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The role of the *uti possidetis* principle in the resolution of maritime boundary disputes

SUZANNE LALONDE

In the fall of 1993, I arrived at Cambridge University where I had the incredible good fortune to have Professor James Crawford as my thesis supervisor. It was Professor Crawford who first alerted me to the importance the principle of *uti possidetis* was increasingly having on the determination of boundaries and who convinced me of the need for further research into its legal status.

A rather obscure Latin American colonial principle, *uti possidetis* had been catapulted into the limelight the previous year by the Yugoslavia Arbitration Commission. In its third Advisory Opinion delivered in January 1992,[1] the Commission had recommended that the explosive issue of Yugoslavia's boundaries be resolved according to the *uti possidetis juris* principle: the internal boundaries dividing the former constituent republics should automatically become the international boundaries of the new States.[2] Elated by what seemed a clear and workable solution to an impossible problem, the international community proceeded to impose the 'binding' principle of *uti possidetis* on all the parties involved. A few short months later in the spring of 1992, five renowned international law experts,[3] relying heavily on the Badinter interpretation of *uti possidetis*, had assured the Quebec government that in the event of separation from Canada, Quebec could assume legal entitlement to its existing provincial boundaries.[4]

[1] Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No. 3 (Borders), International Law Reports, 92 (1993), 170.

[2] *Ibid.*, 172.

[3] The final opinion was drafted by Alain Pellet in close collaboration with the other four signatories: Thomas M. Franck, Rosalyn Higgins, Malcolm N. Shaw and Christian Tomuschat.

[4] Thomas M. Franck *et al.*, 'L'Intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté' in *Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté: Projet de Rapport* (Québec, 1992).

The question in Professor Crawford's mind as we discussed those new developments and which became the focus of my own PhD thesis, was whether these recent interpretations of the *uti possidetis* principle might not have exaggerated its legal status under international law. I therefore spent the next three and a half years examining the Roman origins of the *uti possidetis* principle, its manifestation in the law of war and peace, its colonial roots as well as State practice in the nineteenth and twentieth centuries, to try and clarify its true nature and evaluate its potential as a guarantor of international peace and stability. In devising my thesis plan after a few months of preliminary research, I made the deliberate choice of excluding from the scope of my enquiry the issue of *uti possidetis* and maritime boundaries.

My decision was largely founded on Judge Bedjaoui's arguments in his dissenting opinion in the *Guinea Bissau/Senegal* case militating against the extension of *uti possidetis* to maritime delimitations.[5] Such an opinion, coming from one the most qualified and tenacious supporters of *uti possidetis* as a legal norm for the determination of land boundaries in the colonial context, warranted in my opinion, the greatest deference. The Algerian jurist had been, after all, president of the Chamber of the International Court of Justice (ICJ) which had declared in the course of its decision in the 1986 *Burkina Faso/Mali* affair that *uti possidetis* was:

> 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.[6]

This dictum was later cited by the Badinter Commission in its Opinion No. 3 as authority for the proposition that *uti possidetis* had become a general principle of international law.[7]

Conscious of the strict word limit imposed by the Law Faculty, I reduced Judge Bedjaoui's careful and detailed arguments to a few short lines and presented them as a justification for my decision in the final paragraphs of the introduction to my thesis and the eventual book which was published in 2002 by McGill-Queen's Press:

> The issue of *uti possidetis* and maritime boundaries is not included in our enquiry, as the latter have their own distinctive character. Maritime

[5] *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, Reports of International Arbitral Awards, 20 (2006), 154.

[6] *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, ICJ Reports (1986), 565.

[7] Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No. 3, 172.

> territory is not subject to human occupation as such, nor do historical considerations generally have a strong impact in this area. Furthermore, the relationship between maritime boundaries and the principle of self-determination is of a different nature.[8]

In his dissenting opinion, Judge Bedjaoui had strongly emphasised the differences between the two domains (land and maritime), considering them 'to be manifest and irreducible', adding that the concept of sovereignty and its consequences such as territorial integrity did not have or *did not yet have* any relevance for maritime spaces.[9] Judge Bedjaoui, writing in 1986, could therefore not be entirely certain that his conclusion might not be called into question by future developments.

Over the course of the last few decades, the significance of maritime boundaries in international relations has been steadily growing as a result of the increasing territorialisation of marine spaces[10] and the development of new deep-sea technologies – processes, it must be readily acknowledged, well underway by 2002 when my thesis was published. As the International Law Discussion Group which met at Chatham House in February 2006 pointed out:

> An acre of sea may be worth more than an acre of barren land, especially if there is oil or gas on the subsoil or on the seabed. Therefore boundary-making is now a major task for coastal States and relatively few of them have a full set of maritime boundaries.[11]

Current overlapping claims and maritime disputes in various parts of the world involve such fundamental and sensitive issues as State sovereignty, sovereign rights and jurisdiction, title to valuable natural resources and economic sustainability and even questions of national pride and honour. For these reasons, they may also pose a real threat to international stability.

Thus, and mindful of Cicero's admonition that 'any man [or woman] can make mistakes, but only an idiot persists in his error', I feel compelled to take up the challenge which I set aside two decades ago and attempt to discover, whether, as Judge Bedjaoui speculated, *uti possidetis* has today become relevant for the determination of maritime spaces.

[8] Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal: McGill-Queen's University Press, 2002), 9.

[9] *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, 167, para. 34.

[10] Georges Labrecque, *Les Frontières maritimes internationales* (Montréal: Hamattan, Inc., 1998), 34.

[11] 'Methods of Resolving Maritime Boundary Disputes', Summary Document of a Meeting of the International Law Discussion Group at Chatham House (UK) on 14 February 2006, available at www.chathamhouse.org/publications/papers/view/108176.

Of course, the potential application of the *uti possidetis* principle to the maritime domain has been the subject of some scholarship[12] and it has been endorsed by international tribunals in a handful of cases. Yet some confusion remains as to the actual scope of application of *uti possidetis* in the maritime context. For instance, there has been some academic debate as to its role for the allocation of insular features and islands between claimant States.[13] Nesi[14] and Kohen,[15] for example, see no reason to distinguish insular from continental *terra firma* and do not consider that this type of situation concerns the possible extension of *uti possidetis* to maritime delimitations.[16]

Without a doubt, the critical *uti possidetis* question is what impact the principle can have in regard to pre-existing lines in the sea. However, as a consequence of the credo that 'land dominates the sea', States have attached vital importance to the ownership of land features out at sea because of the generous maritime claims they can generate, a strategy that has given rise to a number of acrimonious disputes around the world. As my aim is to continue the study which I began under the careful guidance of Professor Crawford – the assessment of what real or practical impact the principle of *uti possidetis* has played in the actual determination of boundaries – my investigation will include cases of disputed sovereignty over insular features and the possible effect *uti possidetis* may thus indirectly have on maritime delimitations.

Nearly all writers emphasise that the modern principle of *uti possidetis* was founded amidst the disintegration of the Iberian empires in South America. Sorel and Medhi, for example, declare 'it is in Latin America that *uti possidetis* was first officially baptized',[17] while De Pinho

[12] Giuseppe Nesi, '*Uti possidetis juris* e delimitazioni maritime', *Rivista di Diritto Internazionale*, 74 (1991), 534; Sánchez Rodríguez, '*Uti possidetis*: la reactualización jurisprudencial de un viejo principio', *Revista española de derecho internacional*, (1988), 121; Sánchez Rodriguez, 'L'uti possidetis: application à la délimitation maritime' in INDEMER, *Le Processus de délimitation maritime: étude d'un cas fictif* (Paris: Pedone, 2004), 303; Daniel Bardonnet, 'Frontières terrestres et frontières maritimes', *Annuaire français de droit international*, 35 (1989), 59–64; Marcelo G. Kohen, *Possession contestée et souveraineté territoriale* (Paris: Presses universitaires de France, 1997), 461–4; Constantine Antonopoulos, 'The Principle of *Uti Possidetis Iuris* in Contemporary International Law', *Revue hellénique de droit international* (1996), 45–8.

[13] Rodríguez, '*Uti possidetis*: la reactualización jurisprudencial de un viejo principio', 135–7.

[14] Nesi, '*Uti possidetis juris* e delimitazioni maritime', 539.

[15] M. Kohen, 'Le Principe de l'*uti possidetis* juris', Corso di stampa, par. II.2, quoted in Nesi, '*Uti possidetis juris* e delimitazioni maritime', 539.

[16] *Ibid.*

[17] Jean-Marc Sorel and Rostane Medhi, 'L'*Uti possidetis* entre la consécration juridique et la pratique', *Annuaire français de droit international*, 40 (1994), 13.

Campinos asserts that 'the principle of *uti possidetis* was born in Latin America'.[18] African State practice during the period of decolonisation is then inevitably considered by the majority of commentators, as the most significant application of the 'Latin American principle of *uti possidetis*'.[19] For this reason, the role of *uti possidetis* in the decolonisation of Latin America and Africa was at the heart of my thesis and will also be the focus of this chapter.

The starting point to this enquiry must be a clear and accurate understanding of the *uti possidetis* principle itself. In the first part of the chapter, I will therefore revisit my principal conclusions with regard to the practical contribution of *uti possidetis* to the determination of boundaries between the newly independent Latin American and African States and its status under international law.

The second part of the chapter will provide a brief summary of key international decisions in which the *uti possidetis* principle has been invoked as a relevant rule for the determination of maritime boundaries. As the entire edifice of *uti possidetis* as a general principle of international law rests on Latin American and African State practice in the decolonisation period, only cases involving States from those continents will be considered. Furthermore, only cases presenting the classic *uti possidetis* scenario have been selected: instances of maritime delimitation between two former colonies belonging to the same metropolitan power.

On the basis of this brief overview of relevant cases, I will consider whether my original conclusions with regard to the *uti possidetis* principle and land boundaries must be revised or whether my rather harsh assessment of the principle's track record is still defendable in the maritime context.

A The colonial *uti possidetis* principle

Calls to extend and apply the *uti possidetis* principle in maritime situations are based upon its purported success in the past in resolving conflicts over

[18] Jorge de Pinho Campinos, 'L'Actualité de l'*uti possidetis*' in Société française pour le droit international, *La Frontière* (Paris: Pedone, 1979), 95.

[19] See e.g. D. Bourjorl-Flécher, 'Heurs et malheurs de l'*uti possidetis*: l'intangibilité des frontières africaines', *Revue juridique et politique indépendance coopération*, 35 (1981), 812; Ian Brownlie (ed.), *Basic Documents on African Affairs* (Oxford: Clarendon Press, 1971), 360; A. O. Cukwurah, 'The Organization of African Unity and African Territorial and Boundary Problems: 1963–1973', *Indian Journal of International Law*, 13 (1973), 181; Boutros Boutros-Ghali, 'The Addis Ababa Charter', *International Conciliation*, 546 (1964), 29, among many others.

land boundaries, especially in colonial Latin America and Africa. Before joining the debate on the merits of a maritime *uti possidetis*, I feel it is essential to summarise my previous findings with regard to the actual impact of the principle in the colonial context.

As a result of my in-depth study of nineteenth-century Latin American State practice and breaking with the general doctrinal trend, I argued in my thesis that the *uti possidetis* principle had played neither a significant nor a particularly successful role in settling boundary issues between the new Iberian republics. References to colonial territorial units in early instruments represented the application of established rules on State succession and did not address the question of the precise location of the new international boundaries. Only once their independence had been consolidated, and international recognition had been extended, did the new States turn to the question of the precise delimitation of their mutual frontiers. And even in this limited role, *uti possidetis* had precious little impact because of theoretical and practical problems.

One of the most problematic aspects of the Latin American *uti possidetis* principle was the conflicting meanings it came to possess, particularly the Brazilian *uti possidetis de facto* formula and the Spanish American version, *uti possidetis juris*. According to Brazil's interpretation, the *uti possidetis* principle referred to actual and effective possession. Territorial limits were to be determined on the basis of what each State actually possessed at the time of independence. However, as interpreted by the Spanish American republics, *uti possidetis* constituted a rule of constructive possession. The territorial extent of each State was to be founded on royal titles and official Spanish colonial instruments granting a right of jurisdiction, a type of fictitious possession at the theoretical date of independence. In addition to these two dominant interpretations of the principle, State practice during the period of decolonisation also revealed a number of other alternative interpretations of the principle: for example, *uti possidetis* before independence;[20] *uti possidetis* of 1826;[21] *uti possidetis* of 1874;[22] *uti possidetis juris* of 1880.[23]

[20] Treaty of Peace, Friendship and Alliance between Ecuador and Peru, 25 January 1860, 50 *British and Foreign State Papers*, 1086.

[21] Political Constitution of the Republic of Costa Rica, 22 November 1848, 37 *British and Foreign State Papers*, 777.

[22] République Dominicaine, Haiti, 3 July 1895, 23 *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international* (2d), 79.

[23] Treaty between Colombia and Venezuela for submitting to Arbitration the Question of the Boundary between the two Republics, 14 September 1881, 73, *British and Foreign State Papers*, 1107.

It must be emphasised that the commitment to respect the colonial heritage found in all of the different Latin American versions of the *uti possidetis* principle concerned lines dividing units that the struggle for independence had already placed under the control of the new international actors. Indeed, the *uti possidetis* principle was never allowed to displace boundary lines established as a result of revolutionary activity, force of arms or unequal bargaining power.

In addition to competing interpretations of the principle, inconsistent State practice also prevented *uti possidetis* from having much of an impact in Latin America. Though the Spanish American Republics professed adherence to the *uti possidetis juris* principle, there is clear evidence that the Latin American Republics were inconsistent in their reliance on any given interpretation of the principle, choosing the particular version which, in a given dispute, most favoured their claim.[24]

A number of practical difficulties also severely curtailed the effectiveness of the *uti possidetis* principle in the colonial Latin American context. Many regions in Spanish America were unexplored and other parts were only vaguely known. Consequently, jurisdictional limits between the administrative units were often imprecise and, in certain areas, had not been fixed at all. Furthermore, in some of the more remote regions, the territory had in fact never been allocated to any particular unit. Thus, even in those fairly rare cases where the parties were able to agree on a precise and common definition of the principle and then to submit their dispute to international adjudication, decision-making bodies were in most instances unable to apply the principle because of insufficient information; the decisions were ultimately based on post-independence

[24] Peru, Venezuela and Bolivia each concluded a treaty with Brazil on the basis of the *uti possidetis de facto* – that is to say, on the basis of actual possession – yet on 25 January 1860, Peru concluded the Treaty of Peace, Friendship and Alliance with Ecuador on the basis of the *uti possidetis juris* formula. Similarly, the preamble of the 1881 treaty concluded between Venezuela and Colombia refers to the *uti possidetis juris* of 1880, while Art. 8 of the General Arbitration Treaty between Bolivia and Peru instructed the arbitrator to resolve the dispute in strict obedience with the principle of *uti possidetis* of 1810. See Lalonde, *Determining Boundaries in a Conflicted World*, 34–5. Kohen also notes: '[T]he notion of *uti possidetis de facto* . . . was invoked by Paraguay in its dispute with Bolivia over the *Chaco boreal*, by Guatemala in its frontier dispute with Honduras . . . and to a certain extent, by Salvador in the *Case concerning the Land, Island and Maritime Frontier Dispute*. All these theses have in common the fact of favouring the situation on the ground rather than juridical titles, in other words possession in relation to the right to possess.' Kohen, *Possession contestée et souveraineté territoriale*, 449–50.

effectivités or equitable considerations or by reference to natural geographical features.[25]

Therefore, despite many cavalier references to the 'Latin American' principle of *uti possidetis*, I argued that it was difficult to maintain that the nineteenth-century Latin American Republics had bequeathed to international law a clearly defined and consistently applied principle that could then serve as a precedent in other boundary disputes or that could elevate *uti possidetis* to the status of a general principle of international law.

In the period of independence, African leaders debated the principles of regional organisation, and in 1963 the Organisation of African Unity (OAU) was created. The outcome of the debate was the adoption of a general programme of African unity, but in practical terms this was to be based upon a unity of action between independent States. Article 3(3) of the OAU Charter affirmed every member's adherence to 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence'.[26] As an important aspect of the policy-making of this period, the members of the OAU, meeting in Cairo the following year, adopted a Resolution in which the Assembly of Heads of State and Government reaffirmed 'the strict respect by all member States of the organisation for the principles laid down in Article III, paragraph 3 of the Charter' and declared 'that all member States pledge themselves to respect the frontiers existing on their achievement of national independence'.[27]

As noted, many commentators have argued that this respect for boundaries inherited from the colonial past is simply the application in the African context of the Latin American principle of *uti possidetis*. Indeed, the Charter and the Resolution of the OAU are considered strong evidence that the *uti possidetis* had a major impact in the decolonisation of the African continent. One such commentator is Quéneudec: 'It was therefore possible to consider, from that time, that the Heads of State and of Government meeting in Addis Ababa in 1963 had defended "the principle of an African *uti possidetis*".'[28]

[25] See e.g. the discussion of the 1891 Colombia–Venezuela award rendered by Queen Regent Marie-Christine and the 1909 Bolivia–Peru arbitral award as well as other cases in Lalonde, *Determining Boundaries in a Conflicted World*, 41–51.

[26] OAU Charter (Addis Ababa, adopted 25 May 1963, entered into force 13 September 1963), 479 UNTS 39.

[27] Brownlie, *Basic Documents on African Affairs*, 361.

[28] Jean Pierre Quéneudec, 'Remarques sur le règlement des conflits frontaliers en Afrique', *Revue générale de droit international public*, 74 (1970), 70–1.

The Chamber of the International Court of Justice tasked with determining a sector of the Burkina Faso–Mali land frontier also shared this vision, declaring in its 1986 judgment that elements of *uti possidetis* were latent in many declarations made by African leaders 'in the dawn of independence'.[29] The Chamber emphasised at the outset that the *uti possidetis* principle was not a special rule pertaining solely to one specific system of international law:

> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.[30]

However, unlike the process in nineteenth-century Latin America, independence in Africa was a goal promoted by the UN Charter under Chapter XI and a right conferred by Chapter XII upon those territories within the international trusteeship system. This obligation to promote and support the self-government of the African colonies was subsequently confirmed by the Colonial Declaration.[31] An international legal framework was therefore in place to oversee the accession to independence of the African colonies. The right of self-determination, which was territorially defined and was thus granted to each colonial people as a whole, together with the principle of territorial integrity, which then protected the new State from internal and external claims, largely accounted for the maintenance of colonial boundary lines into the period of independence. In addition, as independence was conferred through acts of devolution, the *nemo dat* principle – that a sovereign entity can only relinquish as much territory as it actually possesses – would also have contributed to maintaining the policy of the territorial status quo in Africa.

In fact, no actual reference to the *uti possidetis* principle can be found in any of the official African instruments or pronouncements of the decolonisation period. Early calls to revise the arbitrary colonial lines[32] cast considerable doubt on the existence of a binding rule of international

[29] *Frontier Dispute (Burkina Faso/Republic of Mali)*, 565–6.
[30] *Ibid.*, 566. [31] GA Res.1514, 15 UN GAOR, Supp. (No. 16) 66, UN Doc. A/4684 (1960).
[32] The revisionist movement culminated in the resolution proclaimed by the All-African Peoples Conference held in Accra in December 1958, which called for the abolition or readjustment of colonial frontiers at an early date. A. C. McEwen, *International Boundaries of East Africa* (Oxford: Clarendon Press, 1971), 73.

law mandating the automatic transformation of administrative lines into international boundaries. And even once African leaders had agreed that the risks inherent in redrawing the map of Africa were too great, the solution adopted, which international law already provided, was to accept the boundary lines existing at the date of independence. However, this pledge to respect existing borders concerned the *de facto* colonial lines on the ground and did not entail referring back to legal instruments of the former colonial power to determine the legitimacy of those lines. Therefore, if African State practice was evidence of a commitment to the *uti possidetis* principle, it did not support the dominant *uti possidetis juris* version favoured by the Spanish American Republics. Howsoever described, the African status quo policy was never intended to create new legal obligations and simply reflected the rights and duties of States as defined according to well-established rules of international law.

A final disturbing aspect concerned claims that *uti possidetis* guaranteed the sanctity of African borders established by treaty between two distinct metropolitan powers.[33] This interpretation appeared to signal a misplaced belief that *uti possidetis* had become the incarnation of every principle and rule of international law bearing on the question of territory, for such boundaries were already protected by long-established and undisputed rules concerning State succession to treaties and fundamental change of circumstances. In the final analysis, and despite later interpretations, it did not appear as if African State practice in the period of independence had consecrated *uti possidetis juris* as a rule of customary international law 'connected with the phenomenon of the obtaining of independence wherever it occurred'.[34]

While African State practice and judgments of the International Court of Justice, particularly in cases such as *Burkina Faso/Mali*, might have conferred a normative status on the colonial *uti possidetis* principle, I argued that its status had been inflated. Though undoubtedly an influential rule for the determination of the international land boundaries of States that had emerged from the colonial rule of a single metropolitan power, *uti possidetis* was no more than a presumption as to the location of the boundaries of an entity which had achieved independence. It was

[33] See *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, 35, wherein the tribunal declared that in Africa, *uti possidetis* had a broader meaning 'because it concerns both the boundaries of countries born of the same colonial empire and boundaries which during the colonial era had already an international character because they separated colonies belonging to different colonial empires'.

[34] *Frontier Dispute (Burkina Faso/Republic of Mali)*, 565.

not a binding solution which could be imposed in advance of formal independence under the mantle of a customary rule of international law.

B A brief overview of some international decisions in favour of the application of the *uti possidetis* principle to maritime delimitations

Latin American State practice in the nineteenth century does not provide much of a context for an analysis of the role of *uti possidetis* in maritime delimitations. International norms regarding the maritime domain were embryonic and rights over maritime zones were considered very limited. This fact explains why Spain and Portugal did not include any references to their respective maritime zones in the principal treaties which divided the Latin American continent between them.[35]

Yet by virtue of a Royal Decree dated 17 December 1760, Spain did claim that its territorial waters off the coasts of Latin America extended for 6 nautical miles. There is also formal evidence that certain areas of the sea, like bays and estuaries, were historically considered by the Spanish Crown as being subject to a special regime. This was notably the case of the Gulf of Fonseca on the western coast of Central America. In the first round of the dispute between El Salvador and Nicaragua in 1917, the Central American Court of Justice declared that the Gulf constituted a historic bay:

> The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion – from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year of 1821 – then under the Federal Republic of the Center of America . . . and, subsequently, on the dissolution of the Federation . . . the States of El Salvador, Honduras and Nicaragua . . . incorporated into their respective territories . . . both the Gulf and its archipelago.[36]

The case, however, does not shed any light on the issue of pre-existing colonial maritime lines and their treatment by successor States or international judicial tribunals. Both parties in the course of their pleadings had

[35] The Treaty of Tordesillas of 1494, the Treaty of Madrid of 1750 (annulled in 1761) and the Treaty of San Ildefonso of 1777.

[36] *El Salvador* v. *Nicaragua*, Central American Court of Justice, Judgment, 9 March 1917, *American Journal of International Law*, 11 (1917), 700.

in fact recognised that no demarcation lines existed between them prior to their constitution as independent entities. Indeed, the Court concluded that, with the exception of a short line of division agreed to by Honduras and Nicaragua in 1900, the great majority of the waters of the Gulf had remained undivided.[37] Thus according to the majority, 'since it is true in principle that the absence of demarcation always results in community',[38] the three riparian States (El Salvador, Honduras and Nicaragua) were co-owners of the waters of the Gulf.[39]

In the *Beagle Channel arbitration* (1977) between Argentina and Chile, the Court of Arbitration was asked to determine sovereignty over Picton, Nueva and Lennox islands and to fix the maritime boundary in the area of the Beagle Channel. The award does consider the *uti possidetis* principle but only in its traditional role as a mechanism for the determination of ownership of certain tracts of land – in this case, islands, islets and rocks near the extreme end of the South American continent.

While both Argentina and Chile had formally recognised in their 1855 Treaty of Peace, Friendship, Commerce and Navigation 'as the boundaries of their respective territories those existing at the time when they broke away from Spanish dominion in the year 1810',[40] no attempt had been made to define what those boundaries were, including in the Beagle Channel. Rather, the two neighbours had agreed 'to defer the questions that have arisen or may arise regarding this matter in order to discuss them later'. Thus, for decades following their independence, the limits between the two former Spanish colonial divisions had remained uncertain. In fact, both Argentina and Chile had at various times relied on *uti possidetis* to claim most of the continent south of the Rio Negro and east of the Andes down to the far south.

The Court concluded that it was 'no part of its task to pronounce on what would have been the rights of the Parties on the basis of the *uti possidetis juris* of 1810' because those rights, whatever they might have been, had been overtaken and transcended by the regime deriving from the 1881 Treaty.[41] Indeed, with the exception of the limits of the two countries' respective claims in Antarctica, the boundaries between Argentina and

[37] *Ibid.*, 711. [38] *Ibid.*

[39] The Court excluded from the regime of co-ownership a marine league of exclusive ownership adjacent to the coasts of the parties' mainlands and islands. *Ibid.*, 716.

[40] Art. 39, Treaty of Peace, Friendship, Commerce and Navigation between Argentina and Chile of 1855, 49, *British and Foreign State Papers*, 1200.

[41] *Case concerning a Dispute between Argentina and Chile Concerning the Beagle Channel*, Award, 18 February 1977, Reports of International Arbitral Awards, 21 (1997), 82.

Chile had been fixed by the 1881 Treaty, Article III of which provided for the allocation of islands in Tierra del Fuego and in the vicinity of the Beagle Channel. Applying the literal method of interpretation and also taking into consideration the context and overall effectiveness of the Treaty,[42] sovereignty over the disputed islands was awarded to Chile. The Court then proceeded to draw a median line through the Beagle Channel, with some minor adjustments for reasons of coastal configuration, convenience and navigability.[43] Thus like a number of other boundary disputes in Latin America,[44] the Beagle Channel dispute was resolved on the basis of an existing treaty which reflected the will of the parties, and not as a result of the operation of the *uti possidetis* principle.

The 1992 decision of a Chamber of the ICJ in the *Land, Island and Maritime Frontier Dispute*[45] considers at some length the *uti possidetis juris* principle and has in fact come to exert the same kind of influence in the maritime context as has the *Burkina Faso/Mali* judgment in cases involving *uti possidetis* and former colonial land frontiers. For the purposes of this chapter, only the Court's reasoning with respect to the maritime issues submitted to it by the parties (El Salvador, Honduras with Nicaragua intervening) will be examined.

The Special Agreement concluded at Esquipulas (Guatemala) on 24 May 1986 between the Republic of El Salvador and the Republic of Honduras requested a determination of the legal status of the islands in dispute between the parties within the Gulf of Fonseca, which the Court identified as El Tigre, Meanguera and Meanguerita islands. It was El Salvador's claim that, on the basis of the *uti possidetis juris* principle, it should be recognised as the successor of the Spanish Crown in respect of all the islands in the Gulf.[46] It was also Honduras's contention that the only law applicable to the dispute was the *uti possidetis juris* of 1821. And the Chamber of the Court agreed with both parties as to the relevance of the *uti possidetis juris* principle:

[42] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Digest of International Cases on the Law of the Sea* (New York: United Nations, 2007), 14.

[43] *Ibid*., 146 and 216.

[44] See e.g. the influence of the Additional Arbitration Convention concluded between Peru and Ecuador on 15 December 1895 in Paul de Lapradelle, *La Frontière: étude de droit international* (Paris: Les éditions internationales, 1928), 85. See also Lalonde, *Determining Boundaries in a Conflicted World*, 58.

[45] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, 11 September 1992, ICJ Reports (1992), 351.

[46] El Salvador also relied upon the existence or display of sovereignty over the islands.

> The Chamber has no doubt that the starting-point for the determination of sovereignty over the islands must be the *uti possidetis juris* of 1821. The islands were discovered in 1522 by Spain and remained under the sovereignty of the Spanish Crown for three centuries. When the Central American States became independent in 1821, none of the islands were *terra nullius*; sovereignty over the islands could not therefore be acquired by occupation of territory. The matter was one of the succession of the newly-independent States to all former Spanish islands in the Gulf. The Chamber will therefore consider whether it is possible to establish the appurtenance in 1821 of each disputed island to one or the other of the various administrative units of the Spanish colonial structure in Central America.[47]

Recognising that in the case of the islands there were no land titles of the kind which it had taken into account to reconstruct the limits of the *uti possidetis juris* on the mainland, the Chamber declared that it could have regard not only to administrative and legislative texts of the colonial period, but also to 'colonial *effectivités*'.[48] However, after a brief consideration of the essential contentions of the parties on the historical basis of their respective claims, the Chamber was forced to conclude that the evidence was confused and conflicting and of no practical value:

> The Chamber considers it unnecessary to analyse in any further detail the arguments of each Party directed to showing that that Party acquired sovereignty over some or all of the islands in the Gulf by the application of the *uti possidetis juris* principle. It has reached the conclusion, after careful consideration of those arguments, that the material available to the Chamber, whether presented as evidence of title (as in the case of the *Reales Cédulas*) or of pre-independence *effectivités*, is too fragmentary and ambiguous to be sufficient for any firm conclusion to be based upon it.[49]

The Chamber felt it therefore had to proceed on the basis of the conduct of the parties in the period following independence as indicative of what must have been the 1821 position. It also decided that such evidence could be supplemented by considerations wholly unconnected with the *uti possidetis juris* principle, in particular, the possible significance of the same conduct, or the conduct of the parties in more recent years, as possibly constituting acquiescence.[50] Thus, and despite the Chamber's strong endorsement of the principle, *uti possidetis juris* as a rule of constructive

[47] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 558, para. 333.
[48] *Ibid.* [49] *Ibid.*, 563, para. 341. [50] *Ibid.*

possession ultimately had no impact whatsoever on the Chamber's final award of sovereignty over the three islands.

As for the legal situation of the waters of the Gulf of Fonseca, the Chamber indicated that it was 'necessary to enquire into the legal situation of the waters of the Gulf in 1821 at the time of succession from Spain; for the principle of *uti possidetis juris* should apply to the waters of the Gulf as well as to the land'.[51] However, in the very next sentence of its judgment, the Chamber acknowledged that no evidence had been presented suggesting that there was for these waters prior to, or at 1821, 'anything analogous to those boundaries of provincial sway, which have been so much discussed in respect of the land'.[52] In light of the absence of any maritime administrative boundaries at the time of inheritance, the Chamber confirmed the *ratio decidendi* of the 1917 judgment of the Central American Court of Justice.

The Chamber therefore declared that the Gulf was a historic bay and that its waters, except for a 3-mile belt, were historic waters subject to the joint sovereignty of El Salvador, Honduras and Nicaragua.[53] The Court also determined that the closing line should be the one referred to in the 1917 judgment (from Punta Ampala to Punta Cosigüina) and recognised by the three coastal States in practice.[54] Finally, the Chamber adjudged that given the tri-partite presence at the closing line, all three of the joint sovereign States had legal entitlements to ocean waters outside the bay.

On 10 October 2002, the International Court of Justice rendered its decision in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Equatorial Guinea intervening*.[55] The application filed by the government of the Republic of Cameroon in March 1994 referred to a dispute with the Federal Republic of Nigeria 'relating essentially to the question of sovereignty over the Bakassi Peninsula'. However, Cameroon further stated in its application that the delimitation of the maritime boundary between the two States had remained a partial one and that despite many attempts to complete it, the two parties had been unable to do so. In a bid to avoid further incidents between the two countries, Cameroon therefore requested the Court to 'determine the course of the maritime boundary between the two States beyond the line fixed in 1975'.

[51] *Ibid.*, 589, para. 385. [52] *Ibid.*, 589, para. 386.
[53] Division for Ocean Affairs, *Digest*, 24. [54] *Ibid.*
[55] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002), 303.

As the Court explained at the outset, the dispute between the parties as regards their land boundary fell 'within an historical framework marked initially, in the nineteenth and early twentieth centuries, by the actions of the European Powers with a view to the partitioning of Africa, followed by changes in the status of the relevant territories under the League of Nations mandate system, then the United Nations trusteeships, and finally by the territories' accession to independence'.[56] Indeed, while Nigeria had been a British colony for over half a century (1900–60), present-day Cameroon was initially a German colony. However, following Germany's defeat in World War I, the colony had been partitioned between the United Kingdom and France under a League of Nations mandate, with Britain's sector consisting of a strip bordering Nigeria from the sea to Lake Chad.

While the dispute might therefore be considered a classic case for the application of *uti possidetis* – the determination of a boundary between two former colonies belonging to the same metropolitan power – in fact, international treaties dating back to 1913 and the post-independence conduct of the parties were held to be the determining factors. Indeed the Court commented at the very outset that 'apart from the Anglo-German Agreements of 11 March and 12 April 1913 in so far as they refer to the endpoint of the land boundary on the coast, all the legal instruments concerning the maritime boundary between Cameroon and Nigeria post-date the independence of those two States'.[57]

After a detailed review of the arguments put forth by both parties,[58] the Court found that 'the Anglo-German Agreement of 11 March 1913 was valid and applicable in its entirety'[59] and that, as a result, it need not 'pronounce upon the arguments of *uti possidetis* advanced by the Parties in relation to Bakassi'.[60] Indeed, the Court concluded that the boundary between Cameroon and Nigeria in Bakassi was delimited by Articles XVIII–XX of the Anglo-German Agreement of 11 March 1913, and that consequently sovereignty over the peninsula lay with Cameroon.[61]

With respect to the delimitation of the maritime boundary between the parties, the Court declared that it was 'anchored' to the mainland in accordance with Articles XVIII and XXI of the said Agreement.[62] It then upheld the validity of the Declarations of Yaoundé II and Maroua, pursuant to which the Heads of State of Nigeria and Cameroon had in 1971 and 1975 agreed upon the maritime boundary between the two

[56] *Ibid.*, 330, para. 31. [57] *Ibid.*, 333, para. 38.
[58] *Ibid.*, 400–12, paras. 195–215. [59] *Ibid.*, 412, para. 217.
[60] *Ibid.* [61] *Ibid.*, 416, para. 225. [62] *Ibid.*, 429, para. 261.

countries from the mouth of the Akwayafe to a point G. As for the maritime boundary further out to sea, the Court essentially endorsed the delimitation method advocated by Nigeria.[63] It drew an equidistance line between Cameroon and Nigeria, declaring that in its view, such a line produced an equitable result. The Cameroon/Nigeria decision is therefore of interest only for the Court's refusal to equate respect for the provisions of an international treaty with the *uti possidetis* principle.

By a Notice of Arbitration dated 16 February 2004, Barbados initiated arbitration proceedings concerning its maritime boundary with the Republic of Trinidad and Tobago. No reference to the *uti possidetis* principle was made in any of the parties' pleadings or formal arguments, and it is also absent from the final award delivered on 11 April 2006.[64]

The maritime boundary between the two former British colonies was determined by the tribunal by reference to the equidistance/special circumstances rule. In arguing that the provisional equidistance line ought to be adjusted in the Caribbean sector, Barbados had relied upon three core factual submissions, including 'a centuries-old history of artisanal fishing in the waters off the northwest, north and northeast coasts of Tobago by Barbadian fisherfolk'.[65] In support of this contention, Barbados had adduced evidence showing that Barbadian fisherfolk had long-range boats and other equipment to enable them to fish off Tobago between the eighteenth and twentieth centuries.[66] The tribunal, however, ultimately ruled that the factual circumstances invoked by Barbados had not been proven[67] and consequently that the equidistance line ought not to be adjusted.

While it appears that there were no pre-existing maritime limits between the parties going back to colonial times which deserved consideration, *uti possidetis* might nonetheless have played a minor or supporting role. It is noteworthy that when invoking centuries-old artisanal fishing activities in the disputed sector, Barbados made no reference to British colonial administrative texts or *effectivités*. It may be that such colonial evidence was 'too fragmentary and ambiguous . . . for any firm conclusion to be based upon it' as the Court commented in its El Salvador/Honduras ruling.[68] Yet the complete absence of any reference to the *uti possidetis*

[63] Division for Ocean Affairs, *Digest*, 137.

[64] *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*, Decision of 11 April 2006, Reports of International Arbitral Awards, 27 (2008), 147.

[65] *Ibid.*, 184, para. 125. [66] *Ibid.*, 185, para. 127. [67] *Ibid.*, 221, para 265.

[68] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 563, para. 341.

juris principle either by the parties or the tribunal appears to cast some doubt on the purported status of *uti possidetis juris* as a binding rule of customary international law.

On 8 October 2007, the International Court rendered its decision in the *Case concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*.[69] The case concerned sovereignty over four islands beyond the territorial sea of the two parties and the delimitation of maritime areas between Nicaragua and Honduras in the Caribbean Sea.

The Court began by acknowledging that 'the principle of *uti possidetis* has kept its place among the most important legal principles' regarding territorial title and boundary delimitation at the moment of decolonisation.[70] This phrase and conclusion, borrowed from the *Burkina Faso/Mali* judgment, was then further emphasised by reproducing the key passage from that same case regarding the status of *uti possidetis* under international law: 'It is a general principle, which is logically connected with the phenomenon of 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.'[71] The Court also endorsed the Chamber's earlier finding that pre-eminence should be accorded to legal title over effective possession as a basis for sovereignty.[72] Finally, and quoting from the judgment in the *Land, Island and Maritime Frontier Dispute*, the Court stressed that '*uti possidetis juris* may, in principle, apply to offshore possessions and maritime spaces'.[73]

In deciding the question of sovereignty over the islands in dispute, the Court found that 'in order to apply the principle of *uti possidetis*

[69] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment, 8 October 2007, ICJ Reports (2007), 659.

[70] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 706, para. 151, quoting *Frontier Dispute (Burkina Faso/Republic of Mali)*, 567, para. 26.

[71] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 706, para. 151, quoting *Frontier Dispute (Burkina Faso/Republic of Mali)*, 565, para. 20.

[72] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 706, para. 152, quoting *Frontier Dispute (Burkina Faso/Republic of Mali)*, 566, para. 23.

[73] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 707, para. 156, quoting *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 558, para. 333 and 589, para. 386.

juris . . . it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces'.[74] To underline this key point, the Court again quoted from the Chamber's judgment in the *Land, Island and Maritime Frontier Dispute*:

> It should be recalled that when the principle of *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definitive answer to the appurtenance of marginal areas, or sparsely populated areas of minimal economic significance.[75]

This proved to be the case as the Court found that the parties had not produced documentary or other evidence from the pre-independence period which explicitly referred to the islands.[76] The Court therefore concluded that 'notwithstanding the historical and continuing importance of the *uti possidetis juris* principle so closely associated with Latin American decolonization, it [could] not in this case be said that the application of this principle to those small islands . . . would settle the issue of sovereignty over them'.[77] In fact, the Court was compelled to admit, despite its earlier sweeping endorsement, that 'the principle of *uti possidetis* affords inadequate assistance in determining sovereignty over these islands'.[78] The Court therefore ultimately had to rely on post-independence *effectivités* in awarding sovereignty over the disputed islands to Honduras.

As for the delimitation of the maritime areas, Honduras relied upon a Spanish Royal Decree dated 17 December 1760 which established that Spain's territorial waters extended for 6 nautical miles. It was Nicaragua's contention, however, that jurisdiction over the territorial sea fell to Spanish authorities in Madrid, not to local authorities. It insisted that the Spanish Crown's claim to a 6-nautical mile territorial sea said nothing with regard to the limit of this territorial sea between the Spanish provinces of Honduras and Nicaragua. And the Court agreed, stating:

> The Court further observes that Nicaragua and Honduras as new independent States were entitled by virtue of the *uti possidetis juris* principle to

[74] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 707, para. 158.

[75] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 708, para. 160, quoting *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 558–9, para. 333.

[76] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 708.

[77] *Ibid.*, 709, para. 163. [78] *Ibid.*, 710–11, para. 167.

> such mainland and insular territory and territorial seas which constituted their provinces at independence . . . It has not been shown however that the Spanish Crown divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea. Although it may be accepted that all States gained their independence with an entitlement to a territorial sea, that legal fact does not determine where the maritime boundary between adjacent seas of neighbouring States will run.[79]

Having found that the *uti possidetis juris* principle did not provide a basis for an alleged 'traditional' maritime boundary along the fifteenth parallel[80] and in light of the difficulty in identifying base points along the parties' mainland coasts, the Court proceeded to rely on the bisector method to define a single maritime boundary.

On 6 December 2001, the Republic of Nicaragua instituted proceedings against the Republic of Colombia in respect of a dispute between the two States concerning title to territory and maritime delimitation in the western Caribbean. Nicaragua asked the Court to adjudge and declare that it had sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys and also over Roncador, Serrana, Serranilla and Quitasueño keys insofar as they were capable of appropriation. Secondly, and in the light of its determination as to title over the features specified, the Court was asked to determine the course of a single maritime boundary between the areas of continental shelf and exclusive economic zones (EEZ) appertaining respectively to Nicaragua and Colombia.

In a judgment dated 13 December 2007 regarding preliminary objections raised by Colombia,[81] the Court held that it had no jurisdiction in regards to Nicaragua's claim to sovereignty over the islands of Providencia, San Andrés and Santa Catalina. The Court ruled that this question had been determined by the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua signed at Managua on 24 March 1928, by which Nicaragua had recognised Colombian sovereignty over the three islands.[82]

In regard to the remaining features in dispute, the Court held in November 2012[83] that Albuquerque and East-Southeast Cays as well as

[79] *Ibid.*, 729, para. 234. [80] *Ibid.*, 729, para. 236.

[81] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Preliminary Objections, Judgment, 13 December 2007, ICJ Reports (2007), 832.

[82] *Ibid.*, 861, para. 90.

[83] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Merits, Judgment, 19 November 2012, ICJ Reports (2012).

Roncador, Serrana, Serranilla and Bajo Nuevo islands and one feature (QS 32) on Quitasueño were capable of appropriation.[84] It then considered the effect of the 1928 Barcenas-Esguerra Treaty and the *uti possidetis juris* principle invoked by the two parties as sources of their title.[85]

Article 1 of the 1928 Treaty provided:

> The Republic of Colombia recognises the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan River, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognises the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago.

The Court was therefore compelled to first establish what constituted the San Andrés Archipelago. Unable to make a precise determination on the basis of the geographical location of the maritime features in dispute or on the historical records relating to the composition of the San Andrés Archipelago referred to by the parties,[86] the Court turned to the second basis of sovereignty invoked by Nicaragua and Colombia in the course of their pleadings: *uti possidetis juris at the time of independence from Spain*.

Nicaragua claimed that the Captaincy-General of Guatemala (to which Nicaragua was a successor State) held jurisdiction over the disputed islands on the basis of the Royal Decree of 28 June 1568, confirmed in 1680 by Law VI, Title XV, Book II of the Compilation of the Indies, and later, the New Compilation of 1744, which signalled the limits of the *Audiencia de Guatemala* as including 'the islands adjacent to the coast'.[87] It contended that it held original and derivative rights of sovereignty over the Mosquito Coast and its appurtenant maritime features based on the *uti possidetis juris* at the moment of independence from Spain.[88] Although, as a result of the 1928 Treaty, it had ceded its sovereignty over the islands of Providencia, San Andrés and Santa Catalina, this did not affect sovereignty over the other maritime features appertaining to the Mosquito Coast.[89]

For its part, Colombia claimed that its sovereignty over the San Andrés Archipelago had its roots in the Royal Order of 1803, which

[84] *Ibid.*, 19, para. 27 and 22, para. 37.
[85] It should be noted that Colombia also invoked *effectivités* as a source of title over the maritime features in dispute.
[86] *Ibid.*, 25–6, para. 53. [87] *Ibid.*, 26, para. 58. [88] *Ibid.*, 27, para. 59. [89] *Ibid.*

placed the Archipelago under the jurisdiction of the Viceroyalty of Santa Fé (New Granada). Colombia therefore argued that it held original title over the San Andrés Archipelago based on the principle of *uti possidetis juris* supported by the effective administration of the Archipelago by the Viceroyalty of Santa Fé (New Granada) until the date of independence.[90]

The Court however was quick to point out that with regard to the claims of sovereignty asserted by both parties on the basis of the *uti possidetis juris* at the time of independence from Spain, 'none of the orders cited by either Party specifically mentions the maritime features in dispute'.[91] The Court then proceeded to quote paragraph 333 from its 1992 Judgment in the *Land, Island and Maritime Frontier Dispute* which, as we have seen, it also highlighted in its Nicaragua/Honduras decision:

> [W]hen the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear or definite answer to the appurtenance of marginal areas, or sparsely populated areas of minimal economic significance.[92]

In the light of this reality, the Court was compelled to admit that the *uti possidetis juris* principle was of precious little assistance in resolving the dispute between the parties:

> In light of the foregoing, the Court concludes that in the present case the principle of *uti possidetis juris* affords inadequate assistance in determining sovereignty over the maritime features in dispute between Nicaragua and Colombia because nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to or upon independence. The Court accordingly finds that neither Nicaragua nor Colombia has established that it had title to the disputed maritime features by virtue of *uti possidetis juris*.[93]

The Court ultimately awarded sovereignty over the disputed islands to Colombia on the basis of post-colonial *effectivités*: 'It has thus been established that for many decades Colombia continuously and consistently acted *à titre de souverain* in respect of the maritime features in dispute.'[94]

[90] *Ibid.*, 27, para. 60. [91] *Ibid.*, 28, para. 64.
[92] *Ibid.*, quoting *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 559, para. 333.
[93] *Ibid.*, 28, para. 65. [94] *Ibid.*, 34, para. 84.

As for the determination of the single maritime boundary dividing the EEZs and continental shelves of the parties, the Court applied the three-part test it had developed in the *Black Sea* case.[95] Notwithstanding arguments by Nicaragua in favour of an alternative approach, the Court proceeded to draw a provisional median line, considered whether relevant circumstances militated in favour of an adjustment of that line, and finally tested the final result for any significant disproportionality.

C An assessment of the actual role of the colonial uti possidetis principle in the resolution of maritime boundary disputes

As a result of my review of relevant cases, it appears that, notwithstanding Judge Bedjaoui's compelling arguments in his dissenting opinion in the 1986 *Guinea Bissau/Senegal* case, international courts and arbitral tribunals have firmly established that '*uti possidetis juris* may, in principle, apply to offshore possession and maritime spaces'.[96] However, the precedents examined reveal the very real limitations of the *uti possidetis juris* principle. In fact, nearly all of the theoretical and practical difficulties which I identified in my thesis as hindering the effectiveness of *uti possidetis* for the determination of land boundaries between the former units of a single colonial power were also a factor in the maritime delimitations considered.

Certain theoretical uncertainties and contradictions continue to plague attempts to rely on the *uti possidetis juris* principle for the settlement of boundary disputes. For instance, in resolving the maritime dispute between Nicaragua and Colombia, the Court had first to establish a definitive meaning for the phrase '*uti possidetis juris* at the time of independence from Spain'. In the *Land, Island and Maritime Frontier Dispute*, despite recognising the '*uti possidetis of 1821* as the necessary starting-point for the determination of sovereignty over the disputed islands', the Chamber ruled that it had to take 'colonial *effectivités*' into account in reaching its decision. And yet, a consideration of actual and effective acts of possession is completely at odds with the task of establishing a formal right of

[95] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, Judgment, 3 February 2009, ICJ Reports (2009), 61.

[96] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 558, para. 333 and 589, para. 386 and also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, 707, para. 156.

ownership between the parties on the basis of official colonial instruments. It is, in effect, to rely on effective occupation to determine sovereignty and therefore to espouse the *uti possidetis de facto* formula rather than the mainstream *uti possidetis juris* principle.

The principal conclusion however which flows from this brief analysis of the cases is that practical difficulties – incomplete knowledge, ambiguous historical records – continue to prevent the *uti possidetis juris* principle from exercising any real or effective influence on the determination of boundaries.

The lack of any allocation of maritime areas between the various colonial units in all of the cases examined, while not surprising, certainly highlights the limited impact the *uti possidetis* principle will likely have on the delimitation of maritime boundaries. Indeed, while the ICJ in the *Land, Island and Maritime Frontier Dispute* appears to have decided that the *uti possidetis juris* principle could determine the legal status of marine areas, displacing the traditional equidistant-special circumstances method and its recent adjunct, the proportionality test, the absence of pre-existing colonial lines at sea makes this little more than an interesting theoretical possibility.

The strongest confirmation of my earlier conclusions is provided by the cases when sovereignty over islands was at issue. Even in this supporting role, as a key mechanism for the determination of ownership of insular features capable of generating substantial maritime claims, the *uti possidetis juris* principle had little or no influence. Indeed, despite ringing endorsements of the principle as in the *Nicaragua/Honduras* case – 'the principle of *uti possidetis* has kept its place among the most important legal principles regarding . . . boundary delimitation' – in practical terms, *uti possidetis* proved of little assistance to the courts and tribunals tasked with the peaceful settlement of the boundary disputes examined.

As McEwen notes: '[A] doctrine which attempts to crystallize, or maintain the *status quo* of, boundaries is little more than an abstract proposition unless there is a factual and tangible identification of the boundaries themselves.'[97] Therefore, and despite claims to the contrary, it appears fairly obvious that, in fact, *uti possidetis* as a means of establishing maritime boundaries has had and is likely to continue to have less than stellar success. Moore's assessment of the *uti possidetis* principle's influence remains as true today as when he wrote his influential article in 1944:

[97] McEwen, *International Boundaries of East Africa*, 28.

'It has not been so constantly invoked nor has its practical effect been by any means so important as writers and learned advocates have sometimes asserted.'[98]

[98] John Bassett Moore, 'Memorandum on *Uti Possidetis*: Costa Rica–Panama Arbitration 1911' in *The Collected Papers of John Bassett Moore*, 7 vols. (New Haven: Yale University Press, 1944), III, 344.