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Uti possidetis, ita domini eritis.

International Law and the Historiography of the Territory
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Uti possidetis, *ita domini eritis*

International Law and the Historiography of the Territory

L'espace qui apparaît aujourd'hui à l'horizon de nos soucis, de notre théorie, de nos systèmes n'est pas une innovation; l'espace lui-même, dans l'expérience occidentale, a une histoire, et il n'est pas possible de méconnaître cet entrecroisement fatal du temps avec l'espace.

Michel Foucault¹

1. Chinese Histories

Covering an area of approximately 3.5 million square kilometres, the South China Sea bathes the shores of several countries (Brunei, China, Philippines, Indonesia, Malaysia, Taiwan and Vietnam), and contains hundreds of small islands, atolls, keys, reefs and sandbanks, many of which are either underwater at high tide or remain permanently submerged. The mere mention of these waters will bring back memories to those of us who were avid readers of the 'Pirates of Malaysia' series in our youth. Today, however, the romantic role of the adventurers imagined by Salgari have been replaced by the most unromantic of coastline states that are embroiled in a dispute over a region of crucial geostrategic importance, with a high concentration of hydrocarbon reserves and abundant fishing resources.² The People's Republic of China undoubtedly plays the lead role in this highly complex and conflict-ridden plot,³ whose most violent episodes reach the world news headlines.⁴

1 FOUCAULT (1984) 46–49.

2 SAMUELS (1982); JOHNSTON/VALENCIA (1991).

3 YEE (2011) 165–19.

4 VALENCIA (2007) 127–167; VALENCIA (2010) 8–17.

I will emphasize at this point one particular aspect of the contention in the China Seas, namely:⁵ Beijing claims a major part of the territory under dispute with arguments unearthed from documents thousands of years old.⁶ Indeed, simply by visiting some of the People's Republic of China's official sites we can see that the Chinese Government fully subscribes the opinions of certain scholars,⁷ who hold that the fact that China was the first to discover, explore and exploit the area, «has naturally led the Chinese rulers and people to believe that the South China Sea Islands were part of China [...] from the Xia Dynasty (21st – 16th centuries B. C.) to the Qing Dynasty (1644–1911)».⁸

The People's Republic maintains similar positions in its dispute with Japan, and, to a lesser degree, with Taiwan, over the archipelago known as Diaoyu, Tiaoyutai or Senkaku.⁹ The latter, composed of five islands and three rocky outcrops, is located on the edge of the Asian continental platform in the East China Sea.¹⁰ According to Japan, after inspections carried out from 1885 showed the islands to be uninhabited, it acquired territorial sovereignty over the archipelago in compliance with current international law (occupation of *terra nullius*), when Japan added it to its territory after claiming victory in the Sino-Japanese War (Treaty of Shimonoseki, 1895).¹¹ Conversely, the People's Republic claims that the islands were unlawfully usurped on that date, as they had belonged to Chinese territory since ancient times. The islands, maintains the Chinese Government, were discovered, named, and exploited by Chinese subjects, and later recognized by imperial envoys and annexed during the Ming Dynasty, allowing them to be placed under the jurisdiction of the local government of Taiwan during the Qing Dynasty, in which situation they remained until they were finally lost.¹²

5 YEE (2011) 165–19.

6 DZUREK (1996). It must be pointed out that the People's Republic claims not only the Spratly archipelago, but also the isles of Pratas, Paracel, and the Macclesfield Bank.

7 Historical Evidence To Support China's Sovereignty over Nansha Islands (available at: <http://www.fmprc.gov.cn/eng/topics/3754/t19231.htm>).

8 SHEN (2002). The official site mentioned in the foregoing note contains the works of this author.

9 International Crisis Group (2013).

10 SHAW (1999).

11 An official version of the subsequent history of the archipelago can be followed at: <http://www.mofa.go.jp/region/asia-paci/senkaku/>.

12 <http://dk.china-embassy.org/eng/ztbd/dydw/t1036399.htm>.

The reader may wonder how the disputes over the China Seas can be related to the principle of international law known as *uti possidetis* referred to in the title of this paper. The answer is fairly simple given that the history of the territory plays an equally important role in the disputes over the China Seas as in those in which the principle of *uti possidetis* is invoked. In effect, the argument wielded by the Chinese government, according to which the historical precedent must be taken into account when determining states' territorial rights, shares the logic of the principle of the international law, – according to which the new states formed through gaining their independence retain the borders they had as colonial demarcations.¹³

This link will seem rather far-fetched, but we should remember a couple of well-known issues that contribute to giving it a more solid grounding. Indeed, the loss of Eurocentricity in historiography,¹⁴ and the progressive universalization of society and international law,¹⁵ have contributed in no small measure to multiplying the number of histories of the territory that are susceptible of being used in border conflicts. Nevertheless, it must be highlighted that practically all of them follow the common pattern of 'history to serve the purposes' of an eminently European invention, the Nation-State, which in turn has permanently marked the nature of international law from its origins up to our time. I will leave for later the analysis of the heavily nationalistic Latin American histories that were and are used for the sake of implementing the *uti possidetis*, examining first the equally nationalistic claims made by China.¹⁶

International Relations experts have stated that the 'historical truths' on which the People's Republic's exterior policy with regard to what it considers 'its Seas' is grounded, can only be explained in terms of internal affairs.¹⁷ *Never Forget National Humiliation*, for example, is the significant title of a study by Z. Wang, who establishes a link between this policy and the strengthening of Han nationalism,¹⁸ which was reformulated during the

13 NESI (1996).

14 CHAKRABARTY (2008). More concretely, KOSKENNIEMI (2011); FASSBENDER/PETERS (2012).

15 REMIRO BROTONS (1999) 11–58.

16 ANDERSON (2001).

17 JIE (1994) 893–903.

18 HAYS GRIES (2004).

educational and propagandistic campaigns that commenced in the 1990s. According to Wang, one central aspect of those campaigns was the emergence of a new historical narrative that, having replaced class struggles with patriotic conflicts, purports to recover a glorious past in order to reactivate the country.¹⁹ I do not know whether or not this narrative has made use of any of the traditional categories from China's multi-millennarian culture,²⁰ but clearly one of the causes/effects of the current territorial claims originates from the extremely popular and nationalist maxim regarding the 'century of humiliation' (1842–1949),²¹ during which China was forced to sign the famous unequal treaties.²² It is no coincidence, therefore, that riding on the tail of the rising star in the international scene that is the People's Republic, some of its leaders should affirm that the historical stages that have elapsed from the signature of the Treaty of Nanking (1842) to the present can be given the following highly significant labels: «humiliation, restoration and, finally, domination».²³ Exaggerating but a little, it could be said that by excluding those humiliating hundred years from the order of time, China becomes connected to its extraordinary global past,²⁴ which in turn gives legitimacy to the People's Republic's expansionist policies regarding what it considers to have been its seas.²⁵ As might be expected, this narrative prompted internal support as much as it aroused external criticism.²⁶ However, I will set out exclusively to give a very brief summary of the criticism questioning the validity of the historical sources used by the Chinese Government.

First, it has been said that if any specific aspect is highlighted in the historical documentation, it is precisely the disparity between past and present territorial perceptions. Indeed, just as the Chinese historical cartography barely coincides with that of today,²⁷ the Record of Curiosities (*Yiwu*

19 WANG (2012).

20 GRANET (2013); HESPAÑA (1993) 275–293; HUI (2006).

21 DE VEL-PALUMBO (2008).

22 WANG (2005).

23 COLOMBANI (2012).

24 HOBSON (2006).

25 LEVATHES (1997).

26 WANG (2012).

27 HARLEY/WOODWARD (1994).

Zhi) published during the Eastern Han Dynasty (23–220), or the travels the famous 15th century navigator Cheng Ho, contain no information that is of any use in solving current border conflicts.²⁸ Secondly, China's claims have likewise been questioned on account of their historical-legal aspects, as some authors hold the opinion that the Chinese Emperor was «King of his people, not of his people's lands», especially with regard to vassal kingdoms such as Vietnam and Siam. Finally, it is said that what the People's Republic really wants is to bring back a specific version of the Monroe doctrine in the Pacific, which would allow China to use titles that do not currently form part of international law (discovery).²⁹

I believe that any neutral observer would accept the above arguments without much thought. But I also believe that it will not be amiss to recall certain data in order to compare these highly condensed *Chinese histories* against those that have been used for implementing the *uti possidetis* principle in the space that saw its birth: Latin America.³⁰ Precisely in this sense, historical documentation on the territory in the form of maps, lists, descriptions or titles, which is still used in many Latin American conflicts, poses problems resembling those arising in the case of China.³¹ Something similar could be said of what I have called the historical-legal aspects of the power exercised by the Celestial Empire over the territory, as they hardly differ from the pre-modern perception of space that pervaded European legal culture practically up to the end of the 18th century.³² We can also recall that, whereas discovery is considered an 'inchoate title' since the famous arbitral award rendered by Max Hubert in the case of the island of Palmas (1928),³³ the fact is that it served to justify «the great land-grab by European powers of non-European soil»,³⁴ in which incidentally the roots of the *uti possidetis*

28 SHEN (1997) 1–75.

29 JENNINGS (1963).

30 NESI (1996).

31 The problem, without doubt, is general (KAPLAN [2013]), therefore the courts must work to resolve it over and over again in the case of border conflicts (ÁLVAREZ JIMÉNEZ [2011] 177–211). On how border disputes are aggravated in Latin America owing to the imprecision of maps, cfr. BRUCE ST. JOHN (1998–1999).

32 HESPANHA (1993a).

33 Island of Palmas case (2006).

34 SCHMITT (1979) 143–144.

doctrine are sunk.³⁵ And, to finish: it escapes no one that it was the most distinguished American internationalists who sentenced, early in the 20th century, that the *uti possidetis* doctrine originated directly from the expansion of the Monroe doctrine in Latin America.³⁶

But let us forget these distasteful similarities for the time. The fact is that provided it is agreed that the territory is a legal and political notion rather than geographical,³⁷ no continuity can be established between the space governed by the Celestial Empire and that belonging today to the People's Republic. Indeed, history not only fails to provide a solution to the dispute over the China Seas but further complicates it,³⁸ if only because 'the past is a foreign country' regarding which countless interpretations are possible.³⁹ I have no wish to add a further reflection to the trove of arguments bearing on the impossibility of recovering the past; to the contrary, my aim herein is merely to articulate the following research proposal: the study, both of the *uti possidetis* principle in itself and of the documentation generated by its implementation, has the virtue of delimiting a field that is particularly relevant to this historical-juridical reflection on the 'temporal dimensions and geographical ambits' inspired by this publication. In order to provide a foundation for this concrete proposal, this paper presents (II) a brief overview of the historiography, and (III) a reflection on the historical notions of time and space that were important to the Latin American territorial disputes.

35 GARRIGA (2006) 35–130.

36 See *infra*.

37 FOUCAULT (1976) 71–85.

38 As expected, several coastal states have responded to Chinese claims with other interpretations of the history of the disputed territory. For example, the government of Vietnam affirms: «Vietnam's case is that it has maintained effective occupation of the two archipelagos at least since the 17th century when they were not under the sovereignty of any country and the Vietnamese State has exercised effectively, continuously and peacefully its sovereignty over the two archipelagos until the time when they were invaded by the Chinese armed forces», Ministry of Foreign Affairs, Socialist Republic of Vietnam, *The Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagos and International Law*, Hanoi, 1988, 4.

39 LOWENTHAL (1998).

2. American origins of the *uti possidetis*. A brief, critical, and no doubt incomplete, “state of the question”

2.1 International Law and Historiography of the territory

It is often said that the *uti possidetis* doctrine is one of the most valuable Latin American contributions to international law.⁴⁰ This is why scholars are wont to reproduce paragraphs from a famous sentence passed down by the International Court of Justice in the Burkina Faso/Republic of Mali case, of which the following is worth noting:

«In these circumstances, the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of decolonization and its exceptional importance for the African continent, including the two Parties to this case. Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent 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. The fact that the new African States have respected the territorial status quo which existed when they obtained independence must therefore be seen not as a mere practice but as the application in Africa of a rule of general scope which is firmly established in matters of decolonization; and the Chamber does not find it necessary to demonstrate this for the purposes of the case».⁴¹

It is evident that in this ‘rule applicable to the case’ the Court raised to the condition of general principle a practice that, having emerged in Latin America in the 1800s,⁴² not only reappeared in Africa during the second half of the 20th century,⁴³ but has also spread across the globe in the last

40 KOHEN (2001) 57–77; SÁNCHEZ RODRÍGUEZ (1993) 93–115.

41 Case concerning the frontier dispute (Burkina Faso/Republic of Mali). Judgment of 22 December 1986. (available at: <http://www.icj-cij.org/docket/index.php?sum=359&p1=3&p2=3&case=69&p3=5>).

42 DURÁN BACHLER (1972).

43 Under the principle of intangibility of frontiers, recognized by Resolution AGH/Res. 16 (1) of El Cairo dated 21 July 1964, the Organization of African Unity repeated the previous Latin American experience: the administrative limits of a given colonial empire became international borders, and the borders between colonies of different metropolis constituted the borders of recently independent states.

decades.⁴⁴ The current state of affairs has obliged experts to certify the resurrection of the venerable Latin American doctrine of *uti possidetis*, which seemed to have lost effectiveness owing to the decline in border conflicts over the last two hundred years.⁴⁵

I am aware that both the analysis of the causes and consequences of acknowledging *uti possidetis* as a principle of international law, and the assessment of the arguments in favour and against it that are discussed these days, are of greater interest than the history of the principle or the historiography generated by its implementation. Nevertheless, recent publications have shown that history is not only complementary but also necessary to international law.⁴⁶ So, it can be stated that the Court ‘standardized’ the history of the principle since did not question whether *uti possidetis* had always been a principle of international law, that is, destined exclusively for use by states.⁴⁷ I shall return to this issue later; however, we have to admit that writing history is not listed among the Court’s responsibilities.

By and large, the court was not far wrong in pinpointing the rule’s origins in the newly emancipated regions of America.⁴⁸ As long as it was not identified with a generic and timeless defence of the *statu quo*,⁴⁹ the *uti possidetis* principle remained unrelated to the Roman interdiction that prohibited altering the possessory condition provided the latter was not gained through violence, clandestinity or a precarious title (D. 43, 17, 1).⁵⁰ It is true that some authors maintain the opposite,⁵¹ but I do not think it fitting to insist on the famous dilemma that, with its impact on the notions of continuity/discontinuity, has marked the debate on legal history over the last decades.⁵² Another entirely different matter is to analyse and assess the nature of internationalism, a legal discipline which has used and abused arguments taken

44 TERRET (2000).

45 DURÁN BACHLER (1989) 490; SÁNCHEZ RODRÍGUEZ (1988) 121–152.

46 CASTELLINO/ALLEN (2003).

47 SHAW (1996) 75–154.

48 However, certain authors affirm that the origin of the principle must be the Treaty of Madrid of 1750. Cfr. ROUX (2001) 515–516.

49 GAUDEMET (1996) v. 1, 37–46. In any case, the expression had a military sense: «Según lo que poseéis [ahora]; actualmente indica que los beligerantes conservan los territorios ocupados hasta el momento en que cesan las hostilidades». SEGURA MUNGUÍA (2007) 146.

50 KOHEN (1997) 427.

51 HASANI (2003) 85–97.

52 HESPANHA (1996).

from Roman law to achieve many different aims; nevertheless, this is a well studied subject that leads us astray from our reflection on the origins of the *uti possidetis* doctrine.⁵³

At all events, one thing is undisputable, namely, that the sentence passed by the Court would have satisfied the Chilean diplomat and jurist Alejandro Álvarez, whose theses on the existence of an international law specific to America influenced to a large extent the “international lawyers” debate during the first half of the 20th century.⁵⁴ According to Álvarez, the use of the Monroe doctrine in Latin America, implying the refusal to consider the so-called ‘western hemisphere’ as *terra nullius*,⁵⁵ conditioned the emergence of an American international law. «The entry of Latin America into the community of nations is one of the most important facts in the history of civilization», stated Álvarez in the opening paragraph of his famous article,⁵⁶ in which he highlighted the role played by the *uti possidetis* doctrine in defending Latin American territorial integrity against foreign interference.⁵⁷ Nevertheless, Álvarez underscored the differences that existed between old Europe and the new America; in his own words: «Europe is formed of men of single race, the White; while Latin America is composed of a native population, negroes imported from Africa, and the Creoles». Therefore, Álvarez did not overlook to identify the ruling group in that new America: according to him, the Creole element was «the only thinking part of the population».⁵⁸

Many Latin American internationalists accepted the Chilean jurist’s thesis, while others were critical of it.⁵⁹ This discussion lost interest for inter-

53 KOSKENNIEMI (1997) 215–263; LESAFFER (2005) 25–58.

54 BECKER LORCA (2006a) 879–930.

55 President Monroe deliberately used the term “this hemisphere” in his message on 2 December 1823, to indicate that the political system in the western hemisphere, understood as a regime of freedom, was frontally opposed to the European monarchic political system. On this subject, vid. SCHMITT (1979) 364 ff.

56 ÁLVAREZ (1909) 269.

57 CASTELLINO (2008).

58 ÁLVAREZ (1909) 271–272.

59 Among the critics was the voice of the Brazilian Manoel Álvaro de Souza Sá Viana, who denied the existence of any specificity, alleging that the Latin American version was just one more among others in international law. SOUZA SÁ VIANNA (1912).

nationalists from the 1950s,⁶⁰ and today it has become both a historical source and object for recent internationalist historiography which, firmly anchored to the present,⁶¹ has revisited the origins of *uti possidetis* analysing and relating them with the role of the latter in the international order.⁶² It must be stressed that most of such studies can be classed under what some have called the «historiographical turn in international law»,⁶³ understood as the insertion of the historical and theoretical dimensions of international law into a single field of research.⁶⁴ Indeed, in the last three decades an extremely powerful historiography has emerged and become consolidated holding a highly critical view of the doctrines of international law,⁶⁵ by virtue of which it has turned the historical tradition of the discipline into a research object.⁶⁶ This understanding has thrown onto the ropes the strategy that, based on the reiteration of a collection of set phrases, has distorted the chronology of the stages in the formation of this discipline,⁶⁷ and contributed to concealing the persistence of a set of ideas that are structural to international law.⁶⁸ In a nutshell, and as I believe P. Costa would have put it, thanks to this “historiographical turn in international law” history is being written today *about* the tradition rather than *in* the tradition.⁶⁹

In more concrete terms, the focus of this Latin American historiography has been on analysing the works of its most distinguished jurists,⁷⁰ from

60 Some authors advocate forgetting the classic Latin American pathologies when making proposals for the future; in this sense, vid. ESQUIROL (2011).

61 BECKER LORCA (2006b). For its references to American authors, vid. also DE LA RASILLA MORAL (2013).

62 CASTELLINO/ALLEN (2003).

63 BANDEIRA GALINDO (2005).

64 BANDEIRA GALINDO (2012) 86.

65 KOSKENNIEMI (2004a); CARIY (1991); BENEYTO/KENNEDY (2012).

66 KENNEDY (1988). One of the most significant items of common knowledge is locating the origins of the discipline in the works of its alleged founding fathers such as Vitoria or Grocio (NUZZO/VEC [2012]), which implies the denial of the internationalist doctrine's essentially nineteenth-century roots (KOSKENNIEMI [2004b]; ANGHIE [2005]).

67 KENNEDY (1999) 100.

68 ANGHIE (2006). In an earlier work, this author affirmed: «The colonial encounter, far from being peripheral to the making of international law, has been central to the formation of the discipline. By this I mean not merely the specific doctrines of the discipline, but its informing philosophy: positivism» (ANGHIE [1999] 70).

69 COSTA (1989).

70 BECKER LORCA (2006a).

which can be inferred the keys to what some authors call “Creole international law”.⁷¹ As a general rule, the use of this adjective is understood in the terms used by Brading,⁷² to which we may add that said law not only reproduced and made use of foreign constructs, but it also contributed to the globalization of international law.⁷³ At all events, and although this problem is overcast by the long shadow of the *New World dispute*,⁷⁴ it is not exclusive to international law.⁷⁵ What I would like to emphasize is that some authors have adopted almost in full the historical narrative drafted by the first Latin American internationalists regarding the origins of the *uti possidetis* principle: such is the case, for example, of the excellent work by Castellino and Allen, who nevertheless show little interest in learning more of Latin American history than that provided by Álvarez for the analysis of what they have termed «Spanish America and the Treatment of Territory in International Law».⁷⁶

The consequences of using the works of early Latin American international lawyers as a source are not exactly of minor importance. To begin with, this practice implies either unwitting ignorance or deliberate dismissal of a juridical historiography whose efforts for the last few decades have been dedicated largely to contextualizing pre-modern juridical culture. To do so, this historiography has had to negotiate many obstacles, in particular those originating from its own disciplinary tradition, in that the latter set the teleological component as its primary objective. We should keep in mind that this hasty diagnosis is valid for both Europe and America, from which we can deduce not only new angles to regard the traditional History of

71 OBREGÓN (2006). I have not gained access to a well cited work by this author: OBREGÓN (2002).

72 BRADING (1991).

73 BECKER LORCA (2010). Two critiques of the theses maintained in this article are found in: ÖZSU (2010) and Gozzi (2010).

74 GERBI (1960).

75 In a recent publication, José Antonio Aguilar reflects once again on the feebleness of Spanish American thinking, highlighting the exceptions to the logic of acritical intellectual appropriation that repeatedly appears in the Spanish American juridical-political culture. «Los hispanoamericanos repetimos fórmulas hechas y compramos teorías que rara vez examinamos a fondo. Nuestro hábito es el consumo, no la producción intelectual», states the autor in his conclusions. AGUILAR RIVERA (2012) 322.

76 CASTELLINO/ALLEN (2003) 57–78.

Indiano Law, but also new conclusions that affect its structural elements.⁷⁷ In short, I fear that some of the authors fuelling the “historiographical turn in international law” are not fully aware of the “historiographical turn in legal history”. Thereby not only will errors and confusion accumulate curtailing dialogue of any sort, but in some instances they will act against the main theses put forward by the new breed of historians and internationalists.

The latter is the case of some of the writings of Liliana Obregón,⁷⁸ who has coined the successful expression ‘Creole international law’ identifying the specific traits of Latin American legal consciousness.⁷⁹ Obregón states that nineteenth-century lawyers, from among whom the future internationalists were to emerge, thought of European law as something susceptible of being appropriated owing to the shared legal tradition based not only on the validity of Castilian sources in the Indies, but also on the manner in which they were enforced throughout colonial times. According to Obregón, the Indies’ special conditions – distance, diversity, etc. –, called for a flexible approach, and therefore casuistry and judicial arbitration were dominant in the administration of *Indiano* legal order.⁸⁰ However, Obregón’s understanding of the regulations of the Catholic Monarchy is very traditional, leading her to take as Creole some structural elements of the legal order in pre-revolutionary Europe.⁸¹ If legal historiography has proved anything for some time now, it is that casuistry and arbitration were consubstantial with the European culture of *ius commune*,⁸² whose transferral to the Indies meant no essential change whatsoever.⁸³ All Hispanic territories were governed in the same heterogeneous fashion,⁸⁴ which basically meant according to their own rights, or in the case of the Indies, according to their customs,⁸⁵

77 TAU ANZOATEGUI (1997).

78 OBREGÓN (2006) and (2009).

79 KENNEDY (1980).

80 L. Obregón maintains these statements referring to a work by Cutter, in which this author uses the expression *derecho vulgar* to describe the process adapting Castilian law to American needs.

81 GARRIGA (2004a).

82 MECCARELLI (1998); TAU ANZOATEGUI (1992). A good summary of juridical culture during the Catholic Monarchy is found in AGÜERO (2006).

83 TAU ANZOATEGUI (2002); NUZZO (2008). Recent studies show that the transplant was successful, even on the periphery of the periphery: AGÜERO (2008); ZAMORA (2010).

84 GARRIGA (2004b).

85 BARRIENTOS GRANDÓN (2000).

the whole being administered by lawyers educated in a common creed on both sides of the Atlantic Ocean.⁸⁶ In this scenario, the elements from which Obregón infers an alleged American juridical identity and extracts there from the term *criollo* (Creole) to label Latin American international law were in no way specific to the legal order of the *Reynos de las Indias* (Kingdoms of the Indies).⁸⁷

Any research on *uti possidetis* with a historical bent comes up against a mass of information distributed across myriad sources and an excessively heterogeneous bibliography. Of course, these features are common to any historical research, but the Latin American historiography generated through *uti possidetis* is characterized by being constitutive of the territory whose history it is supposed to be drafting. Furthermore, this historiography has another not unworthy quality, namely, its foundational nature with respect to Latin American national historiographies. There is no need to consult recent historical research to ground the foregoing statement, since the internationalist Carlos Calvo highlighted this fact as long ago as the 1860s; in his own words:

«South America in its colonial state had nothing; it found little on gaining life of its own, and has not progressed far on that road; it needs, therefore, to create everything on its way. It often happens, when the time comes to discuss limits for their final settlement, that they need to consult the archives and libraries in the motherland, and more often than not those of Paris and London».⁸⁸

The first works written on colonial sources in the Spanish archives throughout the 19th century,⁸⁹ and the creation and organization of the archives on the new American states,⁹⁰ were both in response to the “boundaries question” that arose after Latin American independence. However, the search for titles to prove territorial rights acquired according to the rule of *uti possidetis* to a large extent determined Latin American historiography beyond its original function,⁹¹ insofar as the application of a series of territorial truths became a constant that has continued to the present day.⁹²

86 BARRIENTOS GRANDÓN (2004) and (2001).

87 GARRIGA (2004a).

88 CALVO (1862) t. I, XLV.

89 VÉLEZ (2008) 247.

90 PODGORNÝ (2011).

91 MOLINA (1955).

92 PERALTA (1886).

Having arrived at this point, let us recapitulate. On the one hand, we have a traditional doctrine that prides itself in the American contributions to international law among which one the most outstanding is the *uti possidetis* rule. On the other hand, we have another that, despite being critical of doctrinal traditions, nevertheless tends to reproduce the historic narrative used by the first Latin American international lawyers. We shall not insist for the moment on the first, but rather focus on the consequences of the failure in the case of the second to include the more significant contributions made by American historiography in the last few decades.

2.2 Colonies, Independence and Historiography

Álvarez did not dwell on the role of the *uti possidetis* doctrine in the formation of the new American states; as might be expected, the Chilean jurist had no wish to emphasize the underlying weakness of the new American states. From today's perspective, however, an almost insurmountable barrier separated the function attributable to *uti possidetis* regarding the relationship between America and the European powers, eager for expansion following the collapse of the Catholic Monarchy, from that which is presumed to have regulated the distribution of territory among the American élites, equally eager to become consolidated and even for enlargement, after having gained their independence.

On identifying *uti possidetis* mainly with the refusal to consider Latin America as *terra nullius*, Álvarez not only concealed the consequences of its implementation from the indigenous population, but also tiptoed over the difficulties that arose during the administration of the process by the Creoles themselves.⁹³ Of the consequences mentioned above, one in particular stands out, namely, that the revocation of treaties signed with the Indian nations enlarged the territory of the new, civilized, Latin American states,⁹⁴ independently of the conversion of Araucans, Pampas or Apaches into citizens of the new Republics being a fiction fraught with disadvantages for the latter.⁹⁵ Among the difficulties mentioned, one also stands out significantly: the quarrels among Creole élites discredited any possible respect for the

93 Ireland (1940).

94 LEVAGGI (2002).

95 CLAVERO (2005); WEBER (2007).

former colonial divisions when marking out the territorial boundaries for the new republics. To sum up, while the *uti possidetis* doctrine achieved *grosso modo* the first objective by establishing that emancipated America was not *terra nullius*,⁹⁶ the statement that the distribution criterion on which the Monarchy's famous boundary demarcations were the basis for establishing boundaries is largely a retrospective fiction, refractory to becoming an object of history.

The supposed continuity between the territory of the Monarchy and those corresponding to the new republics, often equated with state succession, met with an objective pitfall at the time, regardless of this being used as a weapon in the new political leaderships' territorial struggles. Expressed in interrogative terms: what were the Monarchy's territorial demarcations?⁹⁷ Or, alternatively, were the Viceroyalties, Audiencias, Intendencias or, conversely, other minor units, expected to determine the spatial limits of the new states? Internationalist historiography usually hastens over such questions although they are essential to understanding in all its density the rule in hand. On many occasions, scholars have suggested without actually stating it as a fact that whereas *uti possidetis* has been acknowledged both in constitutional charters and in American international treaties, this rule was largely a right pre-constituted in colonial times that metamorphosed after independence into the generic Creole gentlemen's agreement referred to by Álvarez when identifying the spirit of *uti possidetis*.⁹⁸ Nevertheless, the priority given to its 'interior' or constitutional use over 'exterior' or international use, has been pointed out by the Court itself in negative terms: «It should be recalled that when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-

96 «Hence there is no territory in Spanish-America that has the status of *res nullius* open to an acquisition of title by occupation» in Dispute between Argentina and Chile (1977).

97 SCHRÖTER (2001).

98 Not only Álvarez; cfr. the following text by a former President of the II Spanish Republic: «Los pueblos hispanoamericanos aparecen con la filiación más legítima, consciente, jurídica y culta que pueda encontrarse. Los más de los otros Estados, quizá todos han surgido de la fusión violenta, sanguinaria y guerra, como esos hijos, más del rencor que el deseo, engendrados entre los incendios y saqueos de las ciudades asaltadas, Solo esta filiación hispanoamericana aparece deliberadamente bendecida por la fe y sancionada por la ley, en una obra reflexiva de fecundidad civilizadora». ALCALÁ ZAMORA (1944) 153.

independence sovereign». ⁹⁹ Indeed, «[...] it should not be overlooked that Spanish colonial divisions in Spanish America did not individually have any 'original' or 'historic' titles, as those concepts are understood in international law. The original title belonged exclusively to the Spanish crown, not the internal administrative subdivisions established by it; and it was equally the Spanish Crown which had sovereignty of the colonial territories». ¹⁰⁰

Independence granted the new nations their title to territory; they, in turn, looked to the Monarchy's legacy for projecting this onto physical space in order to create borders where previously there had been limits or boundaries. ¹⁰¹ This strategy involved recording the landmarks of a political-constitutional history, which have become common knowledge even for the most critical internationalists. The following tale may serve as an example to illustrate this: At the behest of *Libertador* Simón Bolívar, the Venezuelan Congress – which had elected him as president of the republic – enacted in Angostura the Basic Law of 1819 that included the *uti possidetis* doctrine in its articles: «The Republics of Venezuela and New Granada are from this day united in a single Republic, under the glorious name of Republic of Colombia»; «Its territory shall comprise that of the ancient Captaincy General of Venezuela and the Viceroyalty of the New Kingdom of Granada, encompassing an extension of 115 thousand square leagues, the exact boundaries of which shall be agreed under better circumstances». Other texts show that this idea was not exclusive to a portion of the Monarchy's former territories: for example, whereas the Mexican Constitution of 1824 asserted that «The Mexican State is composed of the provinces contained in the Viceroyalty formerly called New Spain; of the province formerly called Captaincy General of Yucatán, and of the Commandancies General of the eastern and western interior provinces», the Constitution of the United Provinces of Central America, promulgated the same year, stated «The territory of the Republic is the same that belonged to the ancient Kingdom of Guatemala, with the exception, for the present, of the Province of Chiapas». The Constitutions gave way to regional treaties: as Álvarez expressed it, «Failing the confederation of the Latin states, the problem of the marking of the boun-

99 Land, Island and Maritime Dispute (1992) 559.

100 Land, Island and Maritime Dispute (1992) 565.

101 MARCHETTI (2001).

daries which the pacts of confederation strove to solve, of necessity came day by day more prominently to the fore. The constitutions of some of the countries fixed their lines on the basis of the *uti possidetis* of 1810, which was, moreover, recognized in fact by all the states, and proclaimed in the Congress at Lima in 1848». ¹⁰² The cycle had ended.

Although acceptable in part, narratives of this type bar the possibility of writing up a history of the territory which departs from the double constitutive valence of historiography placed at the service of *uti possidetis*. To this end, it is indispensable to be familiar with the turn taken by American historiography in recent decades, which has served to cast off the traditional stays that corseted the major national narratives of the 19th century. ¹⁰³ As it is impossible to give a full balance of the new order of things, I shall be content with underscoring the most important aspects which are those generically or directly related to *uti possidetis* in wholly different terms to those employed by such internationalists as Álvarez in his time.

Firstly, the thesis of Halperin Donghi, ¹⁰⁴ according to which Americans were obliged to opt for an independence that they did not want, ¹⁰⁵ has gained an increasing number of followers. ¹⁰⁶ Secondly, the alleged republican sentiment, ¹⁰⁷ that was supposed to identify Latin American states with the United States of America, has been questioned again, since not only did many American Constitutions opt for Monarchy, but also many elements of a monarchic nature were later maintained under republican trappings. ¹⁰⁸ Thirdly, many scholars have been reduced the influence of natural law thought on Latin American institutional constructions, ¹⁰⁹ as it has been demonstrated that preserving a juridical-political imaginary, both Catholic and anti-individualistic, ¹¹⁰ translated into the persistence of former institutional measures well into the 19th century. ¹¹¹ And, to finish, the massive

102 ÁLVAREZ (1909) 290.

103 PALACIOS (2009).

104 HALPERIN DONGHI (1985).

105 MEGLIO (2008).

106 RODRÍGUEZ (2008); PORTILLO (2006).

107 AGUILAR RIVERA/ROJAS (2002).

108 O'GORMAN (1986); LANDAVAZO (2001).

109 ARMITAGE (2007).

110 LEMPÉRIÈRE (2004) (2005b).

111 LORENTE/PORTILLO (2012).

municipal explosion, that practically disintegrated all of Spanish America after 1808,¹¹² is today the starting point for most researches on the period,¹¹³ some of which have also noted the international nature of the relations among American municipalities or provinces.¹¹⁴

All the above goes a long way toward explaining the obsession experienced by the earliest drafters of Constitutions to include in their texts a description of the territory encompassed by the new republics. In this sense, one of the most paradigmatic examples were offered by the neo-Granadine Constitutions, that were drafted, approved and even amended throughout the period known as *la patria boba* (the foolish fatherland).¹¹⁵ Thus, for example, Article 17 of the Constitution of Popayán, enacted by the Most Serene Electoral and Constituent College in 1814, stated: «The territory of the province [...] comprises the area between the eastern and western Andes, as well as the extension between the Pacific Ocean to the west as far as the barbarian Andaquíes nations to the east, the municipalities of Popayán, Cali, Buga, Caloto, Cartago, Anserma, Toro, Almaguer, Pasto, Barbacoas and Inscuandé, and the possessions of Raposo and Micayun».¹¹⁶ As you will have observed, the constituents of Popayán made no mention whatsoever of maintaining the boundaries of the ancient province; to the contrary, in addition to acknowledging the territoriality of the ‘barbarian nations’, they formally recorded the political bodies that made up Popayán. Nevertheless, other Constitutions adopted more geographical criteria, for instance, that of the State of Cartagena in 1812, but on closer examination, this text is found to preserve jurisdictional conceptions of space. Indeed, in the description of the State’s territorial limits contained in Article 6, the Constitution of Cartagena stated that the ownership of the islands in the Magdalena River must be discussed by the General Congress of the Kingdom, considering that they had been «awarded exclusively to one of the adjacent provinces by virtue of

112 ANNINO (1995).

113 VERDÒ (2006a) and (2006b). The cases of Venezuela and Colombia in HÉBRARD (1997) and CALDERÓN (2010). And, lastly, the case of Quito, in MORELLI (2001) (there is a Spanish edition of the latter work translated by HERMOSA ANDUJAR [2005]).

114 GUTIÉRREZ ARDILA (2010).

115 CASTRO LEIVA (1991).

116 RESTREPO PIEDRAHITA (1996).

laws enacted in ignorance of the facts, without a hearing of the parties, and perhaps against the mandate of nature». ¹¹⁷

By 1810, the date of the *uti possidetis*,¹¹⁸ territories had to be formed according to the old logic of aggregation of political bodies. Cities, provinces and, finally, states, held or claimed their ownership.¹¹⁹ Few examples are more illustrative of this process of dismemberment and integration than that of Quito, later to become Ecuador. The Constitution of Quito (1812) highlighted this in its first Article: «The eight free provinces represented in this Congress, and evermore inextricably united from this moment, shall permanently form the State of Quito as integral parts thereof [...]». ¹²⁰ Note that in this Article no mention is made either of former boundaries, to which we must add that it was not until the Constitution of 1852 that any comparison is made of the new Ecuadorian and the old colonial territories, that is to say, to find evidence of the *constitutionalization* of the *uti possidetis* doctrine: «The territory of the Republic comprises the provinces that made up the ancient Presidency of Quito and the Galapagos Archipelago. Its boundaries shall be definitively established through treaties signed with the neighbouring States» (Article 3).¹²¹ This formula is found repeated, *grosso modo*, in subsequent Constitutions until that of 1998,¹²² and only the first Ecuadorian Constitution in force offers a different formula.¹²³ Considering the huge

117 Constitución del Estado de Cartagena (1813).

118 See *supra*.

119 CHIARAMONTE (1997).

120 <http://bib.cervantesvirtual.com/servlet/SirveObras/01372764257917832311802/index.htm>.

121 http://bib.cervantesvirtual.com/servlet/SirveObras/02438343103132163754491/p0000001.htm#I_2_.

122 Art. 2: «The territory of Ecuador is unalienable and irreducible. It includes that of the Real Audiencia of Quito with the modifications made by the treaties in force, the adjacent islands, the archipelago of the Galapagos Islands, the territorial sea, and the ground beneath and the space over said land» (available at: http://bib.cervantesvirtual.com/servlet/SirveObras/01371296122384892980035/p0000001.htm#I_2_).

123 Article 2 of the Constitution of 1998. The current *Constitución Política de Ecuador* (2008) has discontinued this tradition in Article 4: «The territory of Ecuador constitutes a single geographical and historical whole, with natural, social, and cultural dimensions, which has been passed on to us by our ancestors and ancestral peoples. This territory includes the mainland and maritime space, adjacent islands, the territorial sea, the archipelago of the Galápagos Islands, the land, the undersea continental shelf, the ground under the land and the space over our mainland, island, and maritime territory. Its boundaries are those

territorial losses suffered by Ecuador until recent times, it is surprising to find such insistence on mentioning over and again the territory of the Presidency and Audiencia of Quito,¹²⁴ to which we should add that, on occasion, said territory has been identified with that of the ancient Quichua kingdom,¹²⁵ whose existence owes so much to the Jesuit historiography of the seventeenth century.¹²⁶ The Monarchy's old demarcations did not play a prominent role immediately after emancipation. Only after the revolutionary storm had abated, did the new, civilized republics establish a definitive land-sharing criterion that depended on a colonial history of the territory to

determined by treaties currently in force. The territory of Ecuador is unalienable, irreducible and inviolable. No one shall jeopardize its territorial unity or foment secession. The capital of Ecuador is Quito. The Ecuadorian State shall exercise its rights over those segments pertaining to the geosynchronous orbit, the maritime space and the Antarctic».

- 124 SÁNCHEZ BELLA (1980). An example of the Audiencia's territorial delimitation can be followed in the royal *cedula* dictated by Philip II in the city of Guadalajara, on 23. August 1563: «In the city of San Francisco del Quito, in Peru, may another Audiencia y Chancillería Real [...] be established, whose district shall comprise the Province of Quito, and along the coast toward the city of kings (Lima) as far as the port of Payta exclusive, and its inland territory as far as Piura, Caxamarca, Chachapoyas, Moyobamba and Motilonas exclusive, comprising toward said parts the towns of Jaén, Valladolid, Loja, Zamora, Cuenca, la Zarça and Guayaquil, with all other towns lying within their districts or that later might be settled: and in the direction of the towns of Canela and Quixos, let these be included and any others that might be discovered: and following the coast toward Panamá, to the port of Buenaventura inclusive: and inland toward Pasto, Popayán, Cali, Buga, Chapanchica and Guarchicona: because the remaining places under the Gobernación de Popayán belong to the Audiencia of the New Kingdom of Granada, with which, and with the mainland, the North boundary is drawn; Reyes to the South, the Southern Sea to the West, and to the East, provinces as yet unpacified or undiscovered». Included in Law X (*Audiencia y Chancillería Real de San Francisco del Quito*) under Title XV (*De las Audiencias y Chancillerías Reales de las Indias*) of Book II of the Laws of the Indies, 1680.
- 125 Constitution of 1830, Article 6: «The territory of the State included the three departments of Ecuador on the edge of the ancient Kingdom of Quito». Constitution of 1845, Article 1: «The territory of the Republic of Ecuador, composed of the districts of Quito, Guayas and El Azuay, on an equal representation basis, comprises all the provinces of the ancient Kingdom and Presidency of Quito, including the archipelago of Galápagos, whose main island is known as Floriana. The boundaries of this Republic shall be definitively established by public treaties with our neighbouring Nations».
- 126 Velasco (1841–1844) (Juan de Velasco completed this work in 1789; I have used the edition published in Quito, Casa de la Cultura Ecuatoriana, 1977, available at: http://www.bibliotecayacucho.gob.ve/fba/index.php?id=97&backPID=103&begin_at=72&tt_products=82).

become effective. Said criterion, *uti possidetis*, materialized in the international (regional) order and in the national (state) order almost simultaneously, more or less concurrent with the Congress held at Lima in 1847–1848, at which it was affirmed as an American principle of international law.¹²⁷ Hence, in Spanish America the principle did not serve «to prevent the independence and stability of new States», but was used to create them. However, it is commonly said that *uti possidetis* was a rule made for the preservation of «the territorial *status quo* which existed when they obtained Independence», without remarking that, with this stroke of timelessness, the Court contributed in no small measure to strengthening the old Latin American tradition that envisioned not only nations, but states too, well before the collapse of the Catholic Monarchy. Thus, for example, Bernardino Bravo Lira, law historian and recently awarded the national prize for History, insisted on this only a short time ago: «Unlike events in nearly the whole of Spanish America, in Chile we find what in Spenglerian terms I would call a State ‘in form’. In this respect, independence merely represented a parenthesis that was closed with the restoration of the same State under a new modality».¹²⁸

I shall not dwell on the difficulties surrounding the naturalization of key terms in our language, such as State or Nation, and their projection in Latin America,¹²⁹ but I will attempt to identify some of their consequences in the field determined by *uti possidetis*. Today, discussions are ongoing on the contradiction involved in using two principles that are recognized in international law as being contradictory: in absolute terms, the right to self-determination and the principle of *uti possidetis* are irreconcilable, as demonstrated in some flagrant cases such as Western Sahara. Transcending these tensions, however, it should be noted that one thing is to claim the succession of a colonial, but statalized, territory, and quite another to expect to do the same in another which, for merely chronological reasons, had never experienced the consequences of a statalized concept of political power.¹³⁰

Undoubtedly, this last scenario is the Latin American case; consequently, the territorial history of the Monarchy governed according to the *uti possidetis*

127 KOHEN (2009).

128 BRAVO LIRA (1996) 13.

129 CHIARAMONTE (2004).

130 LEMPÉRIÈRE (2005a).

principle has a conventional value equivalent to a sort of procedural truth that may or may not be accepted by the parties.¹³¹ However, establishing territorial truths not only requires agreement over the narrative itself but also in the way it is composed, and this, in turn, draws veritable borders between historiographies. In still clearer terms: everything seems to indicate that the territorial truth that was and is used in issues over boundaries has proved incapable of assimilating any degree of historiographical innovation, especially any changes causing the breakdown of nationalist and /or stalist views of a retrospective nature.

3. Fictions of the *uti possidetis* doctrine

In analysing the *uti possidetis* doctrine, internationalists usually differentiate between *uti possidetis iuris* and *uti possidetis de facto*, and draw comparisons between the dates of 1810 and 1821. Without wishing to address this complex matter in depth, we can safely say that whereas the first question is projected on the territory, the second involves time, and, finally, that both refer to Latin American history. This starting point overlooks a well-known fact, namely that the acceptance of the *uti possidetis* principle carries implicit the annulment of indigenous time and space.¹³² This is not tantamount to affirming that spatial and temporal perceptions were not made use of by the conquistadors in their time,¹³³ who successfully colonized the indigenous imaginary,¹³⁴ nor that they disappeared completely, because they were sometimes brought back and used by the indigenous population,¹³⁵ but today they have no place in international law. The International Court of Justice has been very clear on this point: «It was the administrative boundaries between Spanish colonial administrative units, not the boundaries between Indian settlements as such, that were transformed into international boundaries in 1821».¹³⁶ It is no coincidence, therefore, that so many internation-

131 SEMANA (2012).

132 FLORESCANO (1994b).

133 LOCKART (1999) especially chapter I, titled “El Altéplé? 27–88.

134 GRUZINSKI (1991).

135 CARMAGNAN (1988).

136 Caso relativo a la controversia sobre fronteras terrestres, insulares y marítimas (El Salvador contra Honduras: Intervención de Nicaragua), awarded at the International Court of Justice on 11 September 1992 (available at: http://www.icj-cij.org/homepage/sp/files/sum_1992–1996.pdf).

alists should be critical of the consequences of implementing the principle from the standpoint of defending indigenous rights.

However, the ‘fictions’ referred to in the heading are but indirectly related with plunder, present and past. In my opinion, the *uti possidetis* is based on a ‘mirror game’ that reaches beyond the task of fiction-writing consubstantial to juridical science. The *uti possidetis* charges the history of Latin American territory with the responsibility for establishing borders, while at the same time building said history on the basis of a series of temporal and spatial conventions that are questionable, at least as far as historiography is concerned. On the one hand, the *uti possidetis* owes its existence to two key dates, 1493 and 1810, that originate, respectively, from a Catholic perception of time and from Latin American national mythologies. On the other hand, these same dates refer to property rights conventions that do little to address the effective control of space as an objective phenomenon. All in all, however, I believe it is necessary to clarify that the above statements do not in any way detract from the pacifying function that the use of the *uti possidetis* may have had – or still have – in controversies over borders; the aim here is to establish a generic assessment of its historiographical premises/consequences.¹³⁷

3.1 Dates and Titles. From *Bulas* to *Independencias*, revisiting the Chinese histories

Among internationalists, the *uti possidetis* is not often associated with the Alexandrine Bulls because these papal titles seem to us today rather distasteful in terms of international law. Generally speaking, it is the emancipation of America, understood as the first decolonization movement that appears – when at all – in the writings of those international lawyers.¹³⁸ The terms ‘scarce’ and ‘non-existent’ are of course similar, but have different meanings

137 HENSEL/ALLISON (2004).

138 Some authors claim that the earliest origins of the principle should not be sought in the American emancipation but in the failed Treaty of Madrid which, signed on 13 January 1750, aimed to redefine the boundaries of the Iberian Monarchies referring exclusively to the *uti possidetis*, or the treaty signed on 1 October 1777 in San Ildefonso which, in general lines, rehabilitated the former. At all events, these two instruments responded to an issue that began with the Treaty of Tordesillas of 1494 and, therefore, the papal bulls. RIBOT (1995).

as highlighted by those who hold that the territorial ‘rights’ of Latin American states, Chile in this case, «were granted by the titles (papal bulls included) in possession of the Spanish crown over the continent [...] of Antarctica».¹³⁹ These individual voices were joined by others of an official nature, insisting on the currency of the pontifical provisions: «The Falkland Islands formed part of the area under Spanish jurisdiction [...]. The papal bulls and the Treaty of Tordesillas of 1494 were the first instruments to reflect Spanish titles in accordance with the international law of the period».¹⁴⁰

Whether they were used or not, the bulls could be exhibited as the first historical title held by any state over a given territory. Traditionalists and critics alike agree on this point, although they naturally differ in their valuation. Thus, whereas the first defend the current effectiveness of the pontifical titles, justifying them on the well-tryed grounds of affirming their applicability to an indeterminate “international law of the period” which they do not generally take the trouble to analyse, the second make use of them to single out and denounce that great original sin of international law: in the words of Anghie, «The colonial encounter, far from being peripheral to the making of international law, has been central to the formation of the discipline».¹⁴¹ All in all, the rivers of ink that have been spilt on bulls and treaties advise against returning to the question, despite which it is well to recall some aspects closely related not only to the *uti possidetis* in particular but also to the political-legal use of the history of the territory in general.

It is common knowledge that the great discoveries of the 15th and 16th centuries, or perhaps, ‘the discovery of humanity’,¹⁴² paved the way for a new «global view of space that required a new global spatial order».¹⁴³ Its foundations were rooted in the bulls, which constituted the main evidence that it was possible to «confinare non solo la terra, ma anche la vastità del mare».¹⁴⁴ However, the papal awards of non-Christian territories – the bulls

139 SAN MIGUEL CASISA (2013).

140 Embajada de la República Argentina en la República Federal de Alemania: <http://ealem.mrecic.gov.ar/node/3686>.

141 ANGHIE (1999) 70. On this same question, ANGHIE (1996); KOSKENNIEMI (2009).

142 ABULAFIA (2009).

143 SCHMITT (1979) 74.

144 MARCHETTI (2001) 16.

– that were implemented by the Christian sovereigns assuming those lands and waters – by means of treaties –, had their origins in «[...] the spatial order of the medieval *Respublica Christiana*». ¹⁴⁵ It is a fact that the bulls did not refer to a concrete space, as this was still to be discovered, but were missionary requests that brought with them the juridical culture of the *ius commune*.

In his excellent work, Marchetti has described spatial perception within that culture, stressing its imperial dimension: «Si è spesso incrociato con l'analisi di una forma di organizzazione politica, quella imperiale; non foss'altro per il fatto che due imperi (L'Impero cinese e l'Impero romano) hanno lasciato una memoria talmente profonda delle loro fortificazioni di frontiera da non permettere di trascurare l'osservazione del rapporto esistente tra modelli organizzativi, storicamente dati, di tipo imperiale e i loro confini». ¹⁴⁶ Once again, however, the bulls highlighted the fact that the successors to the Roman Empire believed they could wipe the Chinese from the face of the Earth. Indeed, although initially no one thought of the consequences that the line drawn by the Pope may have in the other hemisphere, the notion of an 'antimeridian' immediately appeared which obviously affected the territory of the Celestial Empire. ¹⁴⁷ Prompted by an evangelizing spirit, the mapping of the antimeridian was determined by the distribution of rights and obligations among the Christian princes; hence it is no coincidence that the Emperor Charles should have addressed his explorers in these terms: «refrain from discoveries or any actions within the demarcation or limits of the Most Serene King of Portugal, my beloved uncle and brother, nor against his interests, save within the limits of our own demarcation». ¹⁴⁸

«Thanks to the Papal Bull, the Crown of Castile *could have established* its sovereign rights over China and the Malay Peninsula», writes Padgen in an excellent book. ¹⁴⁹ However, this author – or, perhaps, his translator – uses the wrong tense, since by the end of the 15th century the unevangelized spaces of the globe were conceived as *res nullius*. Explorers and conquista-

145 SCHMITT (1979) 82.

146 MARCHETTI (2001) 63.

147 PÉREZ BUSTAMANTE (1922).

148 Cit. in *Exposición Pacífico* (2013) 129.

149 PADGEN (1991) 31.

dors, jurists and clerics insisted time and time again on the alleged rights of their monarchs to conquer the world.¹⁵⁰ «I have faith in God that from this small beginning He will enlarge and increase the kingdoms and seignories of your Majesty, and we shall be able to carry the true knowledge of the holy Catholic faith to so many barbarous and blinded men who are found in these regions, including the vast kingdom of China and many others. Heaven has this good fortune in store for your Majesty; so that it may be fulfilled during these propitious times of your Majesty», stated the second Governor of the Philippines in a letter to Philip II in 1574.¹⁵¹ Plans for the so-called “China enterprise”¹⁵² were followed by others of a similar nature,¹⁵³ calling for the conquest of Siam, Champa, Cambodia and Cochinchina.¹⁵⁴ Campanella’s delusions of grandeur were not exclusive to this famous cleric,¹⁵⁵ despite which we know that success did not accompany such mad enterprises, which among other things threatened to substitute the measurement of time in the Celestial Empire with the Catholic measure, through subjugating its subjects to the designs of the Maker, in whose spirit, as Saint Augustine said, *tempora metior*.¹⁵⁶ And so, the classical Chinese representa-

150 PADGEN (1997).

151 AGI (Archivo General de Indias), Patronato, 24.

152 OLLÉ (2002).

153 Copia de carta de fray Martín de Rada al virrey de Nueva España, informando del estado de las Filipinas: descripción de las islas y lugares como Luzón, Borneo, Panay y Masbate, de sus riquezas, pobladores, comercio, esclavitud entre ellos, y abundancia de oro. Opina que es mejor conquistar esas tierras con pobladores que con soldados, pues los naturales no tienen rey, señor, ni leyes, y es fácil dominarlos. Destrozos que han hecho los españoles, incontrolados por falta de orden y autoridad del gobierno, lo que también ocasiona que sean incapaces de mantenerse en una tierra rica y fértil. Si se pretende pasar a China, de la que se tienen buenas noticias y perspectivas, hay que asentar primero la conquista de las Filipinas. AGI, Filipinas, 79, 1, 1.

154 Carta de Fernando de los Ríos Coronel dando cuenta del astrolabio que había inventado; de lo importante que sería la conquista de Siam, Camboya, Champa y Cochinchina; de la conveniencia de ocupar isla Hermosa y descripción detallada de la misma; de dos nuevos caminos de comunicación con estas islas, uno por un estrecho que llaman de Anian (Bering), que comunica Nueva España con China, a 80 leguas al oeste de la Punta de Bacalaos (Terranova), y el otro por Nuevo México, en altura de 45 grados. Manila, 27 de Junio de 1597. Con duplicado. Mapa de las islas de Luzón y Hermosa y parte de la costa de la China, por Fernando de los Ríos Coronel. AGI, Filipinas, 18B, R.7, N.68.

155 CAMPANELLA (1991) 154 (correspondiente a la *Monarquía de España*).

156 AGUSTÍN DE HIPONA (2011) 82.

tions of time – a collection of eras, seasons and periods – and space – a collection of domains, territories, climates and Orients – were preserved, or at least developed within their own parameters.¹⁵⁷

Having reached thus far, we can state that the ‘Chinese histories’ are nothing other than a negative of the ‘Castilian and Portuguese histories’, whose principal foundation is none other than the bulls. In short, and insofar as it established a year zero, the *uti possidetis* cancels the time preceding the Alexandrine bulls, which nevertheless assumed self-assigned powers to distribute rights, but not territories. We could say that this was the mission of the treaties, from the first signed at Tordesillas to the last, signed just before the collapse of the Catholic Monarchy, although even these acted on spaces partly uncontrolled, partly unknown, to the extent that this medieval logic was not merely inherited by the American states after independence, but it also justified the territorial expansion that followed.

The above-mentioned expansion had its origins in another significant date, namely that of 1810, that served to fix another ‘year zero’ regarding the *uti possidetis*: independence. However, as we know, most of the American territories were not fully emancipated in 1810, and in many of them there remained in force the Constitution of the Spanish Monarchy of 1812, whose implementation brought about a major territorial reform based on a new conception of political representation.¹⁵⁸ Indeed, the earliest Hispanic Constitutions promoted a fully-fledged municipal revolution, which continued to weigh on practically all the emancipated states throughout the 19th century.¹⁵⁹ Although initially it may appear not to be, this issue is linked to the *uti possidetis*, since throughout Central America, that is, in the territory of the ancient *Audiencia* of Guatemala today divided into different states, the accepted date for resolving territorial conflicts is 1821, identified with the date of Independence. Given this state of affairs, the “last” demarcation by the Monarchy was made in constitutional times, independently of whether it coincided or not with the previous legacy.¹⁶⁰ It is interesting to observe that the date of 1810 cancels the American constitutional time governed by the first Constitution of the Spanish Monarchy, which is not usually taken into

157 GRANET (2013) 79.

158 LORENTE/PORTILLO (2012).

159 ANNINO (1995) and (2008).

160 LORENTE (2008).

account with regard to the *uti possidetis*. Ultimately, 1810 is the result of a nationalist logic that for decades has not deigned to include the text of the Constitution of 1812 in the compilations of historical constitutions of American states. Needless to say, this logic is not exclusive to Latin America, as can be seen from the persistent denial of the “Spanishness” of the Bayona text, but exclusions of this kind have ceased to affect historiography:¹⁶¹ as far as I am aware, they only endure in the realm of the *uti possidetis*.

3.2 From Corporative Monarchy to National State

«The ground upon which the community State is erected, considered from its juridical aspect, is the space in which the power of the state can exercise its specific activity, namely public power», affirms Jellinek in his well-known *General Theory of the State*.¹⁶² I will not expound here on the architects of nineteenth-century juridical science;¹⁶³ I have only mentioned this quote from the German publicist in order to complete it with another taken from the same work: «The need of a territory, for a State to exist, has been recognized for the first time in modern times [...] None of the definitions of State that reach us from former times speak of the territory [...] Klüber is the first, as far as I know, to define the state as a civil society ‘with a given territory’».¹⁶⁴

Marchetti has explained in detail the absence of the territory in pre-modern juridical reflection: that is why the “territorial limits” were not definitively identified with the word ‘border’ until the 18th and 19th centuries.¹⁶⁵ However, it appears that such assimilation was not reached by the Catholic Monarchy before its collapse, since, although in the *Diccionario de Autoridades* (1726–1739), ‘border’ is defined as “The line and boundary that separates and divides two Kingdoms, that are contiguous to each other”, it described ‘limit’ as «The precinct, confine or boundary line of possessions, lands or state».¹⁶⁶ However, perusing further in the *Diccionario*, we find the following surprise: ‘state’ was defined as «The present and conditional existence in which a thing is or is considered to be».¹⁶⁷ My aims in this paper do

161 BUSAALL (2011).

162 JELLINEK (1981) 293.

163 FIORAVANTI (1979).

164 FIORAVANTI (1979) 296.

165 FEBVRE (1962).

166 *Diccionario de Autoridades*.

167 *Diccionario de Autoridades*.

not include going through all the beads on the rosary for the pre-modern projection of the state; to the contrary, I shall merely mention the ‘technical’ consequences, as it were, of such a projection on the ambit of the *uti possidetis* in Latin America. One example will suffice: in Emile Loubet’s award (11 September 1900),¹⁶⁸ the territory belonging to the United States of Colombia was described with reference to the following list of titles:

«Having made a minute and profound study of said instruments, to us submitted by the parties, especially of the royal cédulas of July 27, 1513, of September 6, 1521, of the royal provision of April 21, 1529, of the royal cédulas of March 2, 1537, of January 11, and May 9, 1541, of January 21, 1557, of February 23 and July 18, 1560, of August 4, and 9, 1561, of September 8, 1563, of June 28, 1568, of July 17, 1572, of the Capitulation of Pardo of December 1, 1573, of the Compilation of the Laws of the Indies of 1680, particularly of Laws IV, VI, IX of that compilation, of the royal cédulas of July 21, and November 13, 1722, of August 20, 1729, of May 24, 1740, of October 31, 1742, of November 30, 1756, of the different instructions emanating from the Spanish Sovereign and addressed to the Superior Authorities of the Viceroyalty of Santa Fe as well as those of the Captaincy General of Guatemala in the course of the eighteenth century, and in the years following; of the royal orders of 1803 and 1805, of the stipulations of the treaty concluded in 1825 between the two independent Republics, etc.»¹⁶⁹

As well as lengthy, the quotation is heavy; nevertheless, this adjective aptly describes the legislation of the Catholic Monarchy viewed from the perspective of today. In the mentioned arbitral award, royal *cedulas*, compilations of laws, royal orders and even instructions of all descriptions, are accumulated, and I am afraid to say, contradict each other without any regard for chronology, rank, or even authority. At the time, the coherence of this complex normative order was assured by the jurisprudential nature of the pre-modern legal order; today, however, the loss of context confers a diametrically opposite meaning to those texts.¹⁷⁰ It has been said that one of the problems intrinsic to the administration of the *uti possidetis* is its projection across the territory affected by the provisions, as on many occasions these are unclear or aimed at spaces unknown in part or in full; all the same, it is not the provisions themselves that are found troublesome, whichever they may be. So we can only conclude that the *uti possidetis* does not aim to resuscitate the

168 ANDERSON (1911).

169 VÁSQUEZ CARRIZOSA (1974) 185.

170 GARRIGA (2007).

interpretative framework of the past, but to transform its current administrators into the new interpreters of the regulations in question.

In this parable, legal history is lost, despite which it becomes the legitimating premise *par excellence* of the whole operation. That is why the historiography that points out the jurisdictional and corporative nature of the political order under the Catholic Monarchy, has no place in the narratives on territory that are regularly used in the border conflicts. Note that said historiography is not exclusively legal; to the contrary, some of the best work on questions of this kind were written by historians of America,¹⁷¹ increasingly convinced that critical legal history provides them with very useful tools for their work.

To all this we can add that the Hispanic world in the 18th century did not witness the collapse of traditional juridical culture,¹⁷² since this issue contains another that is highly relevant for the purposes of *uti possidetis*. The preferred demarcations in Latin American territorial disputes were the last to be drawn by the Monarchy. This is why in the majority of cases the most relevant provisions are those dictated during that century and up to 1810. During those years, a new plan was assigned to the kingdoms of the Indies with the founding of the famous Intendencias that strove to redefine the American space. Besides the difficulty or impossibility of their implementation, the dividing lines between intendencias were drawn upon those of the earliest times, to which we must add that the defensive militarization process that reached its peak during the ministry of Godoy failed to clarify space-related issues but, instead, added considerably to the confusion. As Lempérière has explained with great clarity, throughout the 18th century the number of corporations, and therefore of *fueros*, increased exponentially, to the extent that conflicts over jurisdiction dominated the scene in the government of the Indies.¹⁷³

In this state of affairs, should the complex American jurisdictional fabric be recovered, the consequences for the *uti possidetis* would be, owing to their absurdity, disastrous, especially when the territory under dispute is maritime; a single example will illustrate this statement. The coastline of part of

171 LÉMPÉRIÈRE (2004) and (2003).

172 GARRIGA (2002).

173 MARTÍNEZ (2007).

present-day Honduras was considered the jurisdiction of the Captaincy General of Cuba, owing to the fact that what today are territorial waters of Honduras could only be controlled from Havana. Hence, the strict application of *uti possidetis* would entail the extension of Cuba's territorial waters up to the Honduran coastline, which squarely contradicts the basic principles of international law. Nevertheless, a similar argument has been wielded for over a century in Colombian disputes, whose governments have repeatedly used a royal *cedula*, dated in 1803, according to which the islands of San Andrés and the portion of the coast of Mosquitos which extends from Cape Gracias a Dios inclusive, as far as the river Chagres, were segregated from the Captaincy General of Guatemala and dependent of the Viceroyalty of Santa Fe. In rigour, the term “dependent” should be subjected to examination, but everything seems to indicate that the objectives of the parties involved in the conflict did not include striving to recover the historical significance of the language used by the Catholic Monarchy.¹⁷⁴

All the above allows us to state that the drive to “upgrade” the old jurisdictional borders by identifying them with those of the state, was, at the very least, an impossible task.

4. Recapitulation

Uti possidetis ita possideatis, ‘as you possess, thus may you possess’. It would seem that the present times are not particularly propitious to recurring to Roman law once more with a view to justifying or building our current law. However, the use of the Latin expression to name the principle of international law almost inevitably obliges scholars to mention, at least, its original meaning. Some place emphasis on the archaic nature of the expression, relating it to the territories occupied by armies in the course of a conflict;¹⁷⁵ others, by contrast, focus on analysing the possessory interdict, forcing its meaning to make it coincide with the intelligence available today. However, few have attempted to raise the question of ownership, despite the fact that the meaning of the *uti possidetis* in Latin American disputes is closer to a

174 Libro blanco de la República de Colombia (1980) (available at: http://www.sogeocol.edu.co/documentos/Lib_Blanco.pdf).

175 <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380>.

claim for ownership over a territory than the provisional protection of the possessor. This is why I have amended the expression to bring it closer to the current situation.

“*Uti possidetis ita domini eritis*”. Any observer would claim that this amendment only takes us to the sphere of prescription, which to a certain extent is true. However, the problem lies not so much in the condition of the prospective owner as in the object that is possessed, which in the case in hand are titles and not physical spaces. This is where the perverse logic consubstantial with the *uti possidetis* comes into play, since it does not refer to the history of the territory to resolve border disputes, but to the contrary, it creates that history, and projects it upon the disputed territory.

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