(c) Commentary

The International Court of Justice and the Adjudication of Territorial and Boundary Disputes

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Abstract: Territorial and boundary disputes provide a major part of the work of the International Court. The author considers how cases of this kind come to the Court and the issues of jurisdiction and justiciability they represent; explains how, when the Court decides such cases, it establishes the facts and applies the law; and, finally, discusses the question of implementation and the factors which determine the effectiveness of judgments. He concludes that in territorial and boundary cases, as elsewhere, the Court's decisions serve both to resolve specific disputes and to develop the law, while also highlighting the political context of international adjudication.

1. INTRODUCTION

For students of international adjudication territorial and boundary disputes offer a rich field for investigation. Territory after all is one of the defining features of the state in international law and the importance which governments attach to establishing and maintaining their boundaries makes issues of territorial sovereignty a potent source of conflict with neighbours. At the same time, the fact that cases about boundaries and territory provide much of the business of international courts and tribunals puts such disputes among those which national authorities may well be prepared to litigate. Evidently, therefore, disputes of this type are justiciable not just in the legal sense that they can in theory be settled by arbitration or adjudication, but also in the political sense that every so often they are so settled.

The International Court decided its first territorial case in 1953 when it handed down its judgment in the *Minquiers and Ecrehos* case.[1] Since then it has decided seven further contentious cases involving boundary or territorial issues,

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1. Minquiers and Ecrehos (France *v.* United Kingdom), Judgment of 17 November 1953, 1953 ICJ Rep. 47.

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namely the *Frontier Land* case[2] (1959), the *Arbitral Award* case[3] (1960), the *Temple* case[4] (1962), the *Frontier Dispute* case[5] (1986), the *Land, Island and Maritime Frontier Dispute* case[6] (1992), the *Territorial Dispute* case[7] (1994) and, most recently, the *Kasikili/Sedudu Island* case[8] (1999). To these eight decisions must be added the advisory opinion in the *Western Sahara* case[9] (1975), where some important territorial issues had to be considered, two contentious cases currently before the Court in which only preliminary questions have been dealt with to date, namely the *Maritime Delimitation and Territorial Questions* case[10] between Qatar and Bahrain and the *Land and Maritime Boundary* case[11] between Cameroon and Nigeria, and the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case[12] between Indonesia and Malaysia which has only just begun.

Because the cases are relatively numerous and all of them are rather complex, it is plainly impossible to explore the many fascinating issues presented by this jurisprudence in detail here. Nor, since most of the cases have already been individually analysed elsewhere, is it necessary to do so. What follows is therefore a review of how the Court has handled disputes over territory or boundaries that focuses on three issues. The first part briefly considers how such cases have come to the Court and the technical questions which some of them have posed relating to its competence. Essentially, therefore, this opening section is concerned with issues of jurisdiction and justiciability.

The second part, which forms the core of the paper, then examines how when the issue of jurisdiction has been resolved, the Court establishes the facts and applies the law. This section is therefore concerned with the challenges confronting the Court at the merits stage in cases involving territory and boundaries and with how it seeks to meet them. Following that account, the third and final part considers the question of implementation and the factors which determine the effectiveness of the Court's decisions. This section is therefore concerned

2. Sovereignty over Certain Frontier Land (Belgium *v.* Netherlands), Judgment of 20 June 1959, 1959 ICJ Rep. 209.
3. Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras *v.* Nicaragua), Judgment of 18 November 1960, 1960 ICJ Rep. 192.
4. Temple of Preah Vihear (Cambodia *v.* Thailand), Merits, Judgment of 15 June 1962, 1962 ICJ Rep. 6.
5. Frontier Dispute (Burkina Faso *v.* Mali), Judgment of 22 December 1986, 1986 ICJ Rep. 554.
6. Land, Island and Maritime Frontier Dispute (El Salvador *v.* Honduras; Nicaragua intervening), Judgment of 11 September 1992, 1992 ICJ Rep.351.
7. Territorial Dispute (Libyan Arab Jamahiriya *v.*Chad), Judgment of 3 February 1994, 1994 ICJ Rep. 6.
8. Kasikili/Sedudu Island (Botswana *v.* Namibia), 1999 (not yet published).
9. Western Sahara, Advisory Opinion of 16 October 1975, 1975 ICJ Rep. 12.
10. For relevant references *see* notes 22 and 23, *infra*.
11. For relevant references *see* notes 29, 36 and 115, *infra*.
12. This case was referred to the Court in November 1998, following a special agreement dated 31 May 1997, which came into force on 14 May 1998.

with the post-adjudication phase. As the question of marine boundaries raises distinct issues of international law which would require separate treatment, these and other law of the sea matters are not covered in the present survey.

2. ISSUES OF JURISDICTION AND JUSTICIABILITY

2.1. The nature of the cases

The twelve cases under review involve disputes from four continents, presenting a range of different questions. Whereas the Belgium-Netherlands case, the Cambodia-Thailand case, the Burkina Faso-Mali case and the Libya-Chad case concerned only land boundaries, the France-United Kingdom case, like the current Indonesia-Malaysia case, involved disputed sovereignty over islands, the Botswana-Namibia case involved an island and a river boundary, the Cameroon-Nigeria case features a land boundary and a marine boundary and the El Salvador-Honduras case included islands, mainland and marine boundary issues, as does the current Qatar-Bahrain case. In further contrast, the Honduras-Nicaragua case, though unquestionably relevant in the present context, was wholly concerned with the validity of an earlier arbitral award and the advisory opinion in the *Western Sahara* case was largely taken up with the status of that territory at the time of colonisation and certain related questions.

Amongst factors providing an incentive to refer these cases to the Court were that most concerned long-standing disputes which badly needed settling. Both the Latin American disputes had recently involved fighting, as had three of the African cases,[13] whilst in the Western Sahara affair, though the dispute itself was relatively recent, impending decolonisation threatened to leave a power vacuum. In most of the disputes too, an assortment of methods of resolving the matter had been tried in the past, but had proved fruitless. These included arbitration in the Honduras-Nicaragua dispute and judicial settlement in the El Salvador-Honduras case.[14] In the two European cases and in the *Temple* case reference to the Court was prompted by unsuccessful negotiations, while in the *Kasikili/Sedudu Island* case it followed failure to establish the boundary using a Joint Team of Technical Experts.[15]

13. In the Burkina Faso-Mali dispute and the Cameroon-Nigeria dispute there had been border skirmishes and in the Libya-Chad dispute major hostilities. Though the Botswana-Namibia situation was calmer, an incident during which shots were fired had taken place in 1984, *see* the Court's Judgment *supra* note 8, at para. 64.
14. As mentioned earlier, the Honduras-Nicaragua dispute centred on the validity of an Arbitral Award rendered by the King of Spain on 23 December 1906. The El Salvador-Honduras case, on the other hand, was partly concerned with the 1917 decision of the Central American Court of Justice in the *El Salvador/Nicaragua* case, laying down a regime for the Gulf of Fonseca.
15. For the background to the case *see* the Court's Judgment, *supra* note 8, at paras. 11-16.

In several of these disputes international organisations also played an important role. The OAS was prominent in the two Latin American cases, strongly encouraging the reference of the *Arbitral Award* case to the Court[16] and pointing the parties in its direction at an earlier stage in the *Land, Island and Maritime Frontier Dispute*.[17] In two of the African cases the OAU was equally active, conducting mediation in the *Frontier Dispute* case which was unsuccessful,[18] but helping to persuade Libya and Chad to use the Court for the *Territorial Dispute*.[19] In the *Western Sahara* case an advisory opinion was requested by the UN General Assembly in 1974 on the prompting of Morocco and Mauritania, the UN which had been involved with the Western Sahara since 1963, having already called for decolonisation of the territory.[20]

2.2. Cases referred on the basis of treaties or conventions in force

The Court, as every law student knows, can only decide a case with the parties' consent and in disputes about territory, as elsewhere, this is often achieved through the negotiation of a special agreement. Indeed in nine out of the eleven contentious cases in the present review the Court's jurisdiction was based on an agreement between the states concerned, qualifying as a treaty or convention in force for the purposes of Article 36(1) of the Statute. The two exceptions were the *Temple* case and the *Land and Maritime Boundary* case, where the basis of jurisdiction was the parties' declarations under Article 36(2) of the Statute, more generally known as the Optional Clause. The *Western Sahara* case being an advisory opinion, the Court's jurisdiction there was, of course, based on Article 65 of the Statute.

To states involved in a dispute and wanting to have it resolved by the Court the negotiation of a special agreement enables the issue to be defined and normally minimises arguments about jurisdiction. These advantages are such that states sometimes refer a case to the Court in this way despite having made declarations under Article 36(2) which would provide an alternative basis for jurisdiction. This was the position in both the *Minquiers and Ecrehos* and *Arbitral Award* cases. When commenting on the former, Fitzmaurice pointed out that the parties' choice in this matter may be influenced by a number of factors, not least

16. *See* C.G. Fenwick, *The Honduras-Nicaragua Boundary Dispute*, 51 AJIL 761 (1957).
17. The General Treaty of Peace, concluded in 1980, following mediation under the auspices of the OAS, laid down that any disputes not settled within five years were to be jointly referred to the ICJ.
18. *See* G.J. Naldi, *Case Note*, 35 ICLQ 970 (1986).
19. *See* S.G. Amoo & I.W. Zartman, *Mediation by Regional Organizations: The Organization of African Unity in Chad, in* J. Bercovitch & J.Z. Rubin, Mediation in International Relations: Multiple Approaches to Conflict Management 131 (1992). It should also be noted that Chad received financial assistance for the litigation from the United Nations. *See* P.H.F. Bekker, *International Legal Aid in Practice: The ICJ Trust Fund*, 87 AJIL 659, at 666 note 45 (1993).
20. For the political background *see* M.N. Shaw, *The Western Sahara Case*, 49 BYBIL 119, at 121-124 (1978).

that a unilateral application necessarily makes one plaintiff and the other defendant, something a special agreement avoids.[21]

A further advantage of the special agreement is that it offers some scope for indicating the criteria for decision. Thus the special agreement in the *Frontier Dispute* laid particular emphasis on the *uti possidetis* principle and that in the *Kasikili/Sedudu Island* case asked for a decision "on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law." Moreover, the possibility of using a special agreement to refer a case to a Chamber of the Court means in effect that the parties to a dispute can now also choose their judges. Only four cases have been referred to Chambers so far, but they include two of those with which we are concerned, the *Frontier Dispute,* which has just been mentioned, and the *Land, Island and Maritime Frontier Dispute*.

In the *Maritime Delimitation and Territorial Questions* case between Qatar and Bahrain an unusual situation arose because the parties disagreed about whether an agreement giving the Court jurisdiction over the various matters in dispute had ever come into existence. Qatar claimed that the minutes of a meeting of the Cooperation Council of Arab States held in 1990 constituted an agreement between the two states capable of providing the ICJ with a basis of jurisdiction, something which Bahrain denied. In its decision in 1995 the Court eventually agreed with Qatar,[22] though only after a curious 'partial' judgment in the previous year had left the issue in abeyance.[23] Leaving aside the procedural puzzles of this episode, the general lesson here is that when governments discuss the submission of territorial or other kinds of issues to the Court, they need to be clear about the nature of any commitments.

Although the Qatar-Bahrain case was certainly unusual, it should be borne in mind that there is nothing about a special agreement *per se* which prevents states from arguing jurisdictional points if they want to. For any agreement has to be interpreted and so disagreements may arise as to precisely what question the Court is being asked to answer, or indeed other matters. Thus in the *Land, Island and Maritime Frontier Dispute*, where the Court was authorised to determine "the legal situation of the islands" in the Gulf of Fonseca, the parties disagreed as to which islands were in contention.[24] Similarly, in the Qatar-Bahrain case, having established that the parties had made a binding agreement, the Court then

21. Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. 2, at 505-506 (1986).
22. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar *v.* Bahrain), Jurisdiction and Admissibility, Judgment of 15 February 1995, 1995 ICJ Rep. 6.
23. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar *v.* Bahrain), Jurisdiction and Admissibility, Judgment of 1 July 1994, 1994 ICJ Rep 112. *See also* E. Lauterpacht, *'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice*, in V. Lowe & M. Fitzmaurice (Eds.), Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings 465 (1996).
24. *See* the Chamber's Judgment, *supra* note 6, at 553-557, paras. 323-330.

had to establish its contents. This required decisions as to the subject matter of the dispute and the method of submission, both of which presented considerable difficulties.[25]

Comparable problems may arise with regard to the agreed criteria for the Court's decision. Another jurisdictional skirmish in the *Land, Island and Maritime Frontier Dispute* took place over the question whether the only law applicable to the island dispute was the *uti possidetis juris* of 1821 which Honduras argued was mandated by the terms of the parties' Peace Treaty of 1980, or whether, as El Salvador maintained, the Chamber was bound to apply the modern law of acquisition of territory.[26] In the *Kasikili/Sedudu Island* case, likewise, Botswana argued that the Court was not permitted to take into consideration Namibia's arguments on prescription and acquiescence as these were not included in the scope of the question submitted under the terms of the Special Agreement. The Court, however, disagreed and held that in referring to "the rules and principles of international law" the Agreement not only authorised it to interpret the 1890 treaty in the light of those rules and principles, but also to apply them independently.[27]

2.3. Optional clause cases

In contrast to the majority of cases referred to the Court by agreement, the two cases referred unilaterally on the basis of declarations under Article 36(2) generated considerable argument about jurisdiction. In the *Temple* case, where Thailand sought to deny the validity of the declaration it had made in 1950, much of the argument concerned the effect of Article 36(5) of the Statute and, though useful as an addition to the jurisprudence on the transference of jurisdiction from the Permanent Court, the preliminary phase of the case[28] is of no present relevance. It suffices to note that the Court rejected all Thailand's arguments and finding that its jurisdiction had been established on the basis of Article 36(2), held that it was unnecessary to consider various treaties, also invoked by Cambodia.

In the *Land and Maritime Boundary* case, on the other hand, where the challenge to the Court's jurisdiction was made by Nigeria, a number of the points raised have a bearing on boundary and territorial disputes generally and should be mentioned. In this case both states had made Optional Clause declarations and, though neither contained any relevant limitations or reservations, when Cameroon began proceedings Nigeria raised no less than eight preliminary objections, challenging both the Court's jurisdiction and the admissibility of the

25. For a summary of the issues *see* M.D. Evans, *Case Note*, 44 ICLQ 691 (1995).
26. *See* the Chamber's Judgment, *supra* note 6, at 557-559, paras. 331-333.
27. *See* the Court's Judgment, *supra* note 8, at paras. 90-93.
28. Temple of Preah Vihear (Cambodia *v.* Thailand), Preliminary Objections, Judgment of 26 May 1961, 1961 ICJ Rep. 17.

proceedings. Some of Nigeria's objections lacked plausibility and all but one were rejected by the Court in a preliminary ruling in 1998.[29] However, three of the matters raised merit closer attention.

One, the position of third states in relation to boundary issues, has been raised in other cases and will be discussed in the next section. The second is the point raised in Nigeria's fifth objection that any dispute between the parties over delimitation related to only part of the land boundary and not to all of it. This is, of course, precisely the type of issue that would normally be addressed in a special agreement, but which is likely to present difficulty when a dispute is referred to the Court unilaterally and the matter is left in the hands of the applicant. Four judges upheld Nigeria's objection on this point, which has also arisen in a case involving a marine boundary.[30] Though reliance on the Optional Clause in boundary cases cannot be excluded on account of this problem, it does constitute a limitation of this form of jurisdiction.

Finally, there is the issue raised by Nigeria's objection to the Court's jurisdiction which rested on the proposition that Cameroon had abused its rights under Article 36(2) by initiating proceedings before Nigeria was aware of its declaration. This was summarily rejected by the Court and at first sight may appear to have little relevance to our topic. It should be noted, however, that a number of states have made Optional Clause declarations in which they exclude from the Court's jurisdiction disputes relating to territory, boundaries and similar matters.[31] In 1998 Nigeria deposited a new declaration featuring a comprehensive reservation of this kind which, if made earlier, would have covered the case brought by Cameroon. In its judgment on jurisdiction and admissibility the Court demonstrated that such a reservation was essential for a state in Nigeria's position to have a jurisdictional defence. To put the matter in terms of the Court's power to decide boundary cases, the message of the judgment is that Optional Clause declarations mean what they say and states which wish to enjoy the benefits of an unconditional declaration must also bear its burdens.

2.4. The position of third states

Because the cases under review involve disputes between neighbours, the resolution of boundary or territorial issues between states A and B may touch in

29. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections, Judgment of 11 June 1998, 1998 ICJ Rep. 275. *See also* J.G. Merrills, *Case Note*, 48 ICLQ 651 (1999).

30. *See* Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark *v.* Norway), Judgment of 14 June 1993, 1993 ICJ Rep. 38, at 89 (Separate Opinion of Judge Oda). The suitability of the Optional Clause is discussed by Judge Oda at 91, para. 2 and 110-114, paras. 75-89, of the opinion.

31. *See* J.G. Merrills, *The Optional Clause Revisited*, 64 BYBIL 197, at 234-237 (1993) *also* the recent declarations of Poland (1996), Yugoslavia (1999) and the 1998 declaration of Nigeria mentioned in the text.

some way on the rights and interests of a third state C and present one of two problems. The first is whether, despite C's position, the Court can decide the case without violating the principle that adjudication depends on consent. The other is whether C's position gives it a right to intervene under Article 62 of the Statute. These problems are naturally not peculiar to boundary litigation,[32] but the cases demonstrate that they are particularly common in this context. How they should be handled has accordingly been discussed on several occasions.

In the *Frontier Dispute* the point arose because the frontier between Burkina Faso and Mali ended at a tripoint on the boundary with Niger which was not a party to the case. The Court, however, held that this did not in itself restrict its jurisdiction, adding that "the rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute."[33] Similarly, in the *Territorial Dispute* the eastern end point of the boundary between Libya and Chad was determined without the involvement of Sudan and the western boundary without the involvement of Niger. As no rights of the third states concerned were prejudiced thereby, these rulings were clearly correct. They also, of course, avoid the practical problems that would be encountered if the consent of such states was required.

In the *Land and Maritime Boundary* case Nigeria maintained that the Court was precluded from determining several sections of its boundary with Cameroon on account of the impact of the decision on certain third states. As regards the land boundary Nigeria's objection related to Lake Chad where there was a tripoint on the boundary with Chad. Here Nigeria sought to distinguish the *Frontier Dispute*, but the Court followed that ruling and held that since the Cameroon-Chad boundary was not in issue and could not be affected by the decision, the legal interests of Chad would not constitute 'the very subject matter of the judgment' so as to engage the prohibition against deciding a dispute involving a state without its consent, as laid down in the *Monetary Gold*[34] and *East Timor* cases.[35]

Nigeria's other objection concerned the maritime boundary where it was claimed that a determination of most of the boundary would involve the rights and interests of other states bordering on the Gulf of Guinea and to that extent was inadmissible. Here the Court held that a determination would have to be postponed and joined the objection to the merits. At the same time it drew the attention of third states to the possibility of intervention under Article 62. Subsequently, this invitation was accepted by Equatorial Guinea, whose request to intervene was accepted by the Court in 1999, without objection from Nigeria or

32. For an excellent general survey *see* C. Chinkin, Third Parties in International Law (1993).
33. 1986 ICJ Rep. 554, at 577, para. 46. For comment on this point *see* H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989. Part Seven*, 66 BYBIL 1, at 22-24 (1995).
34. Monetary Gold Removed from Rome in 1943 (Italy *v.* France, UK and USA), Judgment of 15 June 1954, 1954 ICJ Rep. 19.
35. East Timor (Portugal *v.* Australia), Judgment of 30 June 1995, 1995 ICJ Rep. 90.

Cameroon.[36] Earlier, in 1990, a Chamber of the Court had permitted Nicaragua to intervene, over the objection of El Salvador, in respect of the status of the waters of the Gulf of Fonseca in the *Land, Island and Maritime Frontier Dispute*.[37]

Both Equatorial Guinea's intervention in Nigeria/Cameroon case and Nicaragua's in the El Salvador/Honduras case concerned maritime issues and do not call for detailed discussion here. Clearly, however, they are relevant in the present context, not just because they are the only cases so far in which intervention has been allowed under Article 62 and show its requirements, but also because it is not difficult to envisage disputes involving land territory where a third state might wish to intervene and could demonstrate the 'interest of a legal nature' required to do so. If and when such a case arises, the jurisprudence on this point, and in particular the decision in the *Land, Island and Maritime Frontier Dispute*, indicates the conditions which will need to be satisfied.

Finally, it is worth mentioning a point related to that just considered which the Court had to consider in the *Western Sahara* case. As an advisory opinion, this case did not, of course, raise any issue concerned with the rights of third states in contentious litigation. However, Spain argued that because it had previously rejected a proposal by Morocco to refer the dispute to the Court in contentious proceedings, to give the advisory opinion requested by the General Assembly would undermine the principle of consensuality and could amount to an abuse of Article 65 of the Statute. Although this submission derived some support from the fact that the Court had already permitted Spain to appoint a judge *ad hoc*, thereby acknowledging the quasi-contentious nature of the case, the Spanish argument was rejected. Identifying the crucial issue as one of propriety, rather than competence, the Court held that the object of the request was to assist the General Assembly on the issue of decolonisation and that it was therefore entitled to proceed.[38]

The Court also explained that the legal controversy had arisen in the course of the General Assembly's work, rather than in bilateral relations and reinforced this institutional argument by pointing out that the frame of reference of the request was wider than that of the bilateral dispute, since it included future elements and the ties between the territory and Mauritania.[39] The Court's reasoning

36. *See* Land and Maritime Boundary (Cameroon *v.* Nigeria), Application by Equatorial Guinea for Permission to Intervene, Order of 21 October 1999 (not yet published). *See also* J.G. Merrills, *Case Note*, 49 ICLQ 720 (2000).
37. *See* Land, Island and Maritime Frontier Dispute (El Salvador *v.* Honduras), Application to Intervene, Judgment of 13 September 1990, 1990 ICJ Rep. 92. For comment on this decision and the Court's earlier order concerning intervention *see* M.D. Evans, *Case Note*, 41 ICLQ 896 (1992).
38. *See* 1975 ICJ Rep. 12, at 23-24, paras. 29-30.
39. *Id.*, at 25-28, paras. 34-43.

here is relevant to the scope of the advisory jurisdiction generally,[40] but is interesting in the present context for demonstrating the possibility of using the advisory jurisdiction to address boundary and territorial disputes in certain circumstances. On the other hand, the *Western Sahara* case is so far the only example of this being done and, as the Court indicated, in cases under Article 65 the consent of an interested state remains relevant to the issue of propriety. In practice, therefore, the Court's opportunities to deal with boundary and territorial disputes and their associated issues of jurisdiction will rarely arise in advisory proceedings.

3. THE COURT'S JUDGMENTS

3.1. General considerations relating to title

There are many factors with a potential bearing on title to territory, but which of them are relevant in a given case depends on the particular circumstances and the Court's view of what is important. In the *Minquiers and Ecrehos* case, for example, the United Kingdom produced a considerable amount of material relating to feudal title, including several medieval treaties and other ancient documents. However, the Court held that what mattered was "not indirect presumptions deduced from events in the Middle Ages, but evidence which relates directly to the possession of the Minquiers and Ecrehos group."[41] As we shall see later, a similar approach to remote historical material was adopted in the *Western Sahara* case with the result that in both cases the Court based itself on evidence of actual practice, described in the next subsection.

In the *Kasikili/Sedudu Island* case Namibia claimed title to the island on the basis of both a boundary treaty described below[42] and the doctrine of acquisitive prescription. The latter claim rested on occupation of the island by Masubia tribespeople but was rejected by the Court on the ground that even if links of allegiance may have existed with the mainland authorities, it had not been shown that the occupation was *à titre de souverein*, that is that the Masubia were exercising functions of state authority.[43] Even official acts carry varying weight according to the circumstances, as may be seen from the *Frontier Land* case, where the Court decided that acts "largely of a routine and administrative char-

40. *See* M. Pomerance, *The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms*, *in* A.S. Muller, D. Raic & J.M. Thuranszky (Eds.), The International Court of Justice: Its Future Role After Fifty Years 271, at 304-306 (1997).
41. 1953 ICJ Rep. 47, at 57.
42. *See* Section 3.3., *infra*.
43. *See* the Court's Judgment, *supra* note 8, at paras. 90-99. Thirlway suggests that a form of acquisitive prescription was earlier employed by the Court in the *Right of Passage* case (1960), *see* Thirlway, *supra* note 33, at 12-14.

acter"[44] performed by Netherlands officials had no effect on a title previously acquired by Belgium under a boundary treaty. In rather similar circumstances, the Court dismissed conduct relied on by Thailand in *Temple* case as "exclusively the acts of local provincial authorities."[45]

Central to the decisions in both the *Frontier Dispute* and the *Land, Island and Maritime Frontier Dispute* was another basis of title, the principle of *uti possidetis juris*, that is the principle that the boundaries of newly independent states should follow those of the previous colonies.[46] In the first case, as noted earlier, the principle was mentioned in the special agreement, but the Chamber went out of its way to emphasise both its general applicability and the function of the principle in preventing "the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."[47] In the second case *uti possidetis* was not mentioned in the special agreement, but the Chamber, noting its historic significance in Latin America, found the parties to be agreed on it as the primary principle to be applied.

In the case just mentioned, the Chamber, having noted the role of *uti possidetis*, observed that the frontiers with which international tribunals are concerned "are almost invariably the ones in respect of which *uti possidetis juris* speaks for once with an uncertain voice",[48] and applying the principle in practice can present certain problems. Apart from the fact-finding problem, considered later, there is the relevance of *effectivités*, that is of conduct on the ground, to the issue of legal title. In both the *Frontier Dispute* and the *Land, Island and Maritime Frontier Dispute* colonial *effectivités* were treated as evidence of the colonial boundary. In the latter case the Court also took account of post-colonial *effectivités*, not only for the above purpose, but also, as we shall see, as relevant to the issue of acquiescence. It thereby demonstrated that while *uti possidetis* is very important, it does not freeze for all time the inherited colonial boundaries.

A further question about the principle is whether it can be reconciled with current ideas about self-determination. In the *Frontier Dispute* the Chamber suggested that applying *uti possidetis* in no way effects a *renvoi* to the law of the colonising state,[49] but recognised what it called an "apparent contradiction" be-

44. 1959 ICJ Rep. 209, at 229.
45. 1962 ICJ Rep. 6, at 30. *See* generally A.O. Cukwurah, The Settlement of Boundary Disputes in International Law 32-33 (1967).
46. For general discussion of the principle and its contemporary significance *see* M.N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BYBIL 75 (1996) and S.R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AJIL 590 (1996).
47. 1986 ICJ Rep. 554, at 565, para. 20. For criticism of this view and discussion of the distinction between cases involving *uti possidetis* and those, like the *Temple* case, which turn on state succession *see* Thirlway, *supra* note 33, at 15-16.
48. 1992 ICJ Rep. 351, at 386, para. 41.
49. *See* 1986 ICJ Rep. 554, at 568, para 30. For a critical evaluation of this view see H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989. Part One*, 60 BYBIL 1, at 125-

tween the principle and that of self-determination.[50] In the Chamber's view, however, African states had agreed in the interests of stability to regard interpretation of the latter as limited by *uti possidetis*, which removed the contradiction. Not everyone has been persuaded by this analysis,[51] but Crawford, who considers it "clearly correct", rightly notes that no tenable theory of self-determination proposes a return to an "original condition" of the world prior to the drawing of colonial boundaries. In his view therefore any difficulty with the Chamber's dictum lies only "in the apparent assumption that self-determination would require a redrawing of boundaries along ethnic lines."[52]

Self-determination, which featured only incidentally in the *Frontier Dispute*, was much more prominent in the *Western Sahara* opinion. Although the issue of self-determination was not raised directly in either of the questions put by the General Assembly, the Court, prompted in part by the submissions of Algeria, decided that it was necessary to examine the concept as part of the general legal background and, more specifically, in the context of the Assembly's decolonisation policy. What it then had to say ranks as one of its most important pronouncements, containing as it does both an endorsement of its statement in the *Namibia* case that self-determination is a right of all dependent peoples[53] and an affirmation of "the need to pay regard to the freely expressed will of peoples"[54] when determining its form. Furthermore, on the key issue of implementation of the right the Court underlined the role of the General Assembly and its discretion with regard to the forms and procedures through which self-determination is exercised.[55]

The Court's ruling in the same case that the Western Sahara was not at the time of colonisation by Spain *terra nullius* endorses the view that Spain, and by implication other colonial powers, obtained a derivative title through agreements with local rulers and not an original title by occupation. Cassese suggests that this enhances the role and importance of indigenous peoples.[56] While this is true, critics have pointed out that subsequently in both the *Territorial Dispute* and the *Land, Island and Maritime Frontier Dispute* arguments based on indigenous

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127 (1989). The same writer observes that the Chamber in the *Land, Island and Maritime Frontier Dispute* dealt with this issue "more robustly", *see* Thirlway, *supra* note 33, at 17.

50. *See* 1986 ICJ Rep. 554, at 566-567, paras. 25-26.
51. *See* A. Cassese, *The International Court of Justice and the Right of Peoples to Self-Determination*, *in* Lowe & Fitzmaurice, *supra* note 23, at 351. The *Frontier Dispute* is discussed *id.*, at 361-362.
52. *See* J. Crawford, *The General Assembly, the International Court and Self-Determination*, *in* Lowe & Fitzmaurice, *supra* note 23, at 585. The words quoted are to be found at 603. *See also* on this point, G.J. Naldi, *The Case Concerning the Frontier-Dispute (Burkina Faso/Republic of Mali): Uti Possidetis in an African Perspective*, 36 ICLQ 893, at 897-902 (1987).
53. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, at 31, para. 52. *See also* Crawford, *supra* note 52, at 590-591.
54. 1975 ICJ Rep. 12, at 33, para. 59.
55. *See* Cassese, *supra* note 51, at 356-361.
56. *Id.*, at 360-361.

rights received a cool response.[57] Indeed, in the *Western Sahara* case itself the Court's unwillingness to see ties based on personal allegiance as a basis for Moroccan title may be thought to reflect the same tendency.[58] On the other hand, it should perhaps be remembered that the Court's function is to apply the law not make it. Given the novelty of these concepts, it is therefore hard to see how the Court could have satisfied its critics here without compromising its judicial function.[59]

A number of other matters relating to title were bound up with the Court's fact-finding and so will be dealt with in the next subsection. Likewise, the cases in which title depended on treaties and those involving estoppel, acquiescence and preclusion raise special issues and call for separate treatment. Before concluding, however, one or two miscellaneous points should be mentioned. Title in the *Arbitral Award* case derived from an earlier arbitration and the effect of the Court's judgment is to promote stability by discouraging challenges to such awards. In the *Minquiers and Ecrehos* case rulings were made on two concepts of particular important in boundary and territorial disputes, namely the critical date[60] and inter-temporal law.[61] Finally, in the *Territorial Dispute* the Court, applying a principle relevant to many boundary arrangements, held that "when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed."[62]

3.2. Fact-finding

In most boundary and territorial disputes the salient facts are contained in the historical record of the parties' dealings with respect to the disputed area which is the key to the application of the law. This may be seen in the *Minquiers and Ecrehos* case where the Court was required to consider an enormous amount of

57. *See* W.M. Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AJIL 350, at 355-357 (1995).
58. *See* Reisman, *id.*, at 354-355. Also relevant in this context is the Court's unwillingness to find that 'the Mauritanian entity' was capable of exercising sovereignty in international law, *see* Thirlway, *supra* note 33, at 4-6.
59. With reference to the *Western Sahara* case it must also be pointed out that by emphasising the right to self-determination the Court sought to ensure that the future of the territory was determined by modern ideas, rather than by inferences from tribal activities before 1884. Its approach was therefore by no means as backward-looking as Reisman suggests.
60. *See* Thirlway, *supra* note 33, at 31-38 and Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. 1, at 260-284 (1986).
61. *See* Fitzmaurice, *id.*, at 137-138, and for general discussion of the concept, Thirlway, *supra* note 49, at 128-143.
62. 1994 ICJ Rep. 6, at 37, para. 73. *See also* Thirlway, *supra* note 33, at 26-27, suggesting that this is no more than a presumption of interpretation, and G.J. Naldi, *Case Note*, 44 ICLQ 683, at 688 (1995), pointing out the significance in this connection of Article 70(1)(b) of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).

diverse material put forward by the United Kingdom and France relating to the rights and duties of their respective sovereigns and their vassals from medieval times to the present day. The evidence examined included a good deal of material relating to feudal land tenure, court records from Jersey relating to the exercise of criminal jurisdiction in the eighteenth and nineteenth centuries, registers of fishing vessels and land sales and tax documents. In the light of this evidence the Court concluded unanimously that sovereignty over the rocks and islets of the Minquiers and Ecrehos group, in so far as they were capable of appropriation, belonged to the United Kingdom.[63]

A rather similar kind of historical survey had to be made in the very different circumstances of the *Western Sahara* case. Here the request for an advisory opinion sought an answer to two questions: whether Western Sahara was at the time of colonisation by Spain *terra nullius*; and, if not, what legal ties existed between the territory and Morocco and 'the Mauritanian entity'. On the first point the Court found the historical evidence indicated that in 1884 the territory was inhabited by "peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them."[64] As Spain had also claimed to be taking the area under its protection on the basis of agreements with the chiefs of the local tribes, it concluded that the Western Sahara was not *terra nullius*.

To answer the second question the Court had to examine a large amount of material from Morocco and Mauritania relating to nomadic tribal routes, displays of allegiance and nomadic culture. Morocco argued that these provided the basis for a title based on a continued display of authority, but the Court, following its decision in the *Minquiers and Ecrehos* case, held that what mattered was not "direct inference drawn from events in past history", but rather "evidence directly relating to effective display of authority in Western Sahara at the time of colonisation"[65] and immediately before. Finding that there was evidence from this period of personal allegiance, but no political authority, it rejected Morocco's claim. It was, however, satisfied on the evidence presented that there were at the relevant times "legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara", and also that there existed "rights, including some rights relating to the land, which constituted legal ties"[66] between the territory and the Mauritanian entity.

In the *Frontier Dispute* the Chamber, following the promptings in the special agreement, decided that the boundary between Burkina Faso and Mali should be

63. For discussion of the Court's treatment of the evidence in this case *see* Fitzmaurice, *supra* notes 21 and 60, at 575-580 and 284-316 respectively; also T.M. Franck, *Fact-Finding in the I.C.J. in* R.B. Lillich (Ed.), Fact-Finding Before International Tribunals 21, at 22-24 (1992).
64. 1975 ICJ Rep. 12, at 39, para. 81. *See also* Thirlway, *supra* note 33, at 10-12 and Franck, *supra* note 63, at 26-28.
65. 1975 ICJ Rep. 12, at 43, para. 93.
66. *Id.*, at 68, para. 162.

established by applying the *uti possidetis* principle. This meant that it had to determine where the boundary lay when both states had been French colonies, a task of considerable difficulty and one which required examination of a great deal of historical material. The evidence in this case can be divided into three types.[67] In the first place there were the laws, decrees and orders of the colonial authorities which, though very numerous, were inconclusive. Secondly, because the administrative documents were uncertain, both states relied on colonial *effectivités* as proof of the exercise of territorial jurisdiction. Thirdly, both parties made extensive use of maps, whilst disagreeing about the significance of this evidence, as will be seen shortly. Taking into account all this material the Chamber established the boundary by drawing a series of straight lines and arranging for subsequent demarcation.

The Chamber in the *Land, Island and Maritime Frontier Dispute* was also confronted with a situation in which much of the evidence related to *uti possidetis* and the significance of *effectivités* and was disputed. Here the problem was to establish the position in 1821 when El Salvador and Honduras achieved their independence from Spain, as regards the six disputed portions of the land boundary and the three islands which the Chamber decided were in dispute. As in the previous case, although a great deal of material was produced relating to colonial administration, no clear evidence of a defined boundary could be identified. The Chamber therefore took into account *effectivités*, distinguishing for this purpose between colonial *effectivités* of the type utilised in the *Frontier Dispute*, and post-independence *effectivités* relevant to identifying the 1821 boundary and also to the issue of acquiescence. As regards the islands, where the pre 1821 evidence was particularly obscure, the post-independence *effectivités* were decisive and resulted in a decision which gave the island of El Tigre to Honduras and the other two islands to El Salvador.[68]

On boundary and territorial issues maps are capable of providing evidence of both the situation on the ground and the attitude of the states concerned towards it.[69] Not surprisingly, therefore, the *Frontier Dispute* case is not the only one in which maps have been relied on by the parties to support their arguments. In the *Minquiers and Ecrehos* case both states submitted maps purporting to indicate the status of the islands. However, as these were contradictory and so much other evidence was available, maps played little part in the Court's decision.[70] In the *Frontier Land* case, on the other hand, the Court relied on Belgian military staff maps, along with other material, to conclude that Belgian sovereignty over

67. *See* P.-M. Dupuy, *Fact-Finding in the Case Concerning the Frontier Dispute (Burkina Faso/ Republic of Mali)*, *in* Lillich, *supra* note 63, at 81.
68. For a summary and analysis of the Chamber's decision in this complex case *see* M.N. Shaw, *Case Note*, 42 ICLQ 929 (1993) and G. Rottem, *Case Note*, 87 AJIL 618 (1993).
69. *See* S.Akweenda, *The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia*, 60 BYBIL 205 (1989).
70. *See* Akweenda, *id.*, at 220; also Cukwurah, *supra* note 45, at 223.

the disputed plots, which it found to have been established in 1843, had not subsequently been extinguished.[71] Here, therefore, map evidence was more important. Likewise, in the *Temple* case, as will be seen later,[72] the Court decided that a crucial map had been accepted by Thailand and consequently defined the boundary with binding effect, even though the map had not been binding at the time of its production.

A particularly useful treatment of the value of maps is to be found in the *Frontier Dispute* where, as already noted, the parties held different views. Burkina Faso maintained that where documentary evidence was lacking what it called 'cartographic titles' could be used instead. This, however, was rejected by the Chamber in favour of the conventional view advanced by Mali that maps have no intrinsic legal force but "are only extrinsic evidence of varying reliability or unreliability which may be used along with other evidence of a circumstantial kind to establish or reconstitute the real facts."[73] Despite this disclaimer, the Chamber did in fact pay careful evidence to the map evidence, discussing its significance throughout the judgment and in some instances treating it as decisive.[74] The approach adopted in this case was expressly endorsed by the full Court in the *Kasikili/Sedudu Island* case, where both parties submitted a large number of maps relating to the disputed boundary. The Court, however, found this evidence contradictory and inconclusive.[75] In the absence, therefore of any official map, or any acceptance of a map boundary, it decided this case on other grounds.

Before leaving the subject of fact-finding it is worth mentioning two further points. The first is that the adequacy of the evidence available to the Court has sometimes been questioned. In the *Western Sahara* case Spain maintained that the Court was in no position to give the opinion requested because the information available to answer the General Assembly's questions was insufficient, but the argument was rejected. Similarly, in the *Temple* case, where the location of a watershed was in doubt, and the *Kasikili/Sedudu Island* case, where hydrological data was required, individual members of the Court considered that expert surveys should have been ordered.[76] However, these views too were rejected. The second point is that in several of the cases under review an excess of information was available in the sense that the parties spent time and effort bringing evidence forward on matters that were not dealt with in the judgment. As this point concerns the administration of international justice, we return to it below.[77]

71. *See* Akweenda, *id.*
72. *See* Section 3.4., *infra*.
73. 1986 ICJ Rep. 554, at 582, para. 54.
74. *See* Dupuy, *supra* note 67, at 86-91, and Akweenda, *supra* note 69, at 223-225.
75. *Kasikili/Sedudu Island* case, *supra* note 8, at paras. 81-87. An earlier discussion of the map evidence in this case will be found in Akweenda, *supra* note 69, at 244-51.
76. *See* the *Temple* case, *supra* note 4, at 75 (Judge Wellington Koo, Dissenting Opinion), and the *Kasikili/Sedudu Island* case, *supra* note 8 (Judge Oda, Separate Opinion).
77. *See* Section 3.5., *infra*.

3.3. Treaty issues

Treaties are an essential tool in boundary making. As a result disputes over boundaries often involve treaties and in several of the cases under review treaty issues of one kind or another have been prominent. In the *Territorial Dispute* the question was whether a treaty concluded in 1955 between Libya and France laid down the whole of the parties' boundary. Libya argued that it left the crucial part of the boundary unsettled with the result that the case was a dispute as to the attribution of territory, not a boundary dispute.[78] However, the Court disagreed and holding in accordance with Article 31 of the 1969 Vienna Convention on the Law of Treaties that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, ruled that the treaty settled the whole of the boundary.

In reaching this conclusion the Court upheld the principle of stability and finality of frontiers which it had emphasised in earlier cases[79] and which, together with the principle of effectiveness (also mentioned), has the effect of creating a presumption supporting a boundary settlement. The *travaux préparatoires* were held to confirm this view and subsequent practice was found to be consistent. In an argument reminiscent of a point made by Thailand in the *Temple* case,[80] Libya argued that the Court should make allowances for its relative lack of diplomatic experience at the time when the Franco-Libyan treaty was negotiated, but this "variation on the theme of unequal treaties",[81] as questionable in positive law as in legal policy, was ignored in the judgment. The effect of the ruling on the 1955 treaty was, the Court decided, to refer the actual definition of the boundary to a 1919 Anglo-French treaty, incorporated by reference in the later agreement. In accordance with its provisions, the whole of the disputed territory was found to belong to Chad.

The main issue in the *Kasikili/Sedudu Island* case was whether the north or south channel of the River Chobe, where the river divided to flow round the island, was the 'main channel' for the purposes of Article 3 of an 1890 Anglo-German Agreement which Botswana and Namibia accepted as defining their common boundary. This therefore was a case which turned not on the relevance of a boundary treaty, but upon its interpretation. Starting once more from the concept of ordinary meaning, the Court considered the depth and width of the

78. On the significance of this distinction in the *Territorial Dispute* and earlier cases see Thirlway, *supra* note 33, at 27-31.
79. *See* Cukwurah, *supra* note 45, at 119-134, discussing the Court's earlier decisions in the *Frontier Land* case, the *Arbitral Award* case and the *Temple* case. *See also*, however, the reservations expressed by Judge Shahabuddeen in his separate opinion, 1994 ICJ Rep 6, at 44.
80. Thailand had entrusted the preparation of the disputed map to French officials because it lacked experts to carry out the work itself. However, this was held to be irrelevant in view of its acceptance of the map line.
81. Naldi, *supra* note 62, at 689.

river, the flow of water, visibility (in other words appearance), the configuration of the river bed and navigability.[82] Some of this evidence was contested, but evaluating it was made somewhat easier by the assumption that the hydrological situation was the same as in 1890, which meant that current data could be used. On the criterion of ordinary meaning the Court concluded that the northern channel of the Chobe must be regarded as the main channel.

The Court also briefly considered the object and purpose of the treaty, which it identified as to secure freedom of navigation and to delimit as precisely as possible the Anglo-German spheres of influence, then followed this with an extended review of subsequent practice which both parties had discussed extensively in argument.[83] Although the Court concluded that in the absence of consensus none of the material cited qualified as either subsequent practice, for the purposes of Article 31(3)(b) of the Vienna Convention, or a 'subsequent agreement', for the purposes of Article 31(3)(a), the judgment on this point is of general interest because the various materials relied on – a reconnaissance report from 1912, correspondence between the administering authorities in 1947-1951, a joint survey of 1985 and the unopposed, but intermittent presence of tribespeople on the island, are entirely typical of boundary cases. The weight of such evidence, of course, depends on the particular facts and in an appropriate case it can be decisive. Here, however, the Court ruled that neither this evidence, nor the map evidence mentioned earlier, affected its ruling in favour of Botswana.

The problems of interpreting treaties such as the Anglo-German Agreement, which are not unlike those encountered in applying the *uti possidetis* principle, are highlighted by the divergent approaches taken by individual members of the Court. As regards subsequent practice, for example, Judges Weeramantry and Parra-Aranguren in their dissenting opinions attached decisive significance to the use of the islands by tribespeople, although the latter considered that only practice before 1914 was relevant. For Judge Higgins, on the other hand, the crucial element was the Anglo-German desire to create a clear frontier. In her view this required the Court to emphasise physical appearance over other factors and eschew the chimera of ordinary meaning.

In the *Frontier Land* case the Court had to decide whether two small plots of land belonged to Belgium or to the Netherlands. An agreement between local officials, signed in 1841 and called the 'Communal Minute' assigned the plots to the Netherlands, according, at any rate, to its version of the document. But a Convention concluded in 1843, which purported to confirm the status quo, incorporated a different version in its annexed 'Descriptive Minute' and gave the plots to Belgium. In this confusing situation much turned on the interpretation of the Convention. According to the Netherlands, it merely recognised the exis-

82. *Kasikili/Sedudu Island* case, *supra* note 8, at paras. 29-42.
83. *Id.*, at paras. 43-46 and 47-80.

tence of the status quo, leaving its content to be determined by reference to the Communal Minute. According to Belgium, on the other hand, the Convention, which was based on the work of a Boundary Commission, went further and actually delimited the boundary by means of the Descriptive Minute.

The Court preferred the Belgian argument, relying in part on the preamble to the Convention which it decided "was intended to determine, and did determine"[84] which State the various plots belonged to. The reasoning here with its emphasis on finality anticipates the approach in the *Territorial Dispute* case, but the presence of complicating factors such as indications that other versions of the Communal Minute existed and ambivalent subsequent practice should also be noted.[85] Judge Lauterpacht considered that "the relevant provisions of the Convention must be considered as void and inapplicable on account of uncertainty and discrepancy"[86] and Judges Armand-Ugon, Moreno Quintana and Spiropoulos, who also dissented, agreed the Convention was vitiated by error. On this view, therefore, the critical element was not the treaty but the parties' subsequent acts of administration which on their assessment favoured the Netherlands.

Besides the cases just mentioned, in which treaty obligations were the central element, others contain discussion of treaty points, although as a part of judgments based mainly on other grounds. Thus in the *Minquiers and Ecrehos* case, as well as the medieval treaties already mentioned, the Court relied on the parties' subsequent practice when assessing the significance of an Anglo-French Fishery Convention of 1839.[87] In the *Arbitral Award* case the Court satisfied itself that the appointment of the King of Spain as arbitrator had been in accordance with the Gaméz-Bonilla Treaty of 1894 before turning to the question of acquiescence. And in the *Temple* case, having closely examined the issues of acquiescence and preclusion and found in favour of Cambodia, the Court added that it had reached the same conclusion as a matter of interpretation of the relevant treaties, including the Franco-Siamese Boundary Treaty of 1907, the preamble to which recited the parties' desire to ensure "the final regulation of all questions relating to the common frontiers of Indo-China and Siam."[88]

3.4. Estoppel, acquiescence and preclusion

The conduct of states with regard to disputed territory is seldom completely consistent over time. The claims of rivals may be ignored, challenged only belatedly, or even acknowledged, and views about a state's own rights may be ex-

84. 1959 ICJ Rep. 209, at 221. *See also* Cukwurah, *supra* note 45, at 124-126.
85. *See* H. Darwin, *Judicial Settlement, in* E. Luard (Ed.), The International Regulation of Frontier Disputes 198, at 208-211 (1970).
86. 1959 ICJ Rep. 209, at 230 (Judge Lauterpacht, Declaration).
87. *See* Fitzmaurice, *supra* note 60, at 184-186.
88. 1962 ICJ Rep. 6, at 35. *See also* Thirlway, *supra* note 33, at 24-26.

pressed that are subsequently regretted. Not surprisingly, therefore, the concepts of estoppel, acquiescence and preclusion, whose purpose is to attach legal consequences to such vacillations, play a prominent part in boundary and territorial disputes. The precise scope of these concepts is still the subject of some debate, although it seems generally agreed that all three derive ultimately from the principle of good faith.[89] While it is impossible to resolve that debate here, a glance at the leading cases will show its importance.

In the *Temple* case, as noted earlier, Thailand sought to argue that an official map depicting part of its boundary with Cambodia was not binding because the map, which according to a treaty between the two states should have shown a boundary running along the watershed, actually showed a different line. The Court accepted that the map was not an authentic document of the Commission set up to determine the boundary because the Commission had never approved it. Nevertheless, it decided that the map line established a frontier binding on the parties and supported this conclusion with two reasons based on different elements in Thailand's conduct.

The first reason was that France, which then ruled Cambodia, had prepared the map and handed it over to Thailand in circumstances that, in the Court's view, called for some reaction if the recipient wished to challenge it. Since Thailand had not done so, the Court held that it "thereby must be held to have acquiesced."[90] Secondly, even if there was any doubt on the first point, the Court held that Thailand was now precluded from asserting that the map had not been accepted because it had for fifty years refrained from raising the point and over that period had enjoyed the benefit of a stable frontier. The two points neatly illustrate the difference between the concepts of acquiescence and preclusion/estoppel, the former resting on the idea that a state agreed to something (even if tacitly), the latter on the idea that although the state did not agree, it should be treated as if it had on account of its misleading conduct.[91]

The value of the concepts of acquiescence, estoppel and preclusion, and the difficulty of always distinguishing sharply between them, may be seen in the *Arbitral Award* case, another of the Court's earlier decisions. The question here was whether Nicaragua was entitled to challenge a boundary award dating from 1906, and so the issue of territorial title arose at one remove. Nicaragua maintained first that the award was invalid because the King of Spain, as arbitrator, had not been properly appointed. The Court, however, after examining the terms of the relevant treaty, rejected this argument on the merits, but went on to say that as the parties had gone through with the arbitration, it was in any event no longer open to Nicaragua to raise this objection.

89. *See* Thirlway, *supra* note 49, at 29-49 and I. Sinclair, *Estoppel and Acquiescence*, *in* Lowe & Fitzmaurice, *supra* note 23, at 104.
90. 1962 ICJ Rep. 6, at 23.
91. *See* Thirlway, *supra* note 49, at 32-34 and 45-46, drawing attention to the discussion of this issue in the individual opinions of Judge Fitzmaurice and a number of other members of the Court.

Nicaragua's second argument was that the award itself was a nullity on various grounds, including the alleged failure of the arbitrator to give sufficient emphasis to the principle of *uti possidetis*.[92] This too the Court found unpersuasive, but on this point, unlike the first, the main ground for its decision rested on Nicaragua's conduct. Nicaragua had, said the Court, recognised the award by express declaration and by conduct and had also refrained from challenging it for several years. In these circumstances it had lost any right to do so. A striking feature of the judgment is that both points were disposed of without the Court using the terms estoppel, preclusion or acquiescence. However, Thirlway has suggested that the emphasis throughout on Nicaragua's agreement makes the case one of acquiescence with overtones of preclusion and this seems persuasive.[93]

More recently acquiescence played a significant part in the *Land, Island and Maritime Frontier Dispute*. The Chamber, as has been seen, regarded the concept of *uti possidetis* as fundamental to the case, but went on to hold that as a matter of legal principle the *uti possidetis juris* position can be qualified by acquiescence or recognition.[94] Having given this important ruling, it then decided that the course of the first sector of the land boundary should be determined by reference to the acquiescence between 1881 and 1972 of Honduras in El Salvadorean *effectivités*.[95] As regards the islands too, the Chamber not only took into account the parties' immediate post-independence conduct as evidence of the 1821 position, but also the same material, together with their more recent conduct, as possibly constituting acquiescence. This was particularly important with regard to the island of Meanguerra, where it held that a protest to El Salvador in 1991 came far too late as Honduras's conduct "vis-á-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation."[96]

Because the concepts under discussion all concern the conduct of the state, behaviour suggesting acquiescence may be used to support a ruling based on a different ground. This may be seen in the *Minquiers and Ecrehos* case where the main issue, as we have seen, was the parties' ability to prove their possession of the islands, but the United Kingdom put forward evidence of French conduct in the nineteenth century, including a map, tending to acknowledge British claims. In view of its limited character and the quantity of other somewhat contradictory material, the Court did not regard this evidence as strong enough to ground a finding of acquiescence. It did, however, treat it as material indicating French

92. *See* Darwin, *supra* note 85, at 211-215.
93. *See* Thirlway, *supra* note 49, at 46. The question of estoppel was raised (but rejected) in the dissenting opinion of Judge Urrutia Holguin, *see* 1960 ICJ Rep. 192, at 221.
94. *See* 1992 ICJ Rep. 351, at 401, para. 67.
95. *Id.*, at 408, para. 80.
96. *Id.*, at 577, para. 364. *See also* Sinclair, *supra* note 89, at 117-118.

doubts and as such took it into account in evaluating the strength of the competing claims.[97]

It would also be expected that in some boundary and territorial disputes arguments based on estoppel, acquiescence or preclusion are advanced by the parties, but play little or no part in the decision. In the *Frontier Dispute*, for example, Burkina Faso argued that Mali could not challenge the frontier line because in 1975 it had accepted the proposals of an OAU Mediation Commission. Though acknowledging that the Commission had no competence to take binding decisions and had failed to complete its work, Burkina Faso maintained that the President of Mali had declared that Mali would comply with the Commission's proposals and had thereby acquiesced in both the proposals and their underlying principles. The Chamber, however, decided that in the absence of an agreement, Mali could only be bound if the President's statement constituted a binding unilateral act and finding the necessary intention to be absent, decided that it was without legal effect.[98]

A judgment like that in the *Frontier Dispute* in which an argument is expressly rejected applies the particular rule or principle and as such illustrates its scope. Less useful are judgments like that in the *Territorial Dispute* where a point extensively canvassed by the parties is never examined. In that case Chad argued that even if the frontier had not been settled by the 1955 treaty, between 1951 and 1960, when first Libya and then Chad became independent, France had submitted annual reports to the United Nations, showing the disputed territory as belonging to Chad, without challenge from Libya. In Chad's view this constituted acquiescence and Judge Ajibola agreed.[99] The Court, however, finding the boundary to be laid down in the treaty, made only a passing reference to the point.[100]

3.5. The administration of international justice

In a number of the cases we are considering the parties spent time and effort producing evidence on matters that the Court found it had no need to deal with in the judgment. In both the *Minquiers and Ecrehos* case and the *Western Sahara* case, as noted earlier, much of the historical evidence was held to be irrelevant. This was also true of the historical material put forward by Libya and Chad

97. *See* Sinclair, *id.*, at 117. *Cf.* the Court's statement in the *Frontier Land* case that "For almost a century the Netherlands made no challenge to the attribution of the disputed plots to Belgium", 1959 ICJ Rep. 209, at 227. In the *Kasikili/Sedudu Island* case, on the other hand, the Court found that when South Africa had claimed title, Bechuaualand did not accept the claim, thereby precluding acquiescence, *see* para. 98 of the Judgment.

98. *See* 1986 ICJ Rep. 554, at 573-574, paras. 39-40 and Thirlway, *supra* note 49, at 18-20. *Cf.* the separate opinion of Judge Luchaire *id.*, at 652, relying on the principle of estoppel.

99. 1994 ICJ Rep. 6, at 77-83, paras. 96-114 (Judge Ajibola, Separate Opinion).

100. *Id.*, at 34, para. 68. *See also* Sinclair, *supra* note 89, at 118-120.

in the *Territorial Dispute* once the 1955 treaty was ruled definitive,[101] and also of the evidence relating to the location of the watershed in the *Temple* case, which it became unnecessary to consider when the Court decided that Thailand had accepted the map line.[102]

Speaking of his experience as a member of the Court in the *Territorial Dispute*, Judge Ajibola said that "at the end of the day, you feel like writing a book on that country or that dispute"[103] and has questioned whether in the interests of economy the parties' pleadings in boundary and other cases might not be abbreviated. Alternatively, it might perhaps be argued that when the parties have gone to the trouble of arguing a particular point, they should expect the Court to deal with it. A moment's thought, however, shows the second view to be untenable. No court feels obliged to deal with every point in a case and to attempt to do so would often be quite impractical.[104] The efficient administration of international justice does, on the other hand, merit giving some attention to the plea made by Judge Ajibola.

Paring down the voluminous material characteristic of the pleadings in territorial and boundary cases is, however, far from straightforward.[105] While the Court necessarily possesses a general power to regulate the proceedings, the litigants are sovereign states with a party's right to make its case. More specifically, as Sinclair has pointed out,[106] counsel cannot be expected to refrain from developing an apparently promising line of argument without some indication from the Court that to do so would be inadvisable. Abbreviating argument will therefore require procedural innovation. In any event, as the Court's case law demonstrates, in territorial and boundary cases, the historical record is usually the key to applying the law. For this reason, if for no other, evidence of this type will always be significant.

A second and fundamental issue relating to the administration of international justice concerns the Court's view of the law. In the *Temple* case both parties put forward arguments about the cultural and historical significance of the

101. If the treaty was not definitive, title to the disputed territory depended on the previous historical record. Accordingly, Libya produced material relating to rights and titles of the Ottoman empire and indigenous rights and Chad evidence of French colonial *effectivités*. For discussion of this material *see* the dissenting opinion of Judge Sette-Camara, 1994 ICJ Rep. 6, at 101.

102. The watershed issue was, however, discussed in a number of the individual opinions in the case, *see* the separate opinion of Judge Fitzmaurice and the dissenting opinions of Judges Moreno Quintana, Wellington Koo and Spender 1962 ICJ Rep. 6, at 52, 67, 75 and 101 respectively.

103. *See* I. Sinclair *et al.*, *Modernizing the Conduct of the Court's Business*, *in* C. Peck & R.S. Lee (Eds.), Increasing the Effectiveness of the International Court of Justice 101, at 113 (1997).

104. *See* R.Y. Jennings, *The Proper Work and Purposes of the International Court of Justice*, *in* Muller, Raic & Thuranszky, *supra* note 40, at 33.

105. *See* K. Highet *et al.*, *Problems in the Preparation of a Case: Perceptions of the Parties and the Court*, *in* Peck & Lee, *supra* note 103, at 126.

106. *See* Sinclair, *supra* note 103, at 124.

Temple of Preah Vihear which the Court brushed aside.[107] Similarly, when evaluating Thailand's conduct, the Court gave no weight to the fact that the Thai authorities were dealing with a colonial power (France) and, as noted earlier, discounted an analogous point raised by Libya in the *Territorial Dispute*. These attitudes have led some to criticise the Court as insensitive,[108] although arguments outside the accepted legal framework are hard to accommodate by definition. In the *Western Sahara* case, it is interesting to note, the Court achieved something of a compromise, rejecting the argument of Algeria and Mauritania that it should acknowledge the existence of an Arab-Islamic civilisation with its own concept of sovereignty, but on the issue of 'legal ties' making the Arab-Islamic elements in the case the focal point of its opinion.[109]

Related aspects of this issue of some relevance to boundary cases are the role of equity and the *non ultra petita* rule. Equity has played a major part in the Court's decisions on maritime delimitation, but has been much less prominent in cases concerned with land territory.[110] However, in the *Frontier Dispute* the Chamber endorsed the concept of equity *infra legem* which it described as "that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes."[111] Equity *infra legem* was also employed to determine one part of the land boundary in the *Land, Island and Maritime Frontier Dispute*.[112] By virtue of the *non ultra petita* rule a court or tribunal lacks competence in principle to deal with matters not covered by the parties' submissions.[113] Thus, for example, it should not lay down a boundary beyond the lines claimed by the disputing states. In the *Land, Island and Maritime Frontier Dispute*, however, this is just what the Chamber did in respect of five small sections of the land boundary, relying on the minor nature of the deviations, the fundamental significance of the *uti possidetis* principle in the case and geographical convenience.[114]

A third and final point relating to the administration of justice concerns the role of the Court in dealing with international disputes. That this can be engaged

107. "The parties have also relied on other arguments of a physical, historical, religious and archaeological nature, but the Court is unable to regard them as decisive", 1962 ICJ Rep. 6, at 15.
108. *See* G.M. Kelly, *The Temple Case in Historical Perspective*, 39 BYBIL 462 (1963), and L.V. Prott, The Latent Power of Culture and the International Judge 158-161 (1979).
109. *See* Shaw, *supra* note 20, at 134-144.
110. *See* Thirlway, *supra* note 49, at 49-62, and P. Weil, *L' Equité Dans la Jurisprudence de la Cour Internationale de Justice*, in Lowe & Fitzmaurice, *supra* note 23, at 121.
111. 1986 ICJ Rep. 554, at 567-568, para. 28. It then used the concept as justification for dividing a frontier pool between the parties equally, *see id.*, at 633, para. 150.
112. *See* 1992 ICJ Rep. 351, at 514-515, paras. 262-263, and H. Post, *Adjudication as a Mode of Acquisition of Territory? in* Lowe & Fitzmaurice, *supra* note 23, at 237.
113. *See* Fitzmaurice, *supra* note 21, at 525-533, using the *Minquiers and Ecrehos* case as an illustration.
114. See K.H. Kaikobad, *The Quality of Justice 'Excés de Pouvoir' in the Adjudication and Arbitration of Territorial and Boundary Disputes, in* G.S. Goodwin-Gill & S. Talmon (Eds.), The Reality of International Law. Essays in Honour of Ian Brownlie 293, at 299-302 (1999), and *cf.* the Chamber's treatment of the islands issue, discussed *id.*, at 308.

even before the actual judgment is shown by the fact that in the *Frontier Dispute* and the *Land and Maritime Boundary* case the Court exercised its powers under Article 41 of the Statute and indicated provisional measures of protection.[115] In the first case both states had requested such measures (though in different terms), whereas in the second case Cameroon's request was opposed by Nigeria. In each case, however, the Court made an order in rather similar terms, the effect of which was to calm the situation, confirm a previously agreed ceasefire and encourage the parties to co-operate, pending the next stage in the proceedings.[116]

At the merits stage the Court must answer the question or questions posed, but on occasion has decided to go further. In the *Western Sahara* case, as mentioned earlier, the questions put by the General Assembly made no reference to self-determination, but the Court, quite justifiably, saw this as part of the wider legal context and made a point of emphasising the status of the principle in international law, the right of the peoples concerned to be consulted and the role of the General Assembly. An extended view of the judicial function has also sometimes been taken by individual judges. Thus in the *Minquiers and Ecrehos* case Judge Basdevant suggested that the United Kingdom should continue to administer the islands in a flexible manner, and Judge Levi Carneiro welcomed its declaration of willingness to co-operate with a proposed French hydro-electric scheme.[117]

Care must be taken, however, lest such well meaning initiatives infringe the *ultra petita* rule. The dangers may be seen from the *Kasikili/Sedudu Island* case. There, though the special agreement sought a ruling only on the boundary between Namibia and Botswana and the legal status of the island, the Court held unanimously that in the two channels around the island the vessels and nationals of the two states were entitled to equal treatment. It justified this by quoting a communiqué recording an agreement between the parties on social interaction, economic activities and navigation.[118] Judge Weeramantry would have gone further and required the parties to negotiate a joint regulatory regime for the island and waterway as a means of environmental protection.[119] This is, no doubt, a laudable objective, but with due respect to the learned judge, so expansive an

115. *See* Frontier Dispute (Burkina Faso *v.* Mali), Provisional Measures, Order of 10 January 1986, 1986 ICJ Rep. 3, and Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria), Provisional Measures, Order of 15 March 1996, 1996 ICJ Rep. 13.

116. *See* Naldi, *supra* note 18 and J.G. Merrills, *Case Note*, 46 ICLQ 676 (1997). *See also* J.G. Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 ICLQ 90 (1995).

117. *See* 1953 ICJ Rep. 47, at 83-84 (Judge Basdevant, Separate Opinion) and 109 (Judge Levi Carneiro, Separate Opinion). *See also* Fitzmaurice, *supra* note 21, at 561-563.

118. *Kasikili/Sedudu Island* case, *supra* note 8, at paras. 100-103.

119. Dissenting opinion of Judge Weeramantry, *id.*, at paras. 114-116. Dissenting opinion of Judge Weeramantry, *id.*, at paras. 114-116.

approach to the judicial function is hard to reconcile with the special agreement and basis of the Court's jurisdiction.[120]

4. THE POST-ADJUDICATION PHASE

According to Article 94(1) of the United Nations Charter Member States undertake to comply with the decision of the Court in any case to which they are a party. Cases involving territorial and boundary issues, like those involving other issues, may nevertheless present problems of implementation. Indeed by reason of their subject matter such cases are likely to pose particular difficulties. Touching as they do on interests of great sensitivity, disputes about sovereignty usually have a long history which may make an adverse decision hard to accept, especially if it requires territory to be handed over. Even if the parties are disposed to accept a decision in principle, demarcation of the new boundary may be needed, or other practical problems may present themselves. Implementation is therefore not something that can be taken for granted.

The post-adjudication phase of a case, as Rosenne has pointed out,[121] consists in the main of a series of political decisions. It follows that the likelihood of successful implementation depends on a range of factors including the background and circumstances of the dispute, the interests at stake and the attitude of the parties. These, it will be noted, are relevant also to how a case is brought to the Court in the first place which, of course, also involves political decisions.[122] As noted earlier, nearly all the cases we are considering were taken to the Court by special agreement, indicating a willingness by both parties to see the matter resolved. It is therefore no surprise that in several of those cases implementation was quite straightforward.[123]

Although cases referred by special agreement are less likely to present problems than those in which adjudication has been resisted, the *Temple* case demonstrates that in appropriate circumstances unilateral reference to the Court in a boundary dispute can also be effective. In that case, as noted earlier, Cambodia's application was based on the parties' declarations under Article 36(2), but was strongly resisted by Thailand. The Court's decision on the merits, which was in favour of Cambodia, required Thailand to withdraw its forces from the Temple and its vicinity and to restore any objects which it had removed. In its response shortly afterwards Thailand announced that, despite its profound sorrow at the

120. *See* I. Brownlie, *A Lecture on International Boundary and Territorial Disputes*, at 6-9 (March 2000, not yet published).

121. S. Rosenne, The Law and Practice of the International Court, 1920-1996, Vol. I, at 201 (1997).

122. *See* P. Magid *et al.*, *The Post-Adjudication Phase*, *in* Peck & Lee, *supra* note 103, at 324. The comparison is made *id.*, at 332-333.

123. Thus no difficulties seem to have been encountered in the *Minquiers and Ecrehos* case or the *Frontier Land* case. Implementation in the *Kasikili/Sedudu Island* case also appears to be straightforward.

judgment, it considered that as a member of the United Nations, it was bound to honour its obligations under the Charter and to comply with the decision.[124]

Where implementation of a decision is expected to raise technical issues the *Frontier Dispute* shows how the parties can make their task easier by utilising the Court's assistance. Anticipating that when the Chamber made its award they would need help in establishing the boundary on the ground, Burkina Faso and Mali agreed to demarcate the frontier within twelve months of the decision and asked that in its judgment the Chamber should nominate three experts to assist them in this work. In its decision in 1986 the Chamber supported this arrangement in principle, but stated that before nominating experts it wished to ascertain the views of the parties "particularly as regards the practical aspects of the exercise."[125] Accordingly, the three experts were named by an order of the Chamber in 1987.[126] It should also be noted that the eventual demarcation in this case involved the use of a geo-stationary satellite and without considerable assistance provided by Switzerland might well have proved financially prohibitive.[127]

The demarcation of a boundary was also required for the implementation of the Court's judgment in the *Arbitral Award* case.[128] Here, as a result of the decision in favour of Honduras, Nicaragua was required to evacuate a populated area of approximately 5,000 square miles, but difficulties arose over implementation. Following bilateral negotiations, Nicaragua referred the issue of execution to the Inter-American Peace Committee in accordance with a resolution of the OAS Council preceding the reference to the Court. The Peace Committee secured the parties' agreement to the creation of a Mixed Commission to deal with questions of demarcation and nationality. The Commission resolved the issues of demarcation, though not without difficulty[129] and also supervised the transfer of about 4,000 individuals who had opted for Nicaraguan nationality. In July 1963, nearly three years after the Court's judgment and more than half a century after the original Award of the King of Spain, the Inter-American Peace Committee reported to the OAS Council that its work was completed.

In accordance with Article 54 of the Charter the report of the Inter-American Peace Committee was transmitted to the United Nations Security Council and, as Rosenne points out, the sequence of events in the *Arbitral Award* case, from the initial involvement of the OAS Council in 1957 to the execution of the

124. *See* Magid, *supra* note 122, at 333, note 24.
125. 1986 ICJ Rep. 648, para. 176.
126. *See* Frontier Dispute (Burkina Faso *v.* Mali), Nomination of Experts, Order of 9 April 1987, 1987 ICJ Rep. 7. The experts nominated were a French lawyer, an Algerian cartographer and a Dutch geodetic consultant. *See also* G. White, *The Use of Experts by the International Court*, in Lowe & Fitzmaurice, *supra* note 23, at 126.
127. *See* A. Eyffinger, The International Court of Justice 1946-1996, at 366 (1996).
128. *See* Rosenne, *supra* note 121, at 265-269.
129. *See* Rosenne, *id.*, at 269 and Kaikobad, *supra* note 114, at 307. For the text of the 1961 decision of the Mixed Commission *see* 30 ILR 76 (1966).

Court's judgment six years later, illustrate "the functional integration of judicial settlement, including the post-adjudication phase, with the peace-keeping activities of an international organisation."[130] Such integration is no less evident in the *Territorial Dispute* case where, as in the *Arbitral Award* and *Temple* cases, implementation of the decision required the losing party to give up territory, but this time the Security Council was involved.

The Court's judgment of February 1994 awarded the Aouzou Strip to Chad and in April the parties concluded an agreement on its implementation. The agreement provided for the withdrawal of the Libyan administration, under the supervision of officers from the parties and United Nations observers. Following a request from the parties to the Secretary General, the Security Council first arranged for the sending of a reconnaissance team, then by resolution 915 in May established the United Nations Aouzou Strip Observer Group (UNASOG), in both instances providing exemption from the sanctions against Libya imposed by resolution 748 (1992).[131] The Libyan withdrawal took place without incident and in resolution 926 in June 1994 the Security Council welcomed this outcome and terminated UNASOG's mandate. The Libya-Chad case is the first in which the Security Council has been directly involved in the implementation of a judicial decision, but as the Secretary-General commented in his final report, "The accomplishment of the mandate of UNASOG amply demonstrates the useful role, as envisaged by the Charter, which the United Nations can play in the peaceful settlement of disputes when the parties co-operate fully with the Organisation."[132]

Although an advisory opinion is an authoritative statement of the law, no provision of the Charter or Statute renders such opinions legally binding or provides for their enforcement. The reception of such opinions and the extent to which they are implemented are dependant therefore on political circumstances even more palpably than contentious judgments. The significance of this point may clearly been seen from the *Western Sahara* case. Here the General Assembly, which had requested the opinion, took note of the Court's opinion 'with appreciation' and in resolution 3458A of 10 December 1975 requested Spain as administering power to take steps to enable the inhabitants of the territory under United Nations supervision to exercise their inalienable right to self-determination which the Court had emphasised in its opinion. However, at the same time in resolution 3458B it appeared to endorse an agreement between Spain, Morocco and Mauritania providing for a division of the territory. Although Spain withdrew from the Western Sahara in 1976 and Mauritania re-

130. Rosenne, *id.*, at 265.
131. For the text of the Secretary-General's Report proposing the creation of UNASOG, Security Council Resolutions 910 and 915 relating to the Group, and other documentation *see* 100 ILR 101 (1995).
132. *Id.*, at 113. *See also* Rosenne, *supra* note 121, at 274-276. Also relevant in this connection is the assistance provided to Chad from the ICJ Trust Fund, *see* note 19, *supra*.

nounced its claim two years later, reconciling the interests of the Polisario independence movement with those of Morocco has so far proved impossible.[133]

5. CONCLUSION

Most disputes which come before the International Court contain enough material to justify several articles, if not a doctoral thesis. Territorial and boundary disputes with their major historical dimension and legal complexities are certainly no exception. A survey of the Court's activity in this field must therefore, of necessity, leave many details unexplored. From what has been said above, however, three broad conclusions can be drawn. First, the record clearly indicates the value of adjudication in resolving disputes which, as a former President of the Court has pointed out, are not only notoriously difficult, but also of a type that are very likely to generate political passions.[134] But the cases are, of course, more than decisions intended to resolve the particular dispute, important as that undoubtedly is. Because they are judicial decisions they have the incidental effect of developing the law. This, then, is the second conclusion that the rules and principles endorsed by the Court and their application to the particular facts,[135] amount to a significant contribution to legal development. The third conclusion concerns the setting in which all this occurs and the relation between adjudication and international politics. As already noted, the reference of cases to the Court and the reception of its judgments depend on political decisions. Moreover, the judgments themselves, though not political in any partisan sense involve assumptions about the nature of international law and the Court's role which are at root political.[136] Thus adjudication and politics are closely entwined, something that is true for all aspects of the Court's work, but which is manifestly evident in territorial and boundary cases.

133. On the immediate aftermath of the case *see* T.M. Franck, *The Stealing of the Sahara*, 70 AJIL 694 (1976) and on subsequent events Y.H. Zoubir, *The Western Saharan Conflict: A Case Study in Failure of Prenegotiation and Prolongation of Conflict*, 26 Calif. Western Int LJ 173 (1995/96).

134. *See* Sir Robert Jennings, *Contributions of the Court to the Resolution of International Tensions*, in Peck & Lee, *supra* note 103, at 77. The particular role of the Court in territorial and boundary cases is discussed *id.*, at 82-84.

135. So with reference to cases such as the *Minquiers and Ecrehos* case it has been noted that "the manner in which the Court decides upon the relevance of the facts relied upon by the parties provides, when adequately generalised, a contribution of considerable value for this branch of international law", H. Lauterpacht, The Development of International Law by the International Court 36 (1958).

136. For example, the Court's treatment of self-determination, indigenous rights, diplomatic inexperience and cultural factors, *see* respectively notes 53-55, 56-59, 80-81 and 107-109, and accompanying text, *supra*.