 1972), proposing seven alternative categories of territorial claims (strategic, economic, ethnic, proximity, sphere of influence, geographical, and acquisition), and ROBERT STRAUSZ-HUPÉ & STEFAN T. POSSONY, INTERNATIONAL RELATIONS IN THE AGE OF THE CONFLICT BETWEEN DEMOCRACY AND DICTATORSHIP 278 (1950), which offers a set of ten criteria for border definition.

17. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 74 (1991).

legally recognizable expectations" in the other contracting party.[18] The parties to a treaty, as to a contract, then rely on those expectations in carrying out their own affairs, because they entered into the agreement voluntarily and with a view to "structur[ing] their relationship in the way that best suits their . . . interests."[19] Although the enforcement of contracts is rather clear (one can almost always resort to litigation), the enforcement of treaties is more ambiguous. Many treaties contain their own enforcement provisions permitting parties to take certain actions in response to breach or to refer disputes to the ICJ; historically, many treaty disputes have been resolved by force.

Despite the appeal of treaties as contractual agreements between parties to a territorial dispute, a particular difficulty with the ICJ's use of treaty law is the application of a certain treaty to states not party to the agreement.[20] In most of these cases, the treaties are used to demonstrate the consent of other states (possibly colonial powers) with respect to boundaries later inherited by the litigants before the ICJ. In others, the court may employ treaties as factual evidence of how the borders stood at a particular time.[21]

B. Geography

Geographical justifications for territorial boundaries are neither novel nor uncommon. Mountain ranges, rivers, oceans, and other bodies of water and physical formations have perennially separated political entities.[22] Natural borders create a clear dividing line between two states, offer a buffer of security (or at least the appearance thereof), often do not require active patrolling by border guards, and historically have been more difficult to dispute than borders less easily identifiable by a physical landmark.[23] Sometimes

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18. MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 1 (4th ed. 2001); *see also* JANIS, *supra* note 14, at 9 ("International agreements, like private contracts, are something more than statements of expected future conduct. Treaties create legal rights and duties, and it is this obligatory aspect that makes them part of international law.").

19. CHIRELSTEIN, *supra* note 18, at 9.

20. *See infra* notes 108–17 and accompanying text.

21. *See infra* notes 113–17 and accompanying text.

22. Burghardt, *supra* note 16, at 235–37.

23. *See* CUKWURAH, *supra* note 7, at 19–22 (considering boundaries in mountains, deserts, watercourses, swamps, and marshes).

the reasoning behind geographical claims is more psychological—what Professor Norman Hill dubs "geographical predestination."[24]

Natural boundaries, however, can present neighboring states with problems of precision in demarcation, delimitation, or both.[25] Natural boundaries, by their nature, can be difficult to mark.[26] The natural formations that create boundaries can move, thereby making resource allocations in the frontier region more problematic.

Natural boundaries may also carry strategic importance because they confer military advantages[27]—they can thwart enemy advances and reduce costs by diminishing the necessity for heavy fortifications.[28] This strategic value often encourages states to extend their borders to beneficial physical formations under the justification of territorial integrity.[29]

C. Economy

Economic justifications for territorial claims assert that the territory in question is "necessary to the viability or development of

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24. HILL, *supra* note 7, at 74; *see also* POUNDS, *supra* note 16, at 257 (pointing to U.S. manifest destiny as an example of a claim based on proximity); Burghardt, *supra* note 16, at 236 (commenting on manifest destiny and pan-Africanism); Peter Sahlins, *Natural Frontiers Revisited: France's Boundaries Since the Seventeenth Century*, 95 AM. HIST. REV. 1423 (1990) (discussing the role of natural frontiers in French state building).

25. HILL, s*upra* note 7, at 24; *see also* CUKWURAH, *supra* note 7, at 27–29 (explaining the distinction between delimitation and demarcation); Bradford L. Thomas, *International Boundaries: Lines in the Sand (and the Sea)*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 87, 94 (George J. Demko & William B. Wood eds., 1994) (same).

26. *See* HILL, s*upra* note 7, at 24 (discussing the difficulties inherent in demarcating natural boundaries).

27. Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 244 (2001); *see also* Guntram H. Herb, *National Identity and Territory*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE 9, 20 (Guntram H. Herb & David H. Kaplan eds., 1999) (pointing to the strategic importance of mountaintops). Sea access and terrain for railroads are also of great strategic (and economic) importance, because they permit the development and deployment of navies and facilitate the internal transportation of military materiel. *See* POUNDS, *supra* note 16, at 254–56 (discussing the economic importance of terrain for railroads and access to the coast).

28. *See* HILL, *supra* note 7, at 53 ("[N]ations seek frontiers that are naturally adapted to defense, and try to avoid weak, artificial frontiers. . . . Without strategic frontiers a nation feels obligated to erect expensive fortifications.").

29. *See* Burghardt, *supra* note 16, at 236 (commenting on the U.S. acquisition of Florida, Yugoslavia's claim to Trieste, and the Romanian claim to the entire Banat); *see also* HILL, *supra* note 7, at 141–42 ("Although the principle of contiguity as the basis for a legal claim to territory has not received a great deal of support, it has been used with some weight as a non-legal claim, particularly to colonies.").

the state."[30] For example, the territory may be necessary to facilitate internal and international transportation routes for goods (including pipelines, roads, railways, and ports), to exploit raw materials, to cultivate land, and the like.[31] Similarly, states may desire the territory to attract foreign investment,[32] which requires the existence of land, sea, and aerial passages.[33]

Economic claims also include the more novel claim that certain territory should belong to the claimant because it "has been in . . . close economic relation" with territory already within the claimant's jurisdiction.[34] States commonly make this claim with respect to colonies, focusing on the domestic need for raw materials, markets for finished goods, and new ports for cheaper exporting.[35]

D. Culture

Cultural justifications are based on the "ethnic nation" argument, which underlies any justification for drawing a border in a specific place because of a common language, religion, kinship, or other cultural characteristic that defines the group of people living in a particular territory.[36] At the core of the cultural claim is a sense of

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30. Burghardt, *supra* note 16, at 237; *see also* Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703, 730–31 (2001) (examining the economic value of control over land and water). *But see* Zacher, *supra* note 27, at 244 (asserting that economic justifications for seizing land are less forceful today because agricultural production is less significant).

31. *See* HILL, *supra* note 7, at 106 ("The most common economic claim made to territory is the need for raw materials and industrial products."); Burghardt, *supra* note 16, at 237–38 (discussing economic claims to "[p]ort cities . . . railroad lines, ship channels, and mineral deposits").

32. *See* BETH A. SIMMONS, TERRITORIAL DISPUTES AND THEIR RESOLUTION: THE CASE OF ECUADOR AND PERU 3 (U.S. Inst. of Peace, Peaceworks No. 27, 1999) (arguing that border stability enhances investor confidence and assists exporters).

33. *See* HILL, *supra* note 7, at 92 (articulating the two principal means by which states acquire sea access: "annexation of territory containing rivers that lead to the seaports of a neighboring state" and "acquisition of territory with a coast line and seaports").

34. *Id.* at 107 (describing Italy's claim to the Trentino region in the 1860s).

35. *Id.* at 112–14.

36. *See* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 219–24 (1985) (discussing self-determination in the context of language); Herb, *supra* note 27, at 12 (discussing ethnic identity based on "the commonality of language and culture"); David B. Knight, *People Together, Yet Apart: Rethinking Territory, Sovereignty, and Identities*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY, *supra* note 25, at 71, 74–75 (noting the "religious, political, cultural, historical, and psychological bases" of group territorial identities); Juan J. Linz, *From Primordialism to Nationalism*, *in* NEW NATIONALISMS OF THE DEVELOPED WEST: TOWARD EXPLANATION 203, 204 (Edward A. Tiryakian & Ronald

belonging, but the characteristic creating this belonging varies by group and region.[37] In modern Western history, language has been the chief unifier, whereas in the Middle East religion has played that role.[38] Language has also been used as a distinguishing characteristic that has enabled ruling classes to emerge to the detriment of minority groups.[39] In a territorial claim based on culture, the claimant state contends that because of shared pasts, the inhabitants of the disputed territory share the "same national background and aspirations" as the inhabitants of the claimant state.[40]

Cultural claims to territory are often analogized to claims based on the doctrine of self-determination,[41] which draws state boundaries corresponding to the distribution of national groups within the territory,[42] regardless of how such groups may be defined.[43] Ideally, self-determinative actions would result in a more culturally homogenous state. This is by no means the norm, however, because of group overlap and irreconcilable circumstances such as intractable intergroup conflicts and racial and religious intermixing.[44] Ironically, in such circumstances, those who previously decried the injustice of being ruled by a foreign minority may end up attempting to homogenize the territory by pursuing policies of exclusion, expulsion, or violence.[45]

Rogowski eds., 1985) (commenting that many nationalist movements referred to primordial ties "based on a common language, culture, distinctive religion, or kinship"); Zacher, *supra* note 27, at 244 (asserting that states seek to acquire territory to "protect[] . . . ethnic compatriots who are being mistreated in other states").

37. *See* Brilmayer & Klein, *supra* note 30, at 731 (noting that people "develop strong attachments to the places where they settle into communities"); Malcolm N. Shaw, *Territory in International Law*, 13 NETH. Y.B. INT'L L. 61, 63 (1982) (noting that territory contributes to "a sense of group identity").

38. Burghardt, s*upra* note 16, at 233.

39. *See* Herb, *supra* note 27, at 19–20 (arguing that language can be an ineffective method of defining the spatiality of nations because of minorities on the periphery).

40. HILL, s*upra* note 7, at 119.

41. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, para. 1, 999 U.N.T.S. 171, 173 ("All peoples have the right of self-determination."); *see also* U.N. CHARTER art. 1, para. 2 ("To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .").

42. HILL, *supra* note 7, at 115; *see also* Herb, *supra* note 27, at 11–13 (discussing the application of self-determination principles in the post-World War I and post-World War II periods).

43. *See supra* text accompanying notes 38–39.

44. HILL, *supra* note 7, at 115; *see also* Burghardt, *supra* note 16, at 235 (citing examples of states with strong ethnic minorities).

45. *See* HOROWITZ, *supra* note 36, at 197–201 (discussing ethnic exclusion).

E. Effective Control

A claim based on effective control is one in which a group claims certain land because the group has "uncontested administration of the land and its resident population."[46] Many scholars believe that under international law, effective control is the shibboleth—indeed, the *sine qua non*—of a strong territorial claim.[47] Under property law generally, possession is a large factor in the determination of a property right.[48] Professor Andrew Burghardt acknowledges that the principal questions surrounding any such claim are twofold: (1) what constitutes an abandonment of the land by the last governing entity, and (2) what constitutes administration of the land.[49]

The status of abandonment as a precondition to effective control is highly debatable. One scholar would require that the land be *terra nullius*[50]—a "territory not belonging to any particular country."[51] Previously, only discovered land was *terra nullius*; now, the term encompasses land over which no state exercises sovereign control.[52] Another scholar defines abandonment as a "failure to maintain a minimum degree of sovereign activity."[53] When the rightful sovereign acquiesces in the control of territory by the infringing sovereign, the requirement of abandonment is inapplicable altogether.[54] This is the legal doctrine of acquisition by acquiescence, generally accepted by common lawyers and rejected by civil lawyers.[55] In many ways, it is analogous to the common law principle of title by adverse possession.

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46. Burghardt, *supra* note 16, at 228; *see also* Shaw, *supra* note 37, at 82 (asserting that the key to effective control is possession).

47. YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 100 (1965) (quoting D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L. 332, 345 (1950)); *see also* HILL, s*upra* note 7, at 146–49 ("Modern claims to *terra nullius* rely heavily on occupation."); Brilmayer & Klein, *supra* note 30, at 714–16 ("[W]hen title to territory is contested, the single most important indicator of legal title to land is possession . . . .").

48. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 1.4.2.1 (2001) ("It is often accurately said that 'possession is nine-tenths of the law.'").

49. Burghardt, *supra* note 16, at 228–29.

50. HILL, *supra* note 7, at 146.

51. BLACK'S LAW DICTIONARY 1483 (7th ed. 1999).

52. *See* HILL, *supra* note 7, at 146 ("[Discovery] came to be looked upon as, at the most, merely creating an inchoate title to be 'consummated by possession' . . . ." (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823))).

53. JENNINGS, *supra* note 7, at 30.

54. *See* BLUM, *supra* note 47, at 14–15, 51 ("[P]rescriptive rights [to territory] are acquired solely by adverse holding.").

55. *Id*. at 7.

The effective control doctrine is not without problems, though. In particular, the lack of consensus on the applicable standards has resulted in many competing claims.[56] Specifically, these claims have questioned the quantum of control required, as well as its quality—namely, whether private actors can contribute to a state's effective control of a territory.

As to administration of the land, definitions vary, but the central issue is defining "the degree and kind of possession" from which title will issue.[57] Professor Hill argues that, at its pinnacle, effective control is "the establishment of governmental control sufficient to provide security to life and property;"[58] at a minimum, the "occupation must have been real or 'effective.' . . . [This condition is satisfied] when there is an announced intention to acquire, and actual settlement or occupation with the assertion of governmental authority has taken place."[59] Professor Burghardt states that administration must be continuous and occupation effective: "[I]deally, the territory should be settled throughout and the natural resources of the area should be developed and used."[60] Professor Yehuda Blum describes administration as the exercise of the appropriate amount of political, military, or administrative control under the circumstances and with the intention to govern the territory.[61] Some commentators suggest that the longer the duration of the administration, the more substantial the justification for a territorial claim based on effective control.[62]

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56. *See infra* Part II.

57. JENNINGS, *supra* note 7, at 20.

58. HILL, *supra* note 7, at 147.

59. *Id.* at 146–47; *see* Brilmayer & Klein, *supra* note 30, at 715–16 ("The state must engage in acts of jurisdiction that demonstrate its sovereignty over the territory; it must treat the area in question as its own.").

60. Burghardt, *supra* note 16, at 229.

61. BLUM, *supra* note 47, at 101, 110, 118.

62. *See* HILL, *supra* note 7, at 156–57 ("[C]ontinuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order." (quoting L. OPPENHEIM, INTERNATIONAL LAW, ¶ 242 (3d ed. 1920)); *cf.* BLUM, *supra* note 47, at 53–55 ("In all the cases where an historic title is asserted, the time factor fulfils the function that is usually assigned to express recognition or positive consent . . . .").

F. History

Historical claims to territory are based on historical priority (first possession) or duration (length of possession).[63] Although effective control (possession) presents the strongest claim under property law, historical claims create an underlying entitlement to territory, regardless of whether a state has actual or constructive possession of the land at the time of the claim.[64] Thus, historical claims tend to be most common, compared to the other claims discussed here.[65] A claim of historic right is bolstered by the passage of time; when the encroached state does not act to counter the claimant's right, it is deemed to have acquiesced in that right and is estopped from rejecting the title for lack of consent.[66] Claims based on historical priority are most closely related to claims based on historic title because such titles are generally derived from first-in-time claims to land.[67]

Historical claims often relate to cultural claims, because the greater the cultural importance of the territory, the stronger the

63. Burghardt, *supra* note 16, at 230.

64. *See* SHARMA, *supra* note 7, at 31 ("The most common way in which a historic claim is advanced is to refer to a set of historical facts to establish that they logically lead to a right to historic possession."); Burghardt, *supra* note 16, at 230–33 ("Historical claims are greatly strengthened by duration, by the existence over a long period of time (preferably to the present day) of those features that form the basis of the claim."). *See generally* Alexander B. Murphy, *Historical Justifications for Territorial Claims*, 80 ANNALS ASS'N AM. GEOGRAPHERS 531 (1990) ("[J]ustifications now offered in support of territorial claims are almost invariably couched in terms of recovery of territory that historically belonged to the claiming state.").

65. *See, e.g.*, Knight, *supra* note 36, at 73 ("Most conflict over territory is based on historical claims (some of which are quite dubious).").

66. *See* BLUM, *supra* note 47, at 55, 90–91 ("[I]n certain situations one party's failure to act or his acquiesence 'will prejudice his rights against another who has been misled by that party's inaction or silence.'" (quoting O.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 198 (1957))). In this respect, claims based on history and effective control can overlap.

67. *See id.* ("In all cases where an historic title is asserted, the time factor fulfils the function that is normally assigned to express recognition or positive consent . . . ."). Colonialism wholly rejected the validity of territorial claims based on priority and, in most cases, duration, as well. Historical claims to colonies by the colonial powers lay primarily in discovery, settlement, treaties with natives, and treaties among the colonizing nations to parse out their claimed territories in an organized fashion. HILL, *supra* note 7, at 90–91. Subsequent to the initial colonization, the powers claimed sovereignty over the colonies on historical grounds more than on grounds of effective control; in many cases, local control had been transferred to a select ruling class of the natives, and the locally based colonials were there for commercial, as opposed to administrative, purposes. *See id.* at 91 (discussing colonial powers' competing claims over parts of Africa).

historical claim to it. Historical claims are strong when the territory in question is the claimant group's homeland because that "includes both priority and duration and expresses the ultimate case of man-land symbiosis."[68] The history of the people and their land "fleshes out the identity of the nation, reveals it as a community of fate, and gives it genetic legitimacy. It can be based on events that have actually taken place or on myths that were purposely constructed."[69] The land and its inhabitants' identities reinforce each other.

G. Uti Possidetis

Uti possidetis,[70] a principle used to define postcolonial boundaries in Latin America, Asia, and Africa,[71] is a doctrine under which newly independent states inherit the preindependence administrative boundaries set by the former colonial power.[72] The doctrine posits that title to the colonial territory devolves to the local authorities[73] and prevails over any competing claim based on occupation.[74] Thus, *uti possidetis* is predicated on a rejection of self-determination and assumes that internal, administrative boundaries are functionally

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68. Burghardt, *supra* note 16, at 232; *see also* HOROWITZ, *supra* note 36, at 208 ("In general, the closer the identification of the group with the soil, the more powerful the pretension."). *See generally* David H. Kaplan, *Territorial Identities and Geographic Scale*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY & SCALE, *supra* note 27, at 31 ("National identity . . . is bound up with the territory that helps define it . . . .").

69. Herb, *supra* note 27, at 16.

70. *See supra* note 5 and accompanying text. *Uti possidetis* originated in Roman law as a procedural rule that shifted the burden of proof to the party not holding the land. JOHN BASSETT MOORE, MEMORANDUM ON UTI POSSIDETIS 5–8 (1913).

71. *See* P. Mweti Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 J. INT'L L. & PRAC. 159, 215 (1998) (discussing how the ICJ has used *uti possidetis* to decide boundary disputes in Africa); Zacher, *supra* note 27, at 229–31 (describing the doctrine's application in Latin America and Africa). *See generally* Thomas, *supra* note 25, at 87–99 (outlining problems with the stability of postcolonial borders in Africa, Asia, and Latin America).

72. *See generally* Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996).

73. Simmons, *supra* note 32, at 4; Burghardt, *supra* note 16, at 229; *see also* HILL, *supra* note 7, at 154–56 (describing the doctrine's development in Latin America). *But see* BLUM, *supra* note 47, at 341–42 (arguing that the principle of *uti possidetis* is ambiguous because there are differences of opinion as to whether it means actual or rightful possession at the time of independence).

74. *See* HILL, *supra* note 7, at 155 ("This doctrine established a rule that was to be regarded as superior to occupation."); *see also* Zacher, *supra* note 27, at 221 (noting that, in the context of decolonization under the UN Charter, "[t]he colonial territory which was often artificial in terms of delimiting ethnic nations, became the frame of reference").

equivalent to international boundaries.[75] Commentators criticize *uti possidetis* because administrative colonial borders were almost always vaguely drawn[76] and did not correspond to the inhabitant populations. Consequently, these commentators argue, reliance on *uti possidetis* has led to many border disputes.[77]

H. Elitism

Elitist claims to territory contend that a "particular minority has the right or duty to control certain territories."[78] Conquerors—who, historically, made such claims most frequently—often shaped them in terms of divine rights to rule certain territory.[79] Such claims have become rarer over time because they "run counter to the democratic ideal."[80] Nevertheless, elitist claims have a modern and public incarnation in arguments for territory based on superior technological ability—a particular group claims control over a territory by virtue of having the capacity to develop the land's potential most fully.[81] Such claims are consistent with a labor theory of property law, which grants property rights to the person (or entity) investing labor in the land, thereby making it productive.[82] But for the capable person's labor or technological ability, the territory's resources and potential would not be tapped.

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75. Ratner, *supra* note 72, at 591. Professor Ratner contends that such boundaries are not functionally equivalent. *See id.* ("[A]pplication of *uti possidetis* to the breakup of states today . . . ignores critical distinctions between internal lines and international boundaries . . . .").

76. *See, e.g.*, CUKWURAH, *supra* note 7, at 114–15 ("In some areas . . . at the time of independence the colonial administrative authorities of a given political unit had been in fact exercising civil jurisdiction beyond the line designated, approximately at least, as the limit of their territorial jurisdiction . . . .").

77. *See* HILL, *supra* note 7, at 24, 31, 155 (explaining that the application of *uti possidetis* has created unclear boundaries, resulting in many disputes in Latin America and Asia); *see also* Murphy, *supra* note 64, at 542 (discussing postcolonial interstate territorial conflicts in sub-Saharan and West Africa). In attempting to resolve these disputes, cross-claimants have relied on old royal documents, decrees, and agreements as evidence to demonstrate the intention of the powers in dividing their colonial territories. CUKWURAH, *supra* note 7, at 115; HILL, *supra* note 7, at 155.

78. Burghardt, *supra* note 16, at 238.

79. *Id.*

80. *Id.*

81. *Id.* at 239.

82. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 27 (Richard H. Cox ed., Harlan Davidson 1982) (1690) ("Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his property."); *see also* SINGER, *supra* note 48, § 1.4.2.2 (summarizing Locke's labor theory).

I. Ideology

Ideological justifications resemble claims of a "special mission" based in "[u]nique identification with the land" and having inherent "exclusivist overtones."[83] Thus, ideological justifications for territorial claims are more appropriately termed ideologically imperialist. Chief examples of this claim are the Crusades, the Ottoman Turks' eastern advance, anticolonialism, and social justice,[84] among others.[85] The anticolonial ideological justification, which argues that colonial borders are per se inappropriate delimiters of territory for moral or legal reasons, is essentially the antithesis of a *uti possidetis* claim.[86]

II. EVOLUTION OF THE ICJ'S TERRITORIAL DISPUTE JURISPRUDENCE

This Part uses the foregoing categories of justifications for territorial claims to analyze nine land disputes adjudicated by the ICJ. These cases are the only land boundary cases that the court has adjudicated.

A. Minquiers and Ecrehos (France/United Kingdom)

By special agreement,[87] France and the United Kingdom (U.K.) submitted to the ICJ their dispute over the sovereignty of the Minquiers and Ecrehos island groups, located in the English Channel between Jersey (U.K.) and the French mainland.[88] The parties made arguments based on treaty law, history, and effective control.

The court rejected all arguments based on feudal land grants and fisheries agreements, all of which antedated 1648,[89] because none

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83. HOROWITZ, *supra* note 36, at 204.

84. Social justice here is "the right to obtain recompense for injustices and sufferings endured." Burghardt, *supra* note 16, at 240. For example, after World War II, Ethiopia was awarded Eritrea, a former Italian colony, to compensate for Italy's occupation of Ethiopia during the war. *Id. See generally* SINGER, *supra* note 48, § 1.4.1.1 ("Rights language, broadly conceived, includes any normative arguments that justify property regimes or rules because they are right—because they describe ways in which people *should* behave toward each other." (emphasis added)).

85. Burghardt, *supra* note 16, at 239–40; *see also* HILL, *supra* note 7, at 141 (discussing the German colonial claims during and after World War I).

86. Burghardt, *supra* note 16, at 239–40.

87. For an explanation of special agreements, see *supra* note 9 and accompanying text.

88. Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47 (Nov. 17).

89. The Peace of Westphalia, defining the modern interstate system, was agreed to in 1648. *See* Treaty of Westphalia, Oct. 24, 1648, *available at*

specified a border or "which islands were held by the Kings of England and France respectively."[90] Judge Basdevant, writing a separate opinion, concurred: "Suzerainty . . . is not sovereignty," noting the important distinction that the court implicitly made in dismissing claims based ambiguously on feudal titles.[91]

In the absence of a valid treaty claim, the court considered the effective control arguments and found that the British government exercised sovereign jurisdiction and local administration over Minquiers and Ecrehos through such acts as judicial proceedings, local ordinances regarding the handling of corpses, levying taxes, licensing commercial boats, registering deeds to real property, and conducting census enumerations and customs affairs.[92] Thus, the court awarded the territory to the United Kingdom.[93]

B. Sovereignty over Certain Frontier Land (Belgium/Netherlands)

The Kingdoms of Belgium and of the Netherlands submitted a frontier dispute to the ICJ by special agreement that charged the court with deciding which party had sovereignty over certain border plots.[94] The disputed border was marked by several enclaves around Baerle-Duc, a Belgian commune, and Baarle-Nassau, a Dutch commune.[95] The parties made claims based on treaties and effective control.

The court held that the parties' 1843 Boundary Convention established the border, and that the disputed plots were Belgian.[96] This holding stemmed from the evolution of previous bilateral treaties between Belgium and the Netherlands.[97] One treaty was the 1842 Boundary Treaty, which charged a Mixed Boundary Commission with defining the border by maintaining the administrative status quo.[98] The commission's work resulted in the

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http://www.yale.edu/lawweb/avalon/westphal.htm (the Treaty ended the Eighty Years' War and part of the Thirty Years' War).

90. *Minquiers and Ecrehos*, 1953 I.C.J. at 54.

91. *Id.* at 75.

92. *Id*. at 65–69.

93. *Id*. at 72.

94. Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 210–11, 212 (June 20). The disputed plots amounted to a total area of 14.378 hectares. *Id.* at 233.

95. *Id*. at 212–13.

96. *Id*. at 222.

97. *Id.*

98. *Id*. at 214.

1843 Boundary Convention, which, in an annexed document, provided that the plots were part of Baerle-Duc.[99] The court considered the commission's product dispositive because the commission derived its mandate from the 1839 Treaty of London, which made Belgium and the Netherlands separate kingdoms.[100]

The court rejected the Dutch claim that the 1843 Boundary Convention did not reflect the common intention of the parties and was therefore void under the doctrine of mistake.[101] The court also rejected the Dutch contention that acts of sovereignty exercised in the disputed plots extinguished any Belgian title thereto.[102] The court aptly stated the issue as follows:

> This is a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention, sovereignty resided in Belgium. The question for the Court is whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.[103]

The court found that Belgium had not ceased to assert its rights and that the Netherlands' encroachments were insufficient to supplant Belgian sovereignty for two reasons.[104] First, the encroaching acts were "largely of a routine and administrative character performed by local officials and a consequence of the inclusion by the Netherlands of the disputed plots in its Survey."[105] Second, the plots were enclaves in the Netherlands, making it difficult for Belgium to detect these encroachments upon its sovereignty and exercise its own authority over the plots.[106] The court thus awarded the territory to Belgium.[107]

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99. *Id*. at 214–16.

100. *Id*. at 221.

101. *Id*. at 227. The doctrine of mistake annuls a contract when, because the parties did not assent to the same proposition, there is no meeting of the minds. CHIRELSTEIN, *supra* note 18, at 140.

102. *Sovereignty over Certain Frontier Land*, 1959 I.C.J. at 230.

103. *Id*. at 227.

104. *Id*. at 229.

105. *Id.*

106. *Id.*

107. *Id*. at 230.

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

Cambodia brought this action against Thailand for infringing its territorial sovereignty over the land surrounding the ruins of the Temple of Preah Vihear.[108] Thailand denied all violations of Cambodian sovereignty, claiming that the ruins were on its side of the common border.[109] The parties made claims based on treaties, effective control, history, geography, and culture.

The Temple, an "ancient sanctuary and shrine" of "considerable artistic and archaeological interest," sat on the Thai side of the countries' common border, on an escarpment that jutted into the Cambodian plain.[110] The dispute focused on a 1904 boundary treaty in which France and Siam (as Thailand was then called) established the border that later separated Cambodia and Thailand.[111] Thailand asserted its own claim to the Temple land on the theory that Cambodia could have no territorial sovereignty over land on the Thai side of the border.[112]

The court rejected the Thai argument because maps drawn when the border was delimited, coupled with French and Siamese reliance on these maps, indicated that the entire Preah Vihear region was located in what became Cambodia.[113] The 1904 French-Siamese boundary treaty substantiated the Cambodian claim to sovereignty over the Temple land.[114] That treaty, according to the court, established the watershed line as the border but rested ultimate authority to draw the border with the Mixed Boundary Commission.[115] In tandem with drawing the border, the commission had authority to map the entire region, which it delegated, with the consent of the Siamese commission representatives, to French officers.[116] The French officers mapped the area and placed the Temple in French Indochina.[117] Neither France nor Siam ever formally adopted these maps, but each country implicitly accepted

108. Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 9 (June 15).
109. *Id*. at 14.
110. *Id*. at 15.
111. *Id*. at 16.
112. *Id.* at 14.
113. *Id.* at 17.
114. *Id.* at 20–21.
115. *Id.* at 17.
116. *Id*. at 20, 32–33.
117. *Id.* at 20–21.

them.[118] This implicit acceptance of maps showing the Temple in what became Cambodia substantiated Cambodia's claim against Thailand. The maps derived their importance from their mandate in the 1904 boundary treaty, and the borders that they reflected devolved to Cambodia and Thailand under *uti possidetis*.

The court also rejected Thailand's effective control claims by which it had asserted that acts subsequent to the 1904 treaty manifested its exercise of sovereignty.[119] Thailand's administrative acts were conducted by local authorities, were "very few [and] routine," and did not suffice to annul "the clear impression of acceptance of the frontier line at Preah Vihear."[120] When Siam openly flouted French (and later, Cambodian) sovereignty in the disputed area, the latter replied through diplomatic channels, reaffirming its rights, to engage Thailand in dialogue. The court found this evidence of continued French and Cambodian jurisdiction over the Temple persuasive.[121]

By relying on the maps produced by the 1904 boundary treaty, the court dismissed as legally indecisive all arguments of a "physical, historical, religious [or] archeological character."[122] This was tantamount to a rejection of these factors as "incidental equitable considerations."[123]

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118. *Id.* at 23.

119. *Id*. at 27–29.

120. *Id*. at 30.

121. *Id*. at 31–32.

122. *Id*. at 15.

123. MIYOSHI, *supra* note 13, at 114:

> [B]asically whatever one does—feasance or nonfeasance—can have a cultural background, and consequently can be treated in a discriminatory way under the rules of procedure if these are not a fair representation of "the main forms of civilization and of the principal legal systems of the world." If, therefore, an act or omission at issue is of such a basic nature as to reflect inherent cultural values, it may require some special consideration, rather than a mere consideration as a relevant circumstance.

Id. at 207 (quoting ICJ Statute, *supra* note 8, art. 9, 59 Stat. at 1056). Based on the court's holding, it might appear that the justifications less legal in nature (i.e., geography, culture, history, economy, ideology, and elitism) are mere straw men in this Note, but it would be error to dismiss them so quickly. Many states—some more persuasively than others—make legal arguments based on these justifications, cast in terms of property rights based on personality theory. For an articulation of the personality theory of property, *see* SINGER, *supra* note 48, § 1.4.1.3.

D. Frontier Dispute (Burkina Faso/Mali)

By special agreement, Upper Volta (Burkina Faso) and Mali submitted a boundary dispute to the court for adjudication in 1983.[124] The special agreement identified the disputed territory as a strip of land containing a temporary watercourse that was important for agriculture and grazing in the Dori region around the Béli River.[125] The region was formerly part of French West Africa, and decolonization led to competing land claims when the land was divided into independent states in 1960.[126] The parties made claims based on treaty law and effective control.[127]

The court dismissed assertions of sovereignty and exercises of administrative control as immaterial.[128] Instead, the case turned on the location of boundaries at various critical dates under French colonial law.[129] Colonial *effectivités*[130] can "support an existing title" if they can be "compared with the title in question."[131] Here, no such title existed, so the French colonial *effectivités* could not alone delimit the border. Consequently, the court set the border at Burkina Faso's 1932 borders insofar as those limits were ascertainable from the evidence. This border was based on *uti possidetis*, as France, in 1947, set the border at its December 1932 limits, which included the former colony Upper Volta.[132]

Thereafter, the court essentially halved the disputed territory, in recognition of inconsistencies and gaps in the record.[133] When such inconsistencies or gaps existed, the court proceeded in equity, dividing the disputed territory in half.[134] Nevertheless, the court was

124. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 556–57 (Dec. 22).

125. *Id*. at 562; BORDER AND TERRITORIAL DISPUTES 105 (Alan Day ed., 2d ed. 1987).

126. *Frontier Dispute*, 1986 I.C.J. at 570.

127. *Id*.

128. *Id*.

129. *Id*.

130. *Effectivités* are administrative activities that demonstrate jurisdiction over territory; most frequently, they include deed registration, tax collection, and licensing of professions. *See id.* at 586.

131. *Id*.

132. *Id.* at 586–87.

133. *See id*. at 583–87.

134. *Id*. at 632, 640–41, 647.

barred from deciding the case *ex aequo et bono*[135] because the parties had not consented to this.[136] Equity *infra legem*—equity used as a "method of interpret[ing] . . . the law in force"—guided the court instead.[137]

E. Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua Intervening)

El Salvador and Honduras brought this case by special agreement in 1986,[138] charging the court with delimiting a boundary line that constituted two-thirds of the 343-kilometer border between El Salvador and Honduras.[139] The disputed boundary consisted of land that the parties' 1980 General Treaty of Peace between the two parties failed to describe.[140] Additionally, the countries asked the court to determine the status of a number of islands and maritime spaces in the Gulf of Fonseca.[141] The parties made arguments based on treaties, elitism, economics, history, and effective control.

The court grounded its decision in *uti possidetis*,[142] when possible, and relied otherwise on postcolonial effective control and possession. The most persuasive evidence in this analysis was documentation and manifestations of state action from the colonial period.[143] Additionally, the court rested on equity *infra legem* when irreconcilable evidence undermined both countries' claims.[144]

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135. The parties' special agreement governed the scope of the court's review under Article 38 of the court's Statute and did not permit review *ex aequo et bono*. *See supra* note 13 and accompanying text.

136. *See Frontier Dispute*, 1986 I.C.J. at 567 ("It is clear that the Chamber cannot decide *ex aequo et bono* in this case.").

137. *Id*. at 567–68.

138. Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), 1992 I.C.J. 351, 356 (Sept. 11). Nicaragua, as an interested third party, intervened in the proceedings with respect to maritime issues. This Note considers only the land and island disputes.

139. *Id.* at 357; BORDER AND TERRITORIAL DISPUTES, *supra* note 125, at 425.

140. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 356.

141. *Id.* at 351.

142. *Id.* at 391–92.

143. *See id.* at 417 (considering each party's interpretation of a 1776 title survey); *id.* at 423–24 (referencing a 1935 agreement between El Salvador and Honduras that established a border between the two countries); *id.* at 434–35 (referring to the issuance by Honduras of three titles to land in dispute); *id.* at 465 (granting weight to a 1742 title document and to 1766 and 1786 surveys); *id.* at 469 (basing a boundary decision on two titles); *id.* at 486 (noting that El Salvador relied on borders established in 1815 by a decree of the *Real Audiencia*); *id.* at 510 (relying on surveyor results that both parties had approved previously).

144. *Id.* at 514. For a definition of equity *infra legem*, see text accompanying note 137.

Significantly, in reaching its decision the court rejected all claims based on *terra nullius*[145] and historic titles predating the parties' 1821 independence.[146] The court did not resort to competing historic claims based on priority, which meant that the location of the Spanish provincial boundaries was dispositive in the land frontier determination—*uti possidetis* controlled.

The special agreement invoked the 1980 General Treaty of Peace, which allowed the parties to admit a broad scope of evidence in disputes arising under the treaty.[147] However, the majority of this evidence did not influence the court's analysis. For instance, the court dismissed evidence of El Salvador's high population density, which supported El Salvador's elitist claim, and of the economic necessity of the land to El Salvador.[148] Instead, the court conducted an effective control analysis because Spanish boundaries were practically nonexistent and evidence about historic events was inconclusive.[149] It focused this analysis on postcolonial possession and jurisdiction as indicators of the parties' perceptions about the limits of their territorial sovereignty.[150] The court considered two factors to determine whether either party acquiesced in the control of the islands by the other party—one, the parties' conduct after independence as a proxy for the situation in 1821, and, two, the parties' more recent conduct.[151] Given that the islands were left unoccupied for many years after independence because they had little economic value,[152] the court held that even after many years of lack of possession, later "[p]ossession backed by the exercise of sovereignty [could] be taken as evidence confirming the *uti possidetis juris* title."[153] The court therefore awarded the islands to whichever party had exercised postcolonial effective control.

145. *See supra* note 51 and accompanying text (defining *terra nullius*).
146. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 544.
147. *Id.* at 357–58.
148. *Id.* at 396–97.
149. *Id.* at 563.
150. *Id*. at 558.
151. *Id*. at 563.
152. *Id.* at 565.
153. *Id*.

F. Territorial Dispute (Libya/Chad)

Libya and Chad submitted a dispute over the Aozou Strip to the court in 1990.[154] The conflict began in 1973 when Libya's Colonel Mohammar Qaddafi annexed the strip of land—a purported source for uranium—in northern Chad.[155] The parties made arguments based on treaty law, *uti possidetis*, ideology, and elitism.

The court rejected Libya's argument that the 1955 Treaty of Friendship and Good Neighbourliness did not establish a boundary between the two countries, finding that, when interpreted in good faith with ordinary meanings imputed to its terms, the 1955 Treaty left no boundaries undefined.[156] The court confirmed this reading by consulting the Treaty's *travaux préparatoires*, which indicated clearly that Libya understood that the boundaries were set.[157] The 1955 Treaty encompassed by reference and inclusion in pendant annexes several antecedent agreements that codified the international boundaries.[158] Because the court affirmed the validity and scope of the 1955 Treaty, the court applied the boundaries as prescribed in the annexed agreements.[159]

The court further held that, because the 1955 Treaty was clear on the boundary question, it was unnecessary for the court to consider *uti possidetis*, title inherited from indigenous peoples (a Libyan ideological claim[160]), or spheres of influence (a Libyan elitist claim).[161] The court therefore ruled in favor of Chad.[162]

G. Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)

In 1991, Qatar instituted proceedings against Bahrain before the ICJ to resolve a dispute about sovereignty over the land chunk Zubarah, the Hawar Islands, and the island Janan, all located

154. Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, 8–9 (Feb. 3).
155. BORDER AND TERRITORIAL DISPUTES, *supra* note 125, at 113–14.
156. Territorial Dispute, 1994 I.C.J. at 21–26.
157. *Id.* at 27–28.
158. *Id.* at 28–33.
159. *Id*.
160. *Id.* at 12–13.
161. *Id.* at 38–40.
162. *Id.* at 40.

between the Qatari peninsula and Bahrain.[163] The history of Bahrain and Qatar, both former British protectorates, figured prominently in the dispute.[164] Qatar and Bahrain made arguments based on *uti possidetis*, effective control, history, and geography.

The court found Bahrain's arguments as to sovereignty over Zubarah untenable on all counts.[165] For one, it deemed Bahrain's exercises of sovereign activity piracy, meaning that they could not create a legitimate claim to territorial sovereignty.[166] Moreover, the court found persuasive evidence of the parties' shared understanding that Qatar's predecessors in interest would govern the entire Qatari peninsula, including Zubarah,[167] reflected in long-standing Qatari settlements in Zubarah.[168]

As to the Hawar Islands, the court rejected Qatar's claim not to have consented to the 1939 British decision that the islands were part of Bahrain, finding it dispositive that both parties had pled their cases before the British authorities.[169] The court therefore declined to consider Qatar's arguments based on colonial *effectivités*,[170] original title, and geographic proximity. Because the court found the British decision dispositive,[171] it did not consider Bahrain's effective control argument.

The court also found the United Kingdom's 1939 award dispositive as to sovereignty over Janan Island; that award, as interpreted by the British government in 1947, indicated that Janan Island was part of Qatar.[172] So holding, the court discounted Bahrain's argument that it effectively controlled the Island.

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163. Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), 2001 I.C.J. 40, 44, 49–50 (Mar. 16). This Note considers only the question of sovereignty over the islands, insofar as that question is conceptually distinct from the maritime delimitation.

164. *See id.* at 54–64 (describing the history of the dispute).

165. *Id.* at 69.

166. *Id.* at 67.

167. *Id.* at 68.

168. *See id*. at 67–68 (citing agreements dating back to 1913).

169. *Id.* at 83–84.

170. *Id.* at 85.

171. *Id.* at 83–84.

172. *Id.* at 90–91.

H. Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea Intervening)

In 1994 Cameroon lodged proceedings against Nigeria, focusing generally on sovereignty over the Bakassi Peninsula and the Lake Chad region.[173] Underlying this dispute were two 1961 regional plebiscites that provided for the annexation of the disputed territory by Cameroon. Despite the plebiscites, the annexation never occurred because of a minority population in the disputed region that did not wish to be incorporated into Cameroon.[174] Before the ICJ, the parties made arguments based on treaties, history, effective control, and *uti possidetis*.

The court resolved the parties' treaty and *uti possidetis* arguments by looking to preindependence colonial actions. The court found that the 1929–1930 Thomson-Marchand Declaration, to which the United Kingdom and France had agreed, made a detailed delimitation of the interstate border.[175] The court found particularly persuasive the United Nations Trusteeships over Nigeria and Cameroon after World War II, which explicitly referred to the Thomson-Marchand Declaration and to the 1931 Henderson-Fleuriau exchange of diplomatic notes that made the Declaration an international agreement at law.[176] Similarly, the subsequent work of the Lake Chad Basin Commission strongly indicated that the Declaration had defined the disputed frontier, rejecting Nigeria's claim to the contrary.[177]

The court wholly rejected Nigeria's historical consolidation of title argument, holding that it could not "replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law."[178] The court also reaffirmed its holding in *Frontier Dispute* that effective control through *effectivités* are subsidiary to and unable to supersede a

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173. Land and Maritime Boundary (Cameroon v. Nig.: Eq. Guinea intervening), 2002 I.C.J. 303, 342–44 (Oct. 10). This Note does not consider the maritime boundary question, on which Equatorial Guinea intervened.

174. BORDER AND TERRITORIAL DISPUTES, *supra* note 125, at 111.

175. *Land and Maritime Boundary*, 2002 I.C.J. at 340.

176. *Id.* at 341.

177. *See id.* at 342–44 (describing the work of the Commission).

178. *Id.* at 352.

conventional title.[179] The court thus awarded the territory to Cameroon.[180]

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

In 1998 Indonesia and Malaysia, by special agreement, asked the ICJ "to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties" sovereignty over the islands of Ligitan and Sipadan, off the coast of Borneo.[181] The parties presented arguments based on treaty law, *uti possidetis*, effective control, and history.

The court began its analysis with the 1891 British-Dutch Convention and found that it did not address the boundary in question.[182] Lacking a treaty law basis for its decision, the court turned first to subsequent agreements between Great Britain and the Netherlands, and then to the parties' subsequent practice, in an unsuccessful attempt to understand the parties' mutual intent.[183] The court then examined the competing claims of *effectivités* as an independent basis for the judgment[184] and held that Indonesia's claimed *effectivités* were not of a "legislative or regulatory character," rendering them unpersuasive.[185] The court considered, however, that Malaysia's regulation of the commercial collection of turtle eggs and establishment of a bird sanctuary on the islands were sufficiently administrative to demonstrate effective control.[186] The court thus found the *effectivités* arguments a sufficient basis for its decision.[187]

III. THE ICJ'S HIERARCHICAL DECISION RULE

This Part argues that the court, in analyzing the competing claims for sovereignty involved in territorial disputes, applies a tripartite, hierarchical decision rule that looks first to treaty law, then to *uti*

179. *Id.* at 353.

180. *Id.* at 355.

181. Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 I.C.J. 625, 630 (Dec. 17).

182. *Id.* at 652–53.

183. *Id.* at 653–56.

184. *Id.* at 678.

185. *Id.* at 683.

186. *Id.* at 684.

187. *Id.* at 674–78.

possidetis, and finally to effective control. This Part first analyzes the court's territorial dispute jurisprudence and then discusses the implications of the court's decision rule.

A. Analysis of the Court's Territorial Dispute Jurisprudence

The existence of a prior boundary treaty or other documentation reflecting interstate agreement as to boundaries (or provisions for their delimitation) is generally dispositive for the court. This rule often holds even when an agreement is unclear or incomplete. In cases when state consent is evident, the court has started and ended its legal analysis with the agreement.[188] For instance, in *Territorial Dispute* (Libya/Chad),[189] the court decided the case solely on the basis of treaty law, discounting all other arguments completely.[190] Furthermore, the court was unwilling to question the merits of the 1955 Treaty, which was not as clear as the court portrayed it. The court justified its decision, in part, by Libya's being a party to the treaty (as opposed to the successor in interest to a colonial power).[191] To question the substance of the treaty would be tantamount to questioning the parties' expressed preferences and thwarting the parties' and other states' reliance on the agreed terms of the treaty.

When no international agreement exists, however, the next most dispositive basis for a judgment is *uti possidetis*, if applicable.[192] It is unlikely that a decision would rest on *uti possidetis* alone, because almost all colonial boundaries were codified in some kind of instrument. In cases of internal boundaries, however, there may only be domestic understandings, accepted practices, or documentation on the local level. For instance, in *Frontier Dispute* (Burkina Faso/Mali), the court depended on the borders as they existed under French colonial law.[193]

In cases that do not concern postcolonial borders and that lack manifest consent as to borders, the court is most likely to base its decision on effective control.[194] In such cases, the duration and degree

188. *See supra* notes 96–100, 114–18, 156–59, 175–77 and accompanying text.

189. Territorial Dispute (Libya/Chad), 1994 I.C.J. 6 (Feb. 3).

190. *See supra* notes 160–61 and accompanying text.

191. *Territorial Dispute*, 1994 I.C.J. at 38.

192. *See supra* notes 118, 129, 142, 170–72 and accompanying text.

193. *See supra* note 129 and accompanying text.

194. *See supra* notes 92, 102–04, 142–43, 149–53, 179, 186 and accompanying text; *cf. supra* notes 119–21, 165–67, 184–85 and accompanying text (rejecting effective control claims).

of the control are the most important considerations because they make public the claimant state's exercise of the right. In *Minquiers and Ecrehos*, for example, the court's holding depended on the exercise of local administration.[195] In this respect, a decision based on solid effective control is analogous to a common law property award based on adverse possession, whereby the claimant's possession must be actual, open and notorious, exclusive, continuous, adverse or hostile, and extant for a certain period of time.[196] Although the international formulation is somewhat different, effective control claims are also based in law.[197] When the party whose territory is encroached in this manner acquiesces in the encroachment, the claim is bolstered, as in a common law adverse possession claim.

In *Minquiers and Ecrehos*, the court focused on acts of sovereignty and jurisdiction, whereas in *Sovereignty over Certain Frontier Land* (Belgium/Netherlands) and *Land and Maritime Boundary* (Cameroon v. Nigeria), the court almost wholly dismissed such acts, relying instead on treaties and agreements. This ruling was especially significant in the latter case because the treaty, as the court acknowledged, was imperfect and did not resolve all boundary issues.[198] Nonetheless, the imperfect agreement overrode a wealth of Nigerian circumstantial evidence on effective control of the disputed territory.[199]

The distinction between *Minquiers and Ecrehos* on the one hand, and *Sovereignty over Certain Frontier Land* and *Land and Maritime Boundary* on the other, is an important one. Much of the legal literature on territorial disputes focuses on title by acts of sovereignty and acquiescence by the opposing party. However, in *Sovereignty over Certain Frontier Land*,[200] and *Land and Maritime Boundary*, however, the court based its decisions squarely on treaty law, not on effective control.[201] In *Sovereignty over Certain Frontier Land*, Belgium had the clear treaty right, whereas the Netherlands had clear

195. *See supra* note 92 and accompanying text.

196. SINGER, *supra* note 48, § 4.2.

197. HILL, *supra* note 7, at 146–49. The doctrine of acquisition by effective control is a general principle of law because it is a prerequisite for title. Burghardt, *supra* note 16, at 228. It is also one of the five traditional modes of territorial acquisition. JENNINGS, *supra* note 7, at 20.

198. Land and Maritime Boundary (Cameroon v. Nig.: Eq. Guinea intervening), 2002 I.C.J. 303, 340–41 (Oct. 10).

199. *Id.* at 352–53.

200. Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 222 (June 20).

201. *Land and Maritime Boundary*, 2002 I.C.J. at 399.

effective control of the disputed territory.[202] In resolving this tension, the court created a hierarchy of justifications in cases of this nature.[203] *Land and Maritime Boundary* further reinforces this hierarchy, because the court based the core of its decision on an international agreement fixing the border and held that effective control through *effectivités* was subsidiary to any such agreement.[204]

The court has also demonstrated a preference for effective control justification over equity *infra legem*. In *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), the court went to great lengths to decide the case on the exercise of *effectivités* on the disputed islands. In the end it based its decision upon the fact that Malaysia regulated the collection of turtle eggs and established a bird sanctuary[205]—hardly analogous to the level of local administration in *Minquiers and Ecrehos*. The court was more willing to base its decision on evidence of effective control, though, than to resort to equity *infra legem* or any other decision rule.[206]

When the court lacks guidance from treaties, *uti possidetis*, or effective control, it is most likely to proceed in equity *infra legem* and halve the difference between the litigants' positions.[207] The court—somewhat ironically—prefers prescribing an equitable solution over entertaining justifications based on geography,[208] economics,[209]

202. *Sovereignty over Certain Frontier Land*, 1959 I.C.J. at 227.

203. *Id*.

204. *Land and Maritime Boundary*, 2002 I.C.J. at 353.

205. Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 I.C.J. 625, 684–86 (Dec. 17).

206. *See id*. at 674–78 (rejecting historic title arguments).

207. *See, e.g.*, Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 567–68 (Dec. 22) ("It is clear that the Chamber . . . . will have regard to equity infra legem, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes.").

208. *See, e.g.*, Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), 2001 I.C.J. 40, 85 (Mar. 16) (declining to engage in a discussion of the merits of the parties' geographic claims); Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 15 (June 15) (same).

209. *See, e.g.*, Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), 1992 I.C.J. 351, 396 (Sept. 11) ("[E]conomic considerations . . . could not be taken into account for the delimitation of the continental shelf areas appertaining to two States; still less can they be relevant for the determination of a land frontier which came into existence on independence."(citation omitted)).

culture,[210] history,[211] elitism,[212] or ideology.[213]

That these categories do not form part of the court's tripartite hierarchy merits some further discussion. Though claimants sometimes raise geography, this issue is conspicuously absent from the court's holdings. In *Temple of Preah Vihear*, for example, the territory in question formed an escarpment—clearly separable from the plains below the mountain range—and the boundary was intended to follow a watershed line. But this ostensibly natural frontier was irrelevant to the court.[214]

On the single occasion—in *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras)—when a claimant raised economics, the court quickly dismissed the claim.[215] This is unsurprising, however, given the manner in which El Salvador cast its argument.[216] Culture was also directly referenced only once—in *Temple of Preah Vihear*. Although it may be unsurprising that the cultural importance of the Temple did not figure into the court's decision rule, it is somewhat surprising that the court did not engage in further discussion of that consideration,[217] given its great significance to the litigants (as reflected in the extent to which they briefed their cultural arguments). It is noteworthy that, in *Minquiers and Ecrehos*, the parties did not present evidence as to what nationality the inhabitants of the Minquiers and Ecrehos groups considered themselves. In no way was self-determination or culture a factor in the court's decision.

Of the categories not part of the court's rule of decision, history was raised most frequently. History also constitutes the most surprising omission from the court's hierarchy, because titles and other historic information in support of territorial claims have traditionally been very prominent in the international territorial

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210. *See, e.g.*, *Temple of Preah Vihear*, 1962 I.C.J. at 16 (dismissing arguments of "historical, religious [or] archaelogical character").

211. *See, e.g.*, *id.* at 15 ("The Parties have also relied on other arguments of a . . . historical . . . character, but the Court is unable to regard them as legally decisive.").

212. *See, e.g.*, *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 396 ("[P]ost-independence *effectivités*, where relevant, have to be assessed in terms of actual events, not their social origins.").

213. Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, 12–13 (Feb. 3).

214. *See supra* notes 110 and 115 and accompanying text.

215. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 396.

216. El Salvador essentially argued that it was poor and needed the territory for economic exploitation. *Id.*

217. Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 16 (June 15).

dispute literature. In fact, the court could have reasoned through the historic data proffered in *Minquiers and Ecrehos* to reach a decision, given that the parties presented ample evidence on feudal title.[218] In *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ancient titles and other such documentation were not particularly helpful, especially when the parties to the dispute were not parties to the ancient titles.[219]

B. Implications of the ICJ's Jurisprudence

The tripartite hierarchy that the court has adopted for territorial dispute cases is significant in two key respects: first, it depends on an expansive reading of treaty law; and second, the court imputes more legal weight to the *uti possidetis* principle than this principle may merit.

First, the court's hierarchy presupposes a broad reading of treaty law. In the most limited sense, treaties are mere contracts between states.[220] In their broadest sense, they are aspirational statements about how the world should work.[221] In between these two extremes, treaties might constitute legislation or constitutions.[222] The court's use of treaties in its international land dispute jurisprudence favors both a contractual and an aspirational role for treaties in international law.

Viewing treaties as contracts, the court employs them to reflect mutual consent as to the disputed boundaries. So used, a treaty supersedes all other possible justifications for a territorial claim because it is the most direct expression of both parties' wishes with respect to the disputed land. Such was the case in *Sovereignty over Certain Frontier Land*.[223]

However, the court also uses treaties to resolve disputes even when neither party to an original treaty is a litigant before the court—for example, in cases involving *uti possidetis*, such as *Land and Maritime Boundary*. This suggests that treaties may have an

218. Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47, 54 (Nov. 17).

219. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 544.

220. *See* JANIS, *supra* note 14, at 13–14 ("As international contract or *traité-contrat*, a treaty may simply accomplish some exchange or concession.").

221. *See id.* at 14 (citing the 1928 Kellogg-Briand Pact as an example of an aspirational treaty).

222. *Id.*

223. *See* Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 221–22 (June 20) (finding that the 1843 Boundary Convention "represent[ed] the common intention of the two States").

aspirational legal force: they provide notice and, as an easily provable and readily available source of law, facilitate compliance.[224]

Second, the court places greater legal weight to the *uti possidetis* principle than it may merit. By extending colonial powers' boundary agreements to newly independent, postcolonial states, the court may tacitly have elevated *uti possidetis* to the status of customary international law or made it a general principle of international law,[225] even though it has never acknowledged as much.

IV. EVALUATION OF THE HIERARCHY

This Part offers three potential explanations for the court's hierarchy in addressing boundary disputes. An exhaustive analysis of these explanations is beyond the scope of this Note and is best left to future research.

First, the court may favor a decision rule that ensures stable borders by protecting states' harmonized expectations about border placement. The ICJ, by systematically basing decisions on international treaties, may be attempting to restore predictability and stability to the international system in territorial disputes. However, the evidence that this practice would, in fact, render the relationship more stable is unimpressive.

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224. One of the benefits of treaties is that third parties can "observe their content with relative ease." Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1873 (2002).

225. There is some debate as to whether the *uti possidetis* principle is customary international law or a general principle of international law. Although many states have used the *uti possidetis* model to define postcolonial boundaries, Ratner, *supra* note 72, at 598–601, there are few, if any, indications that these states did so out of legal obligation (i.e., the requirement of *opinio juris* for a customary norm), *id.* at 598. The ICJ has, in dictum, indicated that *uti possidetis* might be a "general principle" of international law but has never held so explicitly. *See* Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 556–57 (Dec. 22) ("Although there is no need, for the purposes of the present case, to show that [*uti possidetis*] is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope in view of its exceptional importance for the African continent . . . ."). Nevertheless, different, noncolonial borders frequently emerge after independence and after postindependence border disputes. Ratner, *supra* note 72, at 599–600. It appears, then, that *uti possidetis* is a customary practice but not an international legal norm. This affects the principle's place in the ICJ's hierarchy: lacking status as a rule of customary international law or general principle of law, *uti possidetis* should be only as persuasive as so-called political (i.e., nonlegal) justifications for territorial claims. *See, e.g.*, JENNINGS, *supra* note 7, at 69–87 (exploring and describing the differences between legal and political claims). That is, *uti possidetis* would not fall within one of the sources of authority in Article 38 of the ICJ Statute.

Treaties are breached rather frequently, especially when they lack strong enforcement provisions.[226] Most boundary treaties appearing in the ICJ's jurisprudence have lacked such provisions. So, the ICJ would have limited power to stop, for example, an irredentist war in contravention of international law, especially when the stakes in such a conflict go to the heart of the aggressor's culture or history, as many territorial disputes do. In other words, simply because a treaty sets a particular boundary, the area around the boundary does not necessarily become more stable.[227]

Similarly, the application of *uti possidetis* does not inevitably make for a more predictable and stable system. For example, it is generally thought that subregional ethnic violence is the greatest threat to international peace and security since the collapse of the Soviet Union—the history of Yugoslavia after the fall of the Iron Curtain is a principal example.[228] To be sure, *uti possidetis* was more successful in Africa, Asia, and Latin America, but even there the doctrine did not resolve the underlying territorial disputes; it merely delayed their surfacing.[229]

The application of the doctrine of acquisition by effective control is even more unpredictable than *uti possidetis*; moreover, effective control is subject to abuse. In fact, because it is a general principle of law, it might—in a worst-case scenario—encourage territorial imperialism and a new wave of colonialism.

Second, the court may have a preference for contract-based justifications over property law-based justifications. This Note explained in Part III.B how the preference for treaty-based justifications manifests a predisposition to contract claims.[230] After evaluating any treaty law claims, the court proceeds to whether *uti possidetis* applies. Modern *uti possidetis* is a hybrid contract-property justification: it is analogous to property theory in that the newly

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226. *See generally* Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002) (describing why treaties often lack mandatory dispute resolution clauses).

227. This is, of course, at the heart of a multiyear debate in international relations theory. For a legal take on some of the core issues of the debate, see generally Guzman, *supra* note 224.

228. Ratner, *supra* note 72, at 590.

229. Consider, for example, *Land, Island and Maritime Frontier Dispute*, *supra* notes 138–53 and accompanying text, *Maritime Delimitation and Territorial Questions*, *supra* notes 163–72 and accompanying text, and *Land and Maritime Boundary*, *supra* notes 173–80 and accompanying text.

230. *See supra* notes 220–24 and accompanying text.

independent colonized peoples have had possession (albeit without corresponding jurisdiction) for some time, and analogous to contract theory because of the nature of the relationship between the colonial power and the newly independent state. *Uti possidetis* thus bridges the gap between contract theory and property theory, even if imperfectly. Finally, the court concludes with an effective control inquiry—a purely property law justification. Effective control is most analogous to the Anglo-American common law of adverse possession.[231]

A third possible explanation is that the ICJ is biased toward treaties and other legal justifications, and against more political arguments. After all, the ICJ is a court of law bound to consider certain sources of law as outlined in Article 38 of its Statute. First among those is treaty law. Although the Statute itself does not assign relative weight to particular sources of law, "most observers" maintain that legal rules from international agreements carry the most authority.[232] *Uti possidetis* and effective control, as legal doctrines, are also authoritative. *Uti possidetis* is perhaps more persuasive because it derives a great deal of its power from treaty law. A systemic bias toward legal justifications is not inconsistent with a preference for decisions based on equity *infra legem* over those based on political considerations, because there is a basis in international law for decisions based on equity.[233] Furthermore, any decision based purely on political factors would tend to undermine and delegitimize the court and the international legal regime.

CONCLUSION

This Note considers the nine categories of justifications for territorial claims: treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology. This Note also examines each of the International Court of Justice's nine territorial dispute cases in light of these categories of claims. Although territorial disputants perennially make arguments based on all these justifications, only three of these justifications have operated consistently as the ICJ's decision rule: treaty law, *uti possidetis*, and

231. *See supra* note 196 and accompanying text.

232. JANIS, *supra* note 14, at 10–11.

233. *See supra* note 137 and accompanying text. Consider also the court's own Statute, which provides for decisions *ex aequo et bono*. *See supra* note 13 and accompanying text.

effective control. Only when a decision on any of these three grounds is impossible will the court resort to equity in deciding a case.

The hierarchy among treaties, *uti possidetis*, and effective control has the effect of giving a broad scope to treaty law and possibly imputing more meaning to the principle of *uti possidetis* than it merits at this stage in the evolution of public international law. This Note outlines only a few of several possible rationales for the ICJ's hierarchy of justifications for territorial claims. Whether a causal mechanism exists to explain the hierarchy discussed in this Note remains an open question and is ripe for additional research.