CONCLUDING REMARKS

There does not seem to be very much in common between the relevant rules of French and German law except, to some extent insofar as they concern the calling of meetings, and derivative actions. Thus German law does not contain any provisions permitting a minority to object to the appointment of auditors, or to request the court to deprive shareholders who have been guilty of non-disclosure of their holdings, of their voting rights. Despite the provisions of paragraphs 131 and 132 AktG, German shareholders in public companies do not appear to enjoy the extensive rights to information and documents enjoyed by their French counterparts. Shareholders in French public companies which are listed have still more extensive rights.

If the draft Fifth Directive on Employee Participation and Company Structure had been enacted, this would have resulted in the establishment of common rules for derivative actions in the EC Member States (see Articles 14 and 16 of the 1972 proposal). Such a development now seems unlikely, as owing to political opposition, work on the draft Fifth Directive has now been abandoned. This development should not deter the enactment of substantive rules governing the derivative action in states in which such rules do not exist. Such rules should, it is submitted be applicable to certain situations where directors have been negligent, as well as to breaches of their statutory and other duties.

Frank Wooldridge

Reinforcing territorial regimes: *Uti possidetis* and the right to self-determination in modern international law

by Steve Allen and Joshua Castellino

INTRODUCTION

Although the doctrine of *uti possidetis* finds its origins in the *jus civile* of Roman law, it was transposed into international law to facilitate the creation of new states during the decolonisation of Latin America and subsequently Africa. In its modern form the doctrine provides 'that new States will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power' (Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 BYIL, 1996, 76, 97). For present purposes, the utility of *uti possidetis* lies in the fact that it provides an excellent illustration of the tension existing within modern international law between the evolution of the right to self-determination and the entitlement of states to protect their territorial integrity and retain exclusive jurisdiction in domestic matters.

By way of introduction, the article will briefly discuss the right to self-determination and the problems it poses for the international state system. Against the backdrop of African decolonisation it will then examine the ramifications of *uti possidetis* for self-determination in an attempt to decipher the key priorities of the current international system. Finally, the article will seek to assess the validity of the recent extension of *uti possidetis* to non-colonial situations and the resonance of this development for modern international law in general.

1. Self-determination and existing territorial regimes

One theory of self-determination considers the state to be merely the political manifestation of its constituent nation (or people). This interpretation allows a nation to recreate its political form in the light of national developments to ensure that the political unit (the State) and the nation remain congruent. Underpinning this approach is the claim that a nation or people of a given territory have the right to decide the nature and form of their own political identity. However in practice the

exercise of the right has been extremely problematic not least because it challenges the structure of existing states.

Historically, the notion of the State has been characterised by the doctrine of territorial sovereignty and consequently the doctrine has become one of the founding norms of the international state system. According to Judge Huber in the *Island of Palmas Case* 2 RIAA (1928) 829, 838:

> *"Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of the State."*

Further, traditional notions of statehood persist in modern international law assisted by Article 2(7) of the UN Charter, which provides that neither the UN itself nor states have the right to interfere in the internal affairs of another state. Thus, statehood remains heavily reliant on the idea of exclusive territorial competence. Unsurprisingly states have jealously guarded their territorial integrity and have been reluctant to accede to dismemberment at the hands of separatist movements sustained claims to self-determination. Separatism therefore has generally been perceived as a domestic matter beyond the scope of international regulation.

Despite the recognition of the right to self-determination in numerous international instruments, the inherent threat posed to the present international system by secession has meant that the content and application of this right remains controversial. Clearly the unrestricted exercise of the right could lead to situations of perpetual secession where existing states are subject to constant demands for territorial adjustment in order to realize the congruence of state and nation. Indeed the possible creation of thousands of micro-states in this regard would be extremely disruptive to the structure of the international system and the viability of states in general.

Although a *prima facie* right to self-determination is undoubtedly established in modern international law, the international community has generally been un-supportive of the right outside the confines of decolonisation. It is therefore clear that a tension exists at the heart of the international system between the legitimate exercise of the right to self-determination and the maintenance of the territorial integrity of existing states which underpins the present international order and provides a degree of peace and security in international relations. In the circumstances, it is suggested that *uti possidetis* provides a useful lens through which to study the operation of this fundamental conflict and its wider significance for modern international law especially in light of the fact that it was through this doctrine that the physical parameters of many post-colonial units were determined.

2. Uti possidetis *and the process of modern decolonisation*

During the process of African decolonisation it was thought that the swift withdrawal of colonial powers would lead to continent-wide anarchy. Thus the dilemma faced at this juncture was either to allow re-negotiation of the territorial boundaries of existing colonial entities, or to simply accept them and pursue development without the risk of fragmentation. The international community, led by the UN and the colonial powers themselves decided to give precedence to the demands of international order over other legitimating factors such as ethnicity, group affiliation or cultural identity. This view was accepted at the time by the Heads of African States and was considered a founding principle of the Organisation of African Unity (now the African Union). In Africa therefore it was decided to choose the departure of the colonial ruler as the 'critical date' after which the physical dimensions of the post-colonial state would be considered crystallised. This was achieved by allowing the transition from colonialism to independence to proceed on the understanding that the territorial parameters of the old colonial entities would be transformed into the international boundaries of the new post-colonial states, an approach justified by reference to the doctrine of *uti possidetis*.

In this context it was claimed that the doctrine merely respected the *de facto* situation that existed prior to the departure of the colonial ruler. Thus colonial lines were invested with the sanctity of permanence with no alterations permissible except with the consent of the newly emerging states. For their part, African political elites largely trained in Western political theory, were prepared to accept existing colonial boundaries on the attainment of national independence as an acceptable manner in which to maintain order but also to quell separatist threats arrayed against their newly forged states. This decision found its juridical roots in the doctrine of *uti possidetis* and is manifest in Article 3(3) of the OAU Charter and Resolution 16(1) of the OAU Cairo Declaration (1964).

Since the nature of colonialism had not allowed for the grooming of non-colonial successors primed for the smooth transition of power, it was believed that the newly emerging states were vulnerable to external and internal interests which might seize power in the aftermath of independence. Thus in the interests of order, it was thought the emerging states would need the support of the international community until they could gain experience in the art of Statecraft. In this regard, *uti possidetis* succeeded in keeping irredentist neighbours at bay while the fledgling state was allowed to consolidate itself. Internally, political minorities were restricted to working within the existing state structure in order to advance their interests. It was hoped that this would encourage them to participate in political processes of the post-colonial state rather than disruptively promoting secession. While this order was threatened from time to time, most dramatically

in Biafra in the 1970s, the overarching support for colonial boundaries prevented the OAU from assisting such 'separatism'.

Nonetheless *uti possidetis* encountered numerous problems when applied in the African context. In essence this was due to the nature of the boundaries erected by colonial rulers which had led to the creation of artificial entities across the entire continent. Colonial boundaries were largely drawn in ignorance of historical, geographical and social factors, often placing antagonistic tribes within the same colonial entity. In many cases, colonial boundaries had been drawn merely to restrict the territorial influence of one colonial power at the expense of another colonial rival. Accordingly, in relation to decolonisation, a major flaw of *uti possidetis* was that it facilitated the creation of new states without considering the ramifications of this process for the identity of the peoples affected. The doctrine ultimately validated the actions of metropolitan officials who have shaped the identities of numerous African peoples by determining the territorial parameters of colonial entities. In 1890 Lord Salisbury accurately portrayed the nature of colonial acquisition when he said:

> *"We [the colonial powers] have engaged … in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were."* (Quoted in J.E. Flint, *Sir George Goldie and the Making of Nigeria*, 1960, 166.)

Clearly the situation presented on decolonisation gave the African peoples no choice but to exist within territorial regimes created for them. In an attempt to promote political cohesion, reference was made to the theory of state nationalism which asserted that any differences between the constituent populations contained with the post-colonial entity could be subsumed at the altar of the sovereign state by a process of 'nation-building'. However, while under the colonial influence, strong unrepresentative government had prevented group divisions from arising, with that force gone, latent differences began to re-surface with serious consequences. Indeed post-colonial peoples often found themselves living within the boundaries of a given state with only two things in common. First, that they had been under the same colonial ruler, and secondly, that they existed on a territory deemed by that ruler to constitute the territory of the post-colonial state.

Clearly in asserting *uti possidetis* the international community brought a new rigidity to the issue of international boundaries that affects the very concept of the 'national'. The doctrine evidently forecloses questions of legitimacy; restricting them to a purely territorial basis, in precedence over other legitimating factors such as ethnicity, tradition, linguistics, religion, ideology or history. In addition, by allowing the only exception to rest on the consent of states, *uti possidetis* acts on the unsound premise that the only entities entitled to participate in the process of boundary re-alignment are states. In this sense it reinforces the statist view that international personality only extends to the colonial entity or the post-colonial state with 'colonial' in both cases being restricted to European domination of non-European populations.

Against this background it is submitted that *uti possidetis* presents three main problems. First it critically alters the right to self-determination in modern international law. Judge Dillard classically illustrated the thrust of self-determination in the *Western Sahara Case* when he said that:

> *"it is for the people to determine the fate of the territory and not the territory the fate of the people."* (*ICJ Reports*, 1975, 12, 116.)

However, by contrast, *uti possidetis* seeks to settle different peoples within a fixed territory and treats the need for territorial order as being more important than the identity of a people. Thus according to the rationale of *uti possidetis*, self-determination can only operate within the caveat of territorial order.

Secondly, the manner in which *uti possidetis* 'stops the clock' and freezes the territorial regime on the departure of the colonial ruler suggests an extremely static view of history. Thus in the decolonisation process one particular moment in time is considered 'critical' and all the political processes that follow are subjugated to this defining moment. While European boundaries have evolved over the centuries often through the use of force, boundaries in Africa are deemed settled, based on a specific reading of history with modern norms against the use of force, preventing the territorial regime from self-adjusting. As a result artificial colonial entities developed to provide 'order' were deemed superior to pre-colonial identities.

Thirdly, it can be argued that with respect to its prime aim (the preservation of order) *uti possidetis* is beginning to falter. While it did provide vital order on the attainment of independence, a selection of separatist movements, including the attempted secession of Biafra (Nigeria), similar action in Katanga (Congo) and the secession of Eritrea from Ethiopia when combined with the Moroccan occupation of Western Sahara and the continuing irredentist claims of Somalia in respect of Ethiopia and Kenya indicate that the order created by *uti possidetis* has been somewhat limited. Further, as we shall see in the next section, it is arguable that the doctrine has out-lived its usefulness and perhaps now threatens the very 'order' it sought to preserve in the first place.

From a broader perspective, it is apparent that the number of conflicts wherein groups seek to enforce their right to self-determination has been steadily on the increase. These movements are based on what Thomas Franck calls 'post-modern tribalism' ('Post-modern

Tribalism and the Right to Secession', C. Brolmann *et al*, *Peoples and Minorities in International Law*, 1993, 3) whereby such groups seek to break-up existing states in a bid to constitute uni-ethnic, uni-national states in accordance with their historical claims. A pertinent example of the rise of this phenomenon and its implications for the principles of territoriality can be found in the break up of the former Yugoslavia.

3. *The wider application of* uti possidetis

Although problematic in its application to Africa, *uti possidetis* came to be perceived as being conducive to the order cherished by the international community. The next stage in its development came when international order was again threatened by separatism in the form of the unravelling of East European socialist states in the wake of the Cold War. In the break-up of the Soviet Union, Yugoslavia and the 'Velvet Divorce' between the Slovak and Czech republics, modern international law took the opportunity to reinforce the doctrine of *uti possidetis*. In particular during the conflict within the Socialist Federal Republic of Yugoslavia in 1991/1992, the EC Arbitration (Badinter) Commission was established to monitor developments within the Yugoslavian Republics. In so doing it assessed the importance of *uti possidetis* outside the colonial context.

In its first Opinion the Commission decided that Yugoslavia was in the process of breaking up and that the changing situation must proceed in accordance with the tenets of modern international law. If deemed applicable to this situation, *uti possidetis* would demand that the previous administrative boundaries of the federal state of Yugoslavia be maintained and given legitimacy as international frontiers. In its second Opinion, which concerned self-determination and the protection of minorities, the Commission addressed the question of *uti possidetis* directly expressing the view that it had been accepted as a general principle of international law:

> *"The Commission considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis *juris) except where the states concerned agree otherwise."* (92 ILR, 1992, 168.)

This statement arguably indicates that the right to self-determination is evidently subordinate to the notion of territorial integrity and the need for international order. This position appears to be reasonable since the doctrine seeks to create the preconditions for the maintenance of order during a time of transition. Nevertheless there were significant differences between the operation of *uti possidetis* in the decolonisation process and its application to the dissolution of the former Yugoslavia. State dissolution must be distinguished from the situations where entities suppressed by colonialism gained their 'independence'. In such cases the colonial power attacked and forcibly occupied territories without the consent of the constituent populations. Clearly the application of concepts pertinent to the achievement of 'independence' to a process of state dissolution is inherently flawed.

In addition, the tone of the second Opinion suggests that the doctrine of *uti possidetis* has already been accepted in state practice and tied to the process of state recognition. This presents the operation of the doctrine in Africa as being uncontroversial and suggests that despite the relatively short period of time that has elapsed since decolonisation, *uti possidetis* may have entered into the annals of customary international law by virtue of those events. This would represent an extremely simplistic view with regard to the formation of international custom since the thresholds of *opinio juris* and consistent state practice have not been satisfied in this respect.

In order to fully understand the Commission's interpretation of *uti possidetis* we also need to consider Opinion No.3, which established the so-called, the 'Badinter Principles' namely:

- Respect for external frontiers
- Alteration of frontiers only by consent
- Transfer of former administrative boundaries into international frontiers via the doctrine of *uti possidetis*.

This Opinion confirms that in modern international law, international frontiers must be respected. This view is strongly supported by international jurisprudence as an extension of the notion of territorial sovereignty. The only way in which state sovereignty can be guaranteed is if its exercise is contained within fixed and recognised boundaries. Undoubtedly, without such a premise the current system of sovereign states would be compromised with weaker states liable to occupation, annexation or control by stronger states to the detriment of international order. As a corollary, where alterations are deemed necessary, they require the express consent of the state parties involved.

However the real difficulty with the 'Badinter Principles' lies in the application of principles, developed in the context of colonial boundaries to the federal borders of the former Yugoslavia. To merely sanctify existing administrative lines as international frontiers is highly problematic since this suggests that modern international law protects administrative boundaries as international frontiers as a matter of right. Thus the fundamental flaw in this approach must rest on a failure to recognize that the modern interpretation of *uti possidetis* was developed in relation to decolonisation rather than in reference to the break up of states.

The Commission decided that while *uti possidetis* was initially applied in settling decolonisation, it was now recognized as a general principle of modern international law. The ostensible justification for the application of *uti*

possidetis to the former Yugoslavia is founded on the ruling of the ICJ in the *Frontier Dispute Case, ICJ Reports* (1986) 554, 565 which held that:

> *"… [*uti possidetis*] is not a special rule which pertains solely to one specific system of international law. 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 …"*

However, this case concerned outstanding issues arising from decolonisation. The two protagonists, Burkina Faso and Mali, were successor states to French colonial regimes. It appears that when quoting from the case the Commission was extremely selective in excluding the specific reference to decolonisation. In the same sentence, the judgment goes on to limit the potential scope of *uti possidetis* by providing that its purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles:

> *"… provoked by the challenging of frontiers following the withdrawal of the administering power."*

The situation in Yugoslavia was clearly not one caused by the withdrawal of an administering power. Accordingly the difference between the two situations is manifest by the essential distinction between the process of state dissolution and secession.

In its first Opinion, the Commission indicated that the territory of the former Yugoslavia was in the process of dissolution. It is evident that when a new state emerges through a process of secession, the Parent State continues to exist after the separation. However, if new states arise through a process of state dissolution, the former state ceases to exist. If what transpired in the former Yugoslavia amounted to secession then after the series of 'secessions' by the republics of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia, the Socialist Federal Republic of Yugoslavia would continue to exist as the Parent State (albeit territorially reduced) with its international personality intact. In short, a chain of secessions would allow the remaining republics of Serbia and Montenegro to constitute the (Parent) state of Yugoslavia. However, it is submitted that the preferable view is that the secessions of Slovenia and Croatia initiated a process of dissolution which signalled the end of the Socialist Federal Republic of Yugoslavia, thus leaving Serbia/Montenegro (which later renamed themselves the 'Federal Republic of Yugoslavia') as an unrecognised political entity. The Commission through Opinions 8–11 clearly favoured the latter view and the international community was supportive of this interpretation by requiring that the 'FRY' along with other former republics meet the criteria established by the EC and USA for the recognition of new states arising out of the former Yugoslavia (see the EC Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union and the EC Declaration on Yugoslavia 62 *BYIL* 1991, 559). In addition, it refused to allow the 'FRY' to automatically succeed to the Yugoslavia seat at the UN (Security Council Resolution 757, 1992).

The process of decolonisation may be classified as a dispute over territory since the boundaries set by the colonisers were not open to re-negotiation by the constituent peoples of the post-colonial states. However by contrast, the dissolution of Yugoslavia arguably presented a dispute over the implications of a particular identity for a given territory. Thus the claims of self-determination made by the Serbian enclaves in Croatia and Bosnia indicate that the question posed on dissolution was whether the possession of a minority identity was sufficient justification for the merger of a given territory with another in which the group would constitute a majority. The ostensible reason for this process arose from the fear that measures intended to protect minorities would be inadequate in the light of conditions on the ground. Consequently it was argued that the entire region of the former Yugoslavia should be reconstituted into uni-ethnic states in an attempt to avoid further ethnic conflict an attitude reflected in the Dayton Agreement.

Clearly in the former Yugoslavia the international community was unwilling to endorse the trend towards post-modern tribalism. However it is equally apparent that the undoubted existence of the *prima facie* right to self-determination has ensured that states cannot simply reinforce existing territorial regimes in the face of ethnic conflict as a matter of course. With states gravely concerned about the possibility of intra-state conflicts justified by reference to self-determination, it is imperative that modern international law reassess the relationship between the right to self-determination and its attendant doctrine of *uti possidetis* in order to develop a more equitable approach to the resolution of such territorial disputes.

In this context, if the Badinter Principles were accepted as representing a faithful interpretation of modern international law, federal states would be particularly vulnerable since the territorial dimensions would already exist by which secession or dissolution could proceed at the hands of separatist groups. Consequently, this development would not serve the interests of the federal state since by encouraging the participation of minority groups within its political structures it could be setting in place the very basis for its own demise. Thus if administrative lines are perceived as potential international boundaries the protection of minority rights could be seriously compromised as a result.

While the notion of territorial integrity represents a founding theme of the international state system, it is clear that its provisions apply strictly to states and not to the territorial integrity of sub-state units even if the state in issue is structured along federal lines. In addition, it is a

function of territorial sovereignty that states are allowed to modify their existing administrative boundaries. This does not affect international principles concerning the sanctity of boundaries and indeed, if *uti possidetis* was made applicable in such situations it would politicise the drawing of administrative boundaries and present a major incursion into the exclusive jurisdiction of states.

If a federal state can legitimately break up into republics with the same borders they had when components of the federal state, why are autonomous regions located within federal and unitary states not given similar rights (e.g. Kosovo)? It is suggested that rather than ensuring the order so cherished by the international community, *uti possidetis* actually sows the seeds of a greater disorder in the longer term. This is supported by the fact that the enforcement of rigid borders in a situation such as the former Yugoslavia could only result in more forced expulsions with peoples being required to realign themselves in the wake of new boundaries that have suddenly taken on greater significance than originally envisaged. The resultant transfers can be extremely harmful as evidenced by the transfer of Muslims and Hindus from India and Pakistan to each other respectively at the dawn of independence for British India in 1947. These instance highlights the consequential dangers posed by the re-definition of a multinational entity to reflect newly created territorial regimes. This presents a classic reversal of the interpretation given to self-determination by Judge Dillard in the *Western Sahara Case* when he said it is for the people to determine the fate of the territory and not the territory the fate of the people.

CONCLUSION

The Opinions of the Badinter Commission should not be seen as providing an accurate interpretation of the treatment of territory in modern international law. In particular, there is a fundamental difference between the withdrawal of an administering colonial power and instances of state dissolution as witnessed in the former Yugoslavia. It follows that the Commission's attempt to extend *uti possidetis* to non-colonial situations is of dubious validity and therefore liable to challenge. In such cases, blind adherence to *uti possidetis* is clearly problematic as in its current form the doctrine reduces complex questions national identity to a simple process of line drawing in the perceived interest of order. In so doing this approach fails to realize the potential harm that could result in the maintenance of an unjust and unstable order. This argument was first advanced in relation to international boundaries created on decolonisation, however the weaknesses inherent within the doctrine are even more glaring when transposed into the general canon of modern international law.

Evidently an unbridled right to self-determination causes great anxiety for states and threatens the existing international system. Nonetheless, adherence to a rigid set of territorial principles as exemplified by *uti possidetis* fails to address legitimate claims of self-determination and serves to fuel separatist activity in the longer term. It follows therefore that an international state system, which is not prepared to accommodate such valid claims sacrifices group identity and national development which provide the very conditions for enduring stability in favour of a momentary and fragile peace.

Steve Allen

Department of Law, Brunel University, UK

Joshua Castellino

Irish Centre for Human Rights, National University of Ireland, Galway, Ireland

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