It is high time to reconsider the balance between *uti possidetis* and the right of self-determination. This paper seeks to analyze this balance, and reconstitute these norms. In order to do so, it first examines the customary nature of *uti possidetis*, and whether it remains applicable to modern methods of state-creation. Next, it examines the negative effects of restricting self-determination through *uti possidetis*, and provides jurisprudential reasons why such a balance between the two is untenable. Finally, it provides an alternative procedure to determine the international borders of newly created states, which accounts for the values sought to be protected by the right of self-determination as well as the principle of *uti possidetis*.

**INTRODUCTION**

The principle of *uti possidetis*, at the time of its inception, mandated that on decolonization, newly created States would retain their colonial administrative borders, which were to be transformed into international borders. The underlying rationale for such a rule was simply to provide stability and certainty in the creation of such States, without which there would be possibilities for territorial claims by neighboring nations and separatist groups that could lead to violence and volatility.

Admittedly, the principle certainly restricted the scope of self-determination, by limiting the geographical region which a people could exercise control over and call their own. It denied such a people the opportunity to renegotiate historically unjust borders that were imposed on them by imperial powers, and that often sought to divide them over different administrative units in order to undermine their unity and ensure effective control over them. However, such an outcome was considered justifiable for two reasons: *first*, it was believed that the broader interests of peace of the region should be given greater importance than a people’s ability to

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control their future; and second, the right of self-determination was a relatively new one, and had not obtained the jurisprudential muscle that would be needed to overcome a value as basic as ‘the stability of borders’.

However, it is submitted that these two conditions no longer hold true today. The strict application of *uti possidetis* has not always guaranteed peace, but has even contributed to regional and nationalist violence in certain cases – best exemplified by the genocide in Bosnia-Herzegovina, Croatia and Serbia during the dissolution of Yugoslavia, which can be considered a direct consequence of the Badinter Commission’s decision to apply the principle of *uti possidetis* to the creation of these States. Moreover, the principle of self-determination has, over time, gained significant ground and has been considered a fundamental norm of international law that produces *erga omnes* obligations, as acknowledged by the ICJ in the *Barcelona Traction* case, the *Palestine Wall* case as well as the *Kosovo Advisory Opinion*. In fact, in its commentary to the Articles of State Responsibility, the ILC has gone so far as to classify the right of self-determination as a *jus cogens* norm that cannot be violated under any circumstance.

For these reasons, it is submitted that the time to reconsider the balance between *uti possidetis* is due. This paper seeks to analyze this balance, and reconstitute these norms. In order to do so, it first examines the customary nature of *uti possidetis*, and whether or not it remains applicable to modern methods of state-creation. Next, it examines the negative effects of restricting self-determination through *uti possidetis*, and provides jurisprudential reasons why such a balance between the two is untenable. Finally, it provides an alternative procedure to determine the international borders of newly created states, which accounts for the values sought to be protected by the right of self-determination as well as the principle of *uti possidetis*.

**IS THE DOCTRINE OF UTI POSSIDETIS A RULE OF CUSTOMARY INTERNATIONAL LAW?**

An examination of the basis of the customary nature of *uti possidetis* must begin with the decolonization of Latin America, in the early nineteenth century, in which the Creoles who obtained independence from Spain decided to use the colonial power’s administrative lines as the basis for international borders between the newly formed States.¹ This rule was followed by them for two purposes: first, to ensure that no part of South America remained *terra nullius* upon independence, open to claims from Spain or other non-American powers; and second, to prevent

conflicts between the newly formed States by providing definitive boundaries that were not open to challenge. An identical position was also adopted by the OAU in 1963, during the decolonization of Africa, through the Cairo Declaration, in which States promised to “respect the frontiers existing on their achievement of independence”. Much like the case of Latin America, the adoption of this policy in Africa was also motivated by a desire to quell the irredentist tendencies of neighboring nations, and the secessionist aspirations of minorities within the States, which could have led to territorial claims and violence.

The application of the principle of *uti possidetis* in these two contexts is used to argue that the principle has acquired the status of a rule of general custom. However, in order to become such a rule of custom, a practice must be “extensive and virtually uniform”, such that “the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule”. It is submitted that the application of *uti possidetis* does not meet this standard. In a significant number of situations outside Latin America and Africa, States have emerged from colonial rule with borders that are different from those employed to administer them prior to independence. For instance, when the German colony of Togo was decolonized after World War I, a part of it was integrated into Ghana, while the rest became the State of Togo. This decision was taken based on the outcome of separate plebiscites for the two regions of Togo, which were endorsed by the UN. Similar outcomes were achieved in the British Northern Cameroons in 1959, the British Southern Cameroons in 1961, the island of Kuria-Muria in British Aden (South Yemen) in 1967, the Ellice Islands in 1974, and the French Comores Islands in 1976, which prioritized the desires of peoples within these territories over the rule of *uti possidetis*, in

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2 Beagle Channel Arbitration (Argentina v. Chile) 52 ILR 93, 125 (1977); Colombia Venezuela Frontier Arbitration 1 R.I.A.A. 225, 228 (1922).
3 O.A.U. Resolution on Border Disputes AGH/RES.16(I) [1964].
6 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) 1986 ICJ REP. 14, 98.
13 M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE, 30 (1983).
order to alter pre-independence borders. None of these instances were criticized as aberrations or exceptions to the tenet of *uti possidetis*. Hence, one must conclude that this principle does not possess the state practice required to constitute a rule of general custom, though some have argued that it may be a rule of local custom in Africa or Latin America.\(^{14}\) Others have argued that this principle is also devoid of any *opinio juris*, and has only been expounded as a *policy of convenience* rather than a mandatory rule of law, even in South America and Africa.\(^{15}\)

However, even if one were to concede that *uti possidetis* has acquired the status of custom, it would still be important to determine whether the scope of this rule is limited to decolonization, or whether it is capable of application to modern processes of State-creation – such as secession or dissolution. This was precisely the issue that was addressed by the Badinter Commission, appointed by the European Community to oversee the dissolution of Yugoslavia in 1991, in its 3\(^{rd}\) Opinion.\(^{16}\) When asked if the internal administrative boundaries between Croatia, Serbia and Bosnia-Herzegovina were to become international borders, the Commission responded in the affirmative, stating that on the creation of any new State, “the former boundaries become frontiers protected by international law [according to] the principle of *uti possidetis*”.\(^{17}\) Thus, the decision sought to expand the scope of this principle from one that determined the nature of international borders post-decolonization based on pre-independence administrative boundaries, to a general rule that mandated the borders of new States to conform to prior administrative boundaries of their parent State – irrespective of whether or not that parent State was an imperial power.

The glaring problem with this decision, however, is that the Commission cites absolutely no state practice or *opinio juris* to justify this expansive reading of *uti possidetis*.\(^{18}\) Subsequently, certain jurists have attributed the Badinter Commission’s erroneous extension of the principle of *uti possidetis* to their lack of expertise in international law,\(^{19}\) while others have argued that the


\(^{17}\) Opinion No.3 (Conference on Yugoslavia, Arbitration Commission) 3 EJIL 1 (1992).


\(^{19}\) The Badinter Commission was composed of experts in the field of constitutional law and not international law. Thus, the weight of their opinions, as per Art.38(1)(d) of the Statute of the ICJ, is questionable. See: F.D. Mnyongani, Between a rock and a hard place: self-determination vs. *uti possidetis*, 41(3) The Comparative and International Law Journal of South Africa 463, 471 (2008).
Commission had to provide such an expansive reading out of political necessity, in order to quell the irredentist violence in regions such as Republika Srpska or Serbian Krajina. In fact, the only authority cited by the Commission to justify the existence of a customary rule of *uti possidetis* is the decision of the ICJ in the *Frontier Dispute* case between Burkina-Faso and Mali.

However, it is submitted that the Commission’s reliance on this decision is misplaced for two reasons. *First*, in its decision in the *Frontier Dispute* case, the ICJ applied the principle of *uti possidetis* only because both parties to the dispute had specifically requested the Court to resolve their dispute on the basis of this rule, through their Compromises. In fact, the Court was especially careful to avoid ruling on the customary nature of *uti possidetis*, choosing instead to refer to it as a “principle of a general kind”. *Second*, even while choosing to apply *uti possidetis*, the Court clarified that it was only a “principle that upgraded former administrative delimitations, *established during the colonial period*, to international frontiers” and “therefore [is] a principle ... which is logically connected with this form of decolonization”. Thus, the ICJ was emphatic that the scope of this principle was restricted only to the process of State creation through decolonization. For the above reasons, it is submitted that the principle of *uti possidetis* is not a rule of general customary international law, and, even if considered to be so, it would not be capable of application outside the context of decolonization, to modern methods of State-creation.

**HOW OUGHT THE INTERNATIONAL LEGAL SYSTEM, BALANCE THE PRINCIPLE OF *UTI POSSIDETIS* AGAINST THE RIGHT OF SELF-DETERMINATION?**

The right of self-determination, enshrined in numerous international legal instruments, grants a ‘people’ the right to control their future – whether economic, cultural, social or political. As was observed by the Canadian Supreme Court in the *Quebec Secession Reference* case, this right

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23 Id.
can manifest itself in two dimensions – internal and external. *Internal* self-determination is exercised by a people within the borders of their State, through actions such as collectivizing and lobbying, voting in elections, promulgating their culture and views, and protesting peacefully.\(^{26}\)

However, when faced with an oppressive State that does not grant them effective access to this right of internal self-determination, or which systematically violates their human rights, a people are entitled to a right of *external* self-determination, which operates outside the legal system of their parent State, and grants such a people the ability to determine their international status – whether it be the creation of a new State, through decolonization, secession or dissolution, or integration/free-association with another State, or even claims to greater autonomy within their parent State.\(^{27}\)

The interplay between *uti possidetis* and the right of self-determination occurs at the time when a people are entitled to the external variant of this right. The principle of *uti possidetis* limits the geographical scope over which this right can be exercised.\(^{28}\) For instance, if the Indian government were to oppress the Marathi people within its borders, granting them a right of external self-determination, the principle of *uti possidetis* would mandate that the territory which they would be permitted to secede with must conform to the internal administrative boundaries of India. Hence, while they may exercise their right to secede over the State of Maharashtra, they would not be permitted to also include within their newly formed nation the bordering regions around this territory - even though such regions may have a Marathi majority. This is because the principle of *uti possidetis* mandates that the international borders of a new State must conform to the administrative boundaries it possessed within its parent State, prior to independence.

The justification for the use of *uti possidetis* to limit the scope of the right of self-determination, in this manner, is twofold. *First*, by providing the only unambiguous outcome in such circumstances, this principle is believed to reduce the prospects of armed violence. Without such a policy in place, all borders of a newly formed State would be open to challenge, and, as a consequence, such States would be vulnerable to internal separatist claims and external


irredentist desires. Second, because a cosmopolitan democratic state ought to be able to function within any borders, the conversion of administrative borders to international borders, though *uti possidetis*, is considered as sensible as any other approach, and also the most straightforward to implement.

Although these reasons may seem to justify the limitation of self-determination, *prima facie*, there are significant problems that arise out of the balancing of these two concepts in this manner. The extension of *uti possidetis* to modern breakups leads to genuine injustices and instability, by leaving significant populations both unsatisfied with their status in new States, and uncertain of political participation there. By hiding behind inflated notions of *uti possidetis*, State leaders avoid engaging in issues pertaining to territorial adjustments – even minor ones – even though such adjustments may be essential to the effective exercise of self-determination.

This is best illustrated through the example of Yugoslavia, where the assumption by involved parties of the applicability of *uti possidetis* precluded any negotiation over border alterations, leaving those people on the ‘wrong’ side of the border vulnerable to ethnic cleansing and armed violence. Similar outcomes of ethnic violence in Transnistria (Moldova), Tatarstan (Russia), South Ossetia and Abkhazia (Georgia), Kosovo (Serbia), and Nagorno-Karabakh (Armenia) prove that the promise of certainty and stability that *uti possidetis* is believed to offer may not be realized in all cases.

Hence, it is submitted that in circumstances that warrant the exercise of external self-determination, the principle of *uti possidetis* ought not to be applied in a strict fashion. The precise manner in which this principle ought to be implemented will be discussed below, in the final section of this paper. However, before addressing the procedure, one must first understand the jurisprudential justification for its application.

(a) *The difference between ‘rules’ and ‘principles’*

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As argued in the first section of this paper, *uti possidetis* is not a rule of general custom that is applicable to modern processes of state creation. Instead, according to the ICJ, it is merely a ‘principle’ that ought to be followed to ensure stability and mitigate violence. As pointed out by Dworkin, there is a significant difference in the treatment of rules and principles in jurisprudence – “rules are applicable in an all or nothing fashion; if the facts a rule stipulates are given then the answer it supplies must be accepted.” However, that is not the manner in which principles are to be treated. Principles do not provide legal consequences that follow automatically when the conditions for their application are met. In fact, principles do not even purport to set out conditions that make their application necessary. Rather, “principles incline a decision one way, though not conclusively, and they survive intact when they do not prevail.” Thus, when two or more principles collide, an adjudicator must take into account the relative weight and importance of each, in the circumstances of the case, in order to decide which ought to be given priority.

It is for precisely this reason that one ought not to presume that the principle of *uti possidetis*, which is rooted in the value of stability of boundaries, must always override the right of self-determination, which epitomizes the value of a people’s ability to control their future. Rather, they ought to be balanced as per the facts of each individual case, by determining which of the two values in question ought to be given priority.

It is submitted that such a balancing exercise has already been conducted by international law, for a very similar purpose – that of ‘remedial secession’. Although, ordinarily, international law presumes respect for a state’s territorial integrity, there are exigent circumstances in which a people’s right of self-determination is given priority over this principle of integrity, in order to entitle them to secede from their parent state as a remedy of last resort. *Opinio juris* for such a customary right can be found in Principle 5 of the Friendly Relations Declaration, and other

36 Id.
resolutions, as well as in statements made by the Netherlands, Yugoslavia, the Soviet Union, the United States, the United Kingdom, and others. State practice complements such opinio juris. The secessions of Bangladesh, Croatia, Bosnia-Herzegovina, Slovenia and Macedonia following oppression by their respective parent States have been internationally recognized. Moreover, Kosovo’s secession, in response to Serbian persecution, recognized by 110 States, provides cogent support for remedial secession. Hence, it is submitted that if international law permits the far more fundamental principle of territorial integrity to be overridden by a people’s right of self-determination, then there ought not to be any reason why a similar balancing exercise should not be conducted with respect to the principle of uti possidetis, in order to ensure just outcomes for the peoples affected.

(b) The principle of equity

Equity, considered to be “the creative force which animates the life of the law,” accounts for considerations of fairness, reasonableness, and policy, which are often necessary to ensure the sensible application of law. Equity has been widely applied by the ICJ, as a general principle of law. It is submitted that the strict application of uti possidetis, which results in unjust outcomes, ought to be informed and mitigated by equity. This was precisely what was recognized by Abi-Saab, J. in his separate opinion of the Frontier Dispute case, where he points out that the

44 U.N.Doc.A/AC.125/SR.44.
47 J. Dugard, THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO, 187-196 (2013);
50 In fact, the growing international recognition of Kosovo’s statehood, which is in clear violation of the rule of uti possidetis, as pointed out by the Badinter Commission in its 3rd Opinion, seems to indicate that the international community is already moving towards a consensus in which the right of self-determination may, in certain circumstances, override the value of stability of borders.
51 P. Brutau, Juridical Evolution and Equity in ESSAYS IN JURISPRUDENCE IN HONOUR OF ROSCOE POUND, 82, 84 (1964) quoted by Judge Weeramantry in his separate opinion in Jan Mayen 99 ILR 585.
principle of *uti possidetis* is not to be conceived as absolute rule, and that it should always be applied keeping in mind its function in the international legal order, and the outcomes it can achieve in specific cases.\(^{54}\) He goes on to argue that in situations where the application of *uti possidetis* would fail to ensure the purpose it is intended to fulfill, namely the mitigation of ethnic violence and the promise of stability, then “*considerations of equity infra legem come into play*” and the Court must exercise its freedom to deviate from this rule.\(^{55}\)

The reasoning put forth by Abi-Saab, J. was applied in the *Rann of Katch case*,\(^{56}\) by the tribunal constituted to determine the international boundary between India and Pakistan in the Gujurat-West Pakistan region. Admittedly, the tribunal opted to apply the principle of *uti possidetis* to resolve disputes pertaining to a number of territories – such as Pirol Valo Kun, Rahim Ki Bazar, Dhara Banni and Chhad Bet – by determining which of the two States exercised effective sovereignty over these regions prior to independence, in order to resolve how to draw the colonial administrative line that was to become an international border. However, with respect to the two deep inlets on either side of the Nagar Parkar, which were awarded to Pakistan, the tribunal appears to have been driven by considerations of fair outcomes, rather than a strict application of *uti possidetis*. In fact, the decision explicitly acknowledges that: “*it would be inequitable to recognize these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in the region compels the recognition and confirmation that this territory which is wholly surrounded by Pakistan territory, also be regarded as such.*”\(^{57}\) This decision clearly illustrates that the purpose of *uti possidetis* is to provide equitable outcomes, and in circumstances where such a result cannot be achieved, it would not be improper to depart from this rule.

Hence, it is submitted that, for the reasons outlined above, the principle of *uti possidetis* ought not to be applied as a strict rule, but should, instead, be balanced against the right of peoples to self-determination, and its application should be informed by considerations of equity.

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\(^{54}\) *Frontier Dispute* (Burkino Faso/Mali) 1986 ICJ Rep. 554, 661-62 (Abi-Saab, J., sep. op.).

\(^{55}\) Id.

\(^{56}\) *India/Pakistan Western Boundary (Rann of Katch)* Case 16 RIAA 1 (1968).

\(^{57}\) *India/Pakistan Western Boundary (Rann of Katch)* Case 16 RIAA 1, 571 (1968).
CONCLUSION: AN ALTERNATIVE TO \textit{uti possidetis}

The proponents of \textit{uti possidetis} often argue that this principle provides the only method capable of offering a clear and stable outcome during the process of state creation, without which borders would be open to dispute, leading to territorial claims and violence. However, it is submitted that there are alternatives to \textit{uti possidetis}, and this section of the paper outlines how such alternatives may be implemented if the international community desires to move beyond what Franck calls an “idiot rule”.\textsuperscript{58}

\emph{First}, functional arguments in favour of \textit{uti possidetis} do carry some weight – however, only to justify the preservation of pre-independence borders as a \textit{temporary} solution, to maintain the status quo while the states involved can agree to the costs and benefits of such borders, or agree on new ones.\textsuperscript{59} In several situations, states may decide to retain such pre-independence borders as a permanent solution. However, they will do so only after considering the welfare of the individuals involved and the stability of the region. As a consequence, the \textit{positive act} of agreeing to such colonial borders would confer greater legitimacy on them than an \textit{imposition} of such borders through the rule of \textit{uti possidetis}. Thus, although the outcomes achieved through such negotiation may be identical, the process through which they are achieved would ensure a larger degree of acceptability of such borders for the peoples of both nations, and the possibility of such border-revisions may cause secessionist groups to rethink their claims to statehood entirely.\textsuperscript{60}

\emph{Second}, if states fail to reach an agreement amongst themselves, there ought to be an international adjudicative authority to which their dispute must compulsorily be referred. Although such an adjudicatory body may begin with the pre-colonial boundary as a starting point, it must examine each portion of such boundary and the consequences it would have on the peoples who live on either side of it, as well as on the stability of the region. The body may be assisted in this process through written submissions from both parties. If it decides that the pre-colonial boundary, or any portion of it, does not result in an equitable outcome, then the body will be free to deviate from such a line in order to determine the international border between the two states in question. Finally, any decision of such a body would, of course, be binding on both

parties to the dispute. This process is, in fact, nearly identical to the one laid down by the ICJ and other international tribunals in determining disputes pertaining to the delimitation of maritime zones.  

Third, the adjudicatory body must, while determining the equity of the pre-colonial boundary, keep in mind the following considerations: (a) the age of the line – borders that are centuries old ought to be given greater weight because they increase the likelihood that the populations concerned would have adjusted to such borders through migration or assimilation, while also offering a history of stability that can be relied upon; (b) the legitimacy of the process by which the line was drawn – a constitutionally drawn line, determined by a democratically elected body ought to be given greater importance than one drawn by a dictatorial regime or imperial power, as the former accounts for the people’s wishes and hence reflects their self-determination, whereas the latter is only a reflection of the authority and self-interest of the entity drawing the border; (c) the viability of the entities created through the new borders – if the adjudicatory body is to replace an existing boundary, that has proven itself capable of providing stability and ensuring the functionality of the units it divides, then it would be essential for the body to also verify that the alternatives they propose are capable of ensuring similar viability of the entities they seek to create.

It is submitted that by implementing such a model that allows for the possibility of change, rather than the imposition of arbitrary lines drawn by colonial masters, while also providing a stop-gap solution that preserves status quo until consensus between parties can be reached, the international community may, very well, find an effective method to balance the value of stability of boundaries and the value of a people’s right to self-determination which could guarantee equitable outcomes in all scenarios.

61 See: North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) 1969 ICJ REP. 3; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.) 1982 ICJ REP. 3; Delimitation of the Continental Shelf case (U.K. v. France) 18 RIAA 3 (1977); Dispute Concerning Delimitation of the Maritime Boundary (Guinea/Guinea-Bissau) 25(2) ILM 251; Continental Shelf case (Libya/Malta) 1985 ICJ REP. 13; Case Concerning Maritime Delimitation between Greenland and Jan Mayen (Denmark v. Norway) 1993 ICJ REP. 38; Eritrea v. Yemen, Award on Territorial Sovereignty and Scope of the Dispute 22 RIAA 211 (1999); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) 1991 ICJ REP. 50.