UNIVERSITÉ DE GENÈVE

GLOBAL STUDIES INSTITUTE

GSI Working Paper **BA LAW 2024/01**

"Kyrgyz-Tajik Border Delimitation Dispute A Legal Analysis"

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Publications in the Series should be cited as: AUTHOR, TITLE, GSI WORKING PAPER YEAR/NO. [URL].

ISSN 2624-8360

Abstract:

The unresolved delimitation of the Kyrgyz-Tajik border has incited recurring and increasing violent outbreaks among border communities especially in recent years. Disputes usually involve land allocation and resources distribution, namely access to water, pasture as well as the right of way, the former two intensifying with increasing resource scarcity due to climate change.
This paper investigates the legal situation of disputed border sections between Kyrgyzstan and Tajikistan, with a focus on the Batken/Isfara region, more specifically the contentious areas of the Isfara Valley and the Vorukh enclave, a hotspot of violent clashes. Being of strategic importance the valley is one of the main issues why talks on border delimitation have stagnated.
First, the conflicting territorial claims and origins of disputes are examined on the basis of official statements, government reports as well as Kyrgyz and Tajik newspaper articles. After considering the theoretical and legal framework applicable to international territorial disputes, an assessment of the claims is made. Employing a thorough analysis of historical documents, maps and international legal frameworks, the study examines the territorial claims and legal standings of both nations. The ambiguous and unresolved border delineation trace back to the Soviet era with the '1958 agreement at the centera commission's decision that favoured Kyrgyz SSR by adjusting the de jure situation to reflect actual land use. The decision was ratified by the Kyrgyz SSR, but the consent of the Tajik SSR is contentious, which has led to today's dispute over the legitimacy of the 1958 demarcation under the Soviet legal framework in place at the time.
The findings highlight the inherent challenges posed by the uti possidetis principle, which, while providing legal stability, does not fully address the complexities of pre-existing conflicts. The enduring discrepancy between de facto and initial de jure situations, deeply rooted historical claims, and the strategic significance of the contested areas pose significant hurdles to achieving a lasting resolution to the Kyrgyz-Tajik border dispute. The case offers broader insights into the challenges of border delimitation in post-Soviet states.

La délimitation non résolue de la frontière entre le Kirghizistan et le Tadjikistan a donné lieu à des explosions de violence récurrentes et croissantes au sein des communautés frontalières, en particulier au cours des dernières années. Les différends portent généralement sur l'attribution des terres et la distribution des ressources, à savoir l'accès à l'eau, aux pâturages et au droit de passage, les deux premiers s'intensifiant avec la raréfaction des ressources due au changement climatique.
Cet article étudie la situation juridique des sections frontalières contestées entre le Kirghizistan et le Tadjikistan, en se concentrant sur la région de Batken/Isfara, plus particulièrement sur les zones litigieuses de la vallée de l'Isfara et de l'enclave de Vorukh, un point névralgique de violents affrontements. D'une importance stratégique, la vallée est l'une des principales raisons pour lesquelles les dialogues sur la délimitation de la frontière ont stagné.

Tout d'abord, les revendications territoriales conflictuelles et les origines des différends sont examinées sur la base de déclarations officielles, de rapports gouvernementaux ainsi que d'articles de journaux kirghizes et tadjiks. Après avoir examiné le cadre théorique et juridique applicable aux différends territoriaux internationaux, une évaluation des revendications est effectuée. Grâce à une analyse approfondie des documents historiques, des cartes et des cadres juridiques internationaux, l'étude examine les revendications territoriales et les positions juridiques des deux nations. Le tracé ambigu et non résolu de la frontière remonte à l'ère soviétique, avec au centre l'accord de 1958, une décision de la commission qui a favorisé la RSS kirghize en ajustant la situation de jure pour refléter l'utilisation effective des terres. La décision a été ratifiée par la RSS kirghize, mais le consentement de la RSS tadjike est controversé, ce qui a conduit au différend actuel sur la légitimité de la démarcation de 1958 en vertu du cadre juridique soviétique en place à l'époque.
Les résultats mettent en évidence les défis inhérents au principe de l'uti possidetis, qui, tout en assurant une stabilité juridique, ne répond pas entièrement aux complexités des conflits préexistants. L'écart persistant entre les situations de facto et de jure initiales, les revendications historiques profondément enracinées et l'importance stratégique des zones contestées constituent des obstacles importants à une résolution durable du conflit frontalier entre le Kirghizistan et le Tadjikistan. Ce cas offre un aperçu plus large des défis posés par la délimitation des frontières dans les États post-soviétiques.

Keywords: Public International Law, Border Delimitation, Central Asia, Kyrgyzstan-Tajikistan, Territorial Disputes

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GSI Working Paper **BA LAW 2024/01**

1 Content

2 Abbreviations

ASSR:	Autonomous Soviet Socialist Republic (TASSR- Tajik)
CST:	Constitution
I.C.J.	International Court of Justice
KAO:	Kara-Kirgizh (Kirgiz) Autonomous Oblast
MCC:	Main directorate of cartography (of the Soviet Union)
NDP:	National Delimitation Process (Taking part under soviet Rule 1924-27)
P.C.I.J.	Permanent Court of International Justice
R.H.:	Research Handbook
RSFSR:	Russian Soviet Federative Socialist Republic
SSR:	Soviet Socialist Republic (KSSR - Kirgiz, UzSSR – Uzbek, TASSR – Tajik)
UNDP:	United Nations Development Programme
URSS:	Union of Soviet Socialist Republics

3 Introduction

The Border dispute between Kyrgyzstan and Tajikistan has resulted in violent outbreaks across border communities during the last two decades. Most recent events have shown that even though various mediation efforts have been undertaken, those conflicts remain unresolved if the underlying issues of a clear border delimitation and regulation of resources in border areas (joint management) are not addressed. Tajikistan and Kyrgyzstan, once incorporated in the same territorial entity in the early period of the USSR, have long shared unclear administrative borders, with border regions characterised by extensive cross-border cooperation.
The emergence of the border between Tajikistan and Kyrgyzstan has to be situated in the larger context of the emergence of nowadays Central Asian states taking place mainly during the formation, existence and dissolution of the Soviet Union.

Before it started to become subject to occupation by the Russian Empire in the 19th century, the region of Central Asia was controlled by several regional powers.[1] Under the Tsarist rule large parts of the region were "united" under the newly created governorship of Turkestan. The governorship persisted until the Russian Revolution in 1917 when it was transformed into the autonomous socialist soviet republic of Turkestan (TASSR). The TASSR was subjected to the jurisdiction of the RSFSR (Russian Soviet Federal Socialist Republic). In 1924, the unit(s) [2] were entirely dissolved in order to establish two new main political units: the Uzbek Soviet Socialist Republic and the Turkmen Soviet Socialist Republic.
With the dissolution of the TASSR the process of the formation of today's Central Asian states was initiated. Even though not existing independently at the beginning of the remodulation process of the administrative landscape in Central Asia, the political entities that were the precursors of nowadays Kyrgyzstan and Tajikistan already existed, however had an inferior status besides the other two newly established SSRs. The precursor of Tajikistan, the Tajik ASSR, was an autonomous subunit of the newly created Uzbek SSR and the Kyrgyzstan predecessor existed as the **Karakirghiz autonomous oblast**, an autonomous republic under the jurisdiction of the RSFSR.[3] The status of these two political entities was upgraded to separate and full SSRs only in 1929 (formation of the Tajik SSR) and in 1936 (establishment of the Kyrgyz SSR). (see Annex 10.2) This process of the repartition of the Central Asian space according to ethnicity by the Soviets was referred to as the National Delimitation Process (NDP). It lasted from 1924-27, with a first "preliminary delimitation" project presented in 1924, and modifications till 1927 when a commission decided on the petitions and complaints raised by the local elites concerning the draft of 1924.[4] After that moment further territorial modifications were undertaken due to the above-mentioned emergence of subunits as full SSRs as well as frequent minor adjustments resulting of dispute settlement processes between communities [5], giving rise to a complex border situation faced by the newly independent states in the early 1990s.
The Tajik, Kirgiz and the other SSRs persisted as constituent republics of the Soviet Union till the collapse of the USSR in 1991. The borders established between them were merely of administrative nature. In 1990, in the context of the weakening of the union, a wave of ethnic nationalism pushed the republics in the region of Central Asia to pass a declaration of sovereignty.[6] With the successive

1 AKINER Shirin, Central Asian and Caucasian prospects, Tajikistan Disintegration or Reconciliation?, Royal Institute of International Affairs, 2001, p. 10 and GORSHENINA Svetlana, Asie centrale, L'invention des frontières et l'héritage russo-soviétique, CNRS Editions, 2012, pp. 40-41 and FIERMAN William, "The Soviet "Transformation" of Central Asia in Soviet Central Asia, The Failed Transformation, Westview Press, 1991, pp. 16-17.
2 Apart from the Turkestan Governorship, there existed two further SSRs in the region (Bukhara and Khiva/Khorezm), two former Emirates occupied from the Tsarist era, however, not integrated into Turkestan.
3 FIERMAN William, op. cit., pp. 16-17; For the reason for the creation of subunits for certain ethnicities (see Annex 10.2).
4 GORSHENINA Svetlana, op. cit., pp. 234-238.
5 ABASHIN Sergey, "Ferghana Valley: The Heart of Central Asia (1st ed.)", M.E. Sharpe, 2011, p. 114 [e-book version].
6 FIERMAN William, op. cit., p. 18.

declarations of independence in 1991 and the subsequent official dissolution of the Soviet Union the former administrative frontiers were upgraded to international frontiers between the states. [7]
Conflicts between border communities over land and resources, as well as disputes over land at a republican (SSR) level, date back to the early days of the Soviet era and are not a new phenomenon. However, with the independence of the two states and the upgrading of the disputed border, these disputes have shifted from the regional to the international level and have become part of interstate relations and the agenda of foreign policy. At the beginning of independence, the process of transformation into international frontiers posed fewer problems in the border regions, as both states initially favoured an approach of moderate application of border laws. Only in 1999-2000 in the context of growing nationalist tendencies and problems such as terrorism, drug trafficking and organised crime, did the discourse around the safeguarding of the border emerge.[8] It was under this increasingly tense atmosphere (and securitisation of the border) when efforts to "agree" on a borderline between the states started taking place.[9] (See also the citation of an interview with Alamanov, head of Kyrgyzstan's committee for border delimitation and demarcation, 2008, in the Annex 0.) In the late 90s, a border commission was set up to proceed to the delimitation and demarcation of the 987 kilometres of common border.[10] Work progressed and reached a partial conclusion in 2002 [11] but then halted as the commission moved to the delimitation of more contested and "valuable" border areas in non-mountainous regions, especially in the Ferghana valley over the regions of Isfara and Batken.[12] Since then, various meetings and talks on the partition of these regions have taken place between the governments and within the border commission. On a regular basis, the two governments have issued statements on the continuation of negotiation efforts, the "necessity for future collaboration" and "the importance of continuing the meetings of the topographic working groups on the delimitation and demarcation of the Kyrgyz-Tajik state border".[13] However, the current negotiations often remain unsuccessful [14], in particular due to disputes over the legal basis for delimitation efforts. According to the Cambridge Journal of Eurasian Studies, Tajikistan apparently rejected a proposal by Kyrgyzstan to appoint an external impartial body to settle the dispute. Currently, therefore 459 km out of 987 km of the frontier remain to be settled, [15] leaving the border areas with a legally indeterminate status, ambiguous especially for the local population. Over the last decade, due to an intensification of isolationist policies and climate change leading to scarcity of resources, conflicts around borderland, water and pastures have grown in intensity and frequency, showing a clear radicalization of the conflicts and positions of the states. Recent events such as the violent border clashes in summer 2021 in the Batken district, have shown that the issue of an undelimitated and demarcated border in nowadays international context causes instability and results in a fragilization of border communities. In addition, they are a dangerous source of state fragilization, especially in the context of Central Asia.

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7 POLAT Necati, Boundary Issues in Central Asia, Transnational Publishers, 2002, p. 47.

8 GORSHENINA Svetlana, op.cit., p. 306 and BICHSEL Christine, Conflict Transformation in Central Asia, Irrigation disputes in the Ferghana Valley, Central Asian studies series, N°14, Routledge, 2009, p. 47 [e-book version].

9 MATVEEVA Anna, "Divided we fall ... or rise?", CJES [online], 2017, p. 15. [accessed the 6.8.2022].

10 MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF TAJIKISTAN, "*Tajikistan and Kyrgyzstan state boundary*" [online], 1.3.2013, [accessed the 7.8.2022].

11 SUIUNTAI Zhaimagambetov, "The Proacted Border and Territorial Disputes Between Kyrgyzstan and its Neighbors"» [online], Thesis, Master of Military Art and Science, 2015, pp. 43-46 [accessed the 6.8.2022]. *The commission agreed to first delimit less complicated sections in the mountain ranges, but never agreed on the basis for negotiation (i.e. what maps or evidences to privilege) As soon as they moved to areas which states considered valuable, this posed enormous problems.*

12 GORSHENINA Svetlana, op.cit., p. 315 and BICHSEL Christine, op. cit, p. 14 ff., 112 ff. and REEVES Madeleine, *Border Work, Spatial lives of the state in rural central asia*, Cornell University Press, 2014, pp. 25-31.

13 See the numerous Statements Published on the website of the Ministry of Foreign Affairs of the Kyrgyz Republic, and the ministry of Foreign Affairs of the Republic of Tajikistan (See Bibliography: Ch. 9.4 (14/05/2022), (06/05/2022), (05/05/2021) for ex.).

14 A report of the UNDP mentions the low efficiency of the dispute resolution mechanism/institutions in place; UNDP & JRC Vorukh, « Potential for Peace and Threats of Conflict: - UNDP in Tajikistan « [online], 2011, [accessed the 6.8.2022].

15 MATVEEVA Anna, op. cit., p. 15.

This thesis will analyse the legal situation of the disputed border area in the Batken/Isfara region, focusing on the Isfara Valley and the Vorukh enclave located there. (For a geographical description, see Figure 3 in Annex 10.1.3 and 10.1.4). Being one of the hotspots of violent clashes and subject to many failed negotiations and contradictory claims, the Valley is one of the main issues why talks on border delimitation have stagnated.
In terms of human settlements, the focus will lie on the north-western part of the enclave of Vorukh with the so-considered "Kyrgyz" village of Aksai (including Kapchygai) as well as the village Tojikon popularly considered to be lying inside the "Tajik" Vorukh enclave. (see maps in Annex 10.1 [16])
Structure: In order to determine the causes of the border disputes in Isfara and around the enclave of Vorukh (which are blocking the overall negotiations) the conflicting territorial claims are discussed in the first chapter. Since access to the archives, negotiation protocols and internal government procedures was limited, knowledge of the claims and historical facts are based on a detailed study of Tajik and Kyrgyz newspaper articles, official statements found in government reports or quoted in other sources, as well as academic and research papers based on extensive studies of Soviet archival material or interviews with the authorities. The explanations of past events are therefore primarily based on secondary literature. In a second step, the relevant theoretical legal framework for border disputes is discussed. Finally, a legal analysis of the claims is made from the combination of facts and law.

4 The current claims: Disputes in the Ferghana valley, timeline of the major events giving rise to conflicting claims

Several sources mention that the reason why the negotiation of the Intergovernmental Delimitation and Demarcation Commission [17] came to a halt, was essentially that the representatives started arguing about what kind of map to use as a basis for the delimitation [18], especially in the region of the Kyrgyz Batken (Isfara valley) and Leilek district (See Annexe 10.1.2). Based on the Almaty Declaration and the CIS Charter, in principle (in the absence of other agreements) the administrative frontiers existing between the two states should be preserved and upgraded to international frontiers. However, there are different views on what these administrative borders rightly were/are. Tajikistan uses Soviet maps of 1924 - 1927 or (1924-39 [19] depending on the source) to base their territorial claims, whereas Kyrgyzstan refers to maps from the period of 1958 – 59, as well as 1989.[20] This dispute is also confirmed by several Tajik and Kirgiz newspapers which refer to official statements of the central authorities, commission members or other experts.[21] Both parties quote different documents and decisions of the Soviet central authorities to support their claims. This often leads to contradictory conclusions and interpretations of historical events since these documents allocate lands at different times to different parties.[22] There follows a summary of the main arguments that have emerged from the examination of newspaper articles, reports from organisations such as the UNDP or the Mountain Societies Research Institute (in collaboration with UK Aid), and other academic literature on the subject.

16 REEVES Madeleine, op. cit., p. 17.
17 MATVEEVA Anna, op. cit.
18 WOOD Colleen, "The Enduring Difficulty of Settling the Kyrgyzstan-Tajikistan Border", The Diplomat [online], 2.8.2019, [accessed the 6.8.2022]. and SARKOROVA Anora (САРКОРОВА АНОРА) "Киргизия и Таджикистан: проблемы на границе остаются", Russian service BBC [online], 16.5.2014. [accessed the 6.8.2022].
19 Ibid. SARKOROVA Anora16.5.2014.
20 GORSHENINA Svetlana, op. cit., p. 325 and INTERNATIONAL CRISIS GROUP, "*Water Pressures in Central Asia"*, E & C. Asia Report N°233 [online], 2014, p. 10 [accessed the 6.8.2022].
21 MASALIEVA Jazgul, "*Sokh, Vorukh. What they look like on maps of Kyrgyzstan, Tajikistan, Uzbekistan"*, 24.kg news agency [online], 23.11.2021, [accessed the 7.8.2022]. (See citation of Abdymalik Murzaev in Annex 0) and ibid. ICC p. 10 and *адио Озоди, "Как Хаёев отдал 350 га земель Воруха Кыргызстану?", Radio Ozodi [online], 24. 1. 2014,* [accessed the 6.8.2022].
22 ACLED, "Everlasting or ever-changing?", reliefweb, [online], 9.6.2020, [accessed the 6.8.2022].

4.1 The Tajik line of arguments

Based on the archival documents from 1924-39, the Tajik authorities contest the status of Vorukh as an exclave and reclaim the corridor that would link the exclave to the Tajik mainland (territory of the southern Isfara valley). It also reclaims the villages of Aksai and Kapchygai situated in the area of the land connection between Vorukh and the mainland. The Tajik arguments are:

> **1** **The map of 1927** that was issued as a result of the national delimitation process (see Intro) shows the territory of nowadays Vorukh exclave attached to the mainland, as part of a connected "protuberance" of the Tajik territory (at that time Uzbek territory). It hereby proves the contiguity of the territory.[23]

> **2** **A document issued in 1947 is a further proof of this claim**. According to the Tajik media group ASIA-Plus and the Uzbek newspaper Alampir, there has allegedly been a document issued by the Council of People's Commissars, which was *"(…) clarifying discrepancies (variant readings) in determining a crossing line of the inter-republican border between Uzbekistan and Kyrgyzstan*." [24]The map approved by this document shows Vorukh and its surrounding territory as attached to the mainland belonging to the Tajik SSR.[25]

> **3** **A military map of the soviet archive from 1955** does, according to Radio Ozodi (citing a Tajik parliamentary publication), not mark Vorukh as an exclave. The same article mentions **a document** signed by the former chairman of the council of ministers of the republic that allocates 350 hectares of land for temporary use to the Kyrgyz side (between Jamoat of Khoja-A'lo and Vorukh).[26]

> **4** **The map issued by an inter-republican commission in 1958** (which is invoked by Kyrgyzstan and shows Vorukh as an exclave) is according to Tajikistan deprived of legal value since the Tajik side (the council of ministers of the Tajik SSR) has never (officially) ratified it.[27] (*For further details about the map see point 2 of « Kyrgyz claims » below[28]).*

> **5** According to Sarkorova, some [29] contest the legitimacy of Kyrgyz sovereignty over Aksai territory and the newly constructed Aksai village in the 1970s because according to them the land (and dozens of hectares shared for grazing) has **merely been leased on a temporary basis (20 years)** and now Bishkek refuses to return it.

> **6** **The map of 1989** is according to the Tajik authorities deprived of legal value since the parity commission's conclusion was never agreed upon. (Tajikistan considers both the map from 1958 and 89 to violate its territorial integrity).[30] (See infra Kyrgyz claims point 6 in Ch. 4.2)

> **7** **A report of an expert commission,** sent to clarify the situation in the context of the events following the dispute **in 1989** and preparing proposals for the parity commission sent to solve the crisis, concluded according to the archival documents in Moscow the "legal rightness" of the Tajik side. The commission confirmed that Vorukh was never an exclave and is historically related to the Isfara region which belongs to the Tajik side.[31]

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[23] In fact, the map of 1927 shows Vorukh as attached to the Uzbek SSR's mainland (at that time part of the Uzbek Isfara district). Only later when the Tajik ASSR became a separate SSR and left behind its subordinate status to the Uzbek SSR in 1929 the headland with Vorukh became a part of Tajikistan. (see Figure 7); ABDULLAYEV Sunnatilla, "The seeds of conflict that USSR sowed", ALAMPIR [online], 11.3.21, [accessed the 6.8.2022].

[24] NADIROV Bakhmanyor « How Vorukh became an "enclave".", ASIA-Plus [online], 22.4.2021, [accessed the 6.8.2022].

[25] Ibid. NADIROV Bakhmanyor and ABDULLAYEV Sunnatilla, op. cit., The map was also referred to by the MCC at that time, see NADIROV Bakhmanyor, op. cit.

[26] Радио Озоди, "Как Хаёев отдал 350 га земель Воруха Кыргызстану?"[online], 2014, [accessed the 6.8.2022].

[27] UNDP 2011, op. cit., p. 22, Abashin, op. cit., p. 214 and BICHSEL Christine (n 12) p. 107 and SARKOROVA Anora "Из-за чего конфликтуют Таджикистан и Киргизия" [online], on *Русская служба Би-би-си,* Душанбе, 16.1.2014 [access. 7.8.2022].

[28] The Kyrgyz side approved but the Tajik side merely issued a telegram stating "that it had no objections".

[29] NADIROV Bakhmanyor, op. cit., GORSHENINA Svetlana, op. cit., p. 296, TOKTOMUSHEV Kemel, op. cit., p. 30, in contrary SARKOROVA Anora, op. cit., 16.5.2014.

[30] UNDP 2011, op. cit., p. 22 and BICHSEL Christine, op. cit., p. 110 and NADIROV Bakhmanyor, op. cit.

[31] NADIROV Bakhmanyor, op. cit., The commission consisted of ***deputies of the Supreme Council of the USSR.***

> 8 **The current de facto land use** cannot be taken as a base for border delimitation since the land was seized illegally by Kyrgyzstan. (The land illegally passed to Kyrgyzstan due to the de facto occupancy of Kyrgyz settlers or (temporary) land lease agreements issued to Kyrgyz collective farms). Because the de facto situation does not correspond to the de jure situation it cannot be taken as a reference.[32]

4.2 The Kyrgyz line of arguments

Kyrgyzstan on the contrary counters the claim that Aksai and Kapchygai villages, as well as the territory of the "land connection" of Vorukh in the Isfara Valley, belong to Tajikistan by invoking an administrative map of 1958 as well as 1989, showing Vorukh as an enclave in its territory.[33] In addition to that, it claims the village of Tojikon situated next to Kapchygai at the north-western edge of the enclave. Alternatively to the maps, Kyrgyzstan seems to insist on a delimitation and demarcation carried out on the basis of the de facto residence and use of land. (Statement of Ibol Tashayev, spokesman for the Isfara city administration in Annex 0)[34] The Kyrgyz authorities state that:

> 1 **In 1949 a commission responded to** complaints of the Union Republics stating that the current borders did not fit the de facto land use. The Commission that ruled on the territorial claims which arose in the 1940s and 50s due to the reorganization and collectivization of the agricultural production under Stalin, decided that the current kolkhoz boundaries should be taken as a marker for the borders of the two Union Republics.[35]

> 2 **The inter-republican (dispute settlement) commission in 1958** gave the territory between the enclave and the mainland to Kyrgyzstan. The map established on the basis of the report of this commission shows Vorukh as an enclave in Kyrgyz territory.[36] (The Tajik SSR at that time claimed that 14 collective farms of the Kyrgyz SSR were located on its territory and that the de facto situation does not correspond to the de jure situation.)

> 3 **«[In 1963] the Tajik "Pravda" collective farm of the Vorukh village council began land development on the left bank of the Isfraninka River** [Aksai area see Figure 6 in Annex 10.1.5], *and with the support of the USSR Ministry of Water Resources developed about 700 hectares of vacant land within 10 years. (…)* »[37] According to Nadirov the Kyrgyz protested against the usage and claim the territory as "theirs" (citation in Annex 0)

> 4 **It contests the claim of Tajikistan on Aksai and Kapchygai** since in 1974, following the dispute between the Pravda vs. Lenina farm that had started in 1963, the land of Aksai was officially transferred to Kyrgyzstan **in virtue of a bilateral dispute settlement agreement in 1975**.[38]

> 5 **In 1975, 282 hectares of land were leased to the Tajik for** the construction of "friendship park" (the area that later became Tojikon).[39] The land was leased for 10 years and the contract was renewed for another 10 years from 1985-1995 (under the initiation of the Soviet central authorities since the population of Vorukh needed more agricultural land). However, following the lease renewal in 1985, the Tajiks started to construct the village of Tojikon and after the independence in 1991 the land was never returned.

> 6 **In 1989 an inter-republican commission** was created to evaluate conflicting claims and disputes over territory that arose from 1985 – 89, the map attached to the decision of the commission shows Vorukh as an enclave. **Also, there is the mention of another resolution that was issued prior to**

[32] REEVES Madeleine, op. cit., pp. 29, 82 and SARKOROVA Anora, op. cit., 16.1.2014, ABDULLAYEV Sunnatilla, op. cit., RADIO OZODI, op. cit., 24.1.2014 and BICHSEL Christine, op. cit., p. 107.

[33] MASALIEVA Jazgul, op. cit., (see statement in annexe), ibid. BICHSEL Christine, REEVES Madeleine and GORSHENINA Svetlana, op. cit., pp. 296- 297.

[34] SARKOROVA Anora, op. cit., 16.5.2014.

[35] REEVES Madeleine, op. cit., p. 83 and BICHSEL Christine, op. cit., p. 107.

[36] SUIUNTAI Zhaimagambetov, op. cit.

[37] NADIROV Bakhmanyor, op. cit.

[38] NADIROV Bakhmanyor, op. cit.

[39] REEVES Madeleine, op. cit., p. 85.

the decision of the republican commission, confirming the status quo of the enclave. The 1989 report was clearly in favour of a delimitation according to the actual land use.[40] The map produced in this context shows Vorukh as an enclave as well.

>7 **Accusation of Creeping migration;** Nowadays (post-independence) Kyrgyzstan accuses Tajikistan of practicing creeping migration and suspects that it wants to pose *effectivités* and change the de facto border location in case of a future delimitation according to the actual use of land in certain areas.

>8 **Kyrgyzstan bases claims also on de facto rights**: From the 1930s on, the Soviet Central Authorities pursued the policies of collectivization of agriculture into "collective or state farms" and the settling down of nomads. The policies led to Kyrgyz nomads being transferred from the more mountainous areas to the Isfara valley. Since then, several Kyrgyz state farms (14 according to Bichsel [41]) existed on Tajik territory. The Kyrgyz since then think to have a territorial right due to the de facto occupancy of the space. According to Reeves the land at that time had been leased to them for "long-term use".[42]

Resume: As we can see, the different disputes and arguments mainly concern different maps that allegedly prove the contiguity or discontinuity of the Tajik territory, land leases or dispute resolution commissions that allegedly have transferred territory from one side to the other as well as different de facto arguments, such as the effective administration or utilisation of territory that allegedly confers a right to the administrator of the territory. Arguments of the other party are often contested by claiming the invalidity of a decision, agreement or map adopted. The legal issues that have to be examined are the validity and legal weight of the mentioned maps, decisions, state conduct and de facto occupancy. For the maps and decisions, the essence is to determine their significance and, in case of mutual discrepancy, the precedence of one over the other. The effect of land lease agreements will have to be analysed. It must also be evaluated whether the de facto situation (Kyrgyz presence on the disputed territories) is sufficient to establish a right over territory.

5 Legal framework

The dispute between Kyrgyzstan and Tajikistan is clearly a dispute comprising contradictory claims over land. Disputes over land can be associated to disputes over the attribution of territory or delimitation disputes. However, since the effect of any change in delimitation, no matter how small includes the attribution of land and [43]. *"[…] the result that states intend to achieve is the same; to expand or maintain their sovereignty, and thus their territory and thus their boundaries*"[44], the terms are used synonymously in this paper.

5.1 Territorial titles

To clarify the situation of the disputed boundary section in the region of the Isfara Valley, it is necessary to examine how the respective territorial claims (or state conduct and acts of private persons) of Kyrgyzstan and Tajikistan are to be assessed under international law; or in other words, which state has territorial sovereignty over the disputed area according to international law.

The sovereignty of a state over a territory is based on territorial titles. Territorial titles (**in its broader sense**) designate all the possible juridical "*acts or facts that constitute the legal foundation [or proof]*

[40] UNDP, "Coexistence for northern Tajikistan and Southern Kyrghyzstan", EWR [online], 2006. [accessed 6.8.2022]. p. 23.

[41] BICHSEL Christine, op. cit., p. 107.

[42] REEVES Madeleine, op. cit., p. 31.

[43] KOHEN Marcelo G., HÉBIÉ Mamadou, "Territorial conflicts and their international legal framework", in R.H. on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, p. 10 and FRONTIER DISPUTE (BURKINA FASO/MALI), Merits, 1986 I.C.J. 554, p. 563, para. 17 (22 December).

[44] NESI Guiseppe, "Boundaries", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing 2018, p. 200.

for the establishment of a competence or right over territory".[45] "*There is no single form to which title is acquired*".[46] The most apparent instrument that confers a title over territory is a treaty since it results from the explicit consent of the parties. However, also unilateral acts, state succession or attribution by International Organizations can give rise to a title. **In its narrower sense**, the word title or "legal title" denotes documentary evidence alone.[47] Titles can also derive from legal facts such as effective occupation of *terra nullius* or abandoned territory. [48] In this sense, *effectivités* are "sovereign acts performed in a disputed territory" [49] or in other words "acts of the exercise of state authority[50]", to which international law attributes the acquisition of state sovereignty under certain circumstances.[51] (see Annexe 10.3.1)

A distinction must be made also between titles of sovereignty and titles of administration. Contrary to the former (defined above), the latter confers the right to exercise a certain amount of authority over a given territory to another state, without ceasing sovereignty.[52] Land leases are an example of a title of administration; the lessor leases territory to the lessee, *"granting for a specified or non-specified period, more or less extensive rights […]".*[53]

"Boundaries (…) define the limits of national jurisdiction" and therefore the limits of a state's sovereignty.[54]According to Nesi, in territorial dispute adjudication the judicial body must decide based on the rules governing the acquisition of territorial sovereignty.[55] In order to assess the respective claims of states and to determine which nation has a title to the territory in question, it is necessary to consider some of the most important principles governing the acquisition and loss of territorial sovereignty.[56]

5.2 Principles

"[…] General International Law does not contain any imperative rules governing the establishment of international land boundaries beyond the scope of conventional delimitation […]".[57] The parties are free to search for a mutually convenient alignment and delimitation of their frontier. This completely facultative and subjective operation, however, is confined to the situation in which no previous boundary has yet been established between the states concerned. As soon as the operation of boundary-making is completed an "independent juridical situation is created," and a different, more restrictive judicial system is applicable.[58] In the following chapters the main principles applicable to territorial delimitation and boundary disputes will be discussed.

Probably the most general and quintessential principle of boundary delimitation is the principle of the stability of boundaries. As Shaw mentions, *"[it] constitutes an overarching postulate of the international legal system and one that both explains and generates associated legal norms".*[59] (see Annex 10.3.4) Its emergence has to be considered in the light of the very nature of the international

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45 KOHEN Marcelo G., *Possession contestée et souveraineté territorial*, Presses Universitaires de France, 1997 p. 148 and KOHEN Marcelo G., "Titles and *effectivités* in territorial disputes", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, pp.145, 146.

46 Ibid KOHEN Marcelo, Research Handbook, 2018, p. 148 (From now on; R.H. stands for Research Handbook).

47 BURKINA FASO/MALI CASE, op. cit., p. 563 para 17. And KOHEN Marcelo, R.H. 2018, op. cit., p. 148.

48 Terra nullius refers to territory that had previously existed "without a master"; KOHEN Marcelo, R.H. 2018, op. cit., p. 150.

49 KOHEN Marcelo, HÉBIÉ Mamadou, R.H. 2018, op. cit., p. 33.

50 See KOHEN Marcelo, R.H. op. cit., p. 145, or also "faits d'occupation effective".

51 PARLETT Kate, "State conduct in territorial disputes beyond *effectivités*: recognition, acquiescence, renunciation and estoppel", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018 p. 170.

52 KOHEN Marcelo, R.H. 2018, op. cit., p. 149.

53 STRAUSS Michael J., Territorial Leasing in Diplomacy and International Law, Brill, 2015, p. 13.

54 NESI Giuseppe, R.H. 2018, op. cit., p. 197-201.

55 Ibid. See also p. 201 – the international rules governing territorial sovereignty also govern boundary disputes.

56 KOHEN Marcelo, HÉBIÉ Mamadou R.H. 2018, op. cit., p. 19.

57 BERNSTEIN Itamar, Délimitation of international Boundaries, Tel Aviv university press, 1974, p. 167.

58 Ibid. pp. 167 ff.

59 SHAW Malcolm N., "The Heritage of States: The Principle of *Uti Possidetis* Juris Today", in British Yearbook of International Law1996, 67(1), Oxford, Clearendon Press, 1997, p. 81

system which is characterized by the "*co-existence and co-operation of some two hundred independent and sovereign states within determined territorial limits*".[60] The stability of the territorial delimitation between those units is essential for a peaceful co-existence and for the successful functioning of nowadays international legal system that operates on the basis of state sovereignty [61] (and condemns the use of force as a mean of settling state disputes). It maintains international peace and security by providing that the boundaries between states are fixed and **cannot be questioned or challenged unilaterally**.[62] Deriving from this principle of stability and finality of state borders, Nesi mentions essentially two principles applicable to boundary delimitation: Consent and *Uti possidetis.* [63] Nonetheless, as Kohen puts it, the final/definite character of the boundary is not synonymous with its immutability. The boundary, once established, can still be changed by the means permitted by international law, such as consensual agreement.[64]

5.2.1 The principle of consent

Since nowadays it is rare that the border between two states is not defined [65], the principle of stability of frontiers essentially implies that states can only modify their frontier by consent because all other means, for example the use of force, are prohibited by nowadays international legal order. The parties that intend to modify a state border can manifest their consent in various ways, which include but are not limited to (subsequent) treaties.[66] Consent may be given explicitly [67] or be inferred from **the conduct** of the parties involved.[68] According to Shaw and Nesi the relevance of "tacit consent" is underlined since the failure to contest a territorial claim concretized by actual possession could [69] result in a subsequent modification of a legal title established earlier.[70].

According to Parlett, the International Court of Justice has applied a high threshold for the establishment of title based on conduct, which can be seen again in the Middle Rocks South Ledge Case: "[…] *any passing of sovereignty over territory on the basis of the conduct of the Parties … must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory*."[71] ("firm evidence"[72]). Since a state is a legal construct that cannot act by itself, in order for a state to validly manifest consent to something it is important that the action of the person considered representing the state is attributable to the state. According to Parlett, the customary rules of international law on the attribution of conduct to a state are applicable to determine whether the actions of an individual can be regarded as representing the state and can be binding for the state. (see Annex 10.3.7).[73] In general, the conduct of a party – be it explicit or implicit – concerning a fact or situation

60 Ibid. SHAW Malcolm, p. 81. For further associated norms see Annex 10.3.4
61 Ibid. SHAW Malcom, p. 81.
62 KOHEN Marcelo, 1997, op. cit., pp. 165-166 and NESI Giuseppe, R.H., op. cit., p. 227.
63 NESI Giuseppe, R.H., op. cit., pp. 195, 202, 215 see also SHAW Malcom, YBIL 1996, op. cit., p. 84).
64 KOHEN Marcelo, 1997, op. cit., p. 164 ff.
65 NESI Giuseppe, R. H. 2018, op. cit., p. 202.
66 SHAW Malcom, YBIL 1996, op. cit., p. 84.
67 " An express agreement will usually constitute a cession of title from one state to another, or recognition of a pre-existing but formerly disputed title." (PARLETT Kate, R.H. 2018, op. cit., p. 170). The forms of explicit manifestations of will are either unilateral declarations or treaties. KOHEN Marcelo, op. cit., 1997, p. 300 It must be noted, however, that the consent to a title through a unilateral declaration for example "manifests [only] through statements attributable to the state." NESI Giuseppe, R.H., op. cit., p. 175. This must be examined carefully for each case.
68 Ibid. PARLETT Kate, pp. 169,170 and Op. cit. NESI Giuseppe, R.H. 2018 p. 203.
69 Ibid. NESI Giuseppe, p. 203, SHAW Malcom, YBIL 1996, op. cit., p. 85.
70 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing) Judgment, 2008 I.C.J. 12, para. 120 (23 May).
71 MIDDLE ROCKS AND SOUTH LEDGE (MALAY./SING), op. cit., Judgment, 2008 I.C.J. 12, 51 para. 122 (23 May).
72 SHAW Malcom, YBIL 1996, op. cit., p. 85.
73 PARLETT Kate, R.H. 2018, op. cit., pp. 171-178).

either reveals its acceptance, or its refusal.[74] This makes it possible to establish the justiciability of this situation vis-à-vis the State. (see Annex 10.3.7)

5.2.2 The principle of *uti possidetis* (and the Alma Ata declaration)

The dispute between Kyrgyzstan and Tajikistan is based on a border that used to be not an international, but a mere administrative division between the two predecessor entities: the Tajik SSR and the Kyrgyz SSR. It is therefore a particular case in which there was neither a fully-fledged international border between the two states, nor the complete absence of a pre-existing territorial division. A large part of the doctrine has argued in favour of the application of the principle of *uti possidetis* in this case, be it because of the nature of the situation[75], or because the two states have affirmed the "inviolability of the existing borders" in the declaration of Alma Ata (Almaty) and the CIS charter.[76] The fact that there exists a legal instrument governing the border delineation between the two states, means that its prior examination is necessary to establish title, before other, more general sources of law are considered. However, in the present case, we have a situation in which the treaty in place is generally considered as referring to a principle of general international law, namely the *uti possidetis principle*. The current situation in light of the role of the *uti possidetis* principle is therefore analysed in the following section.

Definition, history, and emergence of the principle

According to Bernstein *uti possidetis* poses a rare exception to the dual system of no pre-established boundary and the absence of imperative [77] rules or a pre-existent boundary and modification through consent only.*[78]* The term *uti possidetis* originates from the Roman legal terminology *"uti possidetis, ita possideatis* " that signifies, "as you possessed, you may continue to possess".[79] In international law it describes a legal principle that was first introduced in the context of the decolonialisation of Latin America. It provided that the newly independent Latin American states would inherit the administrative (or intercolonial)[80] boundaries established by the former colonial power. Its aim was (is) to promote international security and peace by guaranteeing the stability of state boundaries and trying to prevent a legal void that could tempt newly established states to regulate the delimitation of their borders by resorting to force.[81]

The principle soon extended its scope, when the African states after gaining independence from colonisation, were looking for a solution to delimit their respective territories.[82] In the resolution of the Organization of African Unity, adopted in Cairo in 1964 [83], a political statement, affirming the "respect of the colonial frontiers existing at the moment of decolonisation by all member states", was issued.[84] This statement is widely known also under the designation of the "intangibility of the African

74 KOHEN Marcelo 1997, op. cit., p. 350.

75 i.e., "The dissolution of federal states".

76 POLAT Necati, op. cit., p. 47.

77 The absence of imperative rules concerning the establishment of a state boundary does not mean that the states do not need to respect general rules of international law that apply to the interaction of states (i.e., prohibition of using armed force in order to get consent from the other state, the principle of goodwill (bonne fois) etc. The "absence of rules" rather means that the states are free to use any criteria they want (natural, historical, geographical etc.) to determine the boundary between them -- designing it as it pleases them as long as imperative rules of general international law do not pose a limit to their conduct.

78 BERNSTEIN Itamar, op. cit., p. 167.

79 KOHEN Marcelo, 1997, op. cit., p. 426, see fn. 1, BERNSTEIN Itamar, op. cit., p. 182, SHAW Malcom, YBIL 1996, op. cit., p. 98.

80 KOHEN Marcelo 1997, op. cit., p. 428 and FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 566 para. 24.

81 Ibid. KOHEN Marcelo 1997, pp. 426,427 and NESI Giuseppe, op. cit., pp. 206, 212.

82 SHUCKSMITH-WESLEY Marc, "*Uti Possidetis*: The Procrustean Bed of International Law?", FYBIL [online], Hart Publishing, 2018, p. 227–258, [consulted the 6.8.2022].

83 Called "1964 OAU resolution" (SHAW Malcom, YBIL 1996, op. cit., p. 103) or the « resolution of Cairo» by some (KOHEN Marcelo 1997, p. 429).

84 Resolution 16 (1) adopted at the Cairo summit 1964; COT Jean-Pierre, "Des limites administratives aux frontières internationals?," in Démembrements d'Etats et délimitations territoriales: l'*uti possidetis* en question(s), CDI n°41, Editions Bruylant, 1999, p. 21 and SHAW Malcom, 1996 YBIL, op. cit., p. 103.

frontiers"[85] and is considered by the Court to make direct reference to the principle of *uti possidetis*.[86] With the emerging debate about national delimitation in Africa and the resolution of Cairo, the doctrine has started to discuss the general scope of the principle as well as its application as a regional or general custom in the context of decolonisation. At the latest with the "dictum" of the ICJ Chamber in the Frontier (Burkina Faso/Mali case) for the majority of scholars [87] *uti possidetis* has been confirmed as a general principle of international law (at least) in the context of decolonisation. Aside from clarifying the nature of the principle the ruling has also provided one of the most pertinent definitions of the principle:

"[…] [*T]he principle [of uti possidetis] is not a special rule which pertains solely to one specific system of international law [regional custom[88] or principle]. It is a general principle, which is 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*. "[89] "(…) [T]*he essence of the principles lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. […]. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term*". [90]

Nature of the principle

According to Beaudouin the "normative scope" of the principle in Africa can hardly be contested in light of the fact that almost all African boundaries have been demarcated in reference to the former colonial frontiers and that the jurisprudence of the Court has affirmed the essential role of *uti possidetis* in the African context.[91] Also, according to Shaw there is sufficient legal basis that *uti possidetis* is a principle of general international law at least concerning decolonisation: "It can therefore not be denied that *uti possidetis* applies within the framework of decolonization in the accepted sense". He however questions, "*whether the doctrine has an application in the context […] outside of the traditional decolonization process*".[92]

As we can see, the utilisation of the formula "accession to independence" in the above-cited case of the Court (Burkina Faso/Mali), which is a larger and more general notion than mere decolonisation, has sparked the question of its applicability beyond the context of decolonisation. [93] It is a discussion that has gained momentum and relevance, especially with the dissolution of the former Yugoslavia and the USSR in the early 1990s (see infra a) in the next subchapter.).[94]

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85 KOHEN Marcelo 1997, op. cit., p. 429.

86 FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 565 para. 22.

87 Even though the principle is clearly generally practiced in the two cases of accession to independence after decolonialisation: Region of Latin America and Africa, a certain part, though a minority, still contests the customary vocation of the principle due to the absence of "opinio juris". see BEAUDOUIN Anouche, *Uti possidetis* et secession, Dalloz, 2011, p. 6.

88 «**The special customary international law, which is based on [the general practice in] a common region**, can be called regional customary international law. "LIU Chenhong, "*Regional Customary International Law Related to China's Historic Rights in the South China Sea"*, KJICL [online], 2019, p. 262, [accessed the 6.8.2022]. Special/Regional international customary rules can be applied in disputes having a regional scope. See DE ANDRADE Mariana C., "Regional principles of law in the works of the International Law Commission", QUIL, 2021 pp. 23 ff. [accessed the 6.8.2022].

89 FRONTIER DISPUTE (BURK. FASO/MALI), Judgment, 1986 I.C.J. 554, (22 December) C.I.J. Recueil 1986, p. 565 para. 20.

90 FRONTIER DISPUTE (BURK. FASO/MALI) , op. cit., Judgement 1986, p. 566 para. 23.

91 BEAUDOUIN Anouche, op. cit., p. 6; only some have contested the correspondence of the "intangibility of frontiers" to *uti possidetis.*

92 SHAW Malcom, YBIL 1996, op. cit., p. 10.

93 COT Jean-Pierre, op. cit., p. 22. And CHRISTAKIS Theodore and CONSTANTINIDES Aristoteles. "Territorial disputes in the context of secessionist conflicts", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, p. 370 R.H. – "[S]ince then a major doctrinal debate has emerged" No dominant opinion has crystallized so far.

94 SHAW Malcom, YBIL 1996, op. cit., pp. 106, 109-111.

While a certain part of doctrine[95] sees the events following the dissolution of the USSR as a precedent for the establishment of a general international rule (custom) applicable to all processes in relation to the disintegration (démembrement) of a state[96], others contest this statement. It is beyond the scope of this paper to outline the entire debate surrounding the nature of the uti possidetis principle. What is important is to know whether the *uti possidetis* principle is applicable in the context of the dissolution of the USSR and can therefore be used to analyse the border dispute between Kyrgyzstan and Tajikistan.

Scope of application: Applicability in the USSR context

Despite the disputed nature of *uti possidetis* in the context of its application beyond decolonization, only a minority contests its application in the context of the USSR -- beyond its traditional context. The underlying reasoning is as follows:

a) A custom applicable beyond the context of decolonialisation and therefore to the context of the dissolution of the USSR?

The customary nature of the *uti possidetis* principle as mentioned on different occasions is still disputed in the doctrine. If one follows the side supporting this statement, the context of the USSR clearly falls under the designated principle. This line of argument is certainly supported by the statement of the Court in the above-cited paragraph 21 in the Burkina Faso/Mali case as well as the 3rd opinion of the Badinter Arbitration Commission, which has confirmed the application of *uti possidetis* in the case of the dissolution of the Socialist Federal Republic of Yugoslavia, reasoning that *uti possidetis* is a general principle of international law applicable to situations of state dissolution also outside the context of decolonisation.[97] The criteria that a situation would have to fulfil in order to fall under the scope of this principle is according to the Court a situation of new states that have emerged out of a process of obtaining independence. [98] The dissolution of the USSR that has been initiated by the declaration of sovereignty of Estonia,[99] and that led to the republics successfully reaching an independent status in 1991 is an exemplary case of the latter. Therefore, based on general international law, and in the absence of a contrary stipulation of the parties, the borders of Kyrgyzstan and Tajikistan, would need to be determined according to the principle of *uti possidetis.*

Alternatively, one could argue along the lines of Cot[100], who states that in fact the Russian occupation of Central Asia has exhibited certain characteristics of colonialisation. This statement has been put forward by many historians; similarities include the submission of the local population, especially during the early expansion of the Russian empire in the region, the exploitative nature of the occupation in certain periods and the sense of superiority of the administrators especially in the tsarist epoque (civilizing mission).[101] The customary principle could therefore be applicable in its traditional scope *mutatis mutandis*, because of the sufficient similarity of the situation above with decolonisation.

b) Regional custom

If one does not admit that *uti possidetis* is a general custom applicable in the case of the dissolution of states, one could argue in favour of a regional custom [102] that has established itself in Central Asia. In fact, many of the newly independent states have, in bilateral treaties [103] or their constitution, recognized

[95] Kohen and Beaudouin for instance.

[96] KOHEN Marcelo, 1997, op. cit., p. 460.

[97] Arbitration Commission of the Conference on Yugoslavia, Opinion n°3,11 January 1992, R.G.D.I.P., 1992/1, pp. 268-269.

[98] FRONTIER DISPUTE (BURKINA FASO/MALI), op. cit., Judgement 1986, p. 565 para. 20. and KOHEN Marcelo 1997, op. cit., p. 454.

[99] WEERTS Laurence, "Heurs et malheurs du principe de l'*uti possidetis*." in Démembrements d'Etats et délimitations territoriales: l'*uti possidetis* en question(s), CDI n°41, Editions Bruylant, 1999, p. 79-142. pp. 102 ff.

[100] COT Jean-Pierre, op. cit., p. 22.

[101] GORSHENINA Svetlana, op. cit., pp. 17, 133, BICHSEL Christine, op. cit., pp. 17-19, KRITSKIY Vsevolod 1920, op. cit., p. 5, footnote 5.

[102] "Regional custom" or "Special custom"; is a custom applicable only between a selected number of states (of a region)

[103] POLAT Necati, op. cit., pp. 45-47.

the former administrative borders as their new ones [104]. The state practice confirms that almost all the states in the region have preserved the administrative lines issued out of the Soviet administrative period, except for subtle modifications afterwards (concluded by a treaty). *Uti possidetis* has therefore been confirmed in practice as a rule "à defaut" that applies between states until or except if they have reached a subsequent agreement. [105] Concerning the "opinio juris" criterion required for the emergence of a customary law, Beaudouine cites two conflicting doctrines. For a part, such an abundant practice is sufficient to establish the conviction of the actors. For others, however, there is no clear evidence that the state is convinced in its practice that it must comply with an existing legal norm. [106] This thesis adheres to the former opinion and argues that the later approach sets the threshold for the establishment of opinio juris too high also with regards to the practice of the ICJ in that matter[107]. However, the question of whether such widespread behaviour is sufficient to establish a regional custom of applying the uti possidetis principle in Central Asia can actually be left open, as there is another source on the basis of which the principle can be applied to the context (cf. infra c.).

c) The Alma Ata declaration - a reference to *uti possidetis?*

Independently of whether one pleads in favour of the applicability of *uti possidetis* as a customary rule applicable beyond colonialisation or not, the large majority of scholars still confirm the applicability of *uti possidetis* in the case of the dissolution of the USSR.[108] According to the ordinary relation between treaties and customary law, an agreement on a specific issue would generally prevail over the custom on the same issue. (*lex specialis derogat generalis)*As mentioned in Ch. 3 Introduction in 1991 upon accession to independence the Central Asian states have recognized the former administrative boundaries of the predecessor states as new inter-state frontiers[109] in their relations in the Alma Ata (Almaty) declaration, which confirmed their adherence to the Minsk Agreements (also known as Belovezha Accords) [110]. The Minsk Agreements declared the dissolution of the USSR and the foundation of the Community of Independent States (CIS). In 1993 another confirmation followed in the CIS Charter. [111] [112]

- **Art 5 of the Minsk Agreement (8. 12. 1991):** "[T]he High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth".
- **Alma Ata**, **declaration, 2nd paragraph (21.12.1991):** "Recognizing and respecting each other's territorial integrity and the inviolability of existing borders" (verbatim reiteration of Art. 5 of the Minsk Agreement of December 1991)
- **Art 3 of the CIS Charter (22.1. 1993):** "Inviolability of states' frontiers, recognition of existing frontiers and renouncement of illegal acquisition of territories (…)"[113] [114]

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[104] BEAUDOUIN Anouche, op. cit., p. 504 ff.

[105] RATNER, Steven R. "Drawing a Better Line: *Uti Possidetis* and the Borders of New States." The American Journal of International Law, vol. 90, no. 4 [online], 1996, pp. 590 ff. [accessed 7.8. 2022].

[106] BEAUDOUIN Anouche, op. cit., p. 509; Moreover, she mentions that according to Ruiz Rabri a positive proof of the criteria of "opinio juris" is almost impossible (The "two elements doctrine" requires a general and uniform practice and *opinio juris*.).

[107] MONTIEL Moisés, « Fantastical Opinio Juris and How to Find It ». OpinioJuris [online], 2021 [accessed 2.2.2024]

[108] See for example POLAT Necati, op. cit., BEAUDOUIN Anouche, op. cit., KOHEN Marcelo, op. cit.

[109] POLAT Necati, op. cit., p. 45 and SHAW Malcolm N., "peoples, territorialism and boundaries", E.J.I.L./J.E.D.I. [online], 1997 p. 478-507, [consulted the 6.8.2022]" and WEERTS, op. cit., p. 105, l'*uti possidetis* en question(s).

[110] It was initially concluded only between the Russian Federation and the Baltic states, the other 3 founder states of the CIS. The treaty was however open to the adhesion for the other Soviet republics. WEERTS Laurence, op. cit., p. 103.

[111] POLAT Necati, Boundary Issues in Central Asia, Transnational Publishers, 2002, p. 47.

[112] Ibid. WEERTS Laurence, p. 81 ff. The charter was destined to give the Community a more definite juridical form; WEERTS Laurence, op. cit., p. 104.

[113] Ibid. WEERTS Laurence p. 106, POLAT Necati, op. cit., p. 47.

[114] U.N. Doc. A/47/60 - S/23329 (30. December 1991).

As can be seen, the principle of *uti possidetis* is not explicitly mentioned. However, according to Polat, Beaudouin and the interpretation of Shaw, it is clear that, even though the instruments refer essentially to the 'principle of territorial integrity and inviolability of the existing boundaries', the intention of the states was to reinforce the *uti possidetis* doctrine.[115] For Shaw such a reference is evident since the aim was to achieve international legitimation for the new borders, by means of an *uti possidetis* based title.[116] In addition, Weerts mentions the broad support of this reasoning by several other scholars; *"the general interpretation given to these texts is a pure and simple reference to the former Soviet administrative boundaries*".[117] Of course, there are other interpretations of these texts that see in the declarations of Alma Ata and Minsk a mere intention to relegate a pacific settlement of the territorial disputes to a later moment (in the meantime freezing the revendication). The terminology used later in the CIS Charter 1993, however, is disputed by rarely any scholars and there seems to be a general opinion that the validity of the existing frontiers has been recognized (at least from then on).[118] Since the Court in several cases has confirmed the synonymity of *uti possidetis* with the "respect for the intangibility of the frontiers", this thesis adheres to the former point of view. One such example can be found in the **Burkina Faso/Mali case, in which the ICJ Chamber states that "**[s]ince *the two Parties have, as noted above, expressly requested the Chamber to resolve their dispute on the basis, in particular, of the "principle of the intangibility of frontiers inherited from colonization", the Chamber cannot disregard the principle of uti possidetis juris, the application of which gives rise to this respect for intangibility of frontiers. […]"*.[119][120]

Of course, one could criticise that the Court only explicitly confirmed this synonymity in the context of decolonisation; however, it also has to be considered, that the wording of the parties' requests' as well as the Court's response are set in a case that is related to decolonisation Their formulations therefore naturally refer to this fact as well. Consequently, it is only natural that the states wishing to consolidate the mechanism of *uti possidetis* in their relations in the context of the dissolution of the USSR refer not to the borders of the colonial period but to the borders inherited from the former Federation.

5.3 The application of *uti possidetis*

After having established the applicability of *uti possidetis* to the dispute of Kyrgyzstan and Tajikistan, it must now be applied to the case. For this it is important to elaborate on some theoretical implications of the principle.

5.3.1 Function & Mechanism

Given that *uti possidetis*, as stated above, maintains the borders as they were in cases such as the dissolution of the USSR and the transformation of administrative borders into international ones,[121] "*[t]he heart of the problem concerning the […] application of the principle of uti possidetis is to be able to determine the definitive location of the line of administrative control at the appropriate time.* "[122] According to the Burkina Faso/ Mali case; "*By becoming independent, a new state acquires sovereignty with the territorial base and boundaries left to it by the colonial power. Uti possidetis applies to the state as it is i.e. to the "photograph" of the territorial situation then existing. The principle of uti possidetis freezes the territorial title, stops the clock, but does not put back the hands.*" This means that the external

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115 POLAT Necati, op. cit., p. 45, SHAW Malcom, YBIL 1996, op. cit., pp. 110-111, BEAUDOUIN Anouche, op. cit., p. 6.

116 SHAW Malcom N., "peoples, territorialism and boundaries", E.J.I.L./J.E.D.I., 1997, p. 499 and WEERTS Laurence, op. cit., p. 105.

117 WEERTS Laurence, op. cit., pp. 105, 106.

118 WEERTS Laurence, op. cit., p. 107.

119 FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 565 para. 20. *See also the **Benin/Niger case.***

120 NESI Giuseppe, op. cit., p. 208 & BEAUDOUIN Anouche, op. cit., p. 6. See FRONTIER DISPUTE (BENIN/NIGER), Judgment, 2005 I.C.J.90 (12 July).

121 SHAW Malcom, YBIL 1996, op. cit., p. 116: "Internal or administrative boundaries are boundaries established by municipal law in order to divide parts of the same sovereign territory for purely domestic purposes." They may vary a lot over time.

122 SHAW Malcom, YBIL 1996, op. cit., p. 132.

limits (of territorial sovereignty) of the new states are legally based on the tracing of the (administrative) boundaries of the predecessor entity. **It is therefore necessary to establish what the aforementioned former administrative boundary was at the moment of independence.** According to Nesi a "*singling out of the (material) elements to be taken into account in determining the boundaries at the critical date*" is necessary. For Shaw this raises two issues: Firstly, the applicable law determining the definition of the relevant line, and secondly the temporal framework.[123]

The Critical date: Concerning the temporal framework it is necessary to establish the "critical date" in relation to which the asserted titles must be analysed. The critical date "freezes states' claim with regard to their titles source". [124]. Acts before the critical date contribute to the creation, extinction, the weakening or consolidation of the analysed title (in our case a title based on *uti possidetis*). They act as "title sources". The acts after the critical date are mere title-evidence which can be used to interpret (shed light) on the title source(s).[125] If one follows Kohen and Shaw, the critical date in the case of *uti possidetis* is "self-evident" since the principle by definition is clearly anchored in time. Even though in some cases of state dissolution a slightly more nuanced analysis is necessary, as a general rule the criteria for the "temporal determination of *uti possidetis*" is the formal date of independence.[126] The critical date can therefore be set at the official date of the dissolution of the USSR in December 1991, when the Central Asian states have joined the declaration of Minsk which proclaimed the end of the USSR and enshrined respect for existing borders.[127] (For a more detailed analysis see Annex 10.3.5)
The implication of the critical date for this case was made quite clear in the Benin/Niger case where the International Court of Justice stated that "[the] *examination of documents posterior to independence cannot lead to any modification of the "photograph of the territory" at the critical date unless […] such documents clearly express the Parties' agreement to such a change*".[128]

Determination of the administrative line: The elements taken into account to establish the status of the administrative boundary at the time of independence are referred to by the Court as **"titles on which the implementation** of the principle of *uti possidetis* is grounded".[129] It is important to clarify that the "situation existing at the time of independence" refers primarily to the legal situation at the time (*uti possidetis **juris***), meaning the legally established administrative boundaries and not per se to the actual land use (occupancy) at the time of independence. (see infra Ch. 5.3.2). In practice, international courts and tribunals have therefore primarily referred to formal acts adopted during the colonial times.[130] This includes "*colonial legislation, orders and maps issued by colonial authorities, letters of governors and […] other elements referring mainly to the conduct of colonial authorities"* relating to the territorial delimitation.[131] It is clear that the aforementioned types of evidence were enumerated for the context of decolonisation. In the case under consideration, the relevant elements are the legislation of the Soviet Union, orders (decrees), decisions and maps issued by the Central Soviet Authorities, decisions and reports of delimitation commissions and dispute settlement bodies that were instituted by the Centre as well as the conduct of the central and the two SSRs authorities.

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123 NESI Giuseppe, op. cit., p. 212 and SHAW Malcom, YBIL 1996, op. cit., p. 128.
124 KOHEN Marcelo 1997, op. cit., p. 169.
125 DISTEFANO Giovanni, "Time factor and Territorial Disputes", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018 pp. 406,407 and KOHEN Marcelo 1997, op. cit., p. 169.
126 BEAUDOUIN Anouche, op. cit., pp. 388, 401 and KOHEN Marcelo 1997, op. cit., pp. 466, 467 and SHAW Malcom, YBIL 1996, op. cit., p. 130.
127 FUTURA-SCIENCE, "Qu'est-ce qui a provoqué la chute de l'URSS?" [online], [accessed the 7.8.2022] and WEERTS Laurence, op. cit., p. 79.
128 FRONTIER DISPUTE (BENIN/NIGER), p. 109 para. 26 and DISTEFANO Giovanni, op. cit., p. 409.
129 FRONTIER DISPUTE (BURK. FASO/MALI), Judgment, 1986 I.C.J. 554 p. 586, para. 63 (22 December).
130 Meaning "the boundary described in conventional or legislative form"; FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 586, § 63, NESI Giuseppe, op. cit., p. 212.
131 NESI Giuseppe, op. cit., p. 21.

International titles ("post-colonial titles") vs. "colonial titles": A distinction must be made between the titles created by *uti possidetis* that exist under international law, and the above-mentioned titles **"on which the implementation** of the *uti possidetis* principle is grounded", meaning titles existing in the internal legal order that are used as evidence of the legal situation at the time of independence.
The former is referred to by Kohen as a **" post-colonial " title** and is the *uti possidetis* itself, which functions as the source of the territorial sovereignty of the newly independent state by conferring legal value to the administrative lineage as it existed at the time of independence in the international legal order. The latter is designated by Kohen as "**colonial titles" or "titres preuves**" (evidentiary titles).[132]
The notion of "titres preuves" does not denote a source of territorial sovereignty, but refers to evidence that serves as the basis and proof of the territorial rights of the predecessor entity at a given time. These might be internal legal documents of the past, such as maps of legal value that devide the territory in a certain way, or decisions that Granting territorial entity. A a right to a certain part of the land. They thus comprise all the above-mentioned elements of proof that can be taken into account in determining the administrative line/ division at the time of independence.
Since the dissolution of the USSR, from which Tajikistan and Kyrgyzstan emerged, was not a case of decolonisation but the dissolution of a federal entity, the "titres preuves" will be referred to as "federal titles" instead of "colonial titles".

It is also important to note the distinction between **"federal titles" and "federal *effectivités*"** when interpreting evidentiary titles to establish "post-federal" territorial sovereignty. The "federal titles" take the notion of title in its narrow sense referring to a "legal title"[133] meaning documentary evidence of the right over territory such as a treaty or legislation. (However, according to Shaw this may in practice also include any other evidence which may establish the existence of a right and the actual source of that right.)[134] On the contrary "federal *effectivités*" refers to the "*conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the [pre-independence era]*". "Federal effectivités" can be therefore used to proof, disproof and interpret "federal titles" as in the ordinary relation of titles and effectivités (see infra 5.3.2).[135] Parties often invoke both of them in relation to the determination of the administrative boundary; to support their own or counter the other states claim. Therefore, according to Kohen "*uti possidetis is the institution relating to territorial sovereignty that highlights, unlike any other, the relationship that can be established between titles and actual possession [one element of effectivités]*."[136]

5.3.2 "Titles vs. *effectivités*"

"The role played […] by such effectivités is complex, and the Chamber will have to weigh carefully the legal force of these in each particular instance".[137] The International Court of Justice has been quite clear with regards to the relation of titles and *effectivités*, distinguishing in its decision in the Burkina Faso/Mali case four different hypotheses the relationship title/*effectivités* can take. If the act (*effectivités*) corresponds to law (the title), *effectivités* have a confirmatory role of the title. If the effective administration does not correspond to the title in a territory subject to dispute, preference should be given to the title holder. In the case where effective administration does not co-exist with any legal title (absence of title), *effectivités* can be taken into consideration and can even act as a foundation of the title,

[132] KOHEN Marcelo 1997, op. cit., pp. 471 ff.
[133] DEL MAR Katherine, "Evidence in Territorial disputes", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, p. 421.
[134] SHAW Malcom, YBIL 1996, op. cit., p. 134 and FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 564.
[135] KOHEN Marcelo 1997, op. cit., p. 473 and FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 586 para. 63.
[136] KOHEN Marcelo 1997, op. cit., p. 471 and KOHEN Marcelo R.H. 2018, op. cit., and SHAW Malcom YBIL 1996, op. cit., p. 133.
[137] FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 563-564, para. 63.

legitimizing the administrator's right over territory. When the legal title is unclear, the *effectivités* can be used to help clarify, as they are deemed to show how the title is interpreted in practice.[138]
The implication for this case is that the effective occupancy of what was originally Tajik territory by the Kyrgyz SSR is therefore not sufficient in itself to change the title.[139] (see analysis below and Ch. 6)
If the "federal titles" are not clear, state conduct of the period immediately after independence can be considered to interpret the pre-independence situation, since it might indicate how the parties de facto interpreted the law around the critical date. [140] For example, exercise or display of sovereignty accompanied by a lack of protest by the other, can be an indication that the other state initially did not consider having a right over this territory, despite claims being raised later on.[141] However, a distinction must be made between post-independence state conduct which sheds a light on the administrative delimitation at the time of independence, and state conduct which may give rise to a modification of the *uti possidetis* title. According to the dictum of Judge Huber in the Island of Palmas case, "*the continuous and peaceful display of territorial sovereignty […] is as good as a title*"[142]. In this sense, the absence of protest to a public display/exercise of authority can be seen as tacit consent to the claim raised by the other state (given that the state displaying authority had the intention and will to act as a sovereign). In this case, however, it would give rise to a modification of the title of *uti possidetis* and establish a new title based on consent.[143]
Uti possidetis in principle excludes the possibility of invoking effective occupancy (forms of possession) in order to shift the boundary by virtue of "federal law". This was relativized in the El Salvador/Honduras case, clarifying that the situation arising from *uti possidetis* is not condemned to remain unchanged for eternity. The parties can modify the limit by common accord, meaning a treaty, or other forms of "activity or inactivity" that could manifest acquiescence to a modification of the boundary. Therefore, possession that contradicts a legal title in principle is a usurpation, however, if the other party acquiesces to it, the common accord can give rise to a change of the boundary.[144]
Equity: In the case of "lack of clarity and insufficiency of proof " of the location of the administrative boundary, equity infra legem can be applied to trace the delimitation between states.[145] Equity *"constitutes a method of interpretation of the law in force, and is one of its attributes."*[146] On the contrary the application of the other forms of equity that have been identified in the Frontier dispute Burkina Faso/Mali case such as contra legem and praeter legem[147], which modify an established frontier are unjustified.[148] As the Court observed, *"[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law."*[149] Therefore, in the El Salvador/Honduras Case, only where there was no evidence as to the administrative delimitations and the *uti possidetis* line was impossible to identify, the Court has divided the disputed pools and rivers equitably among the states.[150]

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138 Ibid. 137
139 "On voit mal comment l'on pourrait poursuivre ce but tout en légalisant les usurpations du passé"; KOHEN Marcelo 1997, op. cit., p. 476.
140 NESI Giuseppe, op. cit., p. 214, SHAW Malcom, YBIL 1996, op. cit., p. 135 (historical evidence).
141 SHAW Malcom, YBIL 1996, op. cit., p. 129, 135-137.
142 ISLAND OF PALMAS/MIANGAS (NETH./U.S.), Award, 1928 II R.I.A.A. 829 (4 April) p. 839.
143 KOHEN Marcelo 1997 p. 473; and p. 479.
144 KOHEN Marcelo 1997, op. cit., pp. 477, 481-482 and LAND, ISLAND AND MARITIME FRONTIER DISPUTE (El Salvador/Honduras: Nicaragua Intervening), Judgment, 1992, I.C.J. 351 (11 September) p. 408, para. 67, 80.
145 KOHEN Marcelo & HÉBIÉ Mamadou, R.H. 2018, op. cit., pp. 18,19 and DEL MAR Katherine, op. cit., p. 424.
146 FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., para. 28.
147 MILANO Enrico, "General Principles Infra, Praeter, Contra Legem?", in *General Principles and the Coherence of International Law*, Chapter 5 [online], Koninklijke Brill, 2019, p. 66, [accessed the 6.8.2022].
148 FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., pp. 567-568 para. 28 and KOHEN Marcelo & HÉBIÉ Mamadou R.H. 2018 p. 18.
149 FISHERIES JURISDICTION, I.C.J. Reports 1974, p. 33, para. 78; p. 202, para. 69. And Ibid. FRONTIER DISPUTE (BURK. FASO/MALI), para. 28.
150 KOHEN Marcelo & HÉBIÉ Mamadou R.H. 2018, op. cit., p. 19.

5.3.3 Technical considerations

The role of municipal law: In order to examine the weight and the validity of "federal titles", reference must be made to the municipal law. The validity of decisions, orders and maps issued by authorities depends on their conformity with the federal law (here of the Soviet Union) (see Annex 10.3.3).

The role of maps: A particularly important aspect for the present case, as the main dispute between the parties concerns the reference to different maps, is the probative value and legal significance of maps in territorial disputes. A differentiation is made between maps "annexed to a governing legal instrument of delimitation" and maps independent of a legal instrument. The former hold particular evidentiary weight since they are considered to be an integral part of a treaty or an official text. Such a map is an "*agreed interpretation of the treaty by the parties, taking precedence over a textual interpretation of a conflicting treaty clause."*[151] They fall into the category of a physical expression of the will of the states and being part of the treaty, they can constitute a 'document endowed by international law with intrinsic force for the purpose of establishing territorial rights.' Being of varying reliability they "may be used along with other evidence of a circumstantial kind, to establish or reconstitute the real facts".[152] Concerning maps not forming part of a treaty the I.C.J, in the Frontier dispute of Burkina Faso/Mali, clarified that *"[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title.*"[153]

6 Legal Evaluation

As mentioned above the centre of the dispute between Kyrgyzstan and Tajikistan is the question of the different maps invoked by the two parties. In principle, following the application of *uti possidetis*, the status of the administrative boundary at the time of independence needs to be examined, referring to municipal law as evidence. In principle, more recent (in decision incorporated) maps would prevail over older maps (*Lex posterior derogat legi priori*) as those recent decisions (closer to the critical date) concerning the border would have most probably replaced or modified the older legal decisions. The task is therefore to find the most recent and (according to municipal law) validly adopted decision ruling on the placement of the boundary for each border section concerned. In the foregoing analysis, the claims will be examined in chronological order starting from 1927 when the first official legally valid repartition of the territories was adopted. The next step is to see whether other decisions or facts have modified the established border until the time of independence.

Map of 1927: There is no dispute on the fact that the map of 1927 was attached to a legally valid and definite decision of the central Soviet authorities. It is the first map that was clearly approved by all the parties in question. This map will be the basis for the determination of the border, and in absence of subsequent modification of the borderline, this frontier would be validly inherited by the successor entities Tajikistan and Kyrgyzstan. In fact, the definite character of that decision can be clearly seen from the moratorium adopted by the Central Executive Committee at that time, banning all further petitions and contestations for a period of three years after the decision in 1927.[154] In the period from 1925 to 1927 after the first preliminary delimitation project (see Annex 10.2) has been published in 1924, a phase of numerous contestations and claims from the local population followed. In 1927 when an interrepublican commission adopted a conclusion that decisively ruled over those disputes, a moratorium on further petitions and contestation was raised, claiming that the matter was decisively settled at least until 1930.[155]

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[151] DEL MARE Katherine, op. cit., p. 424, See also Temple of Preah Vihear (Cambodia v. Thai), Merits 1962 I.C.J. 6, 32.3 (14 June).

[152] FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 582 para. 54.

[153] Ibid. p. 582 para. 54.

[154] BICHSEL Christine, op. cit., p. 106 and TOKTOMUSHEV Kemel, "Understanding Cross-Border Conflict in Post-Soviet Central Asia", Connections [online], 2018, [accessed the 6.8.2022]. pp. 29-30.

[155] The Soviet Constitution of 1924 leaves no doubt about the faculty of the Central Government to do the former, since Article 1 let b, confers the Union the power "to regulate questions concerning the modification of frontiers between the member

1930-50: Land leases: Land leases are agreements that establish merely a title of administration over a territory without transferring sovereignty. [156]A transfer would only take place if the other lessor state renounced to its title, therefore creating *res nullius* (see Annex 10.3.7). In that case, due to an absence of a legal title *effectivités* would be considered; (*effectivités* can be as good as a title).[157] Since the lessee naturally presents *effectivités* in the territory due to actual administration or utilisation of the land, the territory would be transferred to it. As noted in Ch. 5.2.1 abandonment of territory is not presumed lightly. Therefore, at the end of the lease agreement in general, the territory would have to be returned to the lessor state.

Kyrgyzstan claims that the map of 1927 cannot be taken as an indication of the situation at independence since it has been modified later on, and especially since the territory of the land corridor was no longer administered by Tajikistan. After the delimitation process, in the 1930s the policies of settling nomads and collectivization indeed brought a radical change in the design of administrative management in the region. Apparently, Kyrgyz nomads (especially from mountainous regions) were settled in the region of the Isfara valley between Vorukh and Khojai-A'lo since the surrounding mountainous lands proved unsuitable for permanent (stationary) settlement.[158] According to Bichsel, at one point Tajikistan complained about 14 Kyrgyz farms being situated on its territory. Thus, leading to a de facto administration of the Tajik land corridor by the Kyrgyz.[159] Following the above-mentioned dictum of the Court in the Burkina Faso/Mali case in which the relation between titles and *effectivités* has been clarified, the latter are not sufficient to displace a contradictory legal *"federal title",* namely the one existing in virtue of the 1927 decision. The mere presence of Kyrgyz state farms on the Tajik SSR territory is therefore not sufficient to replace the Tajik "*federal title*". The question is whether any official decisions (or conduct of authorities) have legally enshrined the new de facto repartition of territory (adjustments matching the de jure to the de facto situation). At that time, according to the sources Reeves and Radio Ozodi the land was merely given for lease ("*long-term-use*") to the Kyrgyz SSR for the establishment of collective farms (belonging to the Kyrgyz SSR).[160] In order to confirm that the sense of the term "*long-term use*" does not refer to an effective transfer of title to the territory, the further conduct and events at that time proof relevant. This does not seem to be the case, since the commission ruling on border issues of 1949 (see below) has recognized the problematic situation of a divergence in the de facto and de jure situation and has recommended adjusting frontiers to match the two. However, precisely that decision has never been ratified at an "*all-Union level*"[161] by the Central Authorities. This seems to be a clear indication that the opinion at the time was that the de jure situation had not changed due to the de facto reorganization and that the central government did not have the intention to change this.

1947 Map: As shown above in Ch. 5.3.3 the legal value of maps is determined by whether they are incorporated in a treaty or legal text, according to which they would be a visual manifestation of will of the authorities and have a particular validity. In absence of a treaty or text that attaches legal value to a

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Republics" And let. X "to arbitrate litigious questions between the member Republics." (Soviet Union, Constitution of the Union of Socialist Soviet Republics [online], 1924, [accessed the 7.8.2022]).

156 KOHEN Marcelo, R.H. 2018, op. cit., p. 149.

157 ISLAND OF PALMAS/MIANGAS (NETH./U.S.), op. cit., p. 839.

158 MURZAKULOVA Asel, *Contextual factors of conflict in border communities*, [online], p. 12, REEVES Madeleine, op. cit., pp. 29-31, 41-42.

159 De facto vs. de jure (ABDULLAYEV Sunnatilla, op. cit.) and 14 Kyrgyz farms complaint in 1949 (BICHSEL Christine, op. cit., p. 107 footnote 17).

160 REEVES Madeleine, op. cit., p. 29 See footnote 25, Radio Ozodi mentions a land lease of 350 ha of and for temporary use of the Tajik to the Kyrgyz side in the region between Khojai-A'lo and Vorukh, which would speak in favour of a mere lease agreement and not a permanent cession of territory. RADIO OZODI, op. cit., 24.1.2014.

161 According to REEVES Madeleine "Border Work", op. cit., p. 83. In other articles or decrees, the term "all-Union level" seems to refer to "USSR-wide or the Central Level", see: The Presidium of Supreme Soviet of the USSR, Decree, "О внесении изменений и дополнений в законодательство СССР в связи с образованием союзно-республиканского Министерства юстиции", 12.8.1971, N2013-VIII; section 3 the term "all-union legislation" refers to the USSR legislation, in contrary to the judicial bodies of the Union Republics which are obliged to apply the "all-union legislation".

map, they are merely evidence among others, of indicative value only. **The map of 1947** is part of a decision, which in principle confers to it legal value. However, since the legal text of which the map is part of was meant to clarify the border between Uzbekistan and Kyrgyzstan and not Tajikistan and Kyrgyzstan, it has no official value concerning the dispute in question. The commission issuing this map probably was not explicitly aiming to confirm or verify the status of the Vorukh territory. Interpreting the circumstances of the establishment of this map, it is likely that the area of Vorukh was mainly shown on the map, as it is naturally close to the Kyrgyz-Uzbek border and not because there was an intention to clarify the legal status of the Tajik-Kyrgyz SSRs border. It can therefore only be taken as an indication and does not have the value of a "federal title".

1949 Map: The Commission that ruled on the territorial claims which arose in the 1940s and 50s due to the reorganization and collectivization of the agricultural production under Stalin decided that the current kolkhoz boundaries should be taken as a marker for the borders of the two Union Republics.[162] Since the map, according to Bichsel and Reeves, has not been ratified at the Union level, it has no legal value.[163] Nonetheless, it still sheds light on the events in the 1950s and the considerations made by the commission in 1958 which favoured giving the land separating nowadays Vorukh enclave and the Tajik mainland to the Kyrgyz. This decision seems to be clearly in line with the suggestions of the commission's report of 1949.

The military map of 1955 has the same evidentiary value as the map of 1947. Since the map was used for operational purposes but was not included in an administrative decision on this section of the border, it can only be seen as evidence/indication of how the central Soviet authorities interpreted the geographical situation at that time. (Also, **inter-state farmland lease in 1955**, see infra 1975)

1958 map and the Tajik Statement: Taking the other maps (47, 49, 55) as an indication, as well as the unsigned decree issued by the commissions in 1949, Vorukh was most likely de jure considered as attached to the Tajik mainland till the 1950s. Apparently, this changed in 1958. In the 1950s, a second commission was established to settle disagreements that arose due to the mismatch of the de facto and de jure situation. Complaints were all of similar nature such as the Tajik SSR's claim that 14 collective farms belonging to the Kyrgyz SSR were located on its territory. [164] It seems that the inter-republican commission ruled largely in favour of the Kyrgyz SSR and allocated the territory between the enclave and mainland to Kyrgyzstan, adjusting the de jure situation to the actual land use.[165] The map that was established on the basis of the report of this commission shows Vorukh as an enclave in Kyrgyz territory.[166] According to Reeves, the new boundaries were agreed to at a rayon and oblast level in both republics but only in the Kyrgyz SSR the agreement was ratified by the respective Supreme Soviet.[167] Because of this, the 1958 delineation is now considered illegitimate by Tajikistan[168]. According to the 1936 Soviet Constitution in vigour at that time [169] an SSR had to consent to any transfer to its territory (see art. 14, 15 and 18 USSR CST 1936 in Annex 10.4). Therefore, if only one of the SSRs approved

[162] REEVES Madeleine "Border Work", op. cit., p. 83 and BICHSEL Christine, op. cit., p. 107.

[163] USSR CST 1936: ARTICLE 14. "The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest organs of state authority and organs of government, covers e) Confirmation of alterations of boundaries between Union Republics.".

[164] REEVES Madeleine, op. cit., p. 83 and BICHSEL Christine, op. cit., p. 107 footnote 18.

[165] BICHSEL Christine, op. cit., p. 108.

[166] SUIUNTAI Zhaimagambetov, op. cit., p. 43 and BICHSEL Christine, op. cit., p. 108: "Based on this protocol, a new map was subsequently produced". It is certain that the commission decided many conflicting claims, in favour of the Kyrgyz SSR.".

[167] REEVES Madeleine "Border Work" , op. cit., p. 83. Also: The Supreme Soviet is the "highest organ of state authority; legislative", the term "council of ministers" is according to Roeder traditionally a name given to a "supreme executive organ"; namely the government. See: Constitution of the Union of Socialist Soviet Republics, with Amendments, [online] 1936, [accessed the 7.8.2022] and See: ROEDER Philip G., Where Nation-States Come From, Princeton University Press, 2007, p. 70).

[168] ABASHIN Sergey, op. cit., pp. 193-214

[169] In force till the Breshnev CST of 1977; 1st CST 1924 by Lenin, 2nd CST in 1936 by Stalin, 3rd CST in 1977 by Brezhnev.

an agreement which included territorial transfers, the decision and the map of 1958 would be of no legal value since they had not been validly adopted according to the Soviet legal order.
Another detail seems important however; According to Bichsel who held a "*personal communication*" with a former member of the Kyrgyz-Tajik Parity Commission in 2007; "*The resulting protocol of 1958 [was] signed by the Council of Ministers of the Kyrgyz SSR*[170] *in December, while the Council of ministers of the Tajik SSR merely sent a telegram to the former stating that no objections were raised towards its content*".[171] The question arises if any legal value can be attributed to such a statement. According to International Law, in the Eastern Greenland (Norway v. Denmark) case[172], the statement of a minister of foreign affairs (or another person habilitated to represent the state) can give rise to a legally binding obligation for the state to which the minister belongs to. In the said case, the minister of foreign affairs of Norway responded to a Danish diplomatic request concerning the respect of Danish sovereignty over the whole of Greenland. The wording the minister employed was "that this [the Danish request] would meet no difficulties on the part of Norway" which the Court has interpreted as not only a mere diplomatic assurance but as consent.[173] In the Tajik-Kyrgyz case, it was the official organ, namely the "*council of ministers of the Tajik SSR*", the same organ that has the power to validate such a decision,[174] stating that it had no objections to the content of the protocol. If an even more indirect formulation, as it was the case for Norway, was considered to be legally binding, the here concerned declaration could be equally interpreted as a legally binding statement, approving the transfer of territory to the Kyrgyz SSR. The problem is that in the present context the declaration was made on an inter-republican level, hence outside the international legal order. In principle, the Soviet domestic legislation valid at that time should be applied to determine the legal value of such a statement. It is uncertain whether the same general principles applied in the USSR context also.
According to the relation of International Law and Municipal Law, the former refers to the latter merely as a factual element (evidence) or as an interpretation device of how the situation existing before independence was. Therefore, although, due to the federal structure of the Soviet Union and the similarity of inter-republican relations with the international context for example, it might be tempting to apply the principles of international law to determine the legal value of the telegram, they cannot simply be applied this way. The legal value of the telegram is therefore uncertain.
In addition, the existence of the telegram of the Tajik SSR would first have to be established. In International law, according to a general principle of procedure the party who makes a claim needs to prove it (burden of proof).[175] If Kyrgyzstan therefore would want to invoke such a claim, it would need to find more substantial evidence of the telegram in question. If it can be effectively proven that such a telegram exists, and in the Soviet Union legislation at that time applied principles similar to those of International Law, the decision of 1958 would have the legal value to modify the border issued by the 1927 decision. In the absence of one of the former, the map and agreement of 1958 has no legal value and does not modify the de jure situation in place. The Kyrgyz State farms would continue to exist on Tajik territory using the land in virtue of long-term leases.

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[170] Бердалиев Ш. Браславский С. М. Засухин Б. Н., "The collection of laws of the Kirghiz Soviet Socialist Republic" [online], 1956 [accessed the 7.8.2022]; p. 5-7 The Council of Ministers seems to be the executive body of the Kyrgyz SSR.
[171] BICHSEL Christine, op. cit. p. 107 and p. 148 see footnote 18.
[172] Legal status of Eastern Greenland (Den. v. Nor.), Judgement 1933 P.C.I.J. (ser. A/B) No. 53, at 71 (5 April).
[173] "[t]he Court considered it beyond all dispute that a reply of this nature […] is binding upon the country to which the Minister belongs." EASTERN GREENLAND CASE, op. cit. p. 71.
[174] It is assumed that if in Kyrgyzstan the Council of Ministers had the power to approve a territorial transfer, this would also be the case for the Tajik SSR. The SSRs were organized in a similar matter see; USSR CST 1936 chapter VI and IV.
[175] TEMPLE OF PREAH VIHEAR (CAMBODIA V. THAI.), Merits, 1962 I.C.J.6 (15 June) and KOHEN Marcelo & HÉBIÉ Mamadou, R.H. 2018, op. cit., p. 33.

1975 (1955 - 1975): Pravda vs. Lenina: After the comparison of several sources [176] it becomes clear that the above-mentioned (see Ch. 4) series of incidents (1955, 1963 and events in the 1970s)[177] all correspond to a prolonged dispute between the Kyrgyz Sovkhoz (collective state farm) of the Batken region called "100th anniversary of Lenin" or "100 letiia V.I. Lenina" [178] (including territories of nowadays Aksai municipality) and the Tajik Kolkhoz "Pravda" of the Isfara region (its territory situated mainly in the area of nowadays Vorukh enclave).[179] According to Bichsel the dispute has its origins in the above-mentioned lease agreement in 1955, where the Soviet ministry of agriculture [180] arranged that the Kolkhoz Pravda (Vorukh) could lease 1000 ha of land from the Kyrgyz Sovkhoz Lenina (Aksai region). Most of the land leased was situated in the area of present-day Tojikon and Aksai settlements and fields.[181] The lease specified that the use was limited to pastoral utilization for a "long-term use" until 1980. In line with the reasoning above (supra "30s land leases"), this constitutes merely a passing of rights of use possessed by one farm to another, and it does not change the underlying de jure situation. In the late 1960s /early 1970s (1967 according to Bichsel) however, the Tajik farm started to extend its cultivation in this area. The dispute over agricultural usage broke out in active conflicts since the complaints of the Kyrgyz population in the Aksai region remained unheard. The Interrepublican Dispute Settlement Commission, created in the mid-1970s to address the dispute, led the parties to **sign a bilateral agreement** according to which the 1000 ha of disputed land should be divided: 316 ha would return to the Kyrgyz sovkhoz, 402 ha would become permanently part of the Tajik Kolkhoz Pravda and 282 ha would continue to be leased for long-term use to Pravda. Those events are confirmed also by the article of Asia-plus. This article specifies that the "*old leadership of Tajikistan had agreed to the proposal"* and that "*[T]he leadership of the Tajik SSR agreed to transfer part of the land to the people of Batken district and Ak-Sai village was established."* At that time the "*Kyrgyz side hastily began building the current Ak Sai village* [Central Aksai; Bichsel]" According to Bichsel part of the land allocated to Vorukh included the area where present-day Tojikon is situated (in exchange for water).[182]
Despite this seemingly clear situation, well defined by a mutual agreement, the question arises as to what the nature of this "land transfer" was. Was it merely a transfer of "the right to use the land" between the state farms or a valid transfer of sovereign rights at an SSR level?
On the one hand, the term transfer of territory could refer to a transfer of sovereign rights at the SSR level (implying that the territory transferred to the other state farm would also be permanently attributed to the corresponding SSR). However, this interpretation would only make sense under the assumption that the 1958 map had been validly approved and thus the territorial sovereign rights of the SSR correspond to the actual land use (i.e., the "location" of the state-owned enterprises). Otherwise, by agreeing to this transfer, the Tajik SSR would have agreed to the creation of a kind of Kyrgyz enclave on its territory in the Aksai region, which is unlikely. Furthermore, again the consent of both SSRs would be required in order for this mutual transfer of sovereignty to be valid: only the consent of the Tajik side is mentioned.[183]
On the other hand, the transfer could be a mere redistribution of usage rights between the state farms without affecting the territorial sovereignty of the SSR. Due to the absence of a mention of the Kyrgyz SSR's consent it seems as if only the Tajik consent was considered necessary for the validity of the dispute settlement agreement. Since the original object of the conflict was a disregard of the terms of the

[176] In some sources the events are designated as Aksai/Vorukh dispute, in others as a dispute between Kolkhoz and Sovkhoz. Since the dates and events correspond, it is assumed they refer to the same dispute. GORSHENINA Svetlana, op. cit., p. 296, BICHSEL Christine, op. cit., pp. 104-106 & 108 ff., NADIROV Bakhmanyor, op. cit., MURZAKULOVA Asel, op. cit., and REEVES Madeleine "Border Work", op. cit., p. 83, TOKTOMUSHEV Kemel, op. cit., p. 30.
[177] 1955 land leases,1963 extension of agriculture on Kyrgyz land by Tajik, 1975 agreement following Pravda/Lenina dispute.
[178] The abbreviation "Lenina" will from now on be used to refer to the name of the Kyrgyz Sovkhoz.
[179] NADIROV Bakhmanyor, op. cit., and ABDULLAYEV Sunnatilla, op. cit.
[180] TOKTOMUSHEV Kemel, op. cit., p. 30.
[181] BICHSEL Christine, op. cit., p. 108.
[182] NADIROV Bakhmanyor, op. cit., and BICHSEL Christine, op. cit., pp. 30, 109 (Central Aksai).
[183] NADIROV Bakhmanyor, op. cit.

lease agreement by the Tajik side, the dispute between the farms was essentially about their right to use the territory and not necessarily about which SSR had sovereignty over the territory. Because only the consent of the principal sovereign is required for the transfer of rights of use, this would consequently suggest that the underlying territory is considered to be Tajik, supporting the hypothesis of the invalidity of the 1958 map. However, as this is an article in a Tajik newspaper, the behaviour of the Kyrgyz leadership may simply not have been mentioned because it was considered irrelevant. The fact that the 1955 land lease that had triggered the dispute predated the 1958 agreement means that the underlying land was still under Tajik sovereignty at the time of the lease. This further suggests that the subsequent disputes and agreements were about the right to use the land rather than a de jure adjustment of SSR territorial rights.

The 1975 settlement led to another problem. The allocation of the land to the people means that they now regard it as their land, especially after having built villages in the allotted area. The question is whether there are any legal consequences arising from this de facto occupancy. Since there exists an underlying title (either that of 1927 or that of 1958), it is only in the absence of clarity of the applicable title that *effectivités* can be considered in determining the boundary (see Ch. 5.3.2). In that case, they could be used to interpret the title and determine the exact course of the boundary. Otherwise, no legal effects result from these facts. Again, since the conflict took place under Soviet legal order, the rules of effective occupation and acquiescence of international law, cannot simply be applied as the basis for an acquisition of rights. After independence, such a transfer based on effective occupation coupled with acquiescence would be possible, however, there exists sufficient evidence of Tajikistan disagreeing with the current de facto division of territory, so this would not be the case.

1970s land leases:

During the research, two accounts of land leases both in the 1970s were found

- **In contradiction to the above-mentioned events** in an article of the Russian BBC service an interviewee states that the village of Aksai was leased to Kyrgyzstan in the 1970s on a temporary basis for 20 years and that now after the independence "Bishkek" refuses to return it.[184]
- **Land lease of Tojikon 1975-85 and 85-95: According to the accounts of an Aksai elder (collected by Reeves)**[185] the area that later became Tojikon **even though merely leased to the Tajik for** 20 years until 1995 has never been returned.

It has to be mentioned that those statements are both based on accounts of elders in the region and not statements of an official authority. They are therefore of merely evidentiary/indicative value. It is a surprising coincidence that both mentioned land leases seem to have taken place in the 1970s when also the dispute settlement between the Aksai State farm Lenina and the Vorukh Kolkhoz Pravda took place. It seems that in fact the two accounts refer to the agreement that was reached in 1975 in which the disputed territory was divided into two, thus to the same events mentioned above. Each of the parties considers that the part of territory they have lost in virtue of the decision is merely leased to the other party. This does not make much practical sense. It is unlikely that the solution of the 1975 agreement included reciprocal land leases of the two farms since this would mean that officially the decision has attributed Tojikon to Kyrgyzstan so that they could lease it to Tajik farm. And Aksai would have been attributed to Tajikistan to be able to lease it to Kyrgyzstan. So, no clear conclusion can be drawn from the contradicting statements of the locals. However, since merely land leases are mentioned, they would not have the possibility to change the underlying territorial sovereignty rights either way.

1989 map: In 1989 an interrepublican parity commission was created again to evaluate conflicting claims from disputes that arose from 1985 – 89 and to reassess the border between the Kyrgyz and Tajik SSR. [186]According to Bichsel the decision was this time guided by considerations based on the actual

[184] SARKOROVA Anora, op. cit., 16.1.2014.

[185] REEVES Madeleine, op. cit., p. 85.

[186] Essentially concerning the land between the Kyrgyz Sovkhoz Letiia and the surrounding collective farms of the Tajik SSR, meaning in the area of Aksai and Vorukh. BICHSEL Christine, op. cit., p. 110.

land use according to nationalities. [187]However, if one follows the information from the newspaper article of Asia Plus, the protocol issued was only unilaterally ratified by the Kyrgyz authorities. Apparently, even after efforts made by the central authorities to convince the Tajik side, they refused to sign it[188]. On the contrary, Bichsel mentions that the protocol was not signed by either party.[189] **In any case the map seems to not have been ratified by at least one of the parties.** Since this is necessary for a transfer of territory at that time according to art. 18 of the 1936 USSR CST[190], the decision and map do not seem to have been validly adopted. They do not provide any change to the de jure situation. **The report mentioned in that context** has not per se a legal value because it is not an officially approved decision. However, since it is based on a study of Soviet archival documents it constitutes an interesting piece of evidence. According to the source that mentions the report, it apparently concluded that Vorukh was "historically related to the Isfara region" that belongs to the Tajik side. This is certainly in line with the 1927 map. However, nothing indicates whether then subsequently the enclave stayed connected to the Tajik mainland. Therefore, without having access to this report it is of limited value for the analysis here.

Post-independence: Creeping migration

The "*creeping migration*"[191], meaning construction on or cultivation of disputed land, is a term used for post-independence actions of the local population. The question is if such actions have any legal value under international law, which could modify the legal situation in place based on the *uti possidetis* principle. As has been shown, one of the major functions of *uti possidetis* is to freeze the situation in place at the time of independence. It blocks effective occupation from being used to modify the title in force. However, in the El Salvador/Honduras case the Court has also stated that this does not mean that the legal situation was immutable forever.[192] Since only a subsequent agreement can modify the *uti possidetis* line, only effective occupation that is coupled by consent (ex., acquiescence) could change the situation in place.

As it is for subsequent treaties, the new title based on consent would then replace the *uti possidetis* title. In the present case, this is clearly not the case, since both states have explicitly recognized the border areas as disputed. According to Kohen, international practice shows a plurality of possibilities as to the content of the behaviour of the subjects of international law. [193] Hereby, states may express the recognition of the contentious nature of the territory without taking a position on the substantive issue of sovereignty, as well as the non-recognition of the possibility of establishing sovereignty over a given area. In fact, Kyrgyzstan and Tajikistan have done exactly that. By declaring the border regions in question as disputed [194] and signing an agreement which states that no construction on or utilization of the disputed border areas is possible[195] they have consecrated the impossibility of acquiring land by effective occupation since they have explicitly expressed their non-consent to such actions of the other party. The question of whether the act of private persons can be attributed to a state and from what point on the actions performed would be sufficient in order to manifest the exercise of state authority can be therefore left open.

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[187] Ibid. BICHSEL Christine, p. 110 (series of disputes that escalated in 1989, an event called the "ketmen war").

[188] Apparently, the protocol included proposals of modest land transfers to the Tajik side. However, the matter of the full return of the lands located downstream of the Isfraninka River (land corridor) and other areas considered by Tajikistan as having passed illegally to the Kyrgyz side was not addressed by the protocol. NADIROV Bakhmanyor, op. cit.

[189] BICHSEL Christine, op. cit., p. 110.

[190] ARTICLE 18. The territory of a Union Republic may not be altered without its consent. USSR CST 1936, op. cit.

[191] BICHSEL Christine, op. cit., p. 114.

[192] LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SALVADOR/HONDURAS: NICARAGUA INTERVENING) 1992 (11 Sept) p. 408, para. 80.

[193] KOHEN Marcelo, 1997, op. cit., p. 338.

[194] BICHSEL Christine, op. cit., p. 113 and SARKOROVA Anora, op. cit., 16.1.2014.

[195] MATVEEVA Anna, op. cit., p. 15.

7 Conclusion

As we can see from the dispute between Kyrgyzstan and Tajikistan, *uti possidetis*, even though it does provide a certain stability and legal security, does not solve all problems. In the case of conflicts already existing between the predecessor units, the new states will, with the heritage of the border also inherit these border conflicts.

The critical point of the dispute seems to be the 1958 agreement, where the last potentially valid changes to the de jure situation have been made. If the Kyrgyz side can prove the existence of the telegram and if in the Soviet legal system, the rules similar to those in the international legal system apply, then the territory of the Isfara valley between approximately Khojai-A'lo and Vorukh would fall under Kyrgyz sovereignty. The further task would then be to apply this map and determine which territories and villages it attributes to which side. In the case of absence of clarity, the *effectivités* could be used to determine the exact location of the boundary and in the absence of both clarity of the 1958 map and clear *effectivités*, equity could be used to divide the territory.[196] If no legal value can be attributed to the telegram, the changes made by the 1958 agreement would not be valid and the de jure situation would stay as it was according to the 1927 decision and map. The Vorukh region would be attached to the Tajik mainland.

The problem is that the de facto situation has not corresponded with the de jure situation for a really long time, in either case of hypothesis. Even though initially the territory de jure belonged to the Tajik, with the establishment of Kyrgyz state farms, the same territory has been officially administrated by the Kyrgyz SSR (providing water etc.) for a long time. This means that the local communities both have a strong attachment to their alleged right over territory.

Further complicating the issue of dispute resolution on a political level is the strategic value of the land corridor. The Isfara valley is – except for its northern part in the region of the beginning of the Tajik mainland – surrounded by mountainous terrain. If the land corridor would fell Tajikistan, Kyrgyzstan would lose the connection from its Batken district in the east to its Leilek district in the west. Because of the delicate political value of the region, the intermingled settlements in the contested area (both inhabited by Kyrgyz and Tajik populations) as well as shared infrastructure and conjointly designed irrigation systems, UNDP in fact suggests establishing "zones with shared/dual sovereignty" for the most contested territories[197] or villages in which delimitation is almost impossible.[198]

It is especially important to consider the issues arising for border communities and to conclude mutual agreements to make the solution viable for them. Agreements that would have to be concluded in the present case are especially clearer legislation on pasture use (giving both populations equal access to the scarce resource), the joint use of roads and water infrastructure/irrigation systems and clearer regulation of cross-border migration. It would also be important to conclude agreements to guarantee the property of the population that after a dispute resolution might find themselves on the other side of a border.[199]

8 Glossary

In the context of a complex geographical history of the region with many name changes as well different transliterations due to sources from several different languages and nationalities, names of localisations or villages often appear in different forms.[200] Below is a list of the different villages or territorial entities in the here considered region that have been used in the literature employed here.

[196] The same applies for the case of the invalidity of 1958 and validity of the 1927 map.

[197] UNDP 2005 Warning Report, op. cit., pp. 3, 12.

[198] REEVES Madeleine, op. cit., p. 86: Kök-Tash/Somonien are two villages which have grown into each other because the administrative border has never been clear in that section.

[199] Ibid. pp. 99 ff.

[200] REEVES Madeleine "Border Work", op. cit., p. 40.

The first indicated name in the list will be the one used in the context of this thesis. Moreover, the explanation of some terms is included.

- **Bedek**: (one of the mountain villages on the road going up to Keravshin and Kishemish pastures (above Kapchygai)[201]
- **Isfara River**: Isfraninka River
- **Jamoat**: Term for "municipality" in Tajikistan (lower level administrative division)[202]
- **Kapchygai:** Tangi (former Tajik name)
- **Khujand**: Capital of Sudgh Province; Khojend, Khodjent, Khodzhent, old name Leninabad (city). *Not to confuse with Kokand (different town).*
- **Khojai-A'lo**: Kodjai-Alo (Tajik), Matchai (Kyrgyz) , Oktiabar (Rus)
- **Kök-Tash**: Kok-Tash, Somonien
- **Kolkhoz:** collective farm
- **Oblast:** province (Rus)[203]
- **Province of Osh**: Och (part of it transformed in the nowadays Batken province)
- **Sokh** (Uzbek Enclave); Sux
- **Sovkhoz:** state farm
- **Sudgh Province**: Sodgh, Sogh, Leninabad province (old)
- **Surkh**; Surh
- **Tojikon**: Posleka, Poselok
- **Vorukh** (Tajik Enclave); Woruch, Voruch, Voruh
- **Lenina:** short for the Kyrgyz farm«100 letiia V.I. Lenina» or «100th anniversary of Lenin»

[201] Ibid. REEVES Madeleine p. 45.
[202] BICHSEL Christine, op. cit., p. 29, 134
[203] AKINER Shirin, op. cit., (n 1), p. 11

9 Bibliography

9.1 Books and contributions in revues/articles

AKINER Shirin, *Central Asian and Caucasian prospects, Tajikistan Disintegration or Reconciliation?*, Herzig Edmund (ed.), London, Royal Institute of International Affairs, 2001, 95 p.

ALLCOCK John B., *Border and territorial disputes*, 3rd ed., Essex, Longman Group, 1992, 630 p.

AZNAR Mariano J., "The Human Factor in Territorial Disputes", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, p. 291-342

BEAUDOUIN Anouche, *Uti possidetis et secession*, Pellet Alain (pref.), Kohen Marcelo (avant-propos), Paris, Dalloz, 2011, 667 p.

BERNSTEIN Itamar, *Delimitation of international Boundaries, A study of Modern Practice and Devices From the Viewpoint of International Law*, Docteur ès sciences politiques, Université de Genève, Institut Universitaire de Hautes Etudes Internationales, Tel Aviv, Presse de l'université Tel Aviv, 1972, 291 p.

BICHSEL Christine, *Conflict Transformation in Central Asia, Irrigation disputes in the Ferghana Valley*, Central Asian studies series, N°14, Abingdon, Oxon, Routledge, 2009, 164 p. [e-book version]

CHRISTAKIS Theodore and CONSTANTINIDES Aristoteles. «Territorial disputes in the context of secessionist conflicts»", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, pp. 343-395

COT Jean-Pierre, "Des limites administratives aux frontières internationals?, Rapport general" in *Démembrements d'Etats et délimitations territoriales: l'uti possidetis en question(s)*, Collection de droit international n°41, Corten O. et al., (eds.), Bruxelles, Editions Bruylant, Editions de l'Université Bruxelles, 1999, pp. 12-17.

CUKWURAH A. O., *The Settlement of Boundary Disputes in International Law*, Manchester, Manchester University Press, 1967, 267 p.

DEL MAR Katherine, "Evidence in Territorial disputes", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, p. 417-436

DISTEFANO Giovanni, "Time factor and Territorial Disputes", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 397-416

ENGVALL Johan, "Kyrgyzstan and the Trials of Independence" *in Social and Political Changes in a Post-Soviet Society, Kyrgyzstan beyond "Democracy Island" and "Failing State",* Laruelle Marlene (eds.), Engvall Johan (eds.), London, Lexington Books, 2015, pp. 1-19

FIERMAN William, "The Soviet "Transformation" of Central Asia *in Soviet Central Asia, The Failed Transformation*, Fierman William (eds.), Rakowska-Harmstone Teresa (pref.), Colorado, Westview Press, 1991, 11-35 p.

GIRAUDEAU Géraldine, *Les différends territoriaux devant le juge international, Entre droit et transaction*, Eisemann Pierre M. (eds), Leiden, Martinus Nijhoff Publishers, 2013, 547 p.

GORSHENINA Svetlana, *Asie centrale, L'invention des frontières et l'héritage russo-soviétique*, Paris, CNRS Editions, 2012, 384 p.

HÉBIÉ Mamadou, "The acquisition of original titles of territorial sovereignty in the law and practice of European colonial expansion", in *Research Handbook on Territorial Disputes in*

International Law, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 36- 86

HÉBIÉ Mamadou, "The acquisition of original titles of derivative titles of territorial sovereignty in the law and practice of European colonial expansion", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 87-144

KOHEN Marcelo G., *Possession contestée et souveraineté territorial*, Abi-Saab Georges (préf.), Paris, Presses Universitaires de France, 1997, 579 p.

KOHEN Marcelo G., "Le Problème des Frontières enc as de dissolution et de separation d'états: quelles alternatives?" in *Démembrements d'Etats et délimitations territoriales: l'uti possidetis en question(s)*, Collection de droit international n°41, Corten O. *et al.*, (eds.), Bruxelles, Editions Bruylant, Editions de l'Université Bruxelles, 1999, pp. 365-401

KOHEN Marcelo G., "Titles and *effectivités* in territorial disputes", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 145-168

KOHEN Marcelo G., HÉBIÉ Mamadou, "Introduction to the Research Handbook on Territorial Disputes in International Law", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 1-5

KOHEN Marcelo G., HÉBIÉ Mamadou, "Territorial conflicts and their international legal framework", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 5-35

KRITSKIY Vsevolod, *Reorienting the Nation: Perspectives from Soviet Central Asia in the 1920s*, Burrin Philippe (dir.), PHD degree in International History, Graduate Institute of International and Development Studies, Geneva, 2019, 348 p.

LALONDE Suzanne, *Determining Boundaries in a Conflicted World, The Role of Uti Possidetis*, Montreal, McGill-Queen's University Press, 2002, 347 p.

NESI Guiseppe, "Boundaries", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, p. 145-168.

PARLETT Kate, "State conduct in territorial disputes beyond *effectivités*: recognition, acquiescence, renunciation and estoppel", in *Research Handbook on Territorial Disputes in International Law*, Kohen M. G., Hébié M. (eds.), Cheltenham, Edward Elgar Publishing, 2018, pp. 169-192

POLAT Necati, *Boundary Issues in Central Asia*, New York, Transnational Publishers, 2002, 282 p.

REEVES Madeleine, "In Search of Tolerantnost': Preventive Development and Its Limits at the Kyrgyzstan-Uzbekistan Border" *in Social and Political Changes in a Post-Soviet Society, Kyrgyzstan beyond "Democracy Island" and "Failing State",* Laruelle Marlene (eds.), Engvall Johan (eds.), London, Lexington Books, 2015, pp. 79-97

REEVES, M. (2014). *Border Work, Spatial Lives Of The State In Rural Central Asia.* New York: Cornell University Press

ROEDER Philip G., *Where Nation-States Come From: Institutional Change in the Age of Nationalism*, Princeton University Press, 2007, 417 p.

SHAW Malcolm N., «The Heritage of States: The Principle of *Uti Possidetis* Juris Today», *in British Yearbook of International Law 1996,* Volume 67, Issue 1, BROWNLIE I. et al. (eds.), Oxford, Clearendon Press, 1997, pp. 75-154

STARR Frederick S., *Ferghana Valley: The Heart of Central Asia (1st ed.),* Starr F.S., Beshimov B. et. Al. (eds), New York, M.E. Sharpe, 2011, 512 p. https://doi.org/10.4324/9781315704371 [e-book version]

STRAUSS Michael J., *Territorial Leasing in Diplomacy and International Law*, Leiden, Brill, 2015, 256 p.

VINCEAU Michel, "Débats." in *Démembrements d'Etats et délimitations territoriales: l'uti possidetis en question(s)*, Collection de droit international n°41, Corten O. *et al.*, (eds.), Bruxelles, Editions Bruylant, Editions de l'Université Bruxelles, 1999, pp. 143-148

WEERTS Laurence, "Heurs et malheurs du principe de l'*uti possidetis* : le cas du démembrement de l'U.R.S.S." in *Démembrements d'Etats et délimitations territoriales: l'uti possidetis en question(s)*, Collection de droit international n°41, Corten O. *et al.* (eds.), Bruxelles, Editions Bruylant, Editions de l'Université Bruxelles, 1999, pp. 79-142

9.2 Online sources

ABASHIN Sergey., « Soviet Rule and the Delineation of Borders in the Ferghana Valley, 1917-1930 » in *Ferghana Valley: The Heart of CentralAsia (1st ed.)* , Starr Frederick S., M.E. Sharpe, 2011, pp. 94 – 118 [e-book version]

DE ANDRADE Mariana C., «Regional principles of law in the works of the International Law Commission», in *Questions of International Law (QUIL), General international law and the challenges of regionalism before the International Law Commission* [online], 2021, n° 86 , pp. 23-46, available on: http://www.qil-qdi.org/wp-content/uploads/2021/12/03_Regionalism-in-ILC_DE-ANDRADE_FIN_REV-3.pdf [accessed the 6.8.2022]

EURASIANET, *Kyrgyzstan Batken and Tajikistan Sughd provinces; overview* [online]. Available on: https://eurasianet.org/sites/default/files/media/image/Ortoboz.png [accessed the 6.8.2022]

GOOGLE MAPS, *Physical map of Tajikistan and Kyrgysistan,* [online]. Available on: https://www.google.ch/maps/@40.4250943,70.7795535,6.3z?hl=de [accessed the 14.8.2022]

INTERNATIONAL CRISIS GROUP, «Water Pressures in Central Asia», *Europe and Central Asia Report* [online], N°233, Brussels, 11.9.2014, Available on: https://www.refworld.org/pdfid/5412a6444.pdf [accessed the 6.8.2022]

KOHEN, Marcelo G. *Possession contestée et souveraineté territorial*, *Nouvelle édition* [online], Genève : Graduate Institute Publications, 1997 (généré le 29 juillet 2016). Available on: http://books.openedition.org/iheid/1292 [accessed the 6.8.2022]

KOKAISL, Petr, "Soviet collectivisation and its specific focus on central Asia"[online], *Agris On-line Papers in Economics and Informatics*, Vol. Number 4, 2013. Available on: https://www.researchgate.net/publication/280233074_Soviet_Collectivisation_and_Its_Specific_Focus_on_Central_Asia [accessed the 6.8.2022]

KURMANALIEVA Gulzana, "Kyrgyzstan and Tajikistan: Endless Border Conflicts" *in L'Europe en Formation* [online], n° 385, 1.2018, pp. 121-130. Available on: https://www.cairn.info/revue-l-europe-en-formation-2018-1-page-121.htm [accessed the 6.8.2022]

LIU CHENHONG, «Regional Customary International Law Related to China's Historic Rights in the South China Sea», in *The Korean Journal of International and Comparative Law* [online], Vol. *7*(2), 2019, pp. 262-276. doi: https://doi.org/10.1163/22134484-12340128 [accessed the 6.8.2022]

MATVEEVA, Anna, "Divided we fall ... or rise? Tajikistan–Kyrgyzstan border dilemma", *Cambridge Journal of Eurasian Studies 1* [online], 2017, pp. 1–20, doi: https://doi.org/10.22261/94D4RC [accessed the 6.8.2022]

MILANO Enrico, «General Principles Infra, Praeter, Contra Legem? The Role of Equity in Determining Reparation», in *General Principles and the Coherence of International Law* [online], Chapter 5, Leiden, Koninklijke Brill, 2019, pp. 65- 78, doi: https://doi.org/10.1163/9789004390935_007 [accessed the 6.8.2022]

MONTIEL Moisés, F*antastical Opinio Juris and How to Find it, OpinioJuris* [online], 2021. Available on: http://opiniojuris.org/2021/06/23/fantastical-opinio-juris-and-how-to-find-it/ [accessed the 2.2.2024]

MURZAKULOVA Asel, *Contextual factors of conflict in border communities in Batken Province, Kyrgyzstan* [online], Mountain Societies Research Institute, University of Central Asia, Bishkek, 2017. Available on: https://www.academia.edu/34828002/Contextual_factors_of_the_conflicts_in_border_communities_Batken_province [accessed the 6.8.2022]

MURZAKULOVA Asel, MESTRE Irène, «Border Change and Conflict in Central Asia: the Case of Agro-Pastoral Communities in Cross-Border Areas of the Ferghana Valley», in *Crisis and Conflict in Agriculture* [online], N°13, Zurayk Rami, Woertz Eckart, Bahn Rachel (eds.), Wallingford, CABI Publishing, 2018, pp. 176–89, doi: https://doi.org/10.1079/9781786393647.0176 [accessed the 6.8.2022]

RATNER, Steven R. "Drawing a Better Line: *Uti Possidetis* and the Borders of New States." *The American Journal of International Law* [online], vol. 90, no. 4, 1996, pp. 590–624. *JSTOR*, doi: https://doi.org/10.2307/2203988 [accessed the 7.8. 2022]

SHAW Malcolm N., « Peoples, Territorialism and Boundaries », in *Europan Journal of International Law E.J.I.L./J.E.D.I.*, [online], 1997 pp. 478-507. Available on: http://www.ejil.org/pdfs/8/3/1457.pdf [accessed the 6.8.2022]

SHUCKSMITH-WESLEY, Marc, "*Uti Possidetis*: The Procrustean Bed of International Law?", in *Tiittala T. (Ed.). Finnish Yearbook of International Law* [online], Oxford, Hart Publishing, 2018, pp. 227–258, doi: http://dx.doi.org/10.5040/9781782257820.0010 [accessed the 6.8.2022]

SUIUNTAI Zhaimagambetov, Major, «*The Proacted Border and Territorial Disputes Between Kyrgyzstan and its Neighbors*» [online], Thesis, Master of Military Art and Science, Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, 2015, 82 p. Available on: https://apps.dtic.mil/sti/pdfs/ADA623960.pdf [accessed the 6.8.2022]

TOKTOMUSHEV Kemel, "Understanding Cross-Border Conflict in Post-Soviet Central Asia: The Case of Kyrgyzstan and Tajikistan», *Connections 17* [online], N°1, pp. 21-41, 2018. doi: https://doi.org/10.11610/Connections.17.1.02 [accessed the 6.8.2022]

UMAROV Temur, "Are There Any Winners of the War on the Kyrgyz-Tajik Border?", *Carnegie Endowment For International Peace* [online], 19.5.2021, https://carnegiemoscow.org/commentary/84569 [accessed the 6.8.2022]

UNDP, "Coexistence for northern Tajikistan and Southern Kyrghyzstan", *Early warning report* [online], Dushanbe, 2006. Available on: https://www.yumpu.com/en/document/read/29746935/narrative-early-warning-report-undp-in-tajikistan [accessed the 6.8.2022]

UNDP & JRC Vorukh, « Potential for Peace and Threats of Conflict: - UNDP in Tajikistan, Development Analsis of Cross Border Communities in Isfara District of the Republic of Tajikistan » [online], 2011, Available on : https://www.yumpu.com/en/document/view/31527916/potential-for-peace-and-threats-of-conflict-undp-in-tajikistan [accessed the 6.8.2022]

WIKIPEDIA, Isfara district [online], available on: https://en.wikipedia.org/wiki/Isfara_District [accessed the 14.08.2022]

WIKIPEDIA, Kyrgyzstan, administrative divisions [online], available on: https://de.wikipedia.org/wiki/Datei:Kyrgyzstan,_administrative_divisions_-_de_-_colored.svg [accessed the 14.08.2022]

WIKIPEDIA, Sughd province [online], available on: https://de.wikipedia.org/wiki/Sughd [accessed the 14.08.2022]

WIKIPEDIA, The Uzbek SSR in 1927, inkluding Tajik ASSR and Khodzhent [online], aivailable on : https://www.wikiwand.com/en/Uzbek_Soviet_Socialist_Republic [accessed the 14.08.2022]

9.3 Newspaper articles

ABDULKERIMOV Bahtiyar, "Death toll rises to 55 from Kyrgyz-Tajik border clashes, Clashes erupted last week over control of local water distribution network" [online], on *Anadolu Agency*, 5.5.2021, https://www.aa.com.tr/en/asia-pacific/death-toll-rises-to-55-from-kyrgyz-tajik-border-clashes/2230340 [accessed the 6.8.2022]

ABDULLAYEV Sunnatilla, "The seeds of conflict that USSR sowed: What is the reason for the dissension between Tajiks and Kyrgyz?", on *Alampir*, 11.3.21, https://qalampir.uz/en/news/urugi-sssrda-sepilgan-muammo-tozhiklar-va-k-irgizlar-nimani-bulisholmaydi-57283, [accessed the 6.8.2022]

ARMED CONFLICT LOCATION & EVENT DATA PROJECT (ACLED), "Everlasting or ever-changing? Violence along the Kyrgyzstan-Tajikistan border" [online], on *reliefweb*, 9.6.2020, https://reliefweb.int/report/tajikistan/everlasting-or-ever-changing-violence-along-kyrgyzstan-tajikistan-border, [accessed the 6.8.2022]

ASIA-Plus, "*Кыргызстан предложил Таджикистану обменять Ворух на другой участок*"[online], 26.3.2021, on Asia-Plus, https://asiaplustj.info/news/tajikistan/politics/20210326/kirgizstan-predlozhil-tadzhikistanu-obmenyat-voruh-na-drugoi-uchastok, [accessed the 6.8.2022]. *(Transl.: Kyrgyzstan offered Tajikistan to exchange Vorukh for another section)*

NADYRBEK Avazbekov, "*Kyrgyz-Tajik border disputes: reasons and ways of solution"* [online], on *cabar.asia*, 18.3.2021, https://cabar.asia/en/kyrgyz-tajik-border-disputes-reasons-and-ways-of-solution

FUTURA-SCIENCE, "Qu'est-ce qui a provoqué la chute de l'URSS ?" [online], on *futurascience*, https://www.futura-sciences.com/sciences/questions-reponses/epoque-contemporaine-quest-ce-provoque-chute-urss-5535/ [accessed the 7.8.2022]

HAUSER Markus, "How difficult it Is to refer to "official" maps in border disputes" [Online], on *Twitter*, Accessible on: https://mobile.twitter.com/hausibek/status/1154675754652852226 [accessed the 6.8.2022]

ISRAYILOV, Chyngnyz «Border Issues and their International Importance: a view from Kyrgyzstan» [online], on *cabar.asia*, 10.5.2021, https://cabar.asia/en/border-issues-and-their-international-importance-a-view-from-kyrgyzstan [accessed the 6.8.2022]

ИВАЩЕНКО ЕКАТЕРИНА, "Кыргызстан: Границы как источник проблем и конфликтов" [online], on *Fergananews(Фергана.Ру),*27.11.2014, https://www.fergananews.com/articles/8323 [accessed the 6.8.2022]. (*Transl.: Ivashchenko Ekatarina, Kyrgyzstan: Borders as a source of problems and conflicts)*

MASALIEVA Jazgul, «Sokh, Vorukh. What they look like on maps of Kyrgyzstan, Tajikistan, Uzbekistan» [online], on *24.kg news agency*, Bishkek, 23.11.2021, https://24.kg/english/214634_Sokh_Vorukh_What_they_look_like_on_maps_of_Kyrgyzstan_Tajikistan_Uzbekistan/ [accessed the 7.8.2022]

NADIROV Bakhmanyor, «How Vorukh became an "enclave". The history of the Tajik-Kyrgyz conflict» [online], on *ASIA-Plus, Media group Tajikistan*, 22.4.2021,

https://asiaplustj.info/en/news/centralasia/20210422/how-vorukh-became-an-enclave-the-history-of-the-tajik-kyrgyz-conflict [accessed the 6.8.2022].

РАДИО ОЗОДИ, "Как Хаёев отдал 350 га земель Воруха Кыргызстану?" [online], on *Radio Ozodi,* 24. 1. 2014, https://rus.azattyk.org/a/25241126.html [accessed the 6.8.2022]. *(Transl.: **Radio Ozodi**, How did Khayoev give 350 hectares of Vorukh land o Kyrgyzstan*?)

РАСУЛ-ЗАДЕ ТИЛАВ, Fergananews(Фергана.Ру), "Анклав Ворух: Территория благородных учителей, помолвленных девушек и советских мотоциклов " [online], on *fergananews,* 29.11.2017 , https://www.fergananews.com/articles/9665 [accessed the 6.8.2022]. (*Transl.: Rasul-Zade Tilav, Eclave of Vorukh: Territory of noble teachers, engaged girls and Soviet motorcycles)*

САФАР ТОХИР, "Власти Кыргызстана предложили Таджикистану обменять Ворух на земли в других районах Баткена" [online], on *Радио Озодин*, 26.3.2021, https://rus.ozodi.org/a/31171232.html [accessed the 6.8.2022]. *(Transl.: SAFAR Tahir, The authorities of Kyrgyzstan offered Tajikistan to exchange Vorukh for land in other areas of Batken, on **Radio Ozodi**)*

САРКОРОВА АНОРА "Из-за чего конфликтуют Таджикистан и Киргизия" [online], on *Русская служба Би-би-си,* Душанбе, 16.1.2014. https://www.bbc.com/russian/international/2014/01/140116_tajikistan_kyrgyzstan_border_conflict [accessed the 6.8.2022]. *(Transl.: Why Tajikistan and Kyrgyzstan are in conflict, BBC Russian service, Dushanbe, **SARKOROVA** Anora)*

САРКОРОВА АНОРА, «*Киргизия и Таджикистан: проблемы на границе остаются*» [online], on *Русская служба Би-би-си*, 16.5.2014. https://www.bbc.com/russian/international/2014/05/140516_tajik_kyrgyz_border_report [accessed the 6.8.2022]. (*Transl.: **SARKOROVA** Anora, Kyrgzstan and Tajikistan: border problems remain, Russian service BBC)*

WOOD Colleen, «The Enduring Difficulty of Settling the Kyrgyzstan-Tajikistan Border»[online], on *The Diplomat*, 2.8.2019, https://thediplomat.com/2019/08/the-enduring-difficulty-of-settling-the-kyrgyzstan-tajikistan-border/ [accessed the 6.8.2022]

9.4 Official governmental websites

MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF TAJIKISTAN, » Tajikistan and Kyrgyzstan state boundary » [online], 1.3.2013, https://mfa.tj/en/main/view/151/tajik-kyrgyz-state-border [accessed the 7.8.2022]

(Transl.: Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic to the Republic of Tajikistan Erlan Abdyldaev presented copies of his credentials to the Minister of Foreign Affairs of the Republic of Tajikistan)

OFFICIAL WEBSITE OF THE PRESIDENT OF THE KYRGYZ REPUBLIC, Events, « Presidents Sadyr Japarov and Emomali Rahmon adopted a joint Statement » [online], Dushanbe, 29.6.2021. Available on : https://www.peaceagreements.org/viewmasterdocument/2392 [accessed the 7.8.2022]

THE MINISTRY OF FOREIGN AFFAIRS OF THE KYRGYZ REPUBLIC, « *Чрезвычайный и Полномочный Посол Кыргызской Республики в Республике Таджикистан Эрлан Абдылдаев вручил копии верительных грамот Министру иностранных дел Республики Таджикистан Сироджиддину Мухриддину* » [online], 6.5.2022, https://mfa.gov.kg/en/Main-menu/Press-service/novosti/-627539a267b04 *(Transl.°: The Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic to the Republic of*

Tajikistan, Erlan Abdyldaev, presented copies of his credentials to the Minister of Foreign Affairs of the Republic of Tajikistan, Sirodjiddin Mukhriddin)

THE MINISTRY OF FOREIGN AFFAIRS OF THE KYRGYZ REPUBLIC, « *Министр иностранных дел Кыргызской Республики Жээнбек Кулубаев провел двустороннюю встречу с Министром иностранных дел Республики Таджикистан Сироджиддином Мухриддином* » [online], 14.5.2022, https://mfa.gov.kg/en/Main-menu/Press-service/novosti/-6287360f7da98 (Transl : Minister of Foreign Affairs of the Kyrgyz Republic Jeenbek Kulubaev held a bilateral meeting with the Minister of Foreign Affairs of the Republic of Tajikistan)

9.5 International Case Law

9.5.1 Permanent Court of International Justice

LEGAL STATUS OF EASTERN GREENLAND (Den. V. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (5 April)

9.5.2 International Court of Justice

FISHERIES JURISDICTION (U.K. v. Ice.), Merits, 1974 I.C.J., p. 3 (25 July)

FRONTIER DISPUTE (BENIN/NIGER), Judgment, 2005 I.C.J., p. 90 (12 July)

FRONTIER DISPUTE (BURK. FASO/MALI), Judgment, 1986 I.C.J., p. 554 (22 December)

FRONTIER DISPUTE (BURK. FASO/NIGER), Judgment, 2013 I.C.J. 44, 74 (16 April)

MINQUIERS AND ECREHOS (Fr. V. U.K.), Judgment, 1953 I.C.J., p. 47 (17 November)

NORTH SEA CONTINENTAL SHELF (Ger. V. Den./Ger. V. Neth.), Judgment, 1969 I.C.J., p. 3 (20 February)

LAND AND MARITIME BOUNDARY between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Merits, 2002 I.C.J., p. 303 (10 October)

LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SAL./HOND.: NICAR. INTERVENINT), Judgment, 1992, I.C.J., p. 351 (11 September)

LAND, ISLAND AND MARITIME FRONTIER DISPUTE (El Sal./Hond.: Nicar. Intervenint), Judgment, 1992, I.C.J., p. 677 par. 96 (11 September), dissenting opinion of judge Torres Bernárdez

SOVEREIGNTY over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing), Judgment, 2008 I.C.J. 12 (23 May)

TEMPLE OF PREAH VIHEAR (Cambodia v. Thai.), Merits, 1962 I.C.J., p. 6 (15 June)

TERRITORIAL DISPUTE (Libya v. Chad), Judgment, 1994 I.C.J., p. 6 (3 February)

9.5.3 Arbitral Awards

BORDER DISPUTE between Honduras and Nicaragua, Award, 1906, XI R.I.A.A., p. 101 (23 December)

DUBAI-SHARJAH BODER ARBITRATION (DUBAI/SHARJAH), Award, 1981, 91 I.L.R., p. 543 (19 October)

GRISBADARN (Nor. V. Swed.), Award, 1909, XI R.I.A.A., p. 147 (23 October)

ISLAND OF PALMAS/MIANGAS (NETH./U.S.), Award, 1928 II R.I.A.A., p. 829 (4 April)

9.5.4 Yugoslavia Arbitration Commission

BADINTER COMISSION, OPINION NO. 3, 1992, 92 I.L.R. 170 (11 January 1992)

9.6 United Nations documents

9.6.1 Letter to the Secretary-General

BELARUS, Letter dated 27 December 1991 from the Permanent Representative of Belarus to the United Nations addressed to the Secretary-General, U.N. Doc. A/47/60 - S/23329 (30. December 1991), Available on: https://digitallibrary.un.org/record/197253 [accessed the 7.8.2022]

9.6.2 International Law Commission

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1968, Vol. 2, United Nations, New York, September 1968, 252 p. Accessible on: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1968_v2.pdf [accessed the 7.8.2022]

9.7 Official Documents of States; Declarations, Charters and Treaties

AGREEMENT ON BASES OF THE INTERSTATE RELATIONS BETWEEN THE KYRGYZ REPUBLIC AND REPUBLIC OF TAJIKISTAN, in CIS Legislation, [online], 12.6.1996. Available on : https://cis-legislation.com/document.fwx?rgn=23351 [accessed the 7.8.2022]. (English Translation)

ALMA ATA DECLARATION, 21 December 1991, attached to the Protocol to the Agreement establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991 by the Republic of Belarus, the Russian Federation (RSFSR), and Ukraine, 31 I.L.M. 147, 148 (1992). Available on https://cis-legislation.com/document.fwx?rgn=4744

AOU DOCUMENT AHG/Res. 16(1), Addis Ababa 1964. Availabel on : https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf [accessed the 7.8.2022]

БЕРДАЛИЕВ Ш. Браславский С. М. Засухин Б. Н., "*The collection of laws of the Kirghiz Soviet Socialist Republic, decrees of the Presidium of the Supreme Council and resolutions of the Government of the Kirghiz SSR / Ministry of Justice of the Kirghiz SSR*» [online], Kirgizgosizdat, 1956, 404 p. Available on: https://www.prlib.ru/en/item/718662 [accessed the 7.8.2022]. (*Transl.: Berdaliev Sh. Braslavsky S.M. Zasukhin B.N.)*

CHARTER OF THE COMMONWEALTH OF INDEPENDENT STATES (with declaration and decisions). Adopted at Minsk on 22 January 1993, United Nations, New York, No. 31139, pp. 57 – 98, Vol. 1819, I-31139, Available on : https://treaties.un.org/doc/Publication/UNTS/Volume%201819/volume-1819-I-31139-English.pdf [accessed the 7.8.2022]

CIS DECLARATION ON THE OBSERVANCE OF SOVEREIGNTY, Territorial Integrity and Inviolability of Borders of States Members of the Commonwealth of Independent States of 15. April 1994. Available on: https://cis-legislation.com/document.fwx?rgn=3921 [accessed the 7.8.2022]

SOVIET UNION, *Constitution of the Union of Socialist Soviet Republics 1924* [online], Kremlin, Moscow, 1924, Available on: http://pwerth.faculty.unlv.edu/Const-USSR-1924(abridge).pdf [accessed the 7.8.2022]

SOVIET UNION, *Constitution of the Union of Socialist Soviet Republics 1936, with Ammendments and Additions* [online], adopted by the First, Second, Third, Sixth, Seventh and Eighth

Sessions of the Supreme Soviet of the U.S.S.R., Kremlin, Moscow, 1936, Available on: Marxists Internet Archive (2008): https://www.marxists.org/reference/archive/stalin/works/1936/12/05.htm [accessed the 7.8.2022]

(*Short: USSR CST 1936)*

THE PRESIDIUM OF SUPREME SOVIET OF THE USSR, Decree, "О внесении изменений и дополнений в законодательство СССР в связи с образованием союзно-республиканского Министерства юстиции" [online], Moscow Kremlin, 12.8.1971, N2013-VIII, section 3, Available on: https://web.archive.org/web/20110823112610/http:/ntc.duma.gov.ru/duma_na/asozd/asozd_text.php?code=106956 [accessed the 7.8.2022], *(Transl.: On the introduction of amendments and additions to the legislation of the USSR in connection with the establishment of the Union-republican Ministry of Justice of the USSR)*

9.8 Further literature

ASIA-PLUS, « Kyrgyz populist security chief's own stance on border talks with Tajikistan was less conciliatory, »[online], on *Asia-Plus*, 7.5.2021. Available on : https://asiaplustj.info/en/news/tajikistan/incidents/20210507/kyrgyz-populist-security-chiefs-own-stance-on-border-talks-with-tajikistan-was-less-conciliatory [accessed the 7.8.2022]

CENTRAL ASIAN BUREAU FOR ANALYTICAL REPORTING (CABAR), «Kyrgyz-Tajik border disputes: reasons and ways of solution» [online], on *cabar.asia*. Available on: https://cabar.asia/en/kyrgyz-tajik-border-disputes-reasons-and-ways-of-solution [accessed the 7.8.2022]

ХАМРОХОН ЗАРИФИ, «Хамрохон Зарифи: «Земля Воруха – территория Таджикистана навсегда» [online], on *Asia-Plus*, 31.3.2021. Available on: https://asiaplustj.info/news/opinion/20210331/hamrohon-zarifi-zemlya-voruha-territoriya-tadzhikistana-navsegda [accessed the 7.8.2022]. *(Transl.: Hamrohon Zarifi: "The Vorukh land is Tajikistan's territory forever"*

MURATALIEVA Nargiza, « Peacebuilding and Border Issues in Central Asia. An Interview, Professor Julien Thorez » [online], 9.7.2021, on *Cabar-Asia*, Available on : https://cabar.asia/en/peacebuilding-and-border-issues-in-central-asia-an-interview [accessed the 7.8.2022]

10 Annexes

10.1 Maps

The location of borders and settlements on the maps below are approximate and should not be taken as authoritative. (Exception; the map of 1925, 28 of the Russian Archive).

10.1.1 Physical map of Tajikistan and Kyrgyzstan

Figure 1 Physical map of Tajikistan and Kyrgyzstan[204]

10.1.2 Map of provinces, Geography and structure of the region

The Kyrgyz Batken province and the Tajik Sughd province which comprise the here concerned disputed border section of the Isfara Valley, are themselves again subdivided into districts. The Batken province contains the Batken and the Leilek district (separation took place only recently). The Tajik Sughd province contains (among others) the Isfara district which is situated in the far southeastern corner of Sughd and includes the area of the Chorkuh jamoat as well as Vorukh exclave.
Therefore, the Isfara Valley is for one part included in the Kyrgyz Aksai municipality (area of Isfara valley between approximately Khojai-A'lo and Vorukh), for the other part it is included in the Tajik Chorkuh jamoat (northern part of the valley in Tajik territory).

[204] GOOGLE MAPS, Physical map of Tajikistan and Kyrgyzstan [online], [accessed the 14.8.2022].

Figure 2 Map of the Kyrgyz provinces; Batken district (right part of Batken province, including Vorukh), Leilek district (left part of Batken province)[205]

10.1.3 Kyrgyzstan, Batken and Tajikistan, Sughd provinces; overview

Figure 3 Kyrgyzstan, Batken and Tajikistan, Sughd provinces; overview [206]

[205] WIKIPEDIA, Kyrgyzstan, administrative divisions [online], [accessed the 14.08.2022].
[206] EURASIANET, Kyrgyzstan Batken and Tajikistan Sughd provinces; overview [online], [accessed the 6.8.2022].

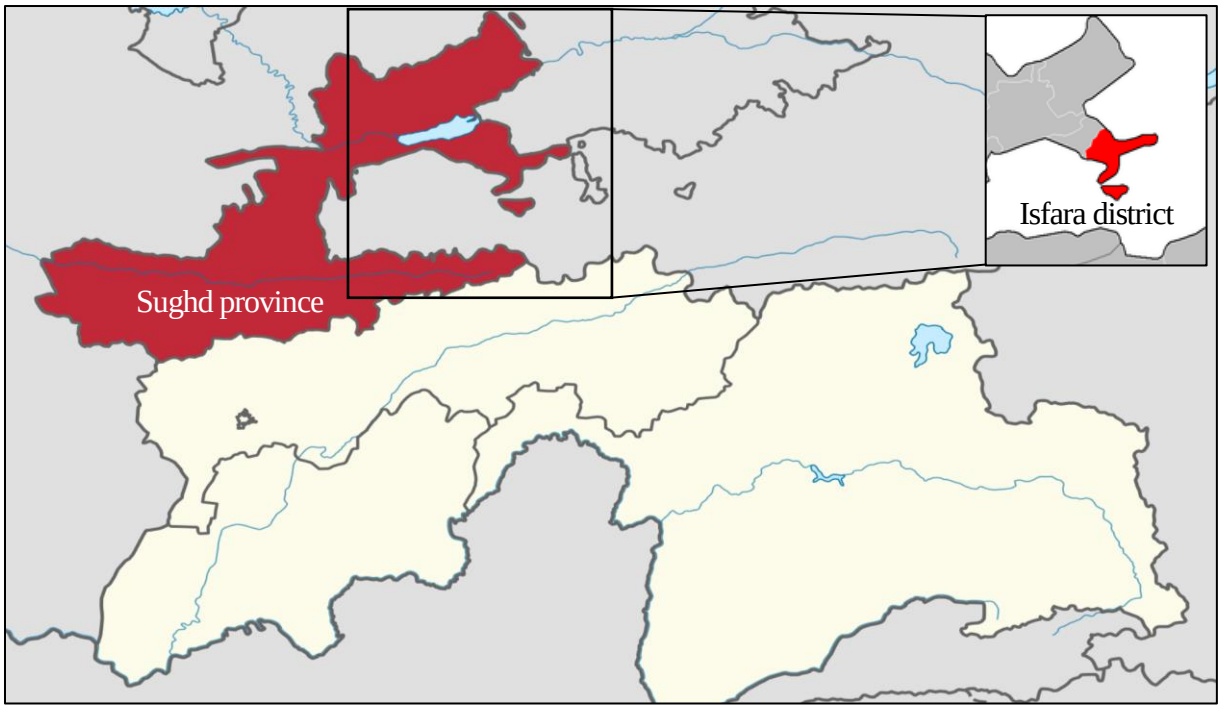

Figure 4 Map of the Tajik Sughd province (Leninabad), Tajikistan (light yellow), Uzbekistan to the left[207], the small map shows the Isfara district[208]

[207] WIKIPEDIA, Sughd province, [online], [accessed the 14.08.2022] https://de.wikipedia.org/wiki/Sughd
[208] WIKIPEDIA, Isfara district, [online], [accessed the 14.08.2022], https://en.wikipedia.org/wiki/Isfara_District

10.1.4 Batken zone; Map of the Isfara Valley (on the left) and the Sokh Valley (right)

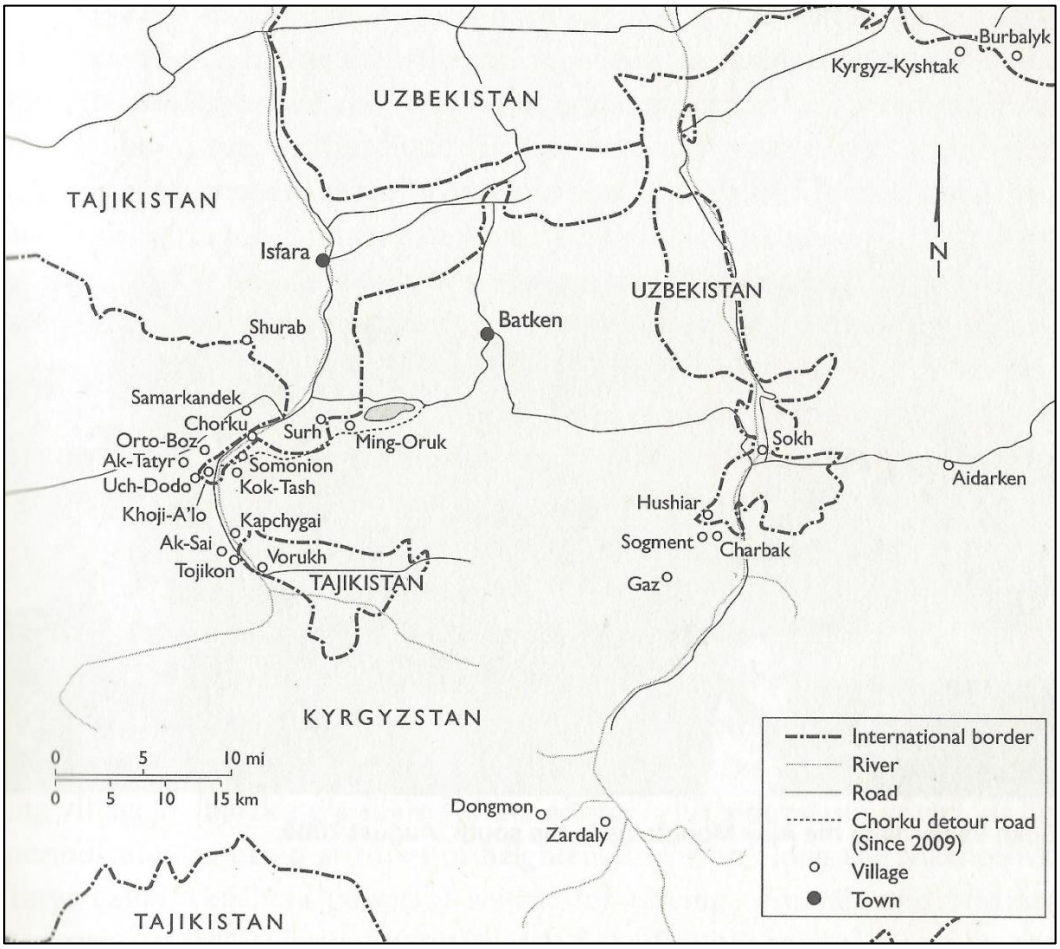

Figure 5 Map of the Isfara Valley (on the left) and the Sokh Valley (right) [209]

The Isfara valley follows the Isfraninka (Isfara) river that originates in the Turkestan and Alay Mountain range situated in the south of the Kyrgyz Batken district. The river first flows through the enclave Vorukh and then proceeds towards the Tajik mainland reaching it approximately in the region of the Khojai-A'lo village. The Isfara Valley is situated in the eastern part of the Kyrgyz Batken district. The Batken district (comprised in the Kyrgyz Batken province) borders the Tajik Isfara district comprised in the Sughd (formerly called Leninabad) province. They are both a part of the big plane in the area called the "Ferghana Valley". The focus area of this thesis lies on the territory of the enclave of Vorukh and its surroundings, as well as on the area separating the enclave from the Tajik mainland, approximately between Aksai and Khojai-A'lo (*part of the Aksai municipality)*.

[209] REEVES Madeleine, op. cit., p. 17.

10.1.5 Map of the Vorukh – Aksai region

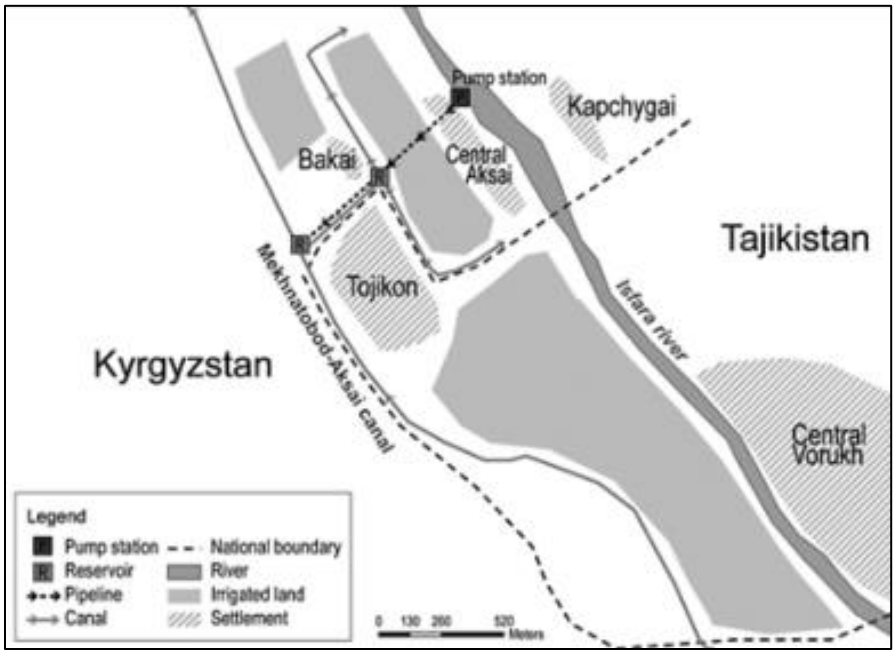

Figure 6 Map of the Vorukh – Aksai region[210]

Nowadays Aksai village consists of three parts: Kapchygai, Bakai and central Aksai. Kapchygai is the oldest village in the region and the area of central Aksai and Bakai were initially only pastures. Central Aksai was founded in the 1970s after a dispute settlement to halt the expansion of the Tajik state Farm situated in Vorukh on the Kyrgyz farm's territory. Bakai was constructed later in the 1990s. (Ch. 2). Directly adjacent to the Aksai village cluster lies the enclave of Vorukh comprising the village of Tojikon.

[210] BICHSEL Christine, op. cit., p. 29.

10.1.6 Maps from the Archive/Atlas or Historical Maps

Figure 7 Map of the former division of the Uzbek SSR, with the Tajik ASSR as its subunit (yellow)[211]

Initially, the maps of 1924–1927 show Vorukh as attached to the Uzbek SSR's mainland because the contiguous territory at the time was part of the Uzbek Leninabad (future Sughd) province. Only later when the Tajik ASSR became a separate SSR and left behind its subordinate status to the Uzbek SSR in 1929, this not only included an upgrade of its status to a full SSR but also the transfer of territory of the Uzbek SSR in the Ferghana Valley to the Tajik SSR. After several Uzbek-Tajik disputes due to old Tajik territorial claims, including the revindication of Samarkand and Khodjent (Khujand) region, to satisfy some of the Tajik revendications, the whole Leninabad province with its arms was by decree transferred to Tajikistan; the headland including Vorukh has passed with it. The 1927 map therefore does not show Vorukh as part of Tajikistan but proves that Vorukh has not been an exclave in the Kyrgyz Autonomous Oblast. Since later this contiguous Uzbek territory passed to Tajikistan in 1929, the Tajik still base their claims on the 1927 map. A part of the transferred territory has later been retransferred to Uzbekistan (which is why the enclave of Sokh is nowadays an Uzbek enclave).[212]

[211] WIKIPEDIA, The Uzbek SSR in 1927, including Tajik ASSR and Khodzhent [online], [accessed the 14.08.2022] https://www.wikiwand.com/en/Uzbek_Soviet_Socialist_Republic.

[212] ABDULLAYEV Sunnatilla, op. cit., and GORSHENINA Svetlana, op. cit., p. 189 ff. and pp. 230-238.

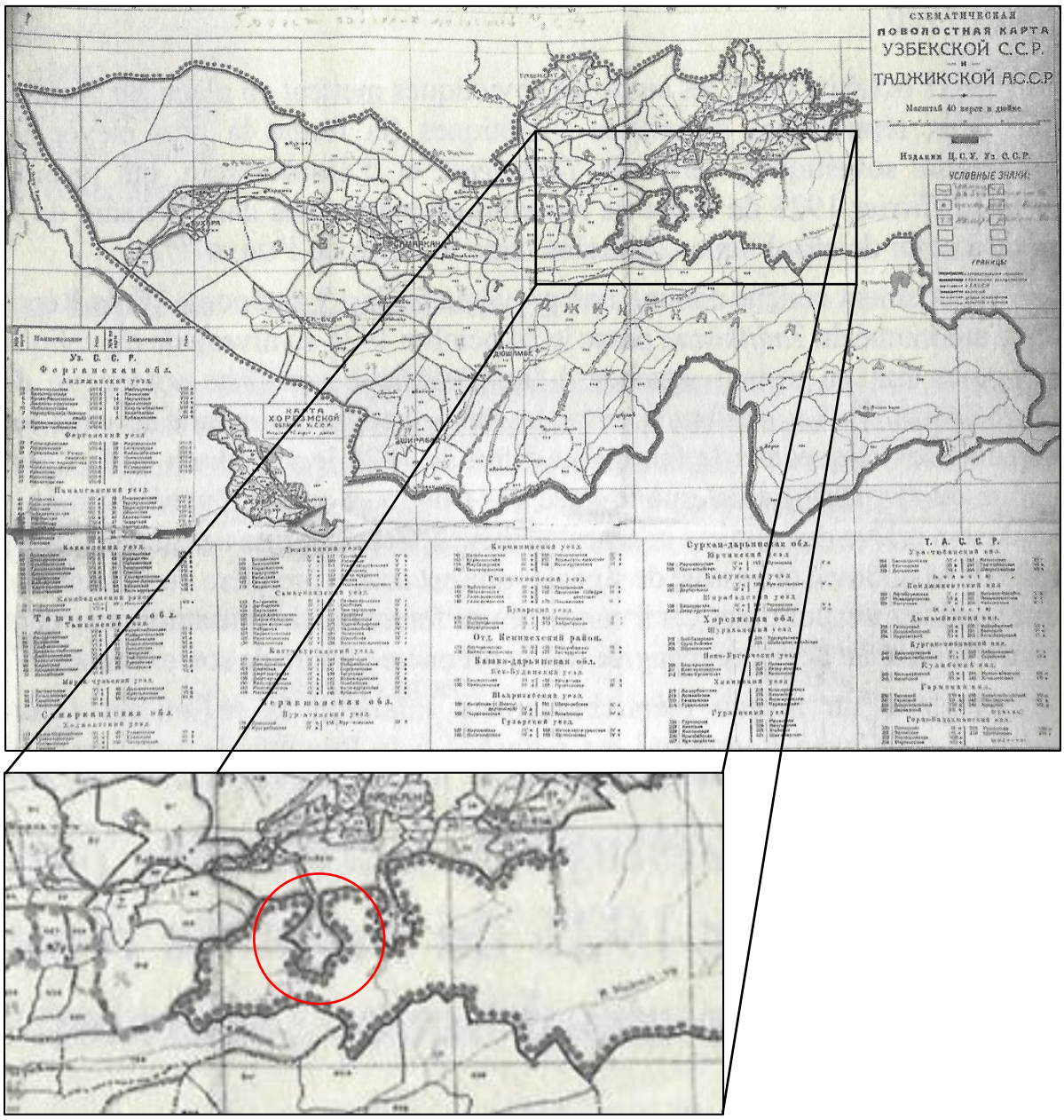

Figure 8 Map of 1924 [213]

[213] GORSHENINA Svetlana, op. cit., p. 230.

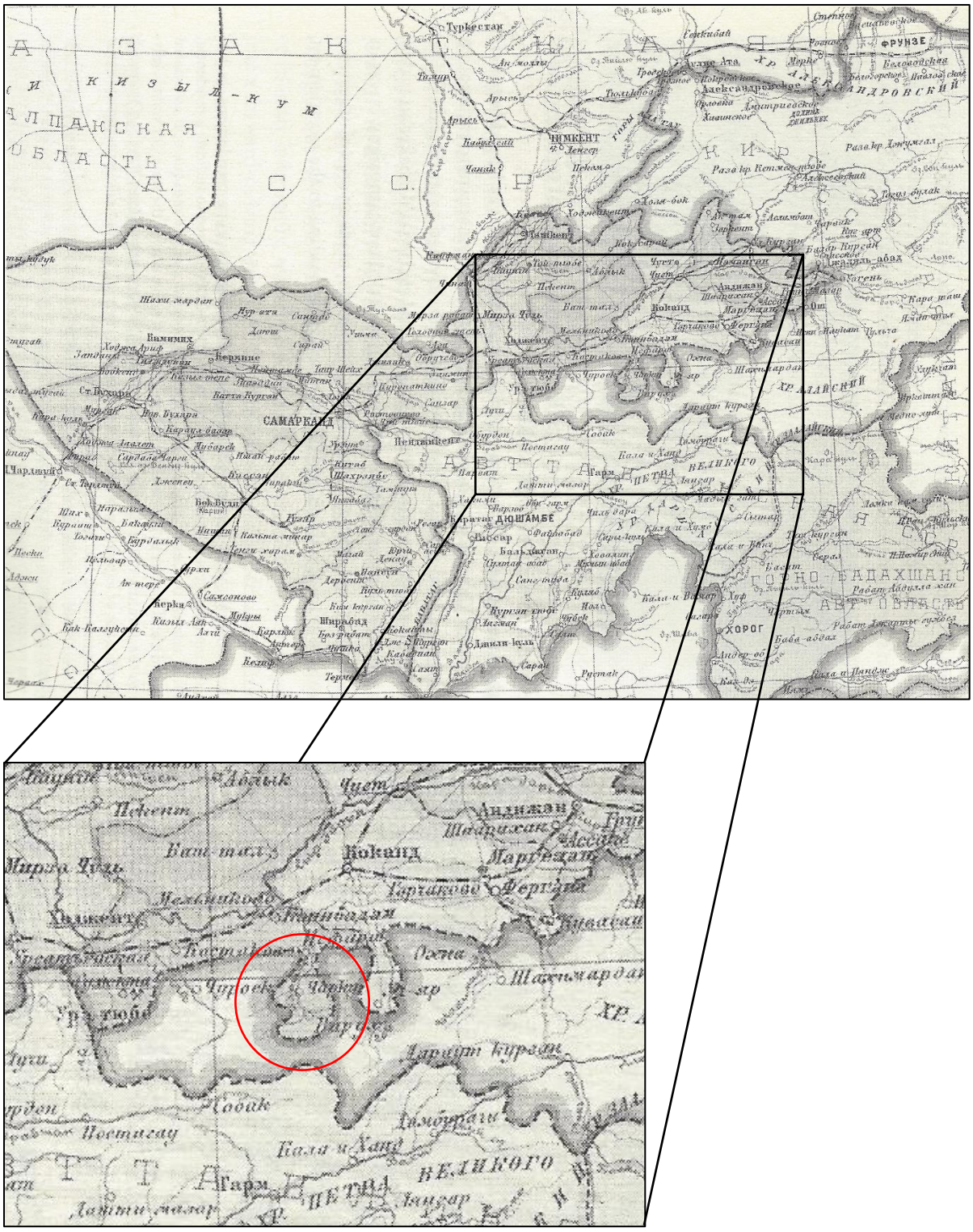

Figure 9 Map of 1928; Soviet Atlas [214]

[214] REEVES Madeleine, op. cit., p. 30.

10.2 History

The National Delimitation Process

The basis for the establishment of the frontier between Kyrgyzstan and Tajikistan was set in 1917 when, after the Bolshevik revolution, it was decided about what form the administration of Central Asia should take.[215] The extensive archival research of Gorshenina shows that two projects were at discussed; one in favour of a single Muslim unit in central Asia, extraterritorial to Russia, and the other in favour of multiple autonomous entities as a part of a federal Russia. The entities should have been based on the major Muslim ethnicities in the region, leaving a degree of national and cultural autonomy to ethnicities that have not received their proper territory. In May 1917, during the first Muslim – pan-Russian congress in Riga, the majority was in favour of the second option (Resolution du congrès en Riga f. 812, op. 133, d. 525, 1. 188 (cit. in Gorshenina p. 191).[216] This decision set the stage for the future dissolution of the Governorate General Turkestan (in the meanwhile transformed into an Autonomous Soviet Socialist Republic, the TASSR). In the years of 1920 untill 1924, several commissions were formed to study the question of ethnicity in the region and propose different projects for the partition and remodulation of the TASSR, Bukharan and Khorezm SSR. Several solutions were rejected before the "preliminary delimitation"[217] project was published in 1924 which marked the beginning of the national delimitation process (NDP) that would take place from 1924 to 1927.

Bevor the beginning of the NDP and during the phase of the elaboration of a partition of Central Asia around the early 20s first essays of reorganisation led to results that grosso modo maintained the Tsarist heritage of administration structure in Turkestan (entities based on the progressive occupation phases).[218] Turkestan was structured in five main provinces (Syr Daraya, Ferghana, Samarkand, Semirechie, Transcaspienne)[219] with Bukhara and Khorezm being separate SSRs with a status of pseudo independence that resembled strongly the protectorate agreements that occurred in the colonialisation context. Their structure was attached to the RSSFR (Russian Socialist Soviet Federative Republic).[220]

In the contrary, the "April report" (rapport d'Avril 1924)[221] proposed major changes to this structure. The territory of Turkestan, Bukhara and Khorezm was remodelled into two large Soviet Socialist Republics, the Uzbek and the Turkmen SSR. The Region of the Kazakh Steps (ancient Governorate d'Orenbourg) in addition to some of the northern parts of Turkestan were transformed into the Kirghiz (Kazakh) ASSR (Kirrespublika). The Kirghiz SSR is actually the precursor of Kazakhstan and was renamed the Kazakh SSR later in 1925, (the Kirghiz ethnicity was called at the time Kara-Kirghiz and the Kazakh ethnicity was called the Kirgiz at that time).[222] Some of the more important subunits that were created based on so-called ethnic "minorities" in the region were the Kara-Kirghiz autonomous oblast (not attached to any other unit – existing separately under the jurisdiction of the RSSFR), the Tajik ASSR (attached to Uzbek SSR) and the Karakalpak autonomous oblast (attached to Kazakh SSR, "Kirrespublika"). The preliminary delimitation project of April 1924 therefore also marks the birth of the Tajik-Kyrgyz frontier.

Following the publication of the first delimitation propositions a phase of protestation and "petitions" began, formulated by the local administration and elites.

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215 GORSHENINA Svetlana, op. cit., pp. 189,190.

216 Djakin v. s. nacional'nyj vopros vo vnutrennej politike carizma (XIX-XX vv.). Archivé dokumenty (la question nationale dans la politique intérieure du tsarisme. Documents d'archives), Saint-Pétersbourg : Liss, p. 1041.

217 GORSHENINA Svetlana, op. cit., p. 237.

218 Ibid. p. 206.

219 Ibid. p. 135.

220 Ibid. p. 206.

221 Ibid. p. 219.

222 Ibid. pp. 203, 206.

"The complaint was a part of a broader reaction against some of the specifics of the proposed delineation" [223]. Because of the number of disputes and complaints, the central Russian authorities decided to create a single commission that would deal with all the border disputes (in a more authoritative rather than bilateral approach that would need the creation of separate commissions to deal with each dispute for bilateral resolutions.[224]

Claims originated from local communities of ethnic groupings which felt that they did not belong to the correct territorial unit, or from local elites who tried to assign surplus territory to their republic (about 50 disputes). This process led to some major adjustments. A commission was created to deal in a centralised manner with the emerged disputes. Some of the major contentions existed between the Tajik ASSR and the superordinate Uzbek SSR and between KAO and Uzbek SSR (concerning territories of the Tajik territories of the Uzbek SSR) [225]

According to Fierman the borderline resulting from the 1924–27 delimitation process persisted with some alterations until the dissolution of the Soviet Union. Major alterations that occurred after were punctual adjustments of sections of the border, as well as name changes and the aforementioned upgrade of the status of subunits or reassociations of parts of one republic to another. In this regard, the Tajik ASSR was proclaimed a SSR in 1929. This was due to the increasing ethnic discrimination that the Tajik population faced (assimilation policies) as well as a more consolidated Tajik nationalist movement/feeling and progression of their language. In 1936 the status of the Kyrgyz AO was also upgraded.[226]

The fact that the **Tajik population** did not always have its own complete SSR can be attributed to certain political factions during the initial demarcation process, which viewed Tajiks as an ethnic minority because they did not have their own schools or official language. That the Tajiks were not considered to be one of the principal indigenous people of Central Asia, stirred many debates. Especially after increasingly having been subject to policies of assimilation by the Uzbek government, appeals in the direction of the Bolshevik Government in Moscow became more frequent. They demanded territories with predominantly Tajik population to be transferred to the ASSR. This tensions finally led to the upgrade of the ASSR to a full SSR. Some of the demanded territories were transferred, however large parts were refused.[227]

These ancient inter-republican disputes continue to influence relations between Tajikistan and Kyrgyzstan today. The disputes stem from the artificial division of the Feraghan Valley, which until the early 19th century always existed as a single entity even under the tsarist administration and is now divided among three different states. In addition, even after the division of the territory into different administrative units, the borders between Kyrgyzstan and Tajikistan were never conceived by the Soviet leadership as purely administrative boundaries. In addition, even after the territory was divided into different administrative units the frontier created between Kyrgyzstan and Tajikistan was never designed to be more than an administrative frontier by the Soviet leadership. Because the frontiers have for a long time been merely administrative and were porous (high amount of cross-frontier cooperation) communities have formed interlinked systems, i.e., shared infrastructure, economy etc. The fact that living in separation and complete division was never really ingrained in the customs of the region until the late 1990s meant that the newly emerging isolationist policies created even more problems in the region.[228]

[223] KRITSKIY Vsevolod, *Reorienting the Nation: Perspectives from Soviet Central Asia in the 1920s*, Ph.D degree in International History, Graduate Institute of International and Development Studies, 2019, p. 284.
[224] Ibid. KRITSKIY
[225] GORSHENINA Svetlana, op. cit., pp. 234-238.
[226] FIERMAN William, op. cit., pp. 16-17.
[227] GORSHENINA Svetlana, op. cit., pp. 224, 229-236.
[228] REEVES Madeleine, op. cit., pp. 20, 21.

10.3 Further matters of international Law

10.3.1 Legal acts vs. Legal facts

"Legal titles" are titles arising from legal acts such as the expression of a common will in a treaty, or a unilateral manifestation of will such as recognition or renunciation of sovereignty.[229] On the other hand, there are titles deriving from "legal facts". In civil law, a legal fact is defined as the "realisation of a fact to which the law attributes legal consequences". Titles deriving from legal facts include for example effective occupation of *terra nullius or abandoned territory*[230].[231] In the context of territorial disputes, a particular form of legal facts referred to by the French term "*effectivités*".

10.3.2 Boundary disputes versus disputes over attribution of territory

Disputes over land can be associated to disputes over attribution of territory ('attribution of sovereignty over the whole of a geographical entity'[232]) or disputes concerning the delimitation of boundaries, also called frontier disputes ('concerning delimitation operations effecting a portion of land which is not geographically autonomous'[233]). Whether a dispute should be classified as a territorial dispute or boundary dispute is according to Kohen irrelevant because no practical differences influencing the application of International Law in its regard arise. In fact, the effect of any change in delimitation, no matter how small, includes the attribution of land.[234] *"[…] In both types of disputes, the result that states intend to achieve is the same; to expand or maintain their sovereignty, and thus their territory and thus their boundaries*" [235]

10.3.3 The role of municipal law

As we have seen, the application of *uti possidetis* requires an interpretation of legal facts according to the municipal law in force before independence. This raises the issue of the role of municipal law in litigations involving the application of *uti possidetis*. The answer to the question lies in the relationship between international law and domestic law.[236] According to several authors such as Nesi and Shaw, municipal law is not integrated into international law ("continuum juridique"). For international law municipal law is a mere matter of fact, and it could be both an element of evidence of the situation existing at the time of independence or a legal norm.[237] In that regard in the case of Burkina Faso/Mali the Court states that "it [municipal law i.e., French colonial law] may play a role not in itself, but only as one factual element among others, or as evidence indicative of what has been called the 'colonial heritage', i.e. the 'photograph of the territory' at the critical date".[238]

10.3.4 Clausula rebus sic stantibus and clean slate principle with regard to borders

The case of the **non-applicability of the *clausula rebus sic stantibus*** is another example of an international practice that confirms that boundaries (especially boundary treaties) are subject to a special

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229 KOHEN Marcelo, op. cit., p. 148.

230 Terra nullius refers to territory that had previously existed "without a master"; Op. cit. KOHEN Marcelo, R. H., op. cit., p. 150.

231 KOHEN Marcelo, R. H., op. cit.

232 FRONTIER DISPUTE (BURK. FASO/MALI), Judgment, 1986 I.C.J. 554 (22 December), p. 563, para. 17).

233 Ibid.

234 KOHEN Marcelo G., HÉBIÉ Mamadou, "Territorial conflicts and their international legal framework", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, p. 10 and FRONTIER DISPUTE (BURKINA FASO/MALI), op. cit., Merits, 1986 I.C.J. 554, p. 563, para. 17 (22 December).

235 NESI Guiseppe, "Boundaries", in Research Handbook on Territorial Disputes in International Law, Edward Elgar Publishing, 2018, p. 200.

236 "Classical dilemma of the relationship between International Law and Domestic Law" (NESI Giuseppe, op. cit., p. 212)

237 NESI Giuseppe, op. cit., p. 214 and "Colonial law is one fact among others in the process of determining the line" (SHAW Malcom, YBIL 1996, op. cit., p. 129) also DEL MAR Katherine, op. cit., p. 424.

238 FRONTIER DISPUTE (BURK. FASO/MALI), op. cit., p. 568 para 30.

regime under international law, and which confirms the objectivization principle.[239] In this sense article 62 (2a) excludes the possibility to invoke a fundamental change of circumstances to terminate a treaty "if the treaty establishes a boundary". [240] A further confirmation (manifestation) of the attitude of the international community concerning the importance and preponderance of the stability of frontiers can be seen in the **non-applicability of the "tabula rasa" or "clean slate"** principle in the case of the boundaries of a successor state. Codified in the 1978 Vienna Convention on Succession of States in respect of Treaties the "clean slate" principle states that "*a newly independent State is not bound to maintain in force or to become a party to any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates*". The general understanding that the "clean slate" principle does not apply to boundary treaties, [241] affirms that that States place border stability above other values in International Law. "*The weight of both opinion and practice seems clearly to be in favour of the view that boundaries established by treaties remain untouched by the mere fact of a succession*."[242]

10.3.5 The critical date

In the case of Kyrgyzstan and Tajikistan, the determination of the critical date seems to be a case where the general rule concerning the establishment of the critical date applies. The critical date can most conveniently be set at the official date of the dissolution/collapse of the USSR in 1991. Since the dissolution of the Soviet Union and the gaining of independence has been a gradual process, with Kyrgyzstan reaching its official independence on August 31, 1991 and Tajikistan – on September 9, 1991, the question of the exact date of independence arises. According to Shaw in the case of more than one state being involved the first date of independence should be determinant.[243] In our case, however, even though the proclamation of independence of Kyrgyzstan and Tajikistan occurred mid-year at different moments of time, the official dissolution of the Soviet Union and the termination of the federal republic as a subject of international law has occurred only in December that year. On December 8, 1991, more precisely, a restricted number of member states decided to put an end to the federal state (Soviet Union) and on December 21, with the Alma Ata declaration, the other member states joined the agreement of the December 8 and the principle of intangibility of the frontiers was consolidated between all the member states.[244] Therefore as introduced above setting the critical date in December of 1991 seems most suitable for this case. Whether the date should be set on the 8th or 21st of December is barely of relevance since in that period of time no major events that would have shifted the border in disfavour of one of the parties have occurred. Following the dictum of the Court in the Case of Burkina/Faso Mali, in the absence of practical relevance of setting the critical date at a precise day, the question will not be evaluated further.[245]

10.3.6 Attribution of conduct to a state

To establish if state conduct has been manifested clearly this conduct must naturally also be attributable to the state. According to Parlett the customary rules of international law in relation to the attribution of conduct to a State in the context of state responsibility for internationally wrongful acts are applicable

[239] KOHEN Marcelo 1997, op. cit., p. 167, for a further principle linked to the matter (" quieta non movere "» see NESI Giuseppe, op. cit., pp.227 ff.).

[240] Vienna convention of the Law of treaties art 61 (1); in the opinion of Giuseppe NESI this article is a consequence of the codification of the principle of stabilty of internaional boundaries. (NESI Giuseppe, op. cit., p. 229).

[241] BRITISH YEARBOOK OF INTERNATIONAL LAW 1996, p. 89, and KOHEN Marcelo G., Possession Contestée et souveraineté territorial, p. 167.

[242] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1968, vol. 2, pp. 92-3 (cited in BYI 1996 ibid. 46)).

[243] SHAW Malcom, YBIL 1996 1996, pp. 130, 131.

[244] FUTURA-SCIENCE, "Qu'est-ce qui a provoqué la chute de l'URSS ?" [online], [accessed the 7.8.2022] and WEERTS Laurence, op. cit., p. 79.

[245] FRONTIER DISPUTE (BURKINA FASO/MALI), op. cit., ICJ reports 1986, p. 570.

(also for the purposes of territorial disputes).[246] The criteria can be found codified in the articles 4 to 8[247] of the International Law commission's articles on state responsibility:

1. The conduct of any state organ (Art. 4),
2. The conduct of persons or entities exercising elements of governmental authority (Art 5),
3. The conduct of persons acting on the instructions of, or under the direction or control of, a state (Art 8).

Also of relevance is Article 7 of the Vienna Convention on the Law of Treaties which states in its first paragraph that a person is considered representing a state if he/she produces appropriate full powers or it appears from the practice of the States concerned or the circumstances that their intention was to dispense that person with full powers. The second line clarifies that a certain group of persons such as the heads of state, of government and ministers of foreign affairs are by virtue of their functions considered to represent their states for all acts related to the conclusion of treaties. Tribunals have given different evidentiary weight to various levels of administration of a state in assessing whether a states' conduct establishes an exercise of effective sovereignty. For acts of private persons, they are attributable if the persons are empowered by the law of the state to exercise elements of governmental authority and act in that capacity in the instance.[248]

10.3.7 Effects of states conduct[249]

(Implicitly) manifesting will (consent) through conduct in respect to territory may give rise to:
Recognition – the conduct of one state may amount to recognition of the title of another, either by renouncing to its own title by way of recognition of the validity of another states' title, or by recognition or agreement to sovereignty being exercised now by another state.[250]
Acquiescence – may arise from an omission, meaning "*the absence of reaction*"[251] for example to another state's acts à titre de souverain on the territory of the state holding the legal title. It is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent (…)[to its exercise of state authority]".[252] Therefore, *"(…) [s]ilence may (…) speak, but only if the conduct of the other States calls for a response*"[253] For this it must be clear that a claim has been made by the other state and the title holder must have "*direct or constructive knowledge of it*". The acquiescence of the initial title holder is essential for the exercise of state authority to have legal effect, without it those acts are a mere usurpation (against the title).[254]
Abandonment – a state is free to abandon territory under its sovereignty and renounce the title by stopping to act as a sovereign (no explicit statement necessary) of the relevant territory or by acquiescing to the claim of another state to sovereignty. The territory then either falls under other states' sovereignty or becomes res nullius – often abandonment is coupled explicitly or tacitly with the recognition of the validity of another state's claim. – Abandonment of territory is, however, never presumed lightly and needs to be clearly manifested and proven. [255]

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246 PARLETT Kate, op. cit., p. 171 ff.
247 Articles 9 to 11 are also rules on attribution of conduct
248 PARLETT Kate, op. cit., pp. 173-174.
249 The Following section in its structure and reference of cases is essentially based on the Chapter of « state conduct in territorial disputes beyond effectivité" by PARLETT Kate, op. cit., pp. 178 ff. in the Research Handbook as well as the section "les formes du comportement de l'état (…)" in KOHEN Marcelo 1997, op. cit., pp. 276 ff.
250 PARLETT Kate, op. cit., p. 178.
251 Ibid. p. 180, KOHEN Marcelo 1997, op. cit., p. 293; the word "silence " refers to the absence of reaction. Inaction has to be considered in regard to the actions of another entity and does not automatically imply the expression of « tacit consent.
252 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America), Judgement, I.C.J. Reports 1984, p. 305, para. 130.
253 SOVEREIGNITY OVER PEDRA BLANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (MALAY./SING), Judgment, 2008 I.C.J. 12, 50 para. 121 (23 May).
254 PARLETT Kate, op. cit., pp. 180, 181.
255 Ibid. pp. 183–185.

Estoppel – is defined by the doctrine as follows: "*the rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit* (….)." The principle will not be addressed further, since "*the circumstances in which a state is precluded from subsequently altering its position by denying the truth of a prior statement are very limited*" according to Parlett.[256]

10.3.8 The institution of acquisitive prescription

Acquisitive prescription is a legal doctrine which may lead to the transfer of a title through the peaceful exercise of state authority over a territory, for a prolonged period of time, without a protest of the title holder.[257] Many scholars have argued in disfavour of the doctrine that seems to have "no practical purpose" in contemporary international law, since its role can be fulfilled by other existing legal mechanisms, namely consent. They refer to the fact that in case law, acquisitive prescription has been replaced by the concept of tacit consent. Through the other states' omission to react to a fact that requires a response it tacitly consents to the other states' exercise of sovereignty (acquiescence).[258]

10.3.9 Intertemporal law

The principle of intertemporal law states that legal acts and facts need to be examined in virtue of the legal framework that existed at that time and the future maintenance of the right must respect the evolution of law respect the evolution of law.[259]

10.3.10 The "human factor"

Considerations such as possession based on reason of **crucial human necessity (human factor)** or others have in principle no direct legal incidence.[260] Exceptions are cases of aqua et bono or reference to equity infra legem, or cases in which the parties have expressly agreed on those kinds of considerations.

10.3.11 Contiguity

The mere argument of contiguity of territory cannot be used to create a title to the territory in question.[261] (Enclaves cannot simply be integrated into one's territory, exclaves cannot simply be attached to one's territory).

10.4 Important Articles of the 1936 USSR Constitution[262]

> **ARTICLE 14.** The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest organs of state authority and organs of government, covers e) Confirmation of alterations of boundaries between Union Republics; f) Confirmation of the formation of new Territories and Regions and also of new Autonomous Republics within Union Republics.
>
> **ARTICLE 15.** The sovereignty of the Union Republics is limited only within the provisions set forth in Article 14 of the Constitution of the U.S.S.R.
> Outside of these provisions, each Union Republic exercises state authority independently. The U.S.S.R. protects the sovereign rights of the Union Republics.
>
> **ARTICLE 18.** The territory of a Union Republic may not be altered without its consent.

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256 Ibid. p. 186, also; Acceptance, Recognition, relinquishment or acquiescence often go hand in hand since the basis of all of them is the establishment of the expression of consent (p. 178).
257 KOHEN Marcelo, op. cit., p. 154.
258 Ibid. pp. 155, 156.
259 KOHEN Marcelo & HÉBIÉ Mamadou, op. cit., p. 31.
260 NESI Guiseppe, Research Handbook of International law, op. cit.., p. 215
261 ISLAND OF PALMAS/MIANGAS (NETH./U.S.), Award, 1928 II R.I.A.A., p. 854-855 (4 April).
262 SOVIET UNION, Constitution of the Union of Socialist Soviet Republics 1936.

10.5 Statements of official authorities or locals

A. Lamonov
Alamanov 2008; "*We never thought that we would have to undertake the same kind of work with our neighbours- Kazakhstan, Tajikistan and Uzbekistan. The experts who conducted the work of determining the line of our border with China said "well, we can get this work finished and then we can get on to other business" […] The same was true for heads of state. If you read through the documents form those early meetings of the heads of state [1992 – 1993] it is written there that we would not have any borders, we will not bother with any of that business [of changing borders] that we would keep the same community that we had in the Soviet Union. As a result, when we formulated our international relations with our neighbours it was written there that we would recognize the existing administrative territorial boundaries. We thought that would be enough to be able to live in our community without any kind of border problems*".[263]
On the delimitation and border management after independence from USSR. ~Alamanov ; Head of the Kyrgyzstan's committee for border delimitation and demarcation.

Ikbol Teshayev
"Dushanbe expressed its readiness to consider options for dividing the border according to later maps, but the Kyrgyz side is now insisting that delimitation and demarcation be carried out based on the fact of residence and use of land that was previously leased by the Tajik side to the Kyrgyz. It is on these very territories that the Kyrgyz are actively settle down, although by agreement of the parties, construction work in the disputed territories is prohibited."[264]
~ Ikbol Teshayev, spokesman for the Isfara city administration.

24.kg news agency
"*Vorukh is not annexed to Tajikistan in any map of Kyrgyzstan. This is mistake. We can provide all the maps of Kyrgyzstan, where not only Vorukh, but also other enclaves located on the territory of Kyrgyzstan are clearly outlined.*"
~ Deputy Director of the State Cartographic and Geodetic Service Abdymalik Murzaev.[265]

Radio Ozodi
"*In the late 1980s, during the leadership of Kakhkhor Makhkamov, on the basis of a document signed by the former chairman of the Council of Ministers of the Republic of Tatarstan Izzatullo Khayoev, the Kyrgyz side was allocated 350 hectares of land for temporary use, located between the jamaat of Khojai-A'lo and Vorukh. These lands have not yet been returned*" [266]
~ The Tajik parliamentary publication.

Kyrgyz proposals
"After that meeting, Tashiev made another big announcement. He gave Tajikistan a choice: either commit to renouncing claims to the territory around Vorukh, or exchange Vorukh for border land of the same geographical since somewhere else."[267]
"The main issue is the Vorukh enclave. We have passed two proposals to Tajikistan: The first is that we will legally measure the enclave's borders and it will no longer grow. But we will give the enclave a

[263] REEVES Madeleine "Border work", op. cit., pp. 25- 26.
[264] SARKOROVA Anora, op. cit., 16.5.2014.
[265] MASALIEVA Jazgul, "Sokh, Vorukh. What they look like on maps of Kyrgyzstan, Tajikistan, Uzbekistan" [online], 24.kg news agency, Bishkek, 23.11.2021.
[266] *РАДИО ОЗОДИ, "Как Хаёев отдал 350 га земель Воруха Кыргызстану?"[online], 24. 1. 2014,* [accessed the 6.8.2022]. (Radio Ozodi 24.1.2014).
[267] UMAROV Temur, "Are There Any Winners of the War on the Kyrgyz-Tajik Border?", Carnegie Endowment For International Peace, 19.5.2021.

road through our territory for use only, so they can come in. The second one is even tougher - we are ready to exchange the Vorukh enclave. If they give us the 12,000 ha enclave area, we are ready to give them 12,000 ha in other districts of Batken Oblast. We have even handed over a list of these plots. But so far the Tajik side has not responded," he said.[268]
~ Radio Ozodi, 26.3.2021

[268] САФАР Тохир, "Власти Кыргызстана предложили Таджикистану обменять Ворух на земли в других районах Баткена", Радио Озодин, 26.3.2021, (*Radio Ozodi, 26.3. 2021).*