Uti Possidetis and Maritime Delimitations

Prof. Marcelo G. KOHEN
The Principle of *Uti Possidetis Iuris*

Content

1. "the pre-eminence accorded to legal title over effective possession as a basis of sovereignty"

2. "The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign" (Burkina Faso/Mali, ICJ 1986, para. 23)
The Principle of *Uti Possidetis Iuris*

Legal Scope:

"It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs." (Burkina Faso/Mali, ICJ 1986, para. 20)

"a principle of a general kind which is logically connected with this form of decolonization wherever it occurs". (ibid, para. 23)

“the principle of *uti possidetis* has kept its place among the most important legal principles” regarding territorial title and boundary delimitation at the moment of decolonization (ibid., para. 26)
Its Possible Application to Maritime Areas

Latin America:

• Beagle Channel Case (Argentina/Chile)  
  (Arbitral Award of 1977)

• The Gulf of Fonseca  
  (El Salvador/Honduras/Nicaragua)  
  (CACJ, 1917 Judgement)  
  (ICJ Chamber, 1992 Judgment)
Beagle Channel Case (Argentina/Chile)
Beagle Channel Case

Argentine thesis:
"Applying the principle of the *uti possidetis juris* of 1810, the Argentine Republic has maintained, as still maintains, that in fact and in law it received in succession to the Spanish Crown a maritime jurisdiction over the whole of the littoral of the Atlantic Ocean from Rio de la Plata as far as Cape Horn" (AM, vol. I, pp. 118-119)

*Rejected by the Arbitral Award (para. 66 (2))
The Gulf of Fonseca

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"The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion – from 1592, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821- then under the Federal Republic of the Center of America, which in that year attained its independence and sovereignty down to 1839; and, subsequently, on the dissolution of the Federation in that year, the States of El Salvador, Honduras and Nicaragua, in their character of autonomous nations and legitimate successors of Spain, incorporated in their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defense, both the Gulf and its archipelago, which nature had indented in that important part of the continent, in the form of a gullet"
"Accordingly, it is necessary to enquire into the legal situation of the waters of the Gulf in 1821 at the time of succession from Spain; for the principle of the *uti possidetis juris* should apply to the waters of the Gulf as well as to the land."

"[t]he legal situation of the waters of the Gulf of Fonseca is as follows: the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly"
Remarks: Maritime attribution

Other antecedents:

**Convention between Great Britain and Spain, signed at The Escurial, 28 October 1790 (“Nootka Sound Convention”)**

Article 4: «His Britannic Majesty engages to employ the most effective measures to prevent the navigation and fishery of his subjects in the Pacific Ocean or in the South Seas from being made a pretext for illicit trade with the Spanish settlements; and with this in view it is moreover expressly stipulated that British subjects shall not navigate nor carry on their fishery in the said seas within the distance of 10 maritime leagues from any part of the coast already occupied by Spain.»

Problem: Maritime delimitations? Nicaragua v. Honduras case
Honduras' position:

"a traditional maritime boundary running along the 15th parallel between Honduras and Nicaragua in the Caribbean Sea and to continue that existing line until the jurisdiction of a third State is reached. (…) this traditional line has its historical basis in the principle of uti possidetis juris. (…) upon independence in 1821 there was a maritime jurisdiction division aligned along the 15th parallel out to at least 6 nautical miles from Cape Gracias a Dios." (para. 86)
"Honduras argues that prior to the independence of Nicaragua and Honduras in 1821, Cape Gracias a Dios separated the jurisdictional areas of the different colonial authorities which exercised authority over the maritime areas off the coasts of present day Nicaragua and Honduras. Honduras asserts that the Royal Order of 23 August 1745 initially divided the military jurisdiction of the maritime area between the Government of Honduras and the General Command of Nicaragua, with Cape Gracias a Dios marking the separation between the two military jurisdictions. Moreover, Honduras contends that the 15th parallel marked the traditional maritime boundary between Nicaragua and Honduras because the propensity of the Spanish Empire to use parallels and meridians to identify jurisdictional divisions makes it inconceivable that the Royal Decree of 1803 would have created a maritime division along a line other than the 15th parallel." (para. 230)
Nicaragua's position:

"there is “no uti possidetis juris of 1821 that attributes or delimits maritime areas” between the two States and that there are no Honduran acts of sovereignty or efectivités to support the contention that a traditional line exists along the 15th parallel. (...) “the concept of uti possidetis that was used to determine the boundaries of the administrative divisions of the colonial power that were considered to be frozen in place at the moment of independence had nothing to do with maritime matters” (para. 93)."
"In response to Honduras, Nicaragua claims that jurisdiction over the territorial sea fell to Spanish authorities in Madrid, not to local authorities, including Captaincy-Generals. Nicaragua argues that the Spanish Crown’s claim to a 6-mile territorial sea “tells [us] nothing with regard to the limit of this territorial sea between the Provinces of Honduras and Nicaragua” (emphasis in the original). Finally, Nicaragua argues that it would be inappropriate for the Court to rely upon uti possidetis to establish title to the exclusive economic zone and to the continental shelf which are distinctly modern legal concepts." (para. 231)
Court's position:

The Court observes that the *uti possidetis juris* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation. However, in the present case, were the Court to accept Honduras’s claim that Cape Gracias a Dios marked the separation of the respective maritime jurisdiction of the colonial provinces of Honduras and Nicaragua, no persuasive case has been made by Honduras as to why the maritime boundary should then extend from the Cape along the 15th parallel. It merely asserts that the Spanish Crown tended to use parallels and meridians to draw jurisdictional divisions, without presenting any evidence that the colonial Power did so in this particular case.

The Court thus cannot uphold Honduras’s assertion that the *uti possidetis juris* principle provided for a maritime division along the 15th parallel “to at least six nautical miles from Cape Gracias a Dios” nor that the territorial sovereignty over the islands to the north of the 15th parallel on the basis of the *uti possidetis juris* principle “provides the traditional line which separates these Honduran islands from the Nicaraguan islands to the south” with “a rich historical basis that contributes to its legal foundation” (paras. 232-233).
"...Nor has it been shown that the Spanish Crown divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea. Although it may be accepted that all States gained their independence with an entitlement to a territorial sea, that legal fact does not determine where the maritime boundary between adjacent seas of neighbouring States will run. In the circumstances of the present case, the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime division along the 15th parallel." (para. 234)
In the African Context:

2 new problems:

• Succession to boundary treaties concluded by the predecessor States
  – Relevance of territorial boundary treaties
  – Scope of maritime boundary treaties

• Succession to factual situations existing during the colonial period as a result of exploitation or other concessions
"La réalité est que longtemps le problème [the southern limit] was held to be a maritime boundary] ne s’est pas posé. Il ne s’est pose qu’en 1958 au sujet de la concession accordée par le Portugal, et la réponse a alors été fort claire. Le Gouvernement portugais, en acceptant que l’étendue de la concession dépasse vers le sud le parallèle 10°40’ de latitude nord, et le Gouvernement français, en ne protestant pas au nom de la Guinée au moment où c’était encore à lui de le faire, ont manifesté leur conviction que la convention n’avait pas établi de frontière maritime entre les deux Guinée (RSA, vol. XIX, para. 63).

(...)
Le Tribunal s’estime fondé à conclure, en dépit de la relative rareté des documents qui lui ont été soumis, que jusqu’en 1978 les Etats signataires de la convention de 1886 -comme leurs Etats successeurs- ont interprété le texte de l’article I, dernier alinéa, de cet instrument comme n’ayant déterminé aucune frontière maritime." (Ibid., para. 67).

1886 Agreement: an allocation line
Succession to the French-Portuguese Treaty of 26 April 1960

Guinea-Bissau's position: *uti possidetis* is not applicable to maritime delimitations

Senegal's position: the Treaty of 1960 is applicable and it delimitates all the maritime areas
Guinea-Bissau/Senegal Award of 31 July 1989

Arbitral Award:

"L’Accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne les seules zones mentionnées dans cet Accord, à savoir la mer territoriale, la zone contiguë et le plateau continental." (RSA, vol. XX, para. 88)

Consequence: EEZs waters remained non-delimitated
Dissenting Opinion of Mohammed Bedjaoui:

"Je considère que les différences de milieux sont patentess et irréductibles; que la notion de souveraineté et ses conséquences telles que l’inviolabilité territoriale n’ont pas, ou pas encore, leur place dans les espaces maritimes (...) que de même une autre notion, celle d’effectivité, développe ses effets, jusqu’à ce jour, plus difficilement dans les espaces maritimes que dans les espaces terrestres ; et qu’enfin, contrairement aux accords frontaliers terrestres, qui sont librement négociés sans devoir obéir à une logique préétablie, les accords de délimitations maritimes obéissent aujourd’hui quant à eux à un principe général d’équité. Mais surtout, si ces règles et d’autres encore existent pour différencier les deux institutions, à plus forte raison il me paraît imprudent d’aligner l’une sur l’autre ces deux institutions, sans motif impérieux, en appliquant à toutes les deux indifféremment une norme telle que l’uti possidetis (...) Si, dans l’état actuel de développement du droit de la mer, le statut et le régime juridiques des délimitations maritimes ne accordent pas de souveraineté à l’État côtier, comme je l’ai relevé, je ne vois pas comment on peut logiquement affirmer que l’accord qui établit précisément ces délimitations maritimes est assimilable au traité de frontière terrestre qui établit, lui, en revanche la souveraineté de l’État.

En conséquence il ne me paraît pas douteux que les limites maritimes sont des frontières, mais d’une nature ou d’une catégorie différente. Elles connaissent, et doivent connaître de ce seul fait, un statut et un régime juridiques que cette différence a déjà imposés pour ce qui concerne les procédures de conclusion des accords qui les créent. De ce seul fait aussi elles n’appellent pas nécessairement l’application du principe de l’uti possidetis" (RSA, vol. XX, paras. 34 and 35)
Territorial boundary: a relevant circumstance

85. The Court regards the 1910 Convention as important for the consideration of the present case, because it definitively established the land frontier between the two countries. The Court is however not able to accept the suggestion based upon it in the Libyan Memorial that the “boundary on the seaward side of Ras Ajdir would continue, or could be expected to continue” in the northward direction of the land frontier. Both Parties have agreed in recognizing the relevance of the land boundary starting-point; this only reinforces the significance of Ras Ajdir as a basic point of reference. In this sense the Court believes that the 1910 Convention constitutes a relevant circumstance for the delimitation of the continental shelf between the two Parties.
95. The Court considers that the evidence of the existence of such a *modus vivendi*, resting only on the silence and lack of protest on the side of the French authorities responsible for the external relations of Tunisia, falls short of proving the existence of a recognized maritime boundary between the two Parties. Indeed, it appears that Libya is not in fact contending that it had that status, but rather that the evidence that such a line was employed or respected to a certain extent is such as to deprive the ZV 45° line of credibility. But in view of the absence of agreed and clearly specified maritime boundaries, the respect for the tacit *modus vivendi*, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of the method for the delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line.

96. Lastly, in this connection, the Court could not fail to note the existence of a *de facto* line from Ras Ajdir at an angle of some 26° east of north, which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas. This line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds furthermore to the line perpendicular to the coast at the frontier point which had in the past been observed as a *de facto* maritime limit, does appear to the Court to constitute a circumstance of great relevance for the delimitation. Since this is a matter closely bound up with the practical method of delimitation, the Court will examine the nature and genesis of the line when it comes to that part of the Judgment.
Roberto Ago's separate opinion:

"The existence of a delimitation extending beyond the outer limit of the territorial waters, a delimitation which for four decades prior to the accession of the two States to independence was respected without any difficulty arising, should, I feel, have been considered as the basic fact which it was also incumbent upon the Parties to observe after independence, by virtue of the same principles of general international law in the succession of States, and the same principles proclaimed by the Organization of African Unity, which the Court has evoked where the land frontier of 1910 is concerned." (pp. 97-98, para. 5)
Eduardo Jiménez de Aréchaga's separate opinion:

"[t]he international law principles of uti possidetis of African boundaries and of succession of States in respect to frontier delimitation also apply to the colonial delimitation of sponge fisheries, as was contended by Tunisia, with respect to the ZV 45" line, in its memorandum of 3 May 1976. Even if one denies the existence of an agreement, there was a de facto delimitation for the exploitation of seabed areas which was acquiesced to and thus it is one which the Court cannot now revise or ignore. Libyan proven historic rights are as worthy of respect as those invoked by Tunisia." (p. 132, para. 102)
Conclusions

Relevance of *uti possidetis*

- For the determination of maritime areas, particularly historic waters
- For the succession to treaties establishing maritime boundaries
- For the succession to delimitation or tacit agreements between the predecessor State(s), insofar as they exist