Self-Determination and Secession in International Law

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The Principle of *Uti Possidetis Juris*

How Relevant is it for Issues of Secession?

Anne Peters

Dans ses écrits, un sage Italien
Dit que le mieux est l'ennemi du bien.
Voltaire, *La Béguinée: Contes moraux* (Grasset et Comp. 1772).

I. Problématique

'Borders have always been drawn with blood.' This dictum is ascribed to the former Bosnian Serb military leader, Ratko Mladic, who is accused of being responsible for the massacre in Srebrenica and is currently being tried for war crimes, crimes against humanity, and genocide by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Obviously, the use of military force and bloodshed as an instrument to define state boundaries is outlawed by contemporary international law. Instead, the principle of *uti possidetis* was (selectively) applied to the dissolution of the Soviet Union and Yugoslavia in 1991 and 1992, namely to upgrade the boundaries of first-level territorial entities (Republics) of the former multilevel federal states to international boundaries of new states. The subsequent establishment of Kosovo in 2008 did not respect the boundary of the former Yugoslav Republic, Serbia.

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1 The author thanks Tigran Beknazaryan and Olivier Corten for valuable comments on the draft of this chapter.

2 Spiegel online (2011), 'Portrait of a Man Possessed: A Search for the Real Ratko Mladic': 'Mladic could still play the charmer when the cameras were on him. In his headquarters north-east of Sarajevo, he waxed and waned with SPIEGEL correspondent Renate Flotau. He answered her critical questions and his protests were muted when she spoke of human rights abuses: “Borders have always been drawn with blood.”' <http://www.spiegel.de/international/europe/portrait-of-a-man-possessed-a-search-for-the-real-ratko-mladic-a-784851-3.html> accessed 18 August 2013. Mladic is also quoted by Steven Rabin in 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1999) 90 AJIL 590.

3 For example, the preamble of the United Nations Security Council Resolution (UN SC Res) 713 (1991) para 8 states: 'No territorial gains or changes within Yugoslavia brought about by violence are acceptable.' See on Georgia UN SC Res 1065 (1996), para 3; Res 1808 (2008), para 1.
The question is what these events mean in law for territorial entities, such as Abkhazia, South Ossetia, Transdniestr (PMR), and Nagorno-Karabakh, claiming independence from their respective mother states, which are former Soviet Republics and all of which—except Georgia—are member states of the Commonwealth of Independent States (CIS). Does the international legal principle of *uti possidetis* apply to their boundaries? If yes, what would this principle demand?

In the current debate on contested territories in the CIS, commentators pointing to *uti possidetis* disagree on whether the principle is applicable or not. If it is applicable, it is unclear to which boundaries and to which not. Finally, observers draw quite different conclusions from any application or non-application of the principle. A first group (observers and interested parties alike) maintains that *uti possidetis* is inapplicable to current CIS member states (and was probably not even applicable to the dissolution of the Soviet Union). They draw the conclusion that a secession of territorial entities within former Soviet Union Republics is not hindered by that principle. The opposing view is that *uti possidetis* was and is applicable to all levels of territorial units of the former Soviet Union, which would mean that both the former Republics and sub-units within them could and can rely on that principle to upgrade their boundaries, transforming the former administrative lines into international boundaries. Importantly, with regard to the admissibility of the secession of territories within CIS member states, the application or non-application of *uti possidetis* does not make a difference under those two views: either *uti possidetis* may also privilege the boundaries of breakaway territories once secession has become effective, or it is not applicable at all.

A third group of observers favours the application of *uti possidetis*, but only with regard to the former Soviet Union's first level of administration. Farhad Mirzayev, in his chapter in this volume (ch 10) on Abkhazia, a breakaway region in Georgia, notably highlights that the constitutive parts of the former Soviet Union agreed to apply the principle of *uti possidetis* with regard to their boundaries and territories. According to Mirzayev, the main intention of the former Soviet Republics was to approve and strengthen the principle of *uti possidetis* but to use it only as an instrument to stabilize the newly independent states and to prevent further

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4. This seems to be Armenia's position on the region of Nagorno-Karabakh, which is situated within Azerbaijan but ethnically affiliated with Armenia. See Krüger, ch 11 (in this volume) 226: "The Armenian side... questions the application of the *uti possidetis* principle. It is said that the affiliation of Nagorno karabakh to Azerbaijan was conditioned exclusively by the formation and existence of the Soviet Union". See against the application of *uti possidetis* also the written statement of the USA on Kosovo in the Advisory Opinion Proceedings, note 128.

5. MG Kohen, 'Le problème des frontières en cas de dissolution et de séparation d'Etats: Quelles alternatives?' in O Court et al. (eds), Démembrements d'Etats et délimitations territoriales: L'uti possidetis en question(s) (Bruylant 1999) 365, 383. For a contextualized discussion of whether *uti possidetis* is transferrable to all at the boundaries in the former Soviet Union see O Luchterhandt, 'Grenzen in Mittelasien und uti possidetis-Prinzip: der Fall „Fergana-Tal“' in A Numberger und C von Gall (eds), *Bewusste Erinnerungen und bewusste Vergessen* (Mohr Siebeck 2011) 51, 58–60, 105–106. The author concludes that despite differences between classical colonialism and the Soviet Empire, and despite the quite uneven and variable status and legitimacy of internal Soviet boundaries, *uti possidetis* is applicable to the territory of the former Soviet Union.
fragmentation. The argument, hence, is that the former Republics' boundaries were upgraded by virtue of uti possidetis, and that this principle now sanctifies the new states' boundaries and prevents the secession of territories from them. This view is also endorsed by Krüger with regard to Azerbaijan (ch 11 in this volume). According to that view, neither Abkhazia in Georgia nor Nagorno-Karabakh in Azerbaijan can draw any support from uti possidetis for their claims to independence—quite to the contrary, uti possidetis works only in favour of the mother state. The result would be the same for a territory such as Transdniestria (PMR), which did not enjoy any specific administrative status within the former Soviet Republic of Moldova. Therefore, uti possidetis would not privilege its boundaries in any case. Nevertheless, in this volume, Bill Bowring seems to assume a right to self-determination by a kind of consolidation through 20 years of separation and predicts that the exercise of this right will lead to a special status within Moldova (ch 8). As far as South Ossetia (in Georgia) is concerned, Christopher Waters (ch 9) tends towards a denial of a right to secession of South Ossetia and records that the parties' positions on status are irreconcilable for the time being. He does not rely on uti possidetis but suggests abandoning the focus on status and rather concentrating on improvements for human's lives, on human rights, and on internally displaced persons.

In order to answer the question of the applicability of uti possidetis to secessions, we must first determine whether the past application of uti possidetis to the territorial realignments (or some of them) in the course of those two dissolutions (Soviet Union and Yugoslavia) was correct in legal terms or whether it violated international law. A third possibility is that the application was not fully covered by international law of the time (at the beginning of the 1990s), but that it constituted a practice which legitimately developed the law further. In that case, contemporary law as it stands now might hold a new and refined answer to the question of applying uti possidetis to the current territorial problems within the CIS.

II. A Brief Introduction to Uti Possidetis

Uti possidetis in international law is—in the words of the ICJ—'a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers...'. The term uti possidetis stems from Roman law, which knew an interdict of the Praetor by which the disturbance of the

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6 Mirzayev, ch 10 (in this volume) 203.  
7 Krüger (n 4) 225–227.  
8 See on this territory ch 8 in this volume by Bowring.  
existing state of possession of immovables, as between two individuals, was forbidden. The interdict evolved into an ancillary mechanism for the purpose of deciding which of the parties, as a possessor, should have the advantage of standing in the defensive in a litigation to determine ownership. The formula employed by the Praetor was: ‘Ut i eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri vetro’. The literal translation is: ‘As you possess the house in question, the one not having obtained by force, clandestinely, or by permission from the other, I forbid force to be used to the end that you may not continue to possess it.’\(^\text{10}\) The core is: ‘uti possidetis, ita possideatis’ (‘as you possess, so you may possess’).

When transferred to international relations in the nineteenth century, the meaning of *uti possidetis* was changed in two respects. First, it was no longer applied to private actors but to states, not to private immovable property but to state territory. Second, *uti possidetis* no longer operated as a merely procedural and provisional shift of the burden of proof or a mechanism of standing, but denoted a definitive status.\(^\text{11}\) The creative adaptation of the principle is just one example of the transfer of Roman (private) law concepts to interstate law which gave rise to the characterization of classical international law as ‘private law writ large’, to use the words of Thomas Holland.\(^\text{12}\) The curious aspect is that *uti possidetis* entered international law at a time when its ‘fundamental object, in private law, of preventing and invalidating the use of force, no longer existed’ in international law.\(^\text{13}\) In contemporary international law, however, *uti possidetis* once again has the purpose of securing the fundamental international prohibition of forcible transfers of territory. In our times, *uti possidetis* has reverted to its primary purpose, so that international *uti possidetis* is currently closer to its Roman original than when it was first transferred to international law.

The first important application of the internationalized *uti possidetis* occurred in Latin America. In the second half of the nineteenth century, when the Spanish colonies declared themselves independent, they adopted a principle which they called *uti possidetis juris* of 1810. It denoted the upgrading of colonial boundaries to international boundaries. One arbitral award on *uti possidetis* was handed down in 1922 by the Swiss Federal Council (the Swiss government), called upon as an arbiter in a boundary dispute between Columbia and Venezuela.\(^\text{14}\) This award qualified *uti possidetis* as a ‘principle of constitutional and South American international law’.\(^\text{15}\)

\(^\text{10}\) This exposition of the Roman origin is based on John Bassett Moore, *Memorandum on Uti Possidetis Costa-Rica Panama Arbitration* (Bancroft Library 1911) 5–8, who also gives the formula and the translation.

\(^\text{11}\) J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (Beck’sche Buchhandlung 1868), para 715.


\(^\text{13}\) Moore (n 10) 8.

\(^\text{14}\) Swiss Federal Council (Bundesrat), *Affaire des frontières Colombo-Vénézuéliennes* (24 March 1922) 1 RIAA 223.

The Principle of *uti possidetis* Juris

In Africa, *uti possidetis* has been applied since around 1960. The leading case is the ICJ Chamber Judgment of 1986 concerning Burkina Faso and Mali, two former French colonies. Here the Court stated that *uti possidetis* meant to upgrade former colonial delineations to international boundaries. The meaning of *uti possidetis*, according to the ICJ, is 'pre-eminence accorded to legal title over effective possession as a basis of sovereignty... The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved'. The function of *uti possidetis* is to secure '[t]he essential requirement of stability in order to survive, to develop and gradually to consolidate their [the new states'] independence in all fields.' That judgment was confirmed by the plenary Court in 2007 in a boundary dispute between Nicaragua and Honduras which involved two former Spanish colonies.

In 1991 and 1992, the Badinter Commission pronounced itself on *uti possidetis* in the context of the dissolution of Yugoslavia. Opinions No. 2 and 3 expressed that the prime principle to define a boundary is the agreement between the involved states, thus the consent principle. *Uti possidetis* applies, according to the Badinter Commission, only as a fallback rule. The wording of these Opinions is quoted at p. 131, where the residual character of *uti possidetis* will be discussed.

III. The Normative Quality of *Uti Possidetis*

1. Customary and contractual *uti possidetis*

We must first identify the legal source of the principle of *uti possidetis*. In which legal shape can it be applied? Both the ICJ Chamber and the Badinter Commission have called *uti possidetis* a 'general principle'. *Uti possidetis* cannot be a 'general principle of law recognized by civilized nations' in the sense of Art. 38 (1) lit (c) ICJ Statute because *uti possidetis* has not been transferred from domestic to international law. *Uti possidetis* is a genuine international law concept, although it is

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16 Organization of African Unity (Assembly of Heads of State and Government) 'Border disputes among African states' (Cairo 17–21 July 1964) Res AHG/RES 16 (I) para 2: 'The Assembly of Heads of State and Government meeting in its First Ordinary Session in Cairo...solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.' The Decolonization Resolution did not expressly stipulate *uti possidetis* but rather its twin principle of territorial integrity: UN General Assembly Res 1514 (XV) (14 December 1960) para 6: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

17 Frontier Dispute Case (Burkina Faso v Mali) (n 9) notably paras 20–6.

18 See the Court's definition of *uti possidetis* at p. 97, with n 9.

19 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 23.

20 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 26.

21 Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea [2007] ICJ Rep 659 paras 151 ff.

22 Frontier Dispute Case (Burkina Faso v Mali) (note 9) para 20; Badinter Commission, Opinion No. 3 (11 January 1992) para 3, third principle.
also enshrined in some national constitutions of Latin America. This means that *uti posidetis* might be, first, applicable as a customary law principle. Second, it could be applied to a given territorial rearrangement by virtue of an agreement. The first type of application is general, whereas the second type of application is specific: the agreement relates to a concrete case and it is only opposable to an actor who agrees. The two types of applicability can coexist, because the agreement to apply *uti posidetis* to a situation does not need to be constitutive but can also be merely declaratory. In the latter case, it simply manifests an *opinio juris* concerning an already existing customary norm.

The agreement to apply *uti posidetis* can be explicit or implicit. An implicit agreement can lie in the simple act of applying the principle.23 Historically, in Spanish America and in Africa, both the colonial powers and the colonies among themselves agreed to apply *uti posidetis*. In the words of the ICJ: ‘Indeed it was by deliberate choice that African states selected, among all the classic principles, that of *uti posidetis*’.24 An agreement to allow for the application of *uti posidetis* can also be embodied in an agreement to submit the drawing of the boundary to adjudication or arbitration because the parties must then reckon with the arbiters’ reliance on that principle. This will be especially the case if the mandate allows for adjudication *ex aequo et bono*. In that sense, the application of *uti posidetis* by the Badinter Commission can be said to flow from an agreement, too.

If an arbitral tribunal is authorized (explicitly or implicitly) to apply *uti posidetis*, the relevance of that principle for the determination of the boundary ends once the award has been issued. If the award is binding (which was not the case with the ‘opinions’ of the Badinter Commission), then it becomes the legal basis of the definition of the boundary. In that case, it is the award that is legally decisive (even if it is based on a view of the *uti posidetis* position). Then the award’s view on the *uti posidetis juris* prevails and cannot later be questioned juridically.25

The customary law quality of *colonial uti posidetis* is uncontroversial and has been affirmed by case law. The open question is only whether a *non-colonial uti posidetis* exists as a matter of customary law (on this question, see section V of this chapter). However, even if a general and automatic application of *uti posidetis* to cases of non-colonial secession is rejected, *uti posidetis* can always be applied, also in the context of secession, by virtue of an agreement which refers to it. But then, the actual legal basis of its application is (only) the agreement: ‘C’est l’accord, et non le mode d’accession à l’indépendance, qui représente le titre juridique qui fondera la délimitation’.26

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24 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 26.
26 Corten (n 23) 430.
2. Independence of the legal basis of the state and its boundary

The creation of a new boundary normally coincides with the emergence of a new state (as opposed to the situation of shifting a boundary due to cession of a piece of territory). How does *uti possidentis* relate to the legal qualification of statehood and to the process leading to the creation of a state? This relationship can be formulated either in a factivist or a normativist way: the question of whether a state boundary exists is synonymous with the question of whether a given entity is a state or not. The question of whether there should be a state boundary is concomitant to the question of whether the entity has lawfully become a state. The traditional and still widespread view is that in this context, only the factual question should be asked, because 'lawful' or 'not lawful' is no relevant category for the emergence and existence of states. From that perspective, the emergence of a new state happens in an international legal vacuum, which means that no international rules govern this process.

Only if—alternatively—we assume that states do have (and need) some kind of legal basis might the applicability of *uti possidentis* depend on that legal basis. Importantly, even *arguendo* that a state needs a legal basis, in any case *uti possidentis* itself does not furnish such a basis. The legal basis must be found elsewhere, in international law or in domestic law. Possible international legal bases for the emergence of a new state are consent (an interstate treaty or other type of agreement on the creation of the state); self-determination (decolonization or—controversially—remedial secession); effectiveness (understood as a legal principle or title); or historical titles. However, tying the application of *uti possidentis* to the new state's legal basis does not seem to be warranted by state practice and does not make much sense, last but not least because the mentioned legal bases often overlap. For example, decolonization was mostly based both on the exercise of colonial self-determination and—often in a later stage—on the consent by the former administrative power.

Therefore, the better view seems to be that *uti possidentis* is indifferent to the (legal) grounds of statehood as such. That view can also be framed in temporal terms: the question of boundaries arises only once independence has been acquired. *Uti possidentis* enters the scene only after independence has been acquired and 'ne vise pas à donner une justification quelconque à l’existence de l’Etat'.

Second, what is the meaning of *uti possidentis* for the legal validity (the existence in law) of a boundary, and how does this relate to title? In the Frontier Dispute

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29 Kohlen (n 5) 375.

30 'Title' in this context means first the source of a right to territory and second the evidence which might establish the existence of that right (Frontier Dispute Case (El Salvador v Honduras, Nicaragua intervening) (n 25) para 45).
between El Salvador and Honduras, the ICJ stated, somewhat confusingly: ‘the principle of uti possidetis juris is concerned as much with title to territory as with the location of boundaries’.31 However, it is generally accepted that the validity of a boundary is independent of the validity and legality of any title to territory. So the boundary’s validity is legally independent of the legal instrument which has created that boundary. For example, with regard to the establishment of a boundary by treaty, the ICJ held in the territorial dispute between Libya and Chad that, once agreed upon, the boundary stands in law, irrespective of the nature and status of the treaty. The treaty can cease to be in force without affecting the legal continuance of the boundary in any way.32

The ICJ also said, for example, that in Latin American decolonization the source of the right to territory was succession of the new state to the Spanish Crown, whereas ‘the extent of territory to which each State succeeded [was] being determined by the uti possidetis juris of 1821’.33 Put differently yet again, ‘uti possidetis guarantees an objective situation erga omnes’, the existence of a certain border, ‘and not the legal validity of the underlying instrument’.34 Uti possidetis protects a boundary, independently of the title; ‘quel que soit le titre juridique qui le fonde’.35

3. The universality of uti possidetis

With a view to potential applications to territorial problems in the CIS, we must also rule out that uti possidetis is a merely regional—as opposed to a universal—principle. At the beginning of the twentieth century (before African decolonization), uti possidetis was probably only a principle of regional international law, a ‘principe fondamental du droit public et international sud-américain’, as the Swiss government, acting as an arbiter in a Latin American boundary dispute, put it.36 Meanwhile, an ICJ Chamber clearly stated that uti possidetis is not only a regional principle of Latin American international law: ‘...the principle 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’.37 The African practice ‘must be seen not as a mere practice contributing to the gradual emergence of a principle of customary

31 Frontier Dispute Case (El Salvador v Honduras, Nicaragua intervening) (n 25) para 42.
32 Territorial Dispute (Libyan Arab Jamahiriya v Chad) [1994] ICJ Rep 6 para 73.
33 Frontier Dispute (El Salvador v Honduras, Nicaragua intervening) (n 25) para 45 (emphasis added). The ICJ did not mention self-determination as a ‘source’ of the right to territory. This makes sense, because self-determination was not part of international law in the nineteenth century.
34 E Milano, Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy (Martinus Nijhoff Publishers 2006) 111. Milano calls this the ‘actual’ existence of the border, but it would seem that what is meant is its existence in law.
36 Swiss Federal Council (1922) (n 14) 248 (emphasis added).
37 Frontier Dispute Case (Burkina Faso v Mali) (note 9) para 20 (emphases added).
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.\textsuperscript{38}

IV. \textit{Uti Possidetis} in the Dissolution of the Soviet Union and Yugoslavia

1. The legal qualification of the dissolution processes of the Soviet Union and of Yugoslavia

The propriety and lawfulness of the past application of \textit{uti possidetis} to the dissolution of Yugoslavia and the Soviet Union do not depend on the legal qualification of those processes as continued secessions or as dismemberments.\textsuperscript{39} This dichotomy is relevant for the legal status of the successor states, notably to answer the question of whether in the CIS Russia is the sole successor to the former Soviet Union, and in Central Eastern Europe whether Serbia is the sole successor to the Socialist Federal Republic of Yugoslavia (SFRY). These matters had been controversial, but an \textit{opinio communis} has formed.

With regard to the dissolution of the Soviet Union, the best legal view seems to be that the Soviet Union was dismembered, rather than that the Republics seceded from Russia. This means that Russia is not identical to the Soviet Union as a state and as a subject of international law, but merely one of various successor states.\textsuperscript{40} Russia (in contrast to the other former Soviet Republics) had never declared its independence, and had in various international fora claimed to be identical with or ‘continuous’ to the USSR. Indeed, continuity was, for practical reasons, admitted with regard to the state’s membership in the UN. However, third states’ statements and their legal qualification of Russia’s legal relation to the USSR were erratic.\textsuperscript{41} Most importantly, the CIS formally dissolved the USSR.\textsuperscript{42}

\textsuperscript{38} Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 21 (emphases added).

\textsuperscript{39} These terms are used here to denote the difference as to whether the previous state persists with a reduced territory (as identical to the former state or as its sole successor state, as in the case of the Soviet Union and Russia) or whether the predecessor state is completely dissolved and disappears (as in the case of Yugoslavia). A different usage of the dichotomy is to call a consented territorial re-arrangement a ‘dismemberment’ and the non-consented re-arrangement a ‘secession’.


\textsuperscript{42} Cf. the Agreement Establishing the Commonwealth of Independent States of Minsk of 8 December 1991, in which the heads of state of Belarus, the RSFSR, and the Ukraine ‘declare that
So in legal terms, Russia is not identical with or 'continuous' to the USSR—only for reasons of political expediency has the Russian claim of continuity come to be accepted by the international community.43

The dissolution of Yugoslavia is best qualified as a prolonged secession of the Republics of the SFRY which began in 1991. The domestic law of the SFRY was ambiguous on the internal lawfulness of secession. While the preamble of the Constitution of Socialist Federal Republic of Yugoslavia of 21 February 1974 mentioned a right to secession, its Art. 5 prohibited internal territorial changes. Notwithstanding that internal illegality, the Republics proclaimed their independence, often backed by territorial referendums, and were then recognized as sovereign states and later acceded to the United Nations. The SFRY ceased to exist. Serbia (until 2006 united with Montenegro) initially tried to interpret these facts differently from other observers. Serbia first claimed to be identical or the sole successor state to the former SFRY. This claim of identity or sole succession by Serbia–Montenegro was refuted, inter alia, in Opinion No. 9 of the Badinter Commission of July 1992.44 Ultimately, all Republics are successor states to the extinct state, the SFRY. This legal difference—Russia being a 'continuer' of the Soviet Union, Serbia not being the only successor to the SFRY—does not play a role for the applicability of uti possidetis. It is correct to qualify both dissolution processes, in a simplified façon de parler, as secessions as opposed to decolonization. What matters is the difference between those processes and decolonization (as will be discussed further in this chapter).

2. The legal source of the application of uti possidetis to the Soviet Union and Yugoslavia in 1991/2: consent-based, customary, or purely political?

The precise analysis of the historical application of uti possidetis to the Soviet Union and to Yugoslavia in 1991 and 1992 helps to determine—in an abstract fashion and prospectively—whether the principle of uti possidetis is at all applicable (as a matter of positive analysis) and whether it reasonably should be applied (normative analysis) to pending situations and future scenarios of secession (as opposed to the classical field of application of the principle: decolonization). With regard to the Soviet Union and Yugoslavia, the application of uti possidetis has been construed and explained in the literature in two different ways, pointing to the two different sources (customary law or treaty) mentioned in section III.1 (pp. 99–100).

A look at the relevant documents on the dissolution of the Soviet Union shows that all of them relied on uti possidetis only implicitly by insisting on territorial integrity and on the intangibility of borders (in detail and on the relationship

the USSR as a subject of international law and a geopolitical reality no longer exists' (reproduced in (1992) 31 ILM 143).

43 Saxer (n 40) 805–6. For Stern (n 41) the conclusion to draw from the non-existence of the USSR must be that all Republics, including Russia, are successor states. It amounts to an 'illegitimate' to qualify Russia as the continuing state.

The Principle of Uti Possidetis Juris

between those principles and uti possidetis see pp. 127–29). One group of authors qualifies the application of uti possidetis to the Soviet Union (as to Yugoslavia and Czechoslovakia) as a purely consensual one (on the basis of agreements or parallel unilateral declarations by all interested sides). For example, Santiago Torres Bernárdez has argued that uti possidetis could only be applied to the Yugoslavian situation through a 'contracting-in' consent of the parties concerned, not by the mere operation of the principle qua norm of international law. Uti possidetis juris qua norm of international law is, according to Torres Bernárdez and others, not directly applicable to territorial problems arising in relations between new states which were formerly constituent territorial units of a given sovereign state.45

A related view is that in the case of Yugoslavia, uti possidetis was applied not even as a matter of law (based on international treaties) but purely as a political device, outside the realm of international law: 'In short, the territorial solution adopted in Yugoslavia was the result of a policy decision that was quite possibly justified. It was not, however, required by international law.'46

The 'contractual' or 'political' explanation of the application of uti possidetis to the Soviet Union has its deeper foundation in the conviction that the ultimate foundation and source of the applicability of uti possidetis as a customary law principle is its correlation to the principle of self-determination. From that perspective, self-determination provides a kind of legal basis for (customary) uti possidetis, too. This means that where territorial claims are raised which cannot (or cannot uncontroversially) be based on self-determination, uti possidetis has no (automatic) place but can—if at all—come in through a space opened by agreement on its application to the specific case. In combination with the restrictive view on self-determination, which holds that any exercise of that right which would lead to the establishment of a new state is basically allowed only in the context of decolonization, this construction leads to the general applicability of uti possidetis being limited to decolonization and thus makes customary uti possidetis a matter of the past, not of the future.

A third, opposing, view is that in the course of the breakup of the Soviet Union and of Yugoslavia, the explicit or implicit acceptance of the upgrading of administrative boundaries to international frontiers by the various interested actors was purely 'declaratory'. The agreement to apply uti possidetis was—from that perspective—a manifestation of an extant opinio juris on the (general) applicability of that pre-existing principle to the situation: 'It is difficult not to see in this practice the expression of a conviction of a compulsory character of the respect of existing frontiers in the moment of independence, that is to say the ancient administrative


46 Lalonde (n 9) 240. The same author considers the application of uti possidetis to the Soviet Union as a political result, not legally determined (Lalonde at 233). See in this sense on Yugoslavia also Barbara Delcour, 'L'application de l'uti possidetis juris au démembrement de la Yougoslavie—règle courrièmère ou impérative politique' in Olivier Corten et al. (eds), Démembrements d'États et délimitations territoriales: L'uti possidetis en question(s) (Bruylant 1999) 35–78.
delineations. The formal acts declaring the respect of existing frontiers thus have a value which declares the law in force, recognizing an existing rule.\(^{47}\)

These three different legal constructions of the application of *uti possidetis* to the Soviet Union and to Yugoslavia make a difference for its possible future application to the CIS. If the legal basis was (only) a contractual or a purely political one, *uti possidetis* cannot lawfully and correctly be relied upon by the current metropolitan states against the will of breakaway territories. If, in contrast, *uti possidetis* is applicable as a matter of customary law, then it is also applicable to the pending territorial controversies. However, the exact meaning and consequences of this application must be further examined anyway (see p. 119).

A fourth interpretation of the historical situation is that the relevant actors\(^{3}\)' decisions to apply *uti possidetis* to the Soviet Union and to Yugoslavia, even if it furnished the necessary contractual basis for applying the principle to that case, can play the role of practice and opinio juris needed as elements for the formation of an emerging customary rule of *uti possidetis*. This construction raises the question of whether treaties and the practice of concluding treaties can count as practice formative of customary law or whether practice must rather be understood as the opposite as a negation of a customary rule.

The divergent legal interpretations of the historical use of *uti possidetis* in the course of the dissolution of the Soviet Union call for a closer doctrinal examination of the scope of *uti possidetis ratione materiae*, to which we now turn.

V. Customary *Uti Possidetis* Limited to Decolonization?

*Uti possidetis* could play no role *qua* customary law for current territorial issues in the CIS or elsewhere if the scope of application of the customary principle were, from the outset, limited to decolonization. The divergent legal qualifications of the practice of the 1990s concerning the Soviet Union and Yugoslavia have failed to settle that matter, as we have seen. In scholarship, both views have been espoused. One side rejects the applicability of customary *uti possidetis* beyond (historical) decolonization.\(^{48}\) Under that view, the application of the *uti possidetis* guarantee as a pre-independence guarantee of administrative boundaries within states is a matter of politics, but not a pre-existing requirement of international law.\(^{49}\) The opposing camp supports a more general scope of the principle which stretches beyond decolonization.\(^{50}\) No dominant opinion has emerged so far.

\(^{47}\) 'Il est alors difficile de ne pas déceler dans cette pratique l'expression de la conviction du caractère obligatoire du respect des frontières existantes au moment de l'indépendance, c'est-à-dire des anciennes limites administratives. Les actes formelles proclamant le respect des frontières existantes ont donc une valeur déclarative du droit en vigueur, reconnaissant une règle existante'. Kohen (1999) (n 5) 378 (translation by the author); see also 379. Recent international practice is witness to the existence of a belief in the compulsory character of *uti possidetis* in cases of separation or dissolution.

\(^{48}\) See for an excellent exposition of that view Corten (n 23); see also Bernárdez (n 45); Lalonde (n 9).

\(^{49}\) Lalonde (n 9) 240.

\(^{50}\) See comprehensively Kohen (1999) (n 5); Beaudouin (n 9); G Nest, 'Uti Possidetis Doctrine' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press online 2013) para 8.
The Principle of Usi Possidetis Juris

The question of whether usi possidetis is also a customary law principle outside the context of decolonization must be examined both with regard to the underlying rationales of the principle itself and with a view to other principles of international law (on its purposes see pp. 115 ff; on the legal context see pp. 125 ff.). Most arguments against the applicability of customary usi possidetis beyond the colonial context rest on the view that decolonization and non-colonial secession differ in crucial respects which outweigh the similarities of both scenarios. The relevant principles and policy considerations must be examined one by one.

The first is legitimacy/legality as opposed to effectiveness. A doctrinal argument—elegantly made by Olivier Corten—is that decolonization and non-colonial secession are two different modes of acquiring independence which have differing legal bases and which follow 'distinct logics'. Decolonization was an exercise of self-determination, and therefore the attainment of independence was based on 'legitimacy.' In contrast, in the situation of secession, independence is attained on the basis of 'effectiveness' (as opposed to legitimacy). Because of these differences, so the argument runs, usi possidetis cannot be reasonably transferred from one context to the other, at least not without any specific agreement—it is in no way 'logically' linked to acquiring independence, as the ICJ put it in the Frontier Dispute Case.53

The premise of this bifurcated view is that there is no right to secession, that secession occurs in an international law-free realm. Therefore, there is no space for any legal principle relating to the territorial delimitation. Due to the principle of effectiveness, secession is a fact which imposes itself over the law. The same must be true not only for the fact but for the spatial extension of that secession. Therefore, there is no 'right' to have certain boundaries.54 The territorial title and the delineation of the boundaries cannot be separated from the mode in which the new state came into existence. Therefore, the legal regime concerning the existence must also apply to the (geographical) extension of the state. The new state is a matter of fact,55 and its existence depends on effectiveness without any room for reliance on the pre-existing boundaries in the predecessor state.

The purported distinction between decolonization and secession may also be framed in terms of lawfulness. Decolonization was allowed and even mandated by international law. Colonization had, by the 1950s, come to be seen as an internationally wrongful act, and there was an international legal obligation to decolonize. Jörg Fisch has pointed out that decolonization started from a

51 Corten (n 23) 432.
52 Corten (n 23) 407. A remark on 'effectiveness' seems in order. Historically, notably in Latin America, usi possidetis was designed to replace the idea of effectiveness. It did so by defining territories in disregard of the fact that much of the territory was not effectively occupied or governed by the colonial state. But the relationship between usi possidetis and effectiveness is ambivalent. Usi possidetis can also be considered as an interpretation of the legal principle of effectiveness which is at work in the instance of a secession. There is no necessary contradiction between the principle of effectiveness and usi possidetis; the principle of usi possidetis rather confirms the normative dimension of effectiveness. Usi possidetis gives effectiveness its 'spatial dimension'. Beaudouin (n 9) notably 610-13.
53 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 20.
54 Corten (n 23) 408.
55 See on this facticist view p. 101.
perception of the illegitimacy and, eventually, illegal and even criminal character of colonial rule. In contrast, federations, including the defunct Soviet Union, did not have a comparably criminal character. Nobody maintained that the Soviet Union or Socialist Yugoslavia were as such contrary to international law. The dissolution of the Eastern European federations therefore had a legal basis different from decolonization.\textsuperscript{56}

However, the seeming difference between decolonization and secession fades if we take into account that in nineteenth-century Latin America, the establishment of the first Republics was not supported by contemporary international law. On the contrary, the Latin American states' independence was perceived by contemporary observers as what we would now call secession (for detail see p. 114). The distinction between decolonization and secession is further undermined by the insight that its underlying claim, namely that secession is outside international law, rests on controversial premises. Many commentators think that secession is regulated by international law but do not agree on when it is allowed and when not. Maybe it can be safely said that the lawfulness of secession is controversial, and that it in any case depends on the context. The complete dissolution of the Soviet Union and of Yugoslavia was not justifiable in regard to all Republics as an exercise of a right to self-determination, and it was surely not mandated by international law. Overall, recent state practice, notably Kosovo's acquisition of independence in 2008, bolsters the view that, under exceptional circumstances, secession can be tolerated, justified, or exculpated as an \textit{ultima ratio} in cases where 'internal' self-determination is persistently denied to a people.\textsuperscript{57}

In addition, Corten's entire paradigm of 'effectiveness' as a legal basis of non-colonial state formation can be questioned. The emergence of a state does not happen in a law-free zone but is embedded in international prescriptions, beginning with the right to self-determination and the prohibition of the use of force.\textsuperscript{58} The facticist view of statehood (considering states as pure matters of fact) glorifies the \textit{fait accompli};\textsuperscript{59} implies an abdication of international law, and has as a result that the 'law' of the more powerful governs and determines whether

\textsuperscript{56} J Fisch, Das Selbstbestimmungsrecht der Völker: die Domestizierung einer Illusion (Beck 2010) 284.


\textsuperscript{58} I leave aside the question of under which circumstances the prohibition may apply in internal situations: it is in any case directed at bystander states to a territorial conflict.

there is a state or not. Statehood needs a factual basis, but lawyers ascribe a legal significance to these facts. The facts are and must be—for a legal evaluation—'conceptualized'. To conclude, the argument that *uti possidentis* can play no role in non-colonial secession because that phenomenon is outside the law appears too schematic to capture the messy political and legal processes leading to the creation of new states, and also disregards the emerging views on remedial secession.

The second factor distinguishing between decolonization and secession which might prevent the transfer of customary *uti possidentis* from the colonial context to the non-colonial one is the implication for territorial integrity. In decolonization, peoples rose against distant powers; territories outside the territory of the colonial power formed new sovereign states; independence did not affect the ordinary territory of the metropolitan state (the 'salt water test'). For example, the independence of Mali (from France) did not involve the neighbouring state or the people of Burkina Faso.

In contrast, in a secession conflict, independence and territorial integrity are at stake simultaneously. In fact, the breaking away of territories from the Soviet Union and from the SFRY led to a full dismemberment of the former state in the case of Yugoslavia, and to a significant shrinking of the state in the case of the Soviet Union/Russia. As far as current conflicts are concerned, the creation of a state of Abkhazia, for example, could only come about at the cost of the territorial integrity of Georgia.

The third issue is extension over time. Decolonization happened step by step over decades. In that situation, the principle of *uti possidentis* secured the equal treatment of all geographical entities. Other criteria could have been applied even-handedly only if all boundaries had been drawn at once, which was not the case. So only *uti possidentis* allowed treating all colonies equally, even if all were treated equally badly.

The fourth argument is that colonial delimitations (often) had a semi-international status (unlike domestic administrative lines). Neighbouring colonies often had a different legal position vis-à-vis the metropolitan state, and therefore the lines dividing them resembled international boundaries. While it is acceptable to upgrade such semi-international boundaries to international ones, such upgrading is far-fetched with regard to administrative lines, which are normally ignored altogether by international law.

The fifth argument against the applicability of *uti possidentis* outside decolonization is that such a rule would not be universalizable. It cannot work as a general rule for all cases of secession, because it does not provide any solution to secessions involving unitary states which do not possess any internal administrative dividing lines.

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61 Cf Corten (n 23), 446; Lalonde (n 9) 234.
62 Ratner (n 2) 609; Lalonde (n 9) 234.
The sixth issue is the legal policy consideration that a state would be penalized for devolution and federalization because the establishment of sub-units with political autonomy (which necessarily possess internal boundaries) would carry the risk of being prone to upgrading. This ‘danger’ is not present if the state is maintained as a fully centralized state without any internal boundary. This incentive against federalization is an undesirable policy outcome, because federal or quasi-federal arrangements seem to be the most promising political strategy for accommodating minority issues.

All in all, these arguments against the application of uti possidetis to cases of secession must be taken seriously. However, they are outweighed by doctrinal, contextual, and policy arguments supporting the application of uti possidetis to secessions, and these will now be examined.

VI. The Application of Customary Uti Possidetis to Secessions

The better view is that today uti possidetis has the value of a customary rule which applies to secession beyond the colonial context.

1. Case law

This view can first of all rely on two international rulings, namely the ICJ Chamber Judgment in the Frontier Dispute Case (Burkina Faso v Mali) and on the Opinions of the Badinter Commission on the dissolution of Yugoslavia. Taken together with the absence of a prior rule of international law clearly precluding the application of uti possidetis to non-colonial or postcolonial situations, the burden of argument seems to fall on those who claim that the principle’s material scope is limited to decolonization and who seek to deny, against those dispute settlement bodies’ findings, the applicability of uti possidetis to all modes of creation of states.

The ICJ Chamber’s leading judgment of 1986, the Frontier Dispute Case, is ambiguous. On the one hand, it contains sentences referring solely to decolonization, on the other, it contains general statements on uti possidetis which sound as if uti possidetis were applicable outside the context of decolonization as well. The Chamber notably stated that uti possidetis ‘is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it

64 Lalande (n 9) 237.
66 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 20: ‘a firmly established principle of international law where decolonization is concerned.’; also para 23: ‘Uti possidetis, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs’ (emphasis added).
occurs' (emphasis added). The Chamber also said: ‘There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula uti possidetis’ (emphasis added). Overall, the ICJ did not give an unequivocal answer to the question of whether uti possidetis applies to all kinds of state succession, but seemed to lean more towards a general scope ratione materiae.

The Badinter Commission applied the principle outside the context of colonization. Opinion No. 3 stated: ‘Uti possidetis, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle…’. Malcolm Shaw pointed out that two types of criticism have been directed at that decision. The first critique is that the decision did not correctly depict the law as it stands and was not in conformity with pre-existing international law. The second is that the opinion offended other principles of international law and was in systemic violation of those other principles which form the context. That context will be examined in section IX of this chapter.

The first critique is unfounded. In particular, the reproach that the Badinter opinion misrepresented or distorted the 1986 Chamber Judgment of the ICJ in the Frontier Dispute Case (Burkina Faso v Mali) is unwarranted. In fact, as we have seen, that Chamber Judgment was ambiguous. The Badinter Commission quoted only that sentence of the Chamber Judgment which qualified uti possidetis as a ‘general principle, which is logically connected with the phenomenon of the obtaining of independence’. It thereby produced a legitimate interpretation of the Chamber’s statement and was acting in legal error. Given the openness of the ICJ judgment, the Badinter Commission was entitled to develop further the law in one particular direction which was already—albeit in a rudimentary form—encapsulated in the ICJ’s case law.

It is conceded that the awards of both bodies have no formal erga omnes value as binding precedents. The ICJ’s statements were, in strict terms, obiter dicta, and are in any case binding only inter partes. The Badinter Awards were not binding judgments but only advisory opinions. However, despite the weak formal status of these decisions, they have high authority in substance.

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67 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 20. However, the preceding sentences of para 20 refer only to decolonization.
68 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 24.
69 Shaw (n 65) 496.
70 See for this type of critique eg H Hamun, ‘Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?’ (1993) 57 TLP 57, 66: ‘This opinion is dubious if it purports to identify a rule of international law which requires the maintenance of existing administrative borders outside the colonial context…’; Radan (n 62) esp at 62: ‘The principle is not, as claimed by the Badinter Commission, recognised as a general principle applicable to all cases of independence’.
71 From para 20 of the ICJ Chamber Judgment, Frontier Dispute Case (Burkina Faso v Mali) (n 9).
72 See notably the careful analysis by Shaw (n 65) 498–9.
2. State practice in the Kosovo Advisory Opinion proceedings

The customary law status of *uti possidentis* beyond the colonial context, and notably in the situation of secession, was put to the test in the Kosovo Advisory Opinion proceedings. First of all, the ICJ itself did not mention *uti possidentis* here.\(^7\) The Court pronounced itself only on the corollary principle of territorial integrity\(^8\) and found that this principle was applicable only among states and thus had no role to play as a legal yardstick for the declaration of independence’s conformity or non-conformity with international law.\(^9\) The written statements filed by 37 states are important indicators of the prevailing *opinio juris* on this matter. Only eight states mentioned *uti possidentis* at all.

Of the eight states which did mention *uti possidentis*,\(^10\) only five (Cyprus, Ireland,\(^11\) Romania,\(^12\) Serbia, and the Netherlands) explicitly or implicitly considered the principle of *uti possidentis* to be applicable to the Kosovo case. Of those five, only three states espoused the legal position that the declaration of independence was not in accordance with international law. Only two of those three states (Serbia\(^13\) and Cyprus) explicitly said that this illegality resulted (inter alia) out of a violation of *uti possidentis*. In contrast, the Netherlands considered *uti possidentis* to be applicable, but nevertheless found the declaration of independence to be lawful and *uti possidentis* not violated in the present case.\(^14\) In the end, leaving out Serbia, which was obviously a self-interested party, only one single state (Cyprus\(^15\)) out of the entire international community found the Kosovo secession to be in violation of *uti possidentis*.

In contrast, two states (the United States and Finland) clearly opined that *uti possidentis* was not applicable to the Kosovo case (and both states also found the declaration of independence to be in accordance with international law). The

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\(^8\) See p. 127.

\(^9\) Unilateral Declaration of Independence in Respect of Kosovo (n 73) para 80.

\(^10\) For example, Slovenia mentioned *uti possidentis*, but it remained unclear whether the state deemed the principle applicable to the Kosovo case (Written Comment (17 July 2009) <http://www.icj-cij.org/docket/files/141/15696.pdf> para 4, accessed 18 September 2013).

\(^11\) Ireland’s statement was inconclusive in that point; it mentioned *uti possidentis* only in a literature quote. Written Statement of Ireland (17 April 2009) <http://www.icj-cij.org/docket/files/141/15662.pdf> para 20 accessed 18 September 2013. Ireland concluded that the declaration of independence was not unlawful.

\(^12\) Written Statement of Romania (14 April 2009) <http://www.icj-cij.org/docket/files/141/15616.pdf> paras 85–7 accessed 18 September 2013. The overall conclusion was that the declaration of independence was not in accordance with international law.


The Principle of Uti Possidetis Juris

United States deemed *uti possidetis* not addressable to non-state actors. The most substantive and best-reasoned statement has been made by Finland, which argued that applying *uti possidetis* 'would be to put the cart before the horse'. The state deemed *uti possidetis* not applicable in an 'abnormal case' in which the question of who possesses the territory and which boundary is valid is itself the controversy. Finland also forwarded the teleological argument that the rule's rationale could not be respected because there was no stability to protect.

In conclusion, *uti possidetis* has been quite conspicuously marginalized in the Kosovo proceedings. The explanation for non-reliance on that principle (by the Court and by most states) might be the genuine legal belief that this principle has no role to play. It might, however, also be motivated by legal tactics. It is therefore difficult to extract the international community's *opinio juris* from these proceedings. Moreover, in most if not all of the governmental statements which do mention *uti possidetis*, the exact consequences of an application of *uti possidetis* to the Kosovo case remain unclear. Two issues deserve to be highlighted. First, *uti possidetis*, even if applicable, would not have prohibited Kosovo's declaration of its independence because it is agnostic regarding that question (see p. 115). Second, *uti possidetis* privileges not only the boundary of the former Socialist Republic of Serbia (which would amount to stating that the declaration of independence violated that *uti possidetis*), but in principle also other types of internal administrative boundaries, notably the provincial one (see pp. 119 ff.). *Uti possidetis* (if deemed applicable to Kosovo and to its provincial boundary) only came into play once Kosovo had declared its independence. The legal consequence is only that the provincial boundary had to be provisionally accepted as the new international boundary until and unless a different arrangement had been brought about by peaceful means, notably a territorial free and fair referendum. With this limited substantial scope, *uti possidetis* had indeed been respected.

3. The analogy between decolonization and secession

The following arguments, drawing on the analogy between decolonization and secession, can be made in support of the transfer of *uti possidetis* from

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82 See n 132. This resembles the reasoning which the Court later adopted, couching it in terms of territorial integrity, not in terms of *uti possidetis*.

83 Written Statement of Finland (16 April 2009) Verbal Note/Embassy of Finland HM5013-31 <http://www.icj-cij.org/docket/files/141/15630.pdf> paras 5 and 9 accessed 18 September 2013. Para 9: 'The rationale invoked in these cases points to a distinction between normal situations and those of abnormality, or rupture, situations of revolution, war, alien subjugation or the absence of a meaningful prospect for a functioning internal self-determination regime. The First World War and the ensuing revolutions constituted such an "abnormality" in the Åland Islands case, just like "colonialism" in the 1950s and 1960s, or the prolonged war in the territory of the former Yugoslavia in the 1990s. In such situations, to rely on the principle of "stability and finality of boundaries", for example, or *uti possidetis*, would be to put the cart before the horse: there is little or no stability of boundaries to be protected. Instead, the very question "who possesses" or "which boundary" has become part of the controversy and cannot therefore be used as a criterion for resolving it.'
decolonization to secession. First, both decolonization and secession have the same result, namely the attainment of independence. Both are cases of state succession. Second, in both contexts uti posidetis can deploy the same function, namely securing stability, all the while admitting that the stabilization of a territorial entity-in-the-making whose boundaries are not precisely recognized is somewhat difficult. Third, the restrictive camp's observation that the two situations of attaining independence have a different legal basis is misconceived (see pp. 107 ff.). Fourth, the non-determination of the territorial basis of the new state would mean that important legal principles, such as prohibition of the use of force and territorial integrity, could not be applied to it—which is an undesirable result.

In addition, some similarities between decolonization and the dissolution of the Soviet Union further support the extension of uti posidetis to the latter case. First of all, the Soviet Union has often been characterized as a modern quasi-colonial empire. In fact, Russia pursued a policy of hegemony and transfer of populations in order to secure Russian domination. Soviet rule, dominated by Russia, over non-Russian Republics was a mix of direct and indirect rule, of economic exploitation accompanied by a civilizing mission, and to that extent displayed the same characteristics as the classic colonial rule of European powers over overseas territories. In that analysis, the boundaries of Soviet Republics were comparable in functional terms to the Latin American inner-Spanish boundaries, and the dissolution of the Soviet Union was a kind of decolonization, too. At least in part, the pending secession attempts are still a reaction to the Soviet divide et impera politics. If the breakup of the Soviet Union was in functional terms an instance of decolonization, and if the current unresolved issues can be seen as incomplete decolonization, then the application of colonial uti posidetis to the dismemberment of that empire is functionally adequate.

Next, we must remember that in the nineteenth century, no concept of decolonization existed. The colonies' declarations of independence were considered to be illegal secession from Spain. At that time, the proclamation of independent American states was potentially illegal, just as some if not all secessions are today. Independence was the result of internal conflicts between the political leaders of the dominated territories and the colonial powers; conflicts which might be considered as civil wars. 'Ut posidetis is thus born for being applied to cases of secession', is the conclusion drawn by Marcelo Kohen.

To sum up, while uti posidetis cannot simply be transferred from decolonization to secession, its applicability to that novel context is warranted by the case law, by state practice, and by doctrinal and policy considerations. Most importantly, applying uti posidetis to cases of secession in no way prohibits

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61 Corten (n 23) 433.  
63 Kohen (n 5) 380.  
66 Some use the term 'internal colonialism' to qualify colonial-type relationships between the centre and the peripheries within one single state—cf. J Oestebamme, Colonialism (Markus Wiener Publishing 1997) 17.  
67 'L'uti posidetis est ainsi né pour être appliqué à des cas de sécessions', Kohen (n 5) 376 (translation by the author).
or condones secessions. The principle is agnostic as to the question of whether there should be a new state with its own territory and new boundaries in the first place. It 'only refers to a rule for the identification of boundaries following the proclamation of independence and is without prejudice to the existence of a right to proclaim independence', as the Netherlands put it in its written statement in the Kosovo proceedings. Uti possidetis is, as Marcelo Kohan has pointed out, only the response of the law to a given reality, the existence of a state. It is no means of secession, no encouragement of secession, and no justification of secession.

VII. The Purposes of Uti Possidetis

The overall underdetermined state of the law should encourage legal scholars to reflect about the reasonableness of applying uti possidetis to secession. Does uti possidetis give a satisfactory answer; does it offer a reasonable tool which is—in legal policy terms—superior to other potential mechanisms for resolving the specific boundary problem raised by secession?

From the perspective of normative individualism which underpins modern international law, the ultimate objective of drawing boundaries should always be human wellbeing and flourishing (as opposed to any raison d’état). The generally acknowledged function of uti possidetis is to secure the stability and finality of borders. Concomitantly, uti possidetis has the latent function to reinforce the political entity called the state, whose constituent and definitional element is its territory, by assigning a clearly defined territory to it and by stabilizing its boundaries.

Jörg Fisch has recently argued that reliance on the principle of uti possidetis in Latin America meant determining a boundary in a purely formal and hence 'neutral' fashion. The Spanish officials who defined colonial lines (without even really knowing the terrain) did not know that they thereby fixed future state boundaries and can therefore not be reproached for having been partial. This analysis seems to allude to the existence of a kind of veil of ignorance (in a Rawlsian sense) which guarantees fairness. But is this adequate? I submit not, because the overall context was one of violence. The occupation and subordination of South America was

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88 Ratner (n 2) 601; 'Thus, uti possidetis is agnostic on whether or not secessions or breakups should occur and is not simply the legal embodiment of a policy condemning them'.
90 Kohan (n 5) 400.
92 P Klein, 'Les glissements sémantiques et fonctionnels de l’uti possidetis' in O Cotten et al. (eds), Dénombrements d’États et délimitations territoriales: L’uti possidetis en question(s) (Bruylant 1999) 299, 316.
93 Fisch (n 56) 92.
brought about by war, extermination policies, and forced labour. The exact lines may have been coincidental and owed to chance, but the entire enterprise was tainted by blood, as it was in Africa. The concept of a veil of ignorance presumes a non-violent decision-making procedure which is normally not given in the situation of territorial realignments. Ignorance of geography, of ethnic divisions, and of other features of the territories and its inhabitants cannot, in such a context, bring about fairness.

The stability of states and boundaries, and legal certainty with regard to these institutions, are not only secondary virtues. This holds true notwithstanding the fact that the application of *uti possidetis* means to legalize the *fait accompli*. Indeed, the ‘freeze’ of territorial demarcations which are for the most part the result of violence and of historical coincidence may perpetuate the outcomes of past injustice. So does not the application of *uti possidetis* risk violating the principle of *ex injuria jus non oritur* (no right should arise from unlawful situations)? This might indeed be the case. However, it is normally—in practical terms—impossible to return to a state of innocence in territorial matters. Any attempt to rectify historical territorial wrongs risks creating new injustices. It may be the most pragmatic course to renounce, in territorial matters, the application of distributive justice.

Stability is a postulate of a different type of justice. It is one aspect of legal certainty, and forms part of the international rule of law. Stability and legal certainty are from that perspective legitimate ends in themselves. More importantly, the stability of boundaries and of states normally helps to safeguard peace. Especially with regard to territorial issues, stability tends to prevent war. This connection between territorial status quo and peace underpins the reasonable belief that international boundaries should be changed as little as possible. The maintenance of the territorial status quo is desirable because all modifications carry the danger of interstate violence and of creating a domino effect. This runs counter to the objective of international law—the maintenance of international peace and security, which has as its ultimate goal human security. Against the background that the establishment of states has been the single most important historical achievement leading to a relative decrease of interpersonal violence and bloodshed, it is justified to privilege the territorial status quo as a plausible contribution to secure human flourishing.

As an aside, it is worth recalling that, besides adjusting and changing boundary lines, other strategies have been tried throughout history to establish stable and peaceful political—territorial units. One tool was the forcible transfer of population, as occurred in the Greco–Turkish exchange of populations after the peace

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92. Kohen (n 5) 460.
94. S Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking 2011) 680: ‘A state that uses a monopoly on force to protect its citizens from one another may be the most consistent violence-reducer...’.
treaty of Lausanne in 1923. Another tool was exchanges of territory, such as the exchange of Zanzibar against Heligoland between Germany and the United Kingdom in 1890. But these were possible only as colonial relics. Finally, numerous international peace and boundary treaties and domestic laws have granted populations affected by a boundary change the right to choose their nationality within a certain period (right of option). Besides, individuals always have the right to emigrate (jus emigrandi) under customary international law as it stands. Neither of these strategies works well, and the forced transfer of populations is unlawful under contemporary law.

*Uti possidetis* furthermore intends to prevent boundary disputes arising from outside threats. During decolonization, the principle prevented other European powers, under the pretext of a lack of factual occupation of territory, from claiming these as *terra nullius*. The Swiss Federal Council in 1922 clearly explained this function: “This general principle offered the advantage of positing as an absolute rule that there is not, in ancient Spanish America, any territory without master, although there existed numerous regions which had not been occupied by the Spanish and numerous unexplored regions... Finally, this principle precluded any attempt by the European colonizing States over territories which they could have tried to proclaim as *terra nullius*. Along that line it has been observed that in Latin America, *uti possidetis* was a defensive principle very much inspired by considerations of self-preservation. The ICJ highlighted this function of the principle in Spanish America in several decisions: 'Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions'. Certainly a key aspect of the principle is the denial of the possibility of *terra nullius*.

99 Y Ronen, 'Option of Nationality' in R Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP online 2012). No right of option was granted in the Laws on Citizenship of Azerbaijan and Belarus. Some of the newly independent States provided for a right of option to acquire the citizenship of the State concerned (positive option), for example the Citizenship Law of Uzbekistan of 2 July 1992 (Art. 4(1)) and the Citizenship Law of Armenia of 6 Nov. 1995 (Art. 10 (1)). Many CIS countries granted a negative right of option, ie a right to refuse the citizenship concerned. Examples are Turkmenistan (Art. 49(1) of the Citizenship Law of 30 Oct. 1992); Georgia (Art. 3a of the Citizenship Law of 25 March 1993); Russia (Law N 1948-1 of 28 Nov. 1991 as amended by the Law N 5206-I of 17 June 1993); Ukraine (Art. 2(1) of the Law on Citizenship of 8 Oct. 1991); Kazakhstan (position 3 of the Resolution by the Parliament introducing the 1991 Citizenship Law). Art. 1(1) of the Kyrgyz Citizenship Law of 18 Dec. 1993 provided for a qualified negative option: refusal of Kyrgyz citizenship required a declaration about the possession of a foreign citizenship. In certain cases no genuine right of option was granted, but rather a right to privileged naturalization, for example by the Law on Citizenship of the Republic of Moldova of 5 June 1991 (Art. 2(4)), and by the Law on Citizenship of the Azerbaijan Republic of 30 Sept. 1998 (Art. 5(2)). I thank Tigran Beknazar for this information.

99 'Ce principe général offrait l'avantage de poser en règle absolue qu'il n'y a pas, en droit, dans l'Ancienne Amérique espagnole, de territoire sans maître; bien qu'il n'existât de nombreuses régions qui n'avaient pas été occupées par les Espagnols et de nombreuses régions inexplorées... Enfin, ce principe excluait des tentatives d'États colonisateurs européens sur des territoires qu'ils auraient pu chercher à proclamer res nullius', Swiss Federal Council (Bundesrat), Affaire des frontières Colombo-Vénézuéliennes (n 14) 228 (translation by the author).

100 Bernadex (n 45) 437.

101 Frontier Dispute Case (Burkina Faso v Mali) (n 9) paras 23.

102 Frontier Dispute Case (El Salvador v Honduras, Nicaragua intervening) (n 25) para 42.
Today, the application of *uti possidetis* (beyond Latin America) has the related external function of forestalling irredentism, i.e. claims of (neighbouring) states advocating the recovery of territories administered by another state on the grounds of common ethnicity or actual or alleged prior historical possession. In post-socialist Eastern Europe, this is an important policy issue. The reign of *uti possidetis* would, for example, give a clear signal against any attempt of recovery of parts of Romania by Hungary.

With regard to the subject matter of this chapter, a core question is whether *uti possidetis* has the additional function, besides protecting boundaries from threats from the outside, of protecting the boundaries from *internal threats* which stem from secessionist movements. The ICJ Chamber Judgment is ambiguous on this point: "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".103 The term 'fratricidal struggles' suggests, more than aggression from the outside, civil wars inside a given state. Parts of contemporary scholars affirm the inward-looking rationale of *uti possidetis*: it 'deters the local exploitation of weaknesses and disorders in newly created States, which are often vulnerable to secessionist actions', writes Giuseppe Nesi.104

Another functional advantage of *uti possidetis* is its clarity and unambiguity. All alternative rules for identifying the boundary of a secessionist entity are at worst not in conformity with international law; at best, each of them points to different boundary lines, and consequently to dispute over them. What would be the alternative criteria? Ethnicity of those groups settling in a given territory? Criteria such as language, culture, or religion will never result in congruent human communities and will therefore never result in an undisputedly 'proper' territory for such groups. What about geography, such as rivers and mountains? As early as 1882, Ernest Renan, in his famous lecture 'Qu'est-ce qu'une nation?', showed the absurdity of relying on so-called 'natural boundaries', an idea which was fashionable in Europe at that time. He had the disputed territory of Alsace in mind. If the Rhine is considered as the natural boundary, then the Alsace must be French; if the Vosges are seen as the natural boundary, then the Alsace must be German.105 'That type of thinking had contributed to a series of wars over that territory. No substantive criterion for drawing a boundary is unquestionably decisive and legitimate.

Finally, *uti possidetis* is in line with the fundamental achievement of modern international law no longer being 'constitution-blind'. Minority protection, human rights protection, and even democracy are international legal prescriptions which governments are obliged to respect when organizing and running their states. If a state is organized in conformity with these international precepts, then it

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103 Frontier Dispute Case (Burkina Faso v Mali) (n 9) para 20 (emphasis added).
104 Nesi (2013) (n 50) para 8.
105 E Renan, 'Qu'est-ce qu'une nation?' (Lecture at the Sorbonne of 1 March 1882) in Ernest Renan, Oeuvres Complètes, Vol. 1 (Calman-Lévy 1947) 887, 902.
can—in theory—function within whatever boundaries. This would mean that *uti possidetis* can and should be applied, because the exact lines of the boundary do not matter anyway. It does not matter whether a boundary 'makes sense' or not, because the well-functioning state does not need a specific ethnic composition or a specific territory.

The objection against this line of argument is that it is utopian. A boundary based on *uti possidetis* will often lead to states which harbour ethnic minorities. As just said, modern international law obliges states to respect minority rights and to guarantee equal political participation to all (ethnic) groups, but to place all bets on minority protection and democracy as a guarantee of stable states means to stretch the power of international law, maybe to overstretch it. If the normative requirements are too strict, international law (as any law) will defeat itself. In order to avoid utopianism, a contextualized drawing of boundaries has been suggested. The delineations should not be orientated to an illusionary ideal of a liberal state, but should take into account the real problems on the ground. Contextualized boundary-drawing would have to deviate from *uti possidetis*, because *uti possidetis* is not exactly contextualized, but artificial, abstract, and coincidental.

However, this suggestion seems both backwards-looking and unfeasible. A legal principle of ‘contextualized’ boundaries, which notably takes into account ethnicity, culture, and language, seems problematic exactly because it draws on factors which are suspect under international law and are in potential conflict with the international legal prohibitions on discrimination.

To conclude, besides being based on the case law (see p. 110), the crucial argument in favour of applying *uti possidetis* to secessions is that this is most in conformity with the ensemble of the international legal system. According to Ian Brownlie, the general principle ‘...is in accordance with good policy.’

VIII. The Scope of *Uti Possidetis*

1. Applicability *ratione materiae*: which frontiers?

A salient question in the context of secession is which type of boundary is privileged by *uti possidetis* so that it may (or must) be upgraded to an international boundary. One question is whether the internal constitutional status of the boundary and its intangibility (or flexibility) under domestic constitutional law matters. This question was particularly relevant for the Soviet Union and Yugoslavia. The Soviet Union was a five-level state consisting of the entire state, the Union Republics (such as Georgia), the Autonomous Soviet Socialist Republics (ASSR, such as

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107 Johansen (p 96).
109 The Union Republics were enumerated in Art. 71 of the Constitution of the Soviet Union of 7 October 1977. Art. 72 awarded them a right to secede from the Soviet Union.
Abkhazia, the Autonomous Provinces (Oblasts, such as South Ossetia), and the Autonomous Areas (Okrugs). Yugoslavia was a three-level state composed of the Federal State, Socialist Republics, and Autonomous or non-Autonomous Provinces (such as Kosovo).

With regard to Yugoslavia, Badinter Opinion No. 3 stated: 'The principle [of uti possidetis] applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republic's territories and boundaries could not be altered without their consent.' In a similar fashion, with regard to the CIS, importance has sometimes been ascribed to the fact that (only) the first-level entities, the former Soviet Republics (Art. 71), had a constitutional right to secede under Art. 72 of the 1977 Constitution. This right arguably implied a somewhat different constitutional status to their boundaries (as opposed to the boundaries of lower-level federal entities). The Tagliavini Report of 2009 on the Georgian–Russian conflict of 2008 applied uti possidetis only to the internal frontiers between Union Republics, but not to boundaries between Union Republics and Autonomous Republics, and not between Union Republics and Autonomous Regions. Along that line, Malcolm Shaw has argued that the presumption of uti possidetis is weaker the more unitary the state is. The presumption is stronger the more entrenched the administrative lines are. He goes on to claim that if secession is proclaimed constitutionally, then the presumption is at its least assailable. This would mean that the former Soviet Union Republics' boundaries could 'unassailably' benefit from uti possidetis, while territories within the successor states of the Soviet Union cannot (or can only to a lesser extent).

To flesh out the debate on the significance of domestic law for the application of uti possidetis, we might cite the case of South Ossetia (ch. 9 in this volume). In the Soviet Union South Ossetia was, within the Georgian Soviet Socialist Republic (SSR), only an Autonomous Region (Oblast)—a fourth-level entity within the Soviet Union. It was one more step farther removed from Union Republic status than Abkhazia, which was for the most of the Soviet period an Autonomous Republic (Art. 85(3)). Domestic law, both in the Soviet era and after the dissolution of the Soviet Union, quite clearly prohibited and continues to prohibit South Ossetia's secession from Georgia. Oblast did not enjoy a right to secede under

110 Arts 82–5 of the Soviet Constitution of 7 Oct. 1977 defined the status of 'Autonomous Soviet Socialist Republics'. Under Art. 85(3) '[t]he Georgian Soviet Socialist Republic includes the Abkhazian and Adzharian Autonomous Soviet Socialist Republics'. In 1989, the Soviet Union had 20 ASSR, 16 of which were in the Russian SFSSR.

111 Arts 86–7 dealt with 'Autonomous Provinces' (Oblasts,' sometimes translated as 'regions'). In 1989, the SU had eight autonomous provinces, five of which were in the Russian SFSSR.

112 Art. 88 dealt with 'Autonomous Areas' (Okrugs). In 1989, the Soviet Union had ten Autonomous Areas, all of which were in the Russian SFSSR.


114 Shaw (n 65) 504.

115 See Art. 87(2) of the Soviet Union Constitution (7 October 1977): 'The Georgian Soviet Socialist Republic includes the South Ossetian Autonomous Region'. Art 86: 'An Autonomous Region is part of a Union Republic or a Territory'.
The Principle of Uti Possidetis Juris

the Soviet Constitution. Additionally, within the Soviet Union still, the 1978 Constitution of the Socialist Soviet Republic of Georgia (as other Union Republics) denied the right to secede to any of its sub-entities.\textsuperscript{116} Article 1 of the post-Soviet Georgian Constitution of 24 August 1995 states: ‘Georgia shall be an independent, unified and indivisible state, as confirmed by the Referendum of 31 March 1991, held throughout the territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the Former Autonomous Region of South Ossetia and by the Act of Restoration of the State Independence of Georgia of 9 April 1991’. Additionally, Art. 26(3) of that post-Soviet Georgian Constitution states that ‘[t]he formation and activity of such public and political associations aiming at overthrowing or forcibly changing the constitutional structure of Georgia, infringing upon the independence and territorial integrity of the country or propagandising war or violence, provoking national, local, religious or social animosity, shall be impermissible’. Nevertheless, South Ossetia declared its ‘sovereignty’ on 20 September 1990, before the dissolution of the Soviet Union, and before Georgia's Declaration of Independence. The territory then declared its independence on 21 December 1991 (the date of the dissolution of the Soviet Union). Also, it held referendums on independence in 1991 and in 2006.

To sum up the historical practice, \textit{uti possidetis} in the Soviet Union and in Yugoslavia has only been applied to the boundaries of first-order sub-units (in the Soviet Union to the Union Republics). In practice, no 'new' \textit{uti possidetis} has emerged so far which would protect second- or third-order entities within the Soviet Union, ranging from Abkhazia to Chechnya. So the fiction was upheld that below that level, no ethnic or social differences exist which would demand the further fragmentation of territories. This fiction was and is empirically false, but, according to Jörg Fisch, is useful in order to avoid endless fragmentation.\textsuperscript{117}

But should it—in terms of legal doctrine and stringency—matter which boundary is affected? In particular, should \textit{uti possidetis} from the outset be inapplicable to boundaries belonging to former entities below the former Soviet Union Republic status (such as South Ossetia and Abkhazia in Georgia, and other breakaway territories of CIS members)? The discussion should start from the insight that normally, domestic law (or colonial law) is considered simply as a \textit{fact} under international law. The whole idea of \textit{uti possidetis} is in itself an exception to that principle, because it attaches international legal consequences to delineation acts under domestic (or colonial) law.\textsuperscript{118} But the ordinary agnosticism of international

\textsuperscript{116} Art. 70 of the Georgian SSR Constitution of 15 April 1978 stipulated: ‘The territory of Georgia shall not be altered without its consent’. See extracts of the constitutional text in English at \texttt{http://www.rre.ge/law/Gkon_1978_04_15_e.htm} accessed 18 September 2013. Identical provisions were contained in all other Soviet Union Republics’ constitutions.

\textsuperscript{117} Fisch (n 56) 264-5.

\textsuperscript{118} It does not seem convincing to depict \textit{uti possidetis} as some kind of ‘factual element’, as the ICJ had: ‘The principle of \textit{uti possidetis} freezes the territorial title; it stops the clock, but does not put back the hands. Hence, international law does not effectuate any \textit{renvoi} to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law—especially legislation enacted by France for its colonies and \textit{territoires d’outre-mer}—may \textit{play a role not in itself} (as if there were a sort of continuum juris, a legal relay between such law and
law concerning domestic law arrangements (as long as they respect international law) would normally suggest that, in principle, any internal boundary might benefit from uti possidetis.

This is all the more compelling as the internal status of administrative boundaries often changed over time, both within the Soviet Union and within Socialist Yugoslavia. The most conscious examples are of course the up- and downgrading of Abkhazia (short-lived as a Socialist Soviet Republic from 1921 to 1931, thereafter downgraded to an Autonomous Republic within the Soviet Union Republic of Georgia) and Kosovo (upgraded 1974, downgraded 1989), and the concomitant change of the status of those territories’ boundaries.

Historically, in Latin America, quite diverse types of territorial entities existed: provinces, vice-royautés, alcaldías mayores, corregimientos, intenencias, and the jurisdictions of a higher court (audiencias). Importantly for this chapter, in Latin America uti possidetis juris was not only applied to the boundaries between vice-royautés (vice-kingsdoms), but was likewise applied to administrative subdivisions (called audiencia or intendencia) within a single vice-kingsdom. It was also applied to subordinate entities of different types within one Captaincy-General. For example, until 1803 the Captaincy-General of Guatemala encompassed the Government of Honduras and the General Command of Nicaragua, which later became sovereign states. Ut possidetis was applied to the different types of boundaries without regard for the differences in status.

Most importantly, the constitutional guarantees of secession to Union Republics or Socialist Republics in the Soviet and Yugoslav constitutions should be irrelevant for the application of uti possidetis. First, it is unpersuasive to ascribe any importance to a constitutional guarantee when its effect only becomes relevant after a breakdown of the constitutional order. Secondly, it is not in line with the historical practice of colonial uti possidetis to limit the application of the principle to entities with a right (in domestic law) to secede, because of course the former overseas colonies had no right to secede under the domestic constitutional law of their time, and still their frontiers were upgraded by uti possidetis.

A different argument has been made by Marcelo Kohen, who asserts that the internal boundaries must have been lawfully established according to the domestic law of the state in order to be eligible to be upgraded to international boundaries.

international law), but only as one factual element among others, or as evidence indicative of what has been called the “colonial heritage”, i.e., the “photograph of the territory” at the critical date—Frontier Dispute case (Burkina Faso v Mali) (n 9) para 30, emphasis modified. Rather, one might say that reliance on uti possidetis does not mean to apply the law of the predecessor state but to use it as a proof of the territorial title of the new state.

119 Cf. Frontier Dispute Case (El Salvador v Honduras, Nicaragua intervening) (n 25) para 43.
120 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (n 21) para 161. To give another example: The new states of Paraguay and Bolivia within their international boundaries emerged from the province of Paraguay on the one hand and on the other hand from the audiencia of Chaco. Both had been part of the vice-kingdom of Rio de la Plata, but were nor assigned to the ’United Provinces of Rio de la Plata’ (which later became Argentina). Kohen (1999) (n 5) 372 n 14.
121 Lalonde (n 9) 235. 122 Kohen (n 5) 394.
Along this line, South Ossetians sometimes rely on the ‘illegality’ of South Ossetia’s inclusion in Georgia following the breakup of the Russian Empire after the 1917 revolutions to avoid the application of the *uti possidetis* principle. Their argument is that *uti possidetis* (in favour of Georgia) cannot override a prior illegality. Christopher Waters, in chapter 9, finds this claim weak. Indeed, it is difficult to find support (in practice or as a matter of legal reasoning) for the claim that prior ‘illegality’ precludes *uti possidetis*. It is exactly the function of *uti possidetis* to terminate arguments about prior territorial illegality.

The general scope of the principle (independent of the precise internal status and meaning of the boundary) is covered by case law. The Swiss Federal Council mentioned ‘anciennes ordonnances royales de la mère patrie espagnole’, Badinter Opinion No. 2 spoke of ‘existing frontiers at the time of independence’. Badinter Opinion No. 3 spoke of ‘the former boundaries’, while the opinion’s context (the question asked) shows that this referred to boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia.

Finally, several states commented in their written statements in the Kosovo Advisory Opinion proceedings on the type of boundaries suitable for upgrading through *uti possidetis*. The Netherlands named all ‘former internal boundaries’. Slovenia seemed to insinuate that all kinds of ‘administrative boundaries’ could be taken into account, including the borders of ‘municipalities’. But the Slovenian statement did not clearly say whether *uti possidetis* was then applicable against or in favour of Kosovo’s claim.

A related salient question is whether a new international boundary could be based on *uti possidetis* pointing to informal displays of territorial jurisdiction (as opposed to internal colonial or administrative boundaries). If that were true, then a territory such as Abkhazia, which is under the rather firm control of a separatist Abkhaz leadership and hardly controlled by Georgia, could rely on *uti possidetis*. State practice does not support such an extended version of *uti possidetis*. Although in some instances ‘not only were formal data considered, but also conduct from which the existence of territorial divisions at the critical date could be inferred’, these were never displays of territorial control after a secession of a territory within a metropolitan state.

To sum up, *uti possidetis* is applicable (if its preconditions are met) to all kinds of internal boundary lines, independent of the precise domestic law status and meaning of the boundary. *Uti possidetis*, ‘in and of itself, does not identify which administrative divisions and lines are to be preserved’ and which are not. *Uti possidetis* is, in particular, not restricted to upgrading lines which delineate entities with a right to secession based on domestic law. Still, it remains a challenge to

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123 Waters, ch 9 (in this volume) 182.  
124 Swiss Federal Council Award 1922 (n 14) 228.  
128 Lalonde (n 9) 237.
consistently apply the principle to multilevel political entities which possess numerous layers of different types of boundaries—although as we have seen, starting in nineteenth-century America, this has always been done.

The conclusion for the breakaway territories in states that were former Soviet Union Republics is that it is neither consistent as a matter of doctrine and logic nor in line with the broad statements in the case law to limit the application of uti possidetis to first-level boundaries (boundaries of former Union Republics) and to deny the application of the principle to former second-level boundaries. If uti possidetis is applicable in Eastern and Central Europe at all, then it can also play a role (if the conditions are met) for former administrative boundaries between former Soviet Oblasts, or between former Yugoslav provinces.129

2. Applicability ratione personae

With regard to the pending territorial issues in the CIS, there arises the question of who is bound to respect the principle of uti possidetis and who can lawfully rely on it. The question is, in other words, the principle’s scope ratione personae. If breakaway territories were the beneficiaries of uti possidetis, then the obligees or addressees would be the metropolitan states or previous mother states.

The colonial uti possidetis benefited non-self-governing territories (colonies) in the moment of proclaiming their independence as states. The principle here had different addressees. The principle was first of all operative in the new states’ (former colonies’) relationships among each other.130 Second, it was addressed against competing dominant states (other colonial powers), notably in situations in which the new states’ effective governmental control was rather weak, in order to forestall those competitors’ assertions that there existed terra nullius susceptible to occupation.131 The (previous) colonial powers were not, in practical terms, the most important addressees of that norm, although these states were bound by the principle, too.

It has been argued, for example by the United States in the Kosovo Advisory Proceedings, that non-state actors (e.g. independence movements) can never benefit from uti possidetis, because these entities are outside the personal scope of the principle.132 However, colonial uti possidetis in its classical form did at least indirectly benefit independence movements and similar types of non-state actors. To assert that non-state actors not relying on colonial self-determination are not within the scope of the principle raises the question of whether uti possidetis is applicable outside the colonial context or not. Moreover, much hinges on the relevant point in time (see p. 125). It is generally assumed that the critical date for applying uti possidetis is the moment of declaring independence. At that point

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129 Luchterhandt (n 5) 59.
130 Cf. Frontier Dispute case (Burkina Faso v Mali) (n 9) para 20.
131 Swiss Federal Council Award 1922 (n 14) 228. See also p. 117.
in time, the beneficiaries already purport to be a state. It seems reasonable not to exclude them in a purely definitional fashion from the principle's scope.

3. Applicability *ratione temporis*

It is usually said that *uti possidetis* is not applicable during the process of acquiring independence, but only afterwards.\(^{133}\) For example, the Badinter Commission stated that 'once the process in the SFRY leads to the creation of one or more independent states' the principle of *uti possidetis* would apply.\(^{134}\) *Uti possidetis*, as a customary rule providing for the respect of territorial limits as they exist at the moment of independence, does not come into issue during the process of secession.\(^{135}\) But these and similar statements do not provide clear guidance, because the actual moment at which independent statehood is acquired is typically controversial, and a central international institution to authoritatively determine the completion of the state-forming process does not exist. For example, the breakaway territories in the CIS have for the most part proclaimed their independence several times already, but to date are generally not recognized as independent states. Even when independence is acknowledged by an agreement or a unilateral declaration by other involved political actors, formal recognition of statehood has only declarative value. What matters for statehood is a certain measure of effectiveness acquired by the territorial–political entity. Because 'effectiveness' is a matter of degree and not an all-or-nothing concept, it cannot be pinpointed easily. This also means that the moment from which *uti possidetis* will apply might often be quite unclear.

IX. *Uti Possidetis* within the International Legal Order

The question of whether *uti possidetis* is generally applicable also to secessions must take into account the overall legal context. Would application of *uti possidetis* to secessions be in harmony with the overall system of international law? It has been claimed that 'application of *uti possidetis* to the breakup of states today...is profoundly at odds with current trends in international law and politics'.\(^{136}\) This section examines the international legal principles which usually come into play in the context of secession,\(^{137}\) in order to identify a substantive scope which is in conformity with both the principle's purposes (see section VII) and its overall legal context. A contextualized interpretation of *uti possidetis* can help answer the question of its general applicability.

\(^{133}\) See Kohen (1999) (n 5) 375.


\(^{136}\) Ratner (n 2) 591.

\(^{137}\) On the relationship between *uti possidetis* and effectiveness, see n 52.
1. *Uti possidetis* and self-determination

Roughly speaking, *uti possidetis* normally stands in an antagonistic relationship to the principle of self-determination. In the *Frontier Dispute Case of Burkina Faso v Mali*, the ICJ Chamber stated: 'At first sight this principle conflicts outright with another one, the right of peoples to self-determination'. Badinter Opinion No. 2 depicted *uti possidetis* as trumping or at least limiting the possible consequences of the exercise of a right to self-determination: 'whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris'). Along this line, several authors in this volume consider *uti possidetis* and self-determination to be in opposition to each other. From that perspective, any South Ossetian claim to secession would have to, according to Christopher Waters (ch. 9), be based on Soviet law, on Georgian law or on a separate international legal principle 'capable of overcoming the application of the *uti possidetis* principle'. The same view is espoused by Farhad Mirzayev with regard to Abkhazia (ch. 10). According to him, *uti possidetis* trumps the right to self-determination, 'meaning the principle was a prevailing force over the right of such newly independent states to external self-determination'. '[I]n the conflict between the right to self-determination and the principle of territorial integrity and *uti possidetis*, the former is limited in favour of the latter. External self-determination in the form of secession is not recognized in international law and primacy has been given to the principle of territorial integrity.

It must however be noted that there is no inevitable or irreconcilable conflict between the two principles; *uti possidetis* is not a simple counter-principle to self-determination. The two norms have different functions and goals, different beneficiaries; they cover different subject matters, and have a different temporal scope. Self-determination means a people's right to choose its political, economic, and social status (not inevitably linked to domination over territory). *Uti possidetis* refers to territorial boundaries of states. Self-determination applies before independence, and *uti possidetis* only after.

Still, there normally is a tension because the group claiming self-determination typically has some territorial basis (the people live somewhere), and even internal self-determination usually includes some territorial aspect. Moreover, colonial self-determination in particular had a very strong territorial component, and its prime content was to award a territory to a group of persons. Article 73 UN Charter mentions 'Non self-governing territories'. The provision also mentions 'self-government of peoples', not self-determination, but in substance concerned decolonization—which has (partly in hindsight) been conceptualized as an exercise of the colonial peoples' right to self-determination.

138 *Frontier Dispute Case (Burkina Faso v Mali)* (n 9) para 25.
140 Waters (n 123) 182.
141 Mirzayev (n 6) 203.
142 Mirzayev (n 6) 212, emphases added.
143 Kohlen (1999) (n 5) 375 and 380; Nesti (n 50) para 20.
144 Cf. Corren (n 23) 417 and 419.
The Principle of Uti Possidetis Juris

On the other hand, *uti possidetis* can—depending on the concrete case—also point in the same direction as the principle of self-determination for a particular group, and then both principles are mutually supportive.\(^{145}\) Along that line, self-determination has even been considered as one legal component of *uti possidetis*: ‘*Uti possidetis juris*, as it stands at the present, is based on two ideas: self-determination and the non-interference...’\(^{146}\) As the ICJ Chamber argued in the Frontier Dispute Case, *uti possidetis* brings about the territorial stability which the different African peoples need in order to develop. If they waste energy with fighting over boundaries, they cannot develop, and this in turn endangers their independence.\(^{147}\) From that perspective, *uti possidetis* can at times serve self-determination.

2. *Uti possidetis*, non-intervention, territorial integrity, and the intangibility of frontiers

Historically, the principle of *uti possidetis* is older than the prohibition of intervention. The latter was indeed shaped not least on the basis of *uti possidetis* in Latin America. In contemporary international law, a state’s territory, as demarcated by the state’s boundaries, is first protected by the international legal principle of non-intervention. Second, it is protected by the principle of territorial integrity: ‘Once the new state is established, the principle of *uti possidetis* will give way to the principle of territorial integrity, which provides for the protection of the new state so created.’\(^{148}\) Third, *uti possidetis* points in the same direction as the principles of inviolability or intangibility of frontiers as enshrined, for example, in Article III of the Helsinki Final Act of 1 August 1975.\(^{149}\) In the Kosovo Advisory Proceedings, Romania qualified *uti possidetis* as a ‘counterpart’ to the principle of inviolability.\(^{150}\) The ICJ described the functional relation as follows: ‘the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers.’\(^{151}\)

\(^{145}\) Cf. Mirzayev (n 6) 212.


\(^{147}\) ‘In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.’ (*Frontier Dispute case (Burkina Faso v Mali)* (n 9) para 25).

\(^{148}\) Shaw (n 65) 495.

\(^{149}\) Helsinki Final Act 1975: III. Inviolability of frontiers. ‘The participating States regard as inviolable all one another’s frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.’


\(^{151}\) *Frontier Dispute case (Burkina Faso v Mali)* (n 9) para 20.
The documents relating to the dissolution of the Soviet Union do not explicitly endorse *uti posit desit*, but rather the intangibility of borders and territorial integrity. First is the Agreement Establishing the Commonwealth of Independent States of Minsk of 8 December 1991, concluded between the three states of Belarus, the Russian Soviet Federative Socialist Republic (RSFSR), and the Ukraine. In its preamble, the three states ‘declare that the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality is ceasing its existence’. In Art. 5, the High Contracting Parties ‘acknowledge and respect each other’s territorial integrity and inviolability of existing borders within the Commonwealth’. Second is the Declaration of Alma Ata of 21 December 1991, proclaimed by 11 former Republics of the Soviet Union, ‘recognizing and respecting each other’s territorial integrity and the inviolability of existing borders’. Third, Art. 3 of the Charter of the Commonwealth of Independent States (CIS) of 22 June 1993 enshrined the principle of the ‘inviolability of frontiers’. Finally, in the Declaration on Observance of the Sovereignty, Territorial Integrity and Immunity of Borders of the States-Members of the Commonwealth of Independent States of 15 April 1994, the ‘Heads of states-participants of the Commonwealth of Independent States…confirming territorial integrity, inviolability of borders of each other, refusal of illegal territorial acquisitions and of any actions directed on the partition of another’s territory…1. Provide accomplishment in the relations of principles of the sovereignty, territorial integrity and inviolability of frontiers. 2. Confirm that, building the relations as friendly, the states will abstain from military, political, economic or any other uniform of pressure, including blockade, and also supports and uses of separatism against territorial integrity and immunity, and also political independence any of the states-members of Commonwealth’.

Given the functional similarity between the principles, the explicit mention of territorial integrity and inviolability of frontiers in the documents relating to the dissolution of the Soviet Union has been interpreted by many as amounting to an indirect endorsement of *uti posit desit* with regard to the boundaries of the Soviet Republics. However, there are no logical links between those principles which would warrant such inference. It is true that once *uti posit desit* has been applied, one consequence is the intangibility of the boundary. While *uti posit desit* refers to the creation of boundaries, intangibility/inviolability refers to their preservation. Also, the principle of territorial integrity can only be applied once we know where the boundaries lie. In that sense, application of the principles of territorial integrity, intangibility, and non-intervention necessarily comes after *uti posit desit* (in a temporal sense); however, their application is not conditioned upon

156 For example by Mirzayev (n 6), ch 10 in this volume.
157 Corten (n 23) 432.
having used *uti possidetis*. Their application presupposes the prior determination of a boundary, but this can take place through various principles or procedures; either *uti possidetis* or, for example, a territorial referendum. Therefore, just endorsing the inviolability of boundaries in international legal texts does not in itself manifest the legal opinion that these borders must be defined on the basis of *uti possidetis*; intangibility is no veiled substitute for *uti possidetis*.

X. *Uti Possidetis* as a Provisional Starting Point in Secession Processes

*Uti possidetis* is dispositive in three different senses. First, it does not belong to the small body of *jus cogens*. Second, states can agree from the outset not to apply *uti possidetis* to a given situation, but may draw a boundary line based on different considerations. Third, a boundary first drawn on the basis of *uti possidetis* can still be changed later by mutual consent among the parties concerned. That third aspect is probably the most important one in practice.

1. Deviations from the principle and concomitant revision of a boundary

The dispositive quality of *uti possidetis*, taken together with its normal temporal scope (application in the moment of establishing a state), leads to the qualification of *uti possidetis* as a fallback rule or as a ‘presumption’. The fallback rule means that *uti possidetis* is applied only unless and only until a different boundary line is established peacefully. Put differently, the normative quality of customary *uti possidetis* as a fallback rule means that a ‘contracting-out’ is required in order to lawfully deviate from it.

On a timeline, *uti possidetis* is a starting point. It will govern the boundary only as long as no agreement on the boundary (or/and on the application of a different principle to define it) is reached. It is a ‘transitional mechanism’ only, a ‘valuable point of departure’ for future territorial negotiations—but no more. Giuseppe Nesi well explains this function through time: *Uti possidetis* is a norm operating particularly in the first phase of the relationships established between

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158 It must be emphasized that the principle is by no means mandatory and the states concerned are free to adopt other principles as the basis of settlement—Brownlie (n 108) 130. It is ‘nullement un principe absolu’—Corner (n 23) 416.

159 Romania, Written statement, Kosovo Advisory Opinion Proceedings, para 87: ‘this principle does not entail that the frontiers are immutable, but that they can only be changed by agreement between or among the parties concerned and without the use of force.’ See in scholarship Nesi (n 50) paras 7, 12, 17, 18.

160 Shaw (n 65) 492 and 504. Cf. Ratner (n 2) 590: ‘states emerging from decolonisation shall presumptively inherit the colonial administrative borders’ (emphases added).

161 Cf. for this term Bernández (n 45) 421 (who also considers contracting-in possible).

162 Shaw (n 65) 495. See also Ratner (n 2) 617–18; Sasser (n 40) 774.

163 Lalonde (n 9) 235.
newly independent States...[W]ith the passage of time *uti possidetis* as a norm autonomously defining the territory of newly independent States is “overridden” (rectius “specified”) by the delimitations set by these very States. In this context, *uti possidetis* tends to act as a norm that “retires”...”\(^{164}\) This provisional function of the principle is actually in line with the Roman origins of the principle.\(^{165}\)

Although *uti possidetis* may thus turn out to be applied merely provisionally, it is not superfluous. Using *uti possidetis* (only) as a rebuttable presumption corresponds to the overall objective of international law, which is to achieve (territorial and legal) stability, but not rigidity. Some options for adaptations must be left open. Then the dual follow-up question is which *substantive* considerations play a role for the ‘rebuttal’ (maybe better conceptualized as a departure from the fallback rule), and in which *procedures* this might happen. ‘Departure’ here means both the decision not (or no longer) to use the rule of *uti possidetis* (ie to discard or to deviate from it in the concrete case) and—at the same time—the revision of the boundary line that was provisionally assumed to be at the place of the former administrative line.

2. Material and procedural factors for deviating from *uti possidetis*

In this section, I examine material considerations that justify a deviation from the starting point of *uti possidetis*. Which considerations, through which procedures, can lead to a revision of the line provisionally drawn on the basis of *uti possidetis*? The guiding concern must be the well-being of human beings affected by drawing a boundary. That concern is reflected in international law through the principles of international human rights, international standards of minority protection, and the principle of self-determination of peoples. In this context, ‘people’ would appear to be the sum of those affected by drawing a boundary line. The follow-up question is into which procedures the observation of these substantive principles translates, as I will discuss (see also pp. 133 ff.).

Besides the mentioned international legal principles, which further factors might be taken into account? One factor might be the age of a boundary. The older it is, the higher the probability that humans have adjusted to it. Another factor might be the viability of the state resulting from a particular delimitation. For example, the separatist region of South Ossetia in Georgia seems hardly viable, as opposed to the region of Abkhazia which can thrive on tourism and agriculture. But the criterion of ‘viability’ which was used during the times of the League of Nations to group the mandates into three categories was (or was perceived as) a pretext to delay independence and decolonization. Since World War II, the idea of viability has been thoroughly discredited—but maybe we now pay the price for ignoring it.

In which procedures should boundary lines provisionally or presumptively established on the basis of *uti possidetis* be revised? One option would be a

\(^{164}\) Nesi (n 50) para 18. \(^{165}\) See pp. 97–98.
The Principle of Uti Possidetis Juris

determination by the Security Council. Such a determination would seem to fall within the Council’s general mandate (cf. Art. 24 UN Charter) because the determination of a boundary is a means to maintain international peace and security. The problem with such a procedure is that it has the taste of a dictate of the Great Powers, which is charged with negative historical connotations. Another option would be arbitral proceedings. History offers numerous examples, such as the Arbitral Awards of the Swiss Federal Council of 1922 or of the Badinter Commission of 1991–92, which have already been mentioned. Arguably, the procedures applied should not contradict the substantive principles of human rights, minority protection, and self-determination mentioned above, and this means that any procedure that does not at least seek to accommodate the opinions of affected populations is not admissible as a matter of international law as it stands.

3. Deviations based on interstate consent

It is generally accepted that a boundary line that deviates from the starting point provided by uti possidetis can only be adopted upon an agreement, but not unilaterally. As the Badinter Commission put it: ‘it is well established 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.’\(^{166}\) ‘Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of uti possidetis.’\(^{167}\)

Normally, ‘agreement’ (consent) in this context is understood as an agreement between the involved political-territorial entities: states and seceding groups. That intergovernmental (or state-group) agreement can be made explicit in a boundary treaty. It can also, according to the ICJ, come about through mere acquiescence.\(^{168}\) Consent can moreover be embodied in an agreement to outsource the delimitation of a boundary to an arbitrator. It is my claim that consent should preferably be sought from the involved populations (on this see pp. 133–35).

Furthermore, speaking of ‘consent’ in this context not only masks who must consent, but also risks conflating different objects to which an agreement relates.

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\(^{166}\) Badinter Opinion No. 2 (20 November 1991), in which the Badinter Commission advocates the internal right to self-determination of the Serbian population in Croatia and Bosnia-Herzegovina but does not grant a right to secession, reprinted in EJIL 3 (1992) 182 et seq., emphasis added.

\(^{167}\) Badinter Opinion No. 3 (11 January 1992).

\(^{168}\) In the El Salvador v Honduras dispute, the ICJ discussed whether a boundary line (originally based on uti possidetis) could be changed later, after the acquisition of independence by acquiescence and recognition. The Court saw no reason to preclude the possibility of such a change, ‘where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the uti possidetis juris position’ (Frontier Dispute Case (El Salvador v Honduras, Nicaragua intervening) (n 25) para. 67, emphasis added). Nesti (n 50) para 13 draws from Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening) [2002] ICJ Rep 303 that a consolidated acquiescence can overcome uti possidetis. But this was not explicitly stated by the Court.
In all processes of state formation, the primary question is whether there should be a boundary at all; the second question is where the boundary is supposed to run, and a third question can be which principles ought to be applied in order to answer the first two questions. Consent/agreement of interested political actors can relate to all of those three questions. First, it can relate to whether a new interstate boundary shall be established at all; second, it can relate to the geographical position of that boundary; third, it can relate to the application (or non-application) of uti possidetis to the territorial issue.

Secession is defined as a territorial disruption against the will of the state. There is (at least initially) no consent on the 'whether'. Put differently, in the event of a secession, the very right to existence of the seceding entity is contested (and this is in fact the definition of secession). The issue is not where the boundary should run but whether it exists at all. But once the secession has succeeded, the affected state will and must come to terms with it. From thereon, there is consent on the 'whether', albeit not necessarily a freely determined one. This was also the course of events in post-1989 Eastern and Central Europe. The declarations of independence pronounced by Soviet Union Republics and by Slovenia, Croatia, and Bosnia basically occurred against the will of the respective metropolitan states. The successive breakaway of sub-national territories met with resistance of varying degrees. But at some point, agreements were negotiated.

It may well be that in twentieth-century decolonization, that moment of acceptance on the part of the dominating states occurred earlier. Typically, the colonial administering powers had accepted at an early stage that the colonies had a right to self-determination. From then on, the right to existence of two political-geographical entities—eg of Burkina Faso and Mali—as internationally relevant entities, as subjects of international law, was no longer contested. The question was only where to draw the line. But, as argued above, the dividing line (in law and in fact) between decolonization and non-colonial secession seems to be blurry, not at least because of the applicability of the principle of self-determination to both situations (see pp. 113–15). The two scenarios are therefore not radically distinct, and the consent of the affected territorial entity can play a similar role in both contexts.

One minor problem with consent is that it implies a territorial settlement on a case-by-case basis. The boundary in that case results from a negotiation process. However, in such settlements, the parties will always have unequal bargaining power. This inequality necessarily taints the material justice of such a settlement. In reality, the case-by-case settlement approach is an abdication of the law at that precise point. The settlement solution is no fully legalized solution because it precisely fails to do the job of the law, which is to posit general rules ex ante and to neutralize unequal power. Interestingly, in historical practice, there is no case in which the line of a boundary has been modified by interstate consensus to deviate from a previous internal administrative delimitation. No subsequent bargaining actually took place on the exact position of the line. The involved entities consented at some point to the boundary provisionally drawn on the basis of uti possidetis; there was (implicit) agreement that it should not be modified.
The Principle of Uti Possidetis Juris

The prevailing view that interstate consent is a necessary but sufficient condition to deviate from *uti possidetis* is often accompanied by the claim that the overall function of *uti possidetis* is quite modest. It has been pointed out that the actual stabilizing factor is not *uti possidetis*, but consent on using it as a starting point. "History teaches that when *uti possidetis* is contested by one party and no alternative to *uti possidetis* is provided (such as the conclusion of a delimitation agreement or the deferral of the delimitation to a judicial or arbitral award) the risk of instability and clashes increases enormously." 169 *Uti possidetis* has (historically) only ever provided a peaceful solution to boundary disputes in cases where its application has been based on consent—on the agreement of the parties to apply it. To use "*uti possidetis* "as law"—without consent—is... dangerous." 170 Along that line, the customary law value of *uti possidetis* has been questioned with the legal policy argument that this would constitute a disincentive for negotiations: *uti possidetis* can only unfold its useful role if its application is founded on the consent of the parties. If *uti possidetis* were applied automatically, then the seceding territory would automatically have resolved in its favour the most important issue in its bid for independence: the determination of its boundaries. 171 To sum up this point, even if *uti possidetis* were applicable to secessions as a matter of contemporary customary international law (as argued in section VI of this chapter), it would only work as a stabilizer when the parties agree on its application (which means that its actual source in the concrete case may well be called a contractual one).

4. Deviations based on consent of the populations: territorial referendums

It is submitted that focus should be shifted from the desirable consent between the affected territorial state and the ‘representatives’ of the breakaway territory to the consent of individuals. Importantly, this involves a move away from a unanimous contract-like decision (in a bilateral treaty or implicit agreement) to a majoritarian decision taken in a vote. So ‘consent’ on the individual level means something other than consent on the interstate level.

From a purely normative perspective, the best procedure for establishing a state boundary is a referendum conducted among the interested populations under international supervision. 172 The consent of the populations of the concerned territories can also be ascertained indirectly. A democratic justification of the creation of a new state and of its boundaries can be brought about through the democratic election of a government whose political programme is clearly directed at a specific territorial rearrangement. In order to function as a legitimating factor, a territorial referendum or election must satisfy the international standards of a free and fair vote—which is often lacking in practice.

169 Nesi (n 50) para 21. 170 Johanson (n 96) 545. 171 Lalonde (n 9) 235. 172 See in scholarship in favour of referendums A. Peters, *Das Gebietsreferendum im Völkerrecht* (Nomos 1995); A. Cassese, *Self-Determination of Peoples* (Grotius/CUP 1995) 180; Ratner (n
Historically, referendums have often been used to justify boundaries, mostly in combination with *uti possidentis*. Widespread use was made during decolonization in Africa and the breakup of Yugoslavia was accompanied by territorial referendums, too. Notably, the Badinter Commission specifically demanded a referendum for Bosnia as a precondition for recognition by the then European Community.\(^{172}\) In 2006, the creation and the boundary of the State of Montenegro were agreed upon by Serbia and additionally bolstered with a referendum.\(^{174}\) In Kosovo, numerous referendums have been held since 1991, but their fairness is dubious. Recent examples all over the world include the vote on the autonomy of Greenland (2008), the vote on Curacao’s partial autonomy from the Netherlands (2009), the independence referendum in South Sudan (2011), and the ‘sovereignty referendum’ on the Falkland Islands/Malvinas (2013).\(^{175}\) A difficult case is the projected UN-supervised referendum on the status of Western Sahara, which has been repeatedly delayed.

When the Soviet Union started to falter, a Soviet Secession Act was adopted in April 1990\(^ {176}\) which prescribed referendums (in Art. 2(2)). The application of that law would have arguably furnished additional procedural justification for the ongoing secessions of the Republics, even if its primary political objective was to slow down the dissolution by building up procedural barriers. However, that law was not really applied and remained a dead letter. Most of the disputed territories now located in the CIS and in Georgia\(^ {177}\) have conducted one or several referendums on independence, and the results have always been clear. One example is Nagorno-Karabakh (see also ch. 11 in this volume). As early as 1988, the local Soviet of Nagorno-Karabakh had called for the territory’s separation from the Azerbaijan SSR and unification with Armenia. On 30 August 1991, Azerbaijan declared the re-establishment of its statehood of 1918–1920. Nagorno-Karabakh then renounced reunification with Armenia, because Armenia no longer supported

2) 622–3; A Tăncredi, ‘A Normative “Due Process” in the Creation of States through Secession’ in M Kohen (ed), *Secession—International Law Perspectives* (CUP 2006) 171, 190–1; Sæver (n 40) 777.


174 The referendum was held on 3 June 2006. Upon a proposal of the EU, voter turn-out of 50% and approval of 55% were required to reach a valid decision on independence. The referendum had a turnout of 85%, and 55% of the participants voted in favour of independence. Montenegro acceded the United Nations on 28 June 2008.

173 A referendum on the political status of the Falkland Islands/Malvinas was held on 10–11 March 2013. The inhabitants were asked whether or not they supported the continuation of their status as an Overseas Territory of the United Kingdom. On a turnout of 92%, 99.8% voted overwhelmingly to remain a British territory. For a critique of this referendum (which was conducted without UN involvement) as irrelevant for the international legal status of the islands, see the Argentinean scholar MG Kohen, ‘El referéndum en Malvinas o la autoasistencia británica’, (5 March 2013) El País 12.

175 Law on the Procedure on the Decision of Questions Connected with the Seccession of a Union Republic from the USSR of 4 April 1990 (Vedomosti S`ednja narodnych deputatov SSSR i Verhovnogo Soveta SSSR 1990 No. 15, 252).

177 For example, South Ossetia conducted a referendum on independence on 19 January 1992 which did not satisfy international standards of fair and free voting.

A problem of territorial referendums is that they are decided by the majority. If, as is mostly the case, the proponents of a new state (and of a new boundary) belong to a specific ethnic group, the result of the vote simply reflects the ethnic composition of a territory. So even if ‘ethnicity’ is not used as a formal criterion for drawing the boundary line, it pops up and becomes decisive through the referendum. Does this mean that a referendum is precisely the wrong tool to safeguard minority rights? Is, therefore, a referendum genuinely and in structural terms unsuitable for legitimizing territorial rearrangements?

This is not the case, as the successful referendums on the Jura territory in Switzerland demonstrate. In that case, a truly democratic decision on the establishment of a new canton and on the exact location of its boundaries was reached in a process which lasted eight years (from 1970 to 1978). This was done by a series of votes asking all affected populations on the various governmental levels (ranging from the local community to the Swiss Federation) whether and where boundaries should be drawn. The boundary line in the end satisfied the needs of the local population. Such a procedure can only function if it is rooted in a strong democratic culture embedded in the rule of law. These indispensable preconditions have been lacking in many areas where territorial rearrangements have been effectuated in the recent past. Therefore, many recent territorial referendums did not—although they are, under ideal conditions, superior to uti possidetis from the point of view of normative theory—in the real world provide a strong justification for the drawing of territorial boundaries. To conclude, despite obvious practical difficulties in organizing fair territorial referendums, they still provide the best normative basis for territorial rearrangements in contemporary international law. Uti possidetis, understood as a residual preliminary rule, can provide a useful function here, because any vote put to the population needs a starting point for the position of the boundary.

178 Peters (n 172) 195–6 with references.
179 Peters (n 172) 194–8.
180 Peters (n 172) 196 with further references; A Manoutscharjan, ‘Nagornoj Karabach im Kampf um das Selbstbestimmungsrecht: Eine Darstellung aus armenischer Sicht’ (1992) 42 Osteuropa 951, 962.
181 Cf. n 176.
XI. Conclusions and Outlook

Frontiers are no longer ‘the razor’s edge on which hang suspended the modern issues of war and peace, of life or death to nations’, as Lord Curzon had put it in his 1907 Romanes lecture. But even in the era of globalization—only seemingly an age of boundlessness—state boundaries continue to matter. The physical boundaries of states have become porous with the transnational mobility of persons, goods, services, data, and finance flows. Still, states continue to be the most powerful international legal subjects, and their physical delineation remains relevant for the application of their domestic law, for their jurisdiction to enforce, and for their responsibility under international law. Because most people are neither willing nor able to migrate and thus to ‘vote with their feet’ against the laws they live under, the side of the state boundary on which they live is crucially important to their lives.

This chapter has sought to demonstrate that uti possidetis is, as a matter of positive law and practice, applicable to non-colonial secessions. This extended scope is reconcilable with other relevant international legal principles, and defensible as a matter of legal policy.

Importantly, uti possidetis can potentially transform any type of internal territorial demarcation that has been established in domestic law in the period of time before secession into an international one once secession has been successful. Generally speaking, older administrative lines stemming from the pre-independence era (eg Soviet era) cannot be opposed against the currently existing ‘mother’ states (eg CIS states) if they are not acknowledged in their domestic law as it stands, too. Neither does uti possidetis apply on the basis of factual control over a territory, in the absence of a formal administrative line.

A core question for the resolution of CIS matters is therefore whether the successor states of the Soviet Union do possess clearly defined internal administrative territorial demarcations. This seems to be true in many, but not in all cases. Although those CIS member states which are affected by secessionist attempts are not constituted as federation-type states but rather unitary states, they still have internal domestic administrative boundaries which in some instances correspond with former Soviet administrative boundaries, in others not. For example, Georgia is divided into nine regions, two autonomous Republics, and the capital, Tbilisi. Chechnya’s administration was reformed between 2006 and 2009, and the Republic is now divided into 15 rajons and two cities. However, the exact boundary lines of these administrative units in Chechnya have not been exactly defined for the most part.

Therefore, the overall conclusion for the CIS problèmatique is that all depends on the existence of internal territorial demarcations. Where administrative boundaries exist, breakaway territories defined by such boundaries can lawfully

rely on *uti possidetis* for their case. Although this finding might estrange international lawyers because it means that details of domestic law determine the international legal situation, this anomaly is inbuilt in the concept of *uti possidetis*. More seriously, the finding seems to provide a wrong incentive: in order to avoid the potential application of *uti possidetis*, a state is well advised not to federalize and decentralize its territory, and this is a course which does not well accommodate the needs of minority populations.

The real issue in the CIS is *whether* there should be new boundaries, and not *where* these should run. Although *uti possidetis* is often invoked as a battle slogan by defenders of national and territorial unity (and sometimes by proponents of secession), the principle does not offer any answer to the question of the 'whether'.

In any event, *uti possidetis*, far from being a perfect solution to define an international boundary, is only the prima facie least bad, and it should only constitute the starting point, the fallback rule, for the final determination of a boundary unless and until consent on the boundary is reached. Ideally, this consent should not be limited to intergovernmental level but should assure the support of the majority, ideally a qualified majority, of the population.

Reliance on *uti possidetis* is a purely formal device; it respects a former administrative line independent of any material factor. The application of *uti possidetis* can however be set aside on the basis of material considerations, notably respect for a concerned people's right to self-determination, exercised in proper procedures. If a fair procedure (eg in a referendum) results in boundary lines which circumscribe a territory whose residents form an ethnically more or less uniform group, this should be tolerated. Obviously, the establishment of a state boundary in an 'ethnicity-conscious' fashion will not resolve the inevitable problem of conflicting cultures in a globalizing world.

*Uti possidetis* is a suitable mechanism for (provisionally) determining a boundary line also in the event of a secession. But in the end, any drawing or shifting of a state boundary has to grapple with the tension between satisfying demands of formal stability/legal security and material justice. Both the formal and the substantive criteria to determine boundaries have their drawbacks, but the worst is to mix formal and material criteria, because then all regularity is lost. Some chance of securing stability exists when a formal criterion (namely *uti possidetis*) is implemented consistently and without regard to material questions. This means renouncing substantive justice. But this renunciation is in turn irreconcilable with the promise given by the Human Rights Covenants proclaiming the principle of self-determination. The relevant actors continue to ruminate about self-determination, and this undermines all attempts to reach stability through pure formality. Therefore, the tension will persist. It is an open question which principle—the formal *uti possidetis* principle, or the material principle of democratic self-determination, ideally expressed in a fair and free referendum—offers the best opportunity to minimize conflict and bloodshed in the long run.

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185 Fisch (n 56) 266.  
186 Fisch (n 56) 266–7.