TERRITORY IN INTERNATIONAL LAW

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GENERAL PRINCIPLES OF INTERNATIONAL LAW: PRINCIPLE OF UTI POSSIDETIS JURIS

INTRODUCTION. *This paper considers the general principles of international law and focusing specifically on the principle of uti possidetis. The author argues that uti possidetis originating from Roman jus civile was transformed into a principle of interstate relations dealing with a transformation of former administrative borders into international boundaries of the newly independent states in Latin America in XX century. The principle's further effective application in Africa and Asia contributed into uti possidetis' formation as the principle of international law.*

MATERIALS AND METHODS. *The materials for the article were the works of leading Russian and foreign researchers in the field of international law dedicated to general principles of international law and international customary law. The author referred to historical, comparative and theoretical methods in his analysis.*

RESEARCH RESULTS. *It is argued that uti possidetis as the principle of international law has a primary concern with the state or territorial sovereignty. The paper analyses uti possidetis' evolution from the regional principle into the general principle of international law. It also deals with the review of cases considered by the International Court of Justice and other international ad hoc tribunals as well as specialised authoritative opinions of specialised international commissions that played a vital role in affirming uti possidetis as one of the general principles of international law.*

DISCUSSION AND CONCLUSIONS. *The author argues that uti possidetis is not similar to the principle of territorial integrity, and in contrast the former serves as auxiliary support to the latter one. The analysis refers to the most recent precedents with dissolution of the former communist federations that simply reconfirmed the importance of uti possidetis as the general principle of international law. It is concluded that the evolution of uti possidetis as the general principle of international law took place under influence of the state practice and application by international judicial bodies.*

KEYWORDS: *customary international law, new norms of international law, general principles of international law, territorial and boundary disputes and conflicts, uti possidetis, International Court of Justice, state practice*

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ТЕРРИТОРИЯ В МЕЖДУНАРОДНОМ ПРАВЕ

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ОБЩИЕ ПРИНЦИПЫ МЕЖДУНАРОДНОГО ПРАВА: ПРИНЦИП UTI POSSIDETIS JURIS

ВВЕДЕНИЕ. *Данная статья рассматривает общие принципы международного права, уделяя особое внимание принципу uti possidetis. Автор утверждает, что принцип uti possidetis, происходящий из римской гражданско-правовой концепции, трансформировался в принцип межгосударственных отношений, подразумевающий преобразование бывших административных границ в международные границы новых независимых государств в Латинской Америке в XX в. Дальнейшее эффективное применение этого принципа на африканском и азиатском континентах способствовало формированию принципа uti possidetis в качестве общего принципа международного права.*

МАТЕРИАЛЫ И МЕТОДЫ. *Материалом для исследования послужили труды ведущих российских и зарубежных исследователей в области международного права, посвященные общим принципам международного права и международному обычаю. В своем анализе автор ссылался на исторические, сравнительные и теоретические методы исследования.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Анализ, приведенный в данной статье, утверждает, что принцип uti possidetis преобразовался в принцип международного права, регулирующий вопросы государственного и территориального суверенитета. В статье приводятся аргументы относительно того, что принцип uti possidetis прошел путь эволюции от регионального принципа к общему принципу международного права. Детально проводится анализ судебных дел, рассмотренных Международным судом ООН и прочими ad hoc международными судебными органами и специализированными комиссиями, которые сыграли роль в формировании uti possidetis в качестве общего принципа международного права.*

ОБСУЖДЕНИЯ И ВЫВОДЫ. *Автор утверждает, что принцип uti possidetis не аналогичен принципу территориальной целостности, а наоборот, призван служить в качестве его дополнительной поддержки. Автор также ссылается на недавние прецеденты распада бывших социалистических федераций, подтвердившие значимость uti possidetis как общего принципа международного права. В своем анализе автор ссылался на исторические, сравнительные и теоретические методы исследования. Автором делается вывод о том, что эволюция uti possidetis как общего принципа международного права проходила под влиянием практики государств и его применения международными судебными органами.*

КЛЮЧЕВЫЕ СЛОВА: *международное обычное право, создание новых норм в международном*

праве, общие принципы права, территориальные и пограничные споры, uti possidetis. Международный суд ООН, практика государств

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The principle of *uti possidetis* is one of the principles of international law which provides for the delimitation of state territories. This principle is regarded within the context of territorial issues related to the process of obtaining independence. The principle also provides for the process of statehood formation [Crawford 2007: 107;] Dinh, Daillier, Pelle 2009: 573-637]. The principle of *uti possidetis* is not an ordinary for the legal doctrine [Sorel, Mehdi 1994: 11; Moore 1911:349-367]. However it should be observed that *uti possidetis* has been recognised as a general principle of international law[1].

According to most legal dictionaries, *uti possidetis* is the international law principle which refers to the transformation of former administrative borders of a colonial empire or state under dissolution into international boundaries of newly independent states[2].

Professor Shaw clearly stresses that the principle of *uti possidetis* is a principle designated to strengthen the principle of territorial integrity [Shaw 2008:527-528]. Oppenheim pointed out the role of *uti possidetis juris* as being a doctrine of great importance which strengthens the principle of the stability of state boundaries [Jennings, Watts 1996:669-690].

It is agreed with some commentators who argue that the principle *uti possidetis* has been adopted in international law for the purposes of protecting the territorial integrity of the constitutional units of former states which have exercised their right to external self-determination [Hannum 1993b: 57-73]. In other words, this principle has been applied as a legal tool not only for the delimitation of the boundaries of new units possessing all attributes of the statehood, but also for the forming of the international legal personality of such new states.

The main idea of the principle is that it determines state boundaries of newly independent states on the grounds of their previous administrative borders which they inherited from the former parent state [Mirzayev 2014: 56-72]. Therefore, the principle of *uti possidetis* pertains to the process of the creation of newly independent states, i.e. is one of the elements of the creation of statehood.

The position of the international tribunals and organisations in various territorial and boundary disputes and conflicts played a huge role in the formation of *uti possidetis* as a principle of international law. U*ti possidetis* was acknowledged as a principle of international law in a number of decisions made by international tribunals, universal and regional organisations[3]. If in the 19th century the Latin American principle (which was a customary rule of regional nature) applied basically between and among the former Spanish colonies, at the later stage it became a general principle of international law applied to newly established states beyond the decolonisation process. Application of u*ti possidetis* in Latin America in the process of decolonisation was the key issue for the new interpretation of the principle within the context of settlement of territorial disputes in international law which served as a ground for transformation of the Roman law doctrine into the principle of international law.

If starting from the beginning of the principle's application in contemporary history, it may be argued that the position of the international community towards *uti possidetis* was initially expressed in the Aalands Islands dispute[4]. Obviously, the use of the concepts and legal arguments constituting the core nature and designation of *uti possidetis juris* by the League of Nations and its specialised commissions in the course of the settlement of the Aaland dispute provided for its effective and peaceful resolution. If the principle of *uti possidetis juris* was applied before only within the colonial frameworks in Latin America and Africa,

[1] Burkina Faso v Mali.1986. – *ICJ Reports.* P. 554-566.

[2] Boczek B.A. *International Law: A Dictionary.* Lamham, MD: Scarecrow Press. 2005. P. 253-254.

[3] Dubai v Sharjah Border Case. 1981. – *International Law Review.* 91. P. 578; Burkina Faso v Mali.1986. – *ICJ Reports*.. P. 565; Land, Island and Maritime Frontier Dispute (El Salvador v Honduras).1992. - *ICJ Reports.* P. 386; Rann of Kutch Case (India v Pakistan).1965. – ILM. No 50. P. 407.

[4] Reports of International Commission of Jurists and the Committee of Rapporteurs League of Nations Council Documents. 1921. Doc No B7:21/68/106. P. 9-21.

currently it is recognised as a principle of international law. This was confirmed by the ICJ in a boundary dispute between Burkina Faso and Mali, where it was proclaimed that 'uti possidetis is a general principle of international law which is logically connected to the process of obtaining independence regardless of the fact of where this process takes place[5].

Although general principles of international law were considered by most Soviet and Russian scholars, no substantial researches were dedicated to this problem[6]. Professor A.N. Vylegzhanin argues general principles of international law are those that attributable to both domestic and international laws, i.e. are supported on both levels [Vylegzhanin, Kalamkaryan 2012: 78-89][7]. He further argues that general principles of international law are basically applied by international courts and tribunals for the purposes of avoiding *non-liquet* cases[8].

Clearly in the context of the Burkina Faso and Mali case, the ICJ's statement was addressed to the decolonisation process and circumstances. However, it can be argued that the way in which this statement was made gives grounds to argue that it is also applicable beyond the decolonisation process. Professor Shaw stresses that the main goal of the Court in this case was to make 'a special statement' on cases related to the process of obtaining independence [Shaw 2008: 478-492]. He also supports the argument that *uti possidetis* as the principle of international law is applicable to all cases of decolonisation and beyond it, since the Court's statement can serve as a ground for lawful interpretation that the principle of *uti possidetis* is applicable to all situations where there is a transfer from one sovereign power to another[9]. The Court specifically emphasised that *uti possidetis* is not 'a special rule which is applicable to a specific system of international law' or in certain continents like Latin America where it emerged or in post-colonial Africa, but that it is applicable to all situations related to the gaining of independence[10]. Therefore, it was witnessed that the ICJ declared the principle as an effective tool for the settlement and prevention of territorial and boundary disputes and conflicts [Mirzayev 2017: 18-22].

Undoubtedly, such statement of the Court is a *ratio decidendi* representing an authoritative statement by such a leading legal forum as the ICJ. It is generally accepted that such authoritative statements can reflect the existing customary international law or be part of a process of creating a new norm of customary international law [Shaw 1997: 478-492; D'Amato 1971:60-63]. Soviet scholar prof. Tunkin stressed that the ICJ's practice is nothing but a process of creating new norms of international law through their recognition by a majority of states [Tunkin 1970:207-208]. Prof. Chernichenko argues that such interpretation by the ICJ leads to the creation of such new norms of customary international law [Chernichenko 1999:24]. Another Russian scholar, prof. Lukashuk, argued the ICJ's judgement and statements shall be a primary source in interpretation of the existing norms of customary international law[11]. In this case, it is an absolute must that the new norm should comply with the pre-existing one, since it is a compulsory requirement for the creation of a new norm or the modification of an existing norm of customary international law[12].

There are certain views and opinions in the doctrine against the recognition of *uti possidetis* as a general principle of international law applicable beyond the colonial context [Craven 1995: 385; Ratner 1996: 613]. Hyde argued that the application of uti possidetis was simply a practice among the Latin American states, the former Spanish colonies, but that it was not a universally applied principle regulating the issues of establishment of state boundaries with binding force [Hyde 1945:508-509]. In other words, he claimed that the newly established independent states of Latin America did not have any obligations to recognise the borders established by the Spanish colonial powers, if the interests of those states could be violated by so doing.

Bluntschli criticised the use of the Roman law term for the description of *status quo post bellum* situations [Bluntschli 1870:363]. He asserted that it was incorrect to use the private law term for the purposes of public

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5 Burkina Faso v Mali.1986. - *ICJ Reports.* P.. 557.

6 For example, see [Shestakov 1981: 60-69] and Lukashuk I.I. *Mezhdunarodnoe pravo. Obshchaya chast'* [International Law. General Provisions]. Moscow: Volters Kluver Publ. 2005. P. 103-128. (In Russ.).

7 *Mezhdunarodnoe pravo.* Pod red. A.N. Vylegzhanina [International Law. Ed. by A.N. Vylegzhanin]. Moscow: Yurait Publ. 2009. P. 105-107.

8 Ibdem. P. 93-95.

9 Ibdem.

10 Burkina Faso v Mali.1986. – *ICJ Reports.* P. 557.

11 Lukashuk I.I. *Mezhdunarodnoe pravo. Osobennaya chast'* [International Law. Special Provisions]. Moscow: Volters Kluver Publ. 2005. P. 235 (In Russ.).

12 Fisheries Jurisdiction Case (United Kingdom v Iceland) (*Merits*).1951. – *ICJ Reports 152*. See: [D'Amato 2015:325; Shaw 2008:72-98; Pineschi 2015: 325; Forlati 2014: 235; Arajarvi 2014: 194; Scharf 2013: 228].

law [Bluntschli 1870:363]. However, it can be agreed with Moore who did not share Bluntschli's opinion and argued that this was purely a literal and linguistic issue [Moore 1944: 328-330]. The use of *uti possidetis* in international law was not limited by situations when territories were obtained through the use of force[13]. In fact, from the history of *uti possidetis*' application, it can be argued that the principle also played an important role in the circumstances when the acquisition of territories was enforced through occupation as a result of discovery and colonisation.

The Soviet doctrine absolutely denied *uti possidetis* and no researches are available in this regard. Soviet scholar Klimenko, specialising in territorial and boundary problems, challenged the legal nature of the principle [Klimenko 1974:18-20]. Most Russian commentators also adhered to this position and took controversial positions and interpretations of the principle [Barsegov 1958:231].

The criticism of the principle is based on an argument that its application is unreasonable and legally unjustified [Mirzayev 2015: 56-77]. One of the key arguments of the principle's opponents is the vague *obiter dicta* in the Burkina Faso vs. Mali case, which in their opinion cannot be considered as a declaration of a new norm of customary international law. In their opinion, this principle is related basically to the principle of inviolability of colonial boundaries [Lalonde 2003: 231]. However, the supporters of this idea fail to defeat the argument that in this case the ICJ specifically emphasised the principle and its importance for the African continent and settlement of territorial and boundary disputes and elimination of sanguinary conflicts. The Court specifically emphasised that *uti possidetis* is not 'a special rule which is applicable to a specific system of international law' or certain continents like Latin America where it emerged or post-colonial Africa; rather, the Court stated that the principle is applicable to all situations related to the obtaining of independence [1997: 478-492][14].

It is also argued that the international community did not recognise *uti possidetis* as a principle of international law since, due to its controversial nature, it contradicts international law. In the Burkina Faso vs. Mali case in a separate opinion Judge Abi-Saab doubted the status of the principle and stated that the principle did not have binding force and should be interpreted within the meanings assigned to it under international law[15].

It is even argued that the Badinter Commission's analysis on *uti possidetis*' role as the general principle of international law was inaccurate and incorrect, and that it is simply a 'wrong interpretation' [Ratner 1996: 614] and 'distortion' [Torres Bernardez 1994:420-435] of the ICJ's actions and decisions upon considering the Burkina Faso vs. Mali case. All such positions of the principle's opponents are grounded by arguments that all references by the Court were made to the decolonisation processes [Lalonde 2003:170-235]. To support this position criticising the ICJ's statement, reference is made to paragraph 23 of the ICJ decision in the above-mentioned case which emphasises only the role of *uti possidetis* for Latin America and its importance for preventing new colonisations in this continent[16]. However, even the literal interpretation fails to support this argument, since the statement of the Court was wide and generally applicable to all situations. In contrast, the ICJ specifically stressed that *uti possidetis* is the principle which provides for a transformation of former administrative borders into international boundaries of independent states as the delimitation between two (or more) former units of the same sovereign[17]. The Court did not specifically state that it is applicable exclusively to decolonisation cases, but rather declared it as the general rule applicable to all situations. Therefore, it can be argued that the application of *uti possidetis* beyond the decolonisation process for the purposes of justifying the transformation of the administrative borders among the former units of the same sovereign into the international boundaries of newly independent states should be considered as being in line with the Court's position.

There are opinions which argue against the use of the Latin term of *uti possidetis* in international law for the settlement of territorial and boundary disputes and conflicts[18]. Bluntschli considered the application of the principle as a mistake, and he argued that it should be used for private law issues rather than territorial matters related to the sovereignty under public international law [Bluntschli 1870:260-261]. There are certain viewpoints against recognition of *uti possidetis* as a principle of international law, arguing about the controversial nature of the principle. Other avid opponents of the principle contend that *uti possidetis* is not

[13] Dias Van Dunem F.J. *Les Frontiers Africaines* (Unpublished PhD dissertation). Universite d'Aix-Marseille. 1969. P. 260-261.
[14] Burkina Faso v Mali.1986. – *ICJ Reports.* P. 566-583.
[15] Ibidem.
[16] Ibidem.
[17] Ibidem.
[18] Dias Van Dunem. Opt. cit. P. 260-261.

a principle of international law and that there are no solid grounds for its application in international law [Lalonde 2003:228-229]. There are even arguments supporting that the principle is a concept contradicting the fundamental norms and principles of international law [Reisman 1995: 350] [Waldock 1948: 225; Pradelle1928:86]. Other opponents of *uti possidetis* claiming that it cannot be accepted as a principle of international law basically refer to the conflicting correlation between this principle and self-determination [Lalonde 2003: 231-245][19]. Some other commentators argue that the principle did not serve as an effective tool for the positive settlement of boundary and territorial disputes and conflicts and was subject to various interpretations [Fenwick 1957: 761-765; Munkman 1972: 93; Sharma 1976:120].

Nevertheless, such critical views lack well-grounded legal argumentation and do not confute the core argument on the formation of *uti possidetis* as the general principle of international law, which was effectively applied for the settlement of some of the territorial disputes considered herein. It can be agreed that there were no other norms of customary international law related to the application of the principle of uti possidetis to the newly established states beyond decolonisation [Shaw 2008: 478-492]. Therefore, it means that at that moment the application of *uti possidetis* beyond decolonisation to newly independent states, which were created upon the collapse of some states or through the separation from existing ones, constituted a ground for the creation of a new norm of customary international law. The subsequent state practice, decisions and awards of the international tribunals and arbitrations, as well as the developed legal doctrine, affirmed these arguments.

Such statement of the Court has been also enriched by the relevant state practice in the collapse of the SFRY and the USSR. Another obvious example is the disintegration of a unitary state: Czechoslovakia. On 1 January 1993 the CFR ceased to exist, resulting in the emergence of two independent states, the Czech Republic and the Slovak Republic [Malenovsky 1993: 305]. Through the signing of the 29 October 1992 Treaty on Delimitation of the Main Boundaries, the two former units of the CFR agreed upon the preservation of the former administrative borders between the two former units and their recognition as international boundaries of the new independent Czech and Slovak Republics [Malenovsky 1993: 305]. Therefore, it can be clearly seen in this case that the two former units of a unitary state which was consensually dissolved had agreed on the application of *uti possidetis* juris and had effectively delimited the international boundaries of the two new independent states based on the former administrative borders between them.

The example of Eritrea can also serve as additional support for the above arguments in favour of *uti possidetis*. Eritrea broke away from Ethiopia and declared its independence within the administrative borders that it had within Ethiopia[20]. However, it should be stressed that the administrative borders of Eritrea were in fact international boundaries between independent Eritrea and Ethiopia delimited under the bilateral treaties in 1900 and 1908 [Goy 1993: 350; Brownlie 1979:9].

The Badinter Commission on former Yugoslavia also adhered to the ICJ's position and argued in favour of *uti possidetis* being recognised as a general principle of international law [Terrett 2000:175-320]. In grounding its opinion, the Commission clearly referred to the ICJ's position expressed in the Burkina Faso vs. Mali case[21], which was made for the purposes of clarifying what is accepted under the principle of *uti possidetis* leading to a transformation of former administrative borders into international boundaries[22].

It is generally admitted that the principle of *uti possidetis* has two forms: *uti possidetis juris* and *uti possidetis de facto* [Moore 1944: 349-367][23]. If the first form is one of the principles of modern international law which refers to territorial and boundary issues and provides for the stability of boundaries, the second form was applied in the past and referred to the issues of partition of territories similar to the partition of private property. In modern international law, *uti possidetis* means a specific mechanism and process of international law which serves the transfer of sovereignty from a previous state to a new one within the previous administrative borders, and its wide interpretation refers to the principle of the stability of state boundaries [Bardonnet 1976: 153; Shaw 1997: 88].

The importance of the principle of the stability of boundaries was stressed for the first time in 1909 by

[19] See also: Hasani E. Uti Possidetis Juris: From Rome to Kosovo. – *Fletcher Forum of World Affairs.* 2003. P. 85.

[20] Temin J. Secession and Precedent in Sudan. - *US Institute of Peace.* November 17, 2010. URL:http://www.usip.org/files/resources/PB%2068%20%20Secession%20and%20Precedent%20in%20Sudan%20and%20Africa_0.pdf. (accessed date: 02.10.2017).

[21] EC Yugoslav Arbitration Commission Opinion No 2 . – *European Journal of International Law.* No 3. 1992. P. 183-185.

[22] EC Yugoslav Arbitration Commission Opinion No 3. – *ILM.* No 31. 1992. P.171.

[23] Hasani *E.Opt.* cit. P. 85-97.

the Permanent Court of Arbitration in the *Grisbadarna* case between Norway and Sweden[24]. The Permanent Court of Arbitration confirmed that the principle exists within the people's right to self-determination and cannot be subject to any further modifications[25]. In the *Eastern Greenland* case, due to Denmark's possession of territorial sovereignty over the disputed territory for a considerable time period, for the purposes of maintaining stability of boundaries, the PCIJ made a decision to preserve Denmark's sovereignty over Greenland[26]. An almost identical position was taken by the chairing Judge Lagergren in the *Rann of Kutch* case between India and Pakistan over the determination of the eastern boundary between the two states[27]. In this case Judge Lagergren stated that the principle of stability of boundaries is one of the fundamental instruments for the maintenance of peace and stability in the region[28].

Therefore, the state practice on application of *uti possidetis juris* indicates that a transformation of former administrative borders into international boundaries is generally accepted subject to the availability of the concerned parties' consent. Although this process to some extent assumes the consent of the parties, it has become a norm of customary international law.

Taking into account the fact that the collapse of a unitary state and the change of its existing boundaries leads to cruel and sanguinary conflicts and disorder, the international community is in permanent search of finding an effective tool for the settlement of territorial and boundary disputes. In such case, the principle of *uti possidetis* can be such a tool in the absence of a better option. The effective application of *uti possidetis* in various continents, as described in previous subsections, is another solid argument in favour of its effectiveness. Moreover, the principle's application in the case of the USSR, the SFRY and Czechoslovakia gives grounds to argue that *uti possidetis* has become a rule of customary international law. Some commentators contend that the principle of *uti possidetis* should be applied automatically upon the collapse of a state or legitimate secession, since by its nature it serves to prevent the unlimited use of force and escalation of conflict [Nesi 1998: 1-34]. It can be agreed that the ignorance of this principle's importance could be dramatic for the international community, since the principle determines sovereignty of the state over its territory, whose integrity cannot be violated without consent by other state(s) [Lachaume 1980: 79-92]. The principle therefore plays an important role in the protection of a state from other states' unreasonable territorial claims.

Notwithstanding the principle's stabilising role in preserving the territories of sovereign states, it should be stressed that *uti possidetis* cannot be counter-opposed to the principle of territorial integrity. The latter provides for the protection of a state's territorial integrity, while *uti possidetis* provides for the transformation of former internal administrative borders among former constitutional units of one metropolitan state into international boundaries of newly independent states. Professor Shaw aptly states that *uti possidetis* applies within the context of the principle of territorial stability and traditional territorial acquisition principles [Shaw 2008: 478-492]. In his opinion, the principle also exercises important functions in the international arena, but cannot be considered as an absolute and stable principle enabling the international community to settle all territorial and boundary disputes and conflicts [Shaw 1996: 75-83]. Therefore, it can be argued that during the last decades of the 20th century *uti possidetis* developed into a principle of international law. Dissolution of the former communist federations including the SFRY, Czechoslovakia and the USSR was a rebirth for *uti possidetis* in a non-colonial format. The role of the re-born principle has been explicitly recognised by the legal community [Pellete 1991: 329]; [Yakemtchouk 1993: 393-401]. It should be emphasised that the precedents available as a result of the dissolution of the SFRY, the USSR and Czechoslovakia simply reconfirm the importance of the principle beyond the colonial context. Contrary to the arguments of Hannum, the principle of uti possidetis can in fact be considered as the 'neo-colonial territorial approach' [Hannum 1993a: 37]. Therefore, the state practice in the cases of the SFRY, the USSR and Czechoslovakia considered hereinabove is clear evidence confirming the transformation of uti possidetis into a general principle of international law.

[24] Grisbadarna case (Norway v Sweden).1909. – *PCIJ Series* 26 (Grisbadarna case).
[25] Scott A. *Hague Court Reports.* London: Stevens & Sons. 1916. P. 22-130.
[26] Eastern Greenland case (Denmark v Norway).1933. – *PCIJ Series.* P. 46-54.
[27] Rann of Kutch case (India v Pakistan). 1965. – *ILM.* No 50. P. 520 (including Judge Bebler's and Chairman Lagergen's Dissenting Opinion).
[28] Ibdem.

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