7-1-2006

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Economic and Cooperative Post-Colonial Borders: How Two Interpretations of Borders by the I.C.J. May Undermine the Relationship Between Uti Possidetis Juris and Democracy

Andrew A. Rosen*

This article re-visits the international legal concept of uti possidetis juris through the discussion and analysis of three recent decisions by the International Court of Justice (I.C.J.) (Qatar v. Bahrain, Botswana v. Namibia, and Cameroon v. Nigeria). In particular, I question whether the application of uti possidetis juris is conducive to democracy.

Uti possidetis juris is the international legal basis for all post-colonial borders and both defines and protects the post-colonial polity through a combination of two principles: self-determination and the non-interference in the affairs of other countries. It is through the principle of self-determination that uti possidetis juris is linked to democracy. However, in each of the three cases (each the result of vaguely-written colonial-era treaties), the I.C.J. has been presented with arguments asking it to apply uti possidetis juris based on the economic interests of the state alone, either explicitly or implicitly, rather than as representative of the polity or on the administration of the polity. I conclude the I.C.J.'s decisions in these disputes all suggest that uti possidetis juris is not conducive to democracy in post-colonial nation-states, as it upholds borders that even those nation-states do not consider as representative of their polity.

I further analyze these decisions through the post-colonial critiques of borders by Makau wa Mutua, who argues that borders are an imposed identity, and Mahmood Mamdani, who argues that borders preserve colonial social and political structures non-conducive to democracy.

* J.D., New York University Law School, 2003; B.A., Yale University, 1998; Term Member, Council on Foreign Relations. I would like to thank Professor J.H.H. Weiler, Professor Ayalet Schachar, Osagie Obasagie, and Harlan Cohen for their invaluable feedback throughout the writing process.
These critiques further emphasize that uti possidetis juris may no longer be considered conducive to democracy.

I also discuss an alternative to a delineated border proposed in Justice Weeramantry’s dissent in Botswana v. Namibia. Weeramantry proposed that instead of delineation, certain disputed regions may be cooperatively governed based on each country’s obligations to an external treaty regime or international obligation (e.g., environmental treaties). I argue that this proposal is an interesting alternative for post-colonial nation-states, though perhaps not yet feasible. I also discuss this proposal in light of the post-colonial critiques of borders.

I conclude by postulating where uti possidetis juris may stand now after these decisions. I conclude that it cannot be considered a rule, but rather a conceptual barrier increasingly unrelated to issues of democratization and increasingly challenged by economic development.

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I. Introduction

The borders of nation-states, and the definition of a nation-state, are relatively new organizing concepts to much of the world, particularly the
Borders in the post-colonial world.\(^1\) Borders in Europe and Latin America have been accepted as nation-state delineations within the past 150 years, and in Africa, Asia, and the Middle East within the past 20 to 50 years.\(^2\) When considered in light of over 5,000 years of human civilization, the nation-state defined by its borders as an organizational foundation is an embryonic concept. Today, nonetheless, it is conceptually integral to international law and a fundamental assumption of its regulatory bodies.

Borders in much of the post-colonial world have been created and enforced via a concept in international law that dates back to the Roman Empire: *uti possidetis juris.*\(^3\) The concept defines borders of newly sovereign states on the basis of their previous administrative frontiers.\(^4\) *Uti posseditis juris* works through the combination of two principles: self-determination and the non-interference in the internal affairs of other countries.\(^5\) Its application has consistently sought one outcome: the avoidance of *terra nullius,* which had driven the colonial conquest of the Great Powers.

There is no simple explanation as to how *uti possidetis juris* works, as its status and application under international law, and its historical legacy, are uncertain. Consequently, international law provides no simple answers as to how to apply *uti possidetis juris*.

This article will address the status of *uti possidetis juris* as it currently stands in international law following three recent decisions by the International Court of Justice (I.C.J.). I will analyze *uti possidetis juris* from two different perspectives: how the I.C.J. has handled direct challenges to the concept, and how the I.C.J. has handled implicit challenges to the concept via challenges to its fundamental assumption of borders as administrative. I will then analyze these challenges in light of post-colonialist critiques of the compatibility of *uti possidetis juris* with

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1. The end of colonialism was precipitated by the end of World War II in 1946. The former Great Powers withdrew from territories in Asia, the Middle East, and Africa. But the process was not instantaneous—France’s control over French Indochina ended with the Geneva Accords in 1954; a majority of African states reached independence in the 1960s, and the independence of nations in the Middle East came at the end of World War II, in the 1950s, and in the 1970s. WILLIAM R. KEYLOR, THE TWENTIETH-CENTURY WORLD: AN INTERNATIONAL HISTORY Asia map at 429, Middle East map at 343, Geneva Accords at 369 (3rd ed., 1996).

2. This number is calculated based on African states reaching independence in the 1960s, with Zimbabwe achieving independence from Great Britain as recently as 1980, and Middle Eastern states reaching independence as recently as 1971 (Oman, United Arab Emirates).


4. *Id.*

5. *Id.* at 86. Hasani traces both ideas back to their application in Latin America at the beginning of the nineteenth century.
democratization. It will conclude that the I.C.J.'s decisions suggest any link between uti possidetis juris and democracy may no longer exist.

A. A Brief History of Uti Possidetis Juris in the Post-Colonial World

The application of uti possidetis juris in the post-colonial world is rooted in the application of the principle to Latin America at the beginning of the nineteenth century. This first application followed the wars for Latin American independence between 1810 and 1824. It involved establishing new nation-states in Latin America delineated by their colonial-era administrative boundaries.

In order to establish borders, “boundaries were derived from various sorts of Spanish governmental instruments setting up hierarchical and other units . . .,” or from borders established by treaty between Spain and Portugal. Two different rationales guided the application of the principle in Latin America—first, Europeans sought to transfer the balance of power politics to Latin America, and the nation-state served as the foundation for this form of diplomacy; and second, uti possidetis juris offered Latin American countries some protection from European interference but moreover, from further border conflicts between newly independent nations.

The second application of the principle took place during the decolonization of Africa and the breakup of the British Empire after World War II. In Africa, borders derived initially from “spheres of influence” - arrangements between European colonial powers that

6. Post-colonial theory is a set of theories in philosophy and literature that address the legacy of post-colonial rule (http://en.wikipedia.org/wiki/Post-colonial_theory). Edward Said’s ORIENTALISM is considered to be the founding work of post-colonial thought. Other authors considered as figureheads of post-colonial thought are Kwame Nkrumah and Frantz Fanon. The authors included in this piece—Antony Anghie, Makau wa Mutua, and Mahmood Mamdani—fall under the philosophical branch of post-colonial critique. Mamdani and Anghie have provided political angles on the philosophical critiques. Mutua is one of the first scholars to apply the post-colonialist critique to international law.

7. In the cases discussed, I will avoid discussion of issues pertaining to maritime disputes. This decision has been made because maritime law is an unique field that may touch upon the issues discussed in this paper, but does so in a way that is tangentially related to uti possidetis juris.

As for discussing the relationship between uti possidetis juris and democracy, this line of argument is heavily influence by Mahmood Mamdani's work, who questioned whether a post-colonial state's structures are conducive to democracy. See infra note 42.

8. See Hasani, supra note 3 at 86.


10. See Hasani, supra note 3 at 87.
provided for non-interference by each party in the sphere of interest of the other. These spheres ultimately evolved into administrative boundaries as colonial powers further secured control over their respective territories. But these boundaries were rarely clear delineations—rather, they often marked protectorates, neutral and buffer zones, and suzerainties that had been set up to reflect “spheres of influence.” Moreover, these lines were often determined primarily with regard to latitude and longitude, and with little knowledge of the topography of the terrain, geographic or demographic.

These boundaries, although problematic and often not necessarily clearly delineated between colonial powers, were adopted by post-colonial African nation-states as borders. This adoption was officially affirmed in the Cairo Declaration, a declaration by the Organization of African Unity (OAU) that the borders of Africa reflect a “tangible reality,” and that all leaders of Africa were committed to respect the borders existing at the time of independence. This declaration continues to uphold modern African borders, and has been adopted by the OAU’s newest reorganization as the African Union. Border disputes continue today, but uti possidetis juris has become the basis for border disputes, while claims on ethnic, historic, or other entitlements do not have much standing.

Overall, the historical strength of the precedent of uti possidetis juris has laid in its simplicity of application. The vagueness of negotiated boundaries in theory became clearly delineated black lines, and in turn, former colonies became nation-states. But the weakness of the precedent also lay in the simplicity of the application—beyond longitude and latitude, boundaries negotiated were not representative of demographic or geographic realities. Nonetheless, according to the

11. See MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA 48 (1986).
12. See id.
13. See Hasani, supra note 3 at 88.
14. “The view at the time was that Africa needed to settle down.” Paul Reynolds, African Union Replaces Dictators’ Club, BBC News World Edition, July 8, 2002, http://news.bbc.co.uk/2/hi/africa/2115736.stm. As will be seen later on, the other problem is that self-determination as currently defined under international law, does not include a right to secession. See infra note 22.
15. See Reynolds, supra note 14.
16. See Hasani, supra note 3 at 88.
17. Hasani quotes Jeffery Herbst, who argues “borders are always artificial because states are not natural creations.” For this reason, Herbst argues, it is important to judge borders “on the basis of their usefulness to those who created them[,]” and not on demographic, ethnographic, or topographic criteria. On his basis, Herbst believes African boundaries are not arbitrary. See id. at 94, quoting Jeffrey Herbst, The Creation and Maintenance of National Boundaries in Africa, INTERNATIONAL ORG. 43(4) (Autumn 1989) 692.
precedent of its application under international law, *uti possidetis juris* remains the underpinning of borders—and in turn, modern nation-states—throughout much of the modern world.

B. Uti Possidetis Juris under International Law

*Uti possidetis juris* is a concept with uncertain foundations in international law. It is unclear whether it is a principle or rule of international law, or whether it is customary international law, so it is neither a fundamental tenet nor a reliable source of guidance. It circumscribes the identity of the post-colonial state, but has been criticized for imposing identities on the various inhabitants of former colonies. It has established international borders, but often has left the location of these borders ambiguous. It has been applied in Asia, Africa, and Latin America, but the international legal justifications for its application have been whittled away by theorists over time, to a point where perhaps it can only be justified as the last wall between chaos and order in the post-colonial world. Conceptually, then, there is some justification for *uti possidetis juris* to be considered a principle or a rule of international law, or part of customary international law, but not much.

Instead, *uti possidetis juris* may be best understood as a free-floating idea of limited application, linked to international law only via the principle/right of self-determination, tenuous though this link may be. It is, by definition, linked to self-determination. It was intended to

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18. See Case Concerning the Frontier Dispute (Burk. Faso v. Republic of Mali) 1986 I.C.J 554, 566-67 (Dec. 22) [hereinafter Frontier Dispute (Faso v. Mali)]. Steven R. Ratner argues that there is some support for the proposition that *uti possidetis juris* should be considered part of customary law, despite a lack of an affirmative proclamation of the I.C.J. *Ratner, supra* note 9 at 598. However, he concedes that there is a “less than rock solid” basis for it to be considered a customary norm and surmises that *uti possidetis juris* may have been “no more than a policy decision adopted to avoid conflicts during decolonization.” Id. Perhaps the problem with defining *uti possidetis* is most evident in S. AKWEENDA, NAMIBIA: A CASE STUDY (1997), where *uti possidetis* is referred to as a “principle,” a “doctrine,” and a “rule” alternately. See AKWEENDA at 47-48. For this reason, and for the explicatory purposes of this paper, I will refer to *uti possidetis* as either a concept or an idea.

19. See AKWEENDA, supra note 18 at 47.

20. See Ratner, *supra* note 9 at 617 (“any solution other than acceptance of past injustices would be too complicated to be applied, would lead to chaos, and would therefore prove illegitimate.”).

21. Malcom Shaw refers to self-determination as a legal right under international law, but also as a principle. See Shaw, *supra* note 11 at 92-93. It is unclear how a Positivist conception of international law would define *uti possidetis juris*. It has been applied, but it is on its way out, as this paper seeks to prove.

22. See Frontier Dispute (Faso v. Mali), supra note 18. By “self-determination,” I mean both internal self-determination, which enables the people of a country to make
be a form of self-determination for the polities of post-colonial states, who would be defined by the borders that had been established by their former rulers. However, it was a version of self-determination where the self—the polity and the identity of the polity—had been pre-determined by an outside power using randomly drawn borders. Thus, important political or constitutional decisions, and “[e]xternal self-determination[,] which] enables the population of a territory to decide freely whether to join, or not, an existing state, or whether to become an independent and sovereign state... Both external and internal self-determination imply a democratic process...” Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transitions to Democracy* 18 (1994). The closeness of the link between self-determination and democracy will not be explored in this paper. Rather, it is assumed that there is a close link, and that it is sufficient for the sake of this argument that such a link exists. However, I recognize that a polity exercising self-determination may not necessarily choose a democratic government. It is also assumed that self-determination is part of jus cogens, and of legal significance in international law. See, e.g., Jochen A. Frowein, *Self-Determination as a Limit to Obligations Under International Law, in Modern Law of Self-Determination* 218 (Christian Tomuschat ed., 1993). See also, Shaw, supra note 11 at 93; Western Sahara, Advisory Op., I.C.J. 12, 33 (Oct. 16) (self-determination is “the need to pay regard to the freely expressed will of peoples”).

23. Ratner argues, The juxtaposition of uti possidetis and self-determination began in Latin America, where the Creoles who wrested independence from their Spanish brethren beginning in the early nineteenth century seized upon the idea as a way of setting boundaries of the new countries. Scorned by the peninsulares, the new Americans in the Latin American bureaucracy had formed political allegiances to the administrative units in which they were raised and assigned for their jobs, rather than to Spanish America writ large. Ratner, supra note 9 at 593. Decolonization in Africa occurred along colonial borders because it as “the most feasible method for speedy decolonization.” Id. at 595. Utis possidetis juris was the implicit basis for this approach, ultimately referred to in principle but not by name in the Cairo Declaration of the Organization of African Unity in 1963 with a pledge to “respect the frontiers existing on [the] achievement of independence” by African states. Id. Similar declarations may be found in Articles II(1)(c) and Article III of the Charter of the O.A.U. The new Charter of the African Union preserves the same language.

24. Malcolm Shaw writes, the emphasis upon the necessity of maintaining colonial frontiers clearly demonstrated by the overwhelming majority of Afro-Asian and South American States can be understood in terms of the necessity of establishing stable legitimacy factors. But this has meant a general freezing of territorial entities as at the eve of decolonization and a consequent disregard for ethnic and historical ties which cross the old colonial border, or at least a minimization of their importance in territorial terms. Accordingly, the principle of self-determination has operated in practice to safeguard the colonial delimitations and overrule purely ethnic definitions of the “self,” so that the “self”; must be determined within the colonial territorial context. Shaw, supra note 11 at 93. This also was the position of Pan-Africanists at the time of decolonization. Pan-Africanists, like Makau wa Mutua, argued that a “wholesale restructuring of borders” was necessary “to rectify past injustices.” Ratner, supra note 9 at 595.
there currently exists a tenuous link between *uti possidetis juris* and self-
determination.\(^{25}\)

An attenuating factor in this relationship is the argument that *uti possidetis juris* "has become discredited as a criterion for settling boundary disputes, as it has proved to be indefinite and ambiguous."\(^{26}\) The borders it has internationalized have often been unclear, either for historical reasons or because colonial powers left them undefined. The treaties establishing them may not have been ratified, the boundaries were drawn on imprecise maps, the location of some boundaries were left unclear, or because despite the existence of an agreement neither the original powers nor the post-colonial states have chosen to adhere to those borders.\(^{27}\) The result has been an international identity, and consequently a definition of *self*, for post-colonial states that can be uncertain, constantly changing, and/or oft-disputed.

This relationship is further attenuated by the fact that self-
determination does not include a right to secession.\(^{28}\) Nor does *uti possidetis*, on its own, allow for secession.\(^{29}\) Therefore, post-colonial

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25. The Badinter Commission, oft-criticized for the conclusions it reached on the application of *uti possidetis juris* in post-dissolution Yugoslavia, concluded that "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at that time of independence (*uti possidetis juris*) except where the states concerned agree otherwise." Opinion No. 2., EJIL 3 (1992) at 183-84, as cited in Jochen A. Frowein, *Self-Determination as a Limit to Obligations Under International Law; in Modern Law of Self-Determination* 216-17 (Christian Tomuschat ed., 1993). This conclusion has been critiqued as the application of *uti possidetis* without any underlying justification. Frowein at 217.

26. See AKWEENDA, supra note 18 at 48.

27. These particular problems will be seen in the cases to be discussed in this paper.

28. The Restatement of Foreign Relations Law of the United States defines a state in § 201 as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." However, according to comment d. to § 202, [e]ven when an entity appears to satisfy the requirements of § 201, other states may refuse to treat it as a state when circumstances warrant doubt that it will continue to satisfy the requirements of statehood—for example, where the new entity is attempting to secede from another state which continues to resist the secession.


29. The Roman root of *uti possidetis* is a form of Praetorian edict that would "preserve, pending litigation, an existing state of possession of an immovable." AKWEENDA, supra note 18 at 47. It has continued to have a preservative purpose in its subsequent application. Secession has never been an aim or an application of the concept, with the exception of the work of the Badinter Commission, which has been discredited. See supra note 6. See also para. 6 of Resolution 1514 (XV); the 1970 Declaration of Principles (2625(XXV)).
identity has been formed by self-determination but not by secession.\textsuperscript{30} In other words, the limitations of self-determination under customary international law are inhered by \textit{uti possidetis juris}.

Some certainty in this link remains, largely due to dictum of the I.C.J. in the Case Concerning the Frontier Dispute (\textit{Burkina Faso v. Republic of Mali}) to clarify \textit{uti possidetis juris}. The I.C.J. has labeled \textit{uti possidetis juris} “not a special rule,” but “a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”\textsuperscript{31} This conceptualization of \textit{uti possidetis juris} lays out a logical connection with self-determination, uncertain only because of the Court’s unwillingness to label \textit{uti possidetis juris} a principle or a rule.\textsuperscript{32} This holding is currently considered the guiding conceptualization of \textit{uti possidetis juris} in international law.

Given the above, where does \textit{uti possidetis juris} stand now? \textit{Uti possidetis juris} should be conceived as a concept with limited justification for the post-colonial state. This is primarily because its relationship with self-determination is much weaker than its definition would suggest. It is also unclear whether acts of self-determination are feasible within a post-colonial nation-state. Somewhat confusingly, self-determination preserves borders as they are by preventing secession, but in preventing secession, does not permit potentially necessary remedies to disputed or poorly drawn borders. Last, as a nebulous concept, it has preserved more debate than it has clarity. As post-colonial nation-states evolve, an uncertain foundation for determining borders can be a recipe for chaos and dispute, as the cases before the I.C.J. have demonstrated. For these reasons, it should be reconsidered as a basis for preserving the integrity of the post-colonial nation-state.

\textsuperscript{30} This is not generally true. Namibia achieved independence in 1990 from South Africa. Similarly, North Cameroon and South Cameroon became Cameroon and part of Nigeria, respectively. But these have really been the only exceptions to the application of \textit{uti possidetis} in Africa, which “yield[ed] the most international frontiers of any continent relative to its area.” Ratner, \textit{supra} note 9 at 596.

\textsuperscript{31} \textit{Frontier Dispute (Faso v. Mali), supra} note 18 at 565. But even as a principle, the Court refuses to show that \textit{uti possidetis juris} is “a firmly established principle of international law where decolonization is concerned,” thus leaving open the questions of whether as a principle \textit{uti possidetis juris} is firmly established, and of whether it is only a principle as to decolonization and not applicable to other areas of international law. \textit{Id}.

\textsuperscript{32} More importantly, dictum in \textit{Frontier Dispute (Faso v. Mali)} lays out a much more apparent, tangible link with preservation of order and stability. However, the ruling does little to clarify the status of \textit{uti possidetis juris} in international law.
C. External and Internal Attacks on “Administrative Borders”

A particularly vulnerable area of uti possidetis juris is the concept of administrative borders upon which it rests. The meaning of “administrative borders” has varied in context. In colonial Latin America, “boundaries were derived from various sorts of Spanish governmental instruments setting up hierarchical and other units,” or from borders established by treaty between Spain and Portugal. In Africa, borders were derived initially from spheres of influence, arrangements between colonial powers that provided for non-interference by each party in the sphere of interest of the other, but ultimately evolved into administrative boundaries as colonial powers further secured control over their respective territories.

From these two historical precedents, it may be argued that there is an internal and external aspect to administrative borders of former colonial states. Internally, the borders corresponded to the internal administration of a polity by a former colonial power. Externally, borders represented an identity created by foreign powers that were integral to geopolitical and regional peace. Uti possidetis juris thus rests upon the assumption that the former colonial administrative borders were representative of a political identity and preserved stability and territorial integrity.

Post-colonial theorists have attacked both the internal and the external aspects of post-colonial borders. The external attack argues that borders signify an imposed identity on the polity, and therefore no

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33. Malcom Shaw confirms this reading of post-colonial borders as administrative in the colonial sense, and hence identity confined to within these borders.

The current situation would appear to be that, as a legal right, self-determination as leading to modifications in the international status of a territory applies only to an accepted non-self-governing territorial situation. All groups may be entitled to self-determination in the sense of fully participating within the internal constitutional structure of a particular State, but they will not thereby acquire a right under international law to self-determination in the former sense. The people—territory dialectic may open the way in the future of modifications to the basic principle, but that is yet to come.

SHAW, supra note 11 at 104.

34. See Ratner, supra note 9 at 594. Similar problems occurred in post-colonial Asia. See generally Temple of Preah Vihear, supra note 9.

35. SHAW, supra note 11 at 48.

36. This article, in its prior form as an essay for a seminar, was written prior to Enver Hasani’s publication of his Article. Therefore, it is coincidental that I make this distinction between scholarly attacks on uti possidetis juris as internal and external, and that Prof. Hasani defines scholarly approaches to defining the real causes behind the emergence and acceptance of the uti possidetis juris principle as “internal” and “external.” See Hasani, supra note 3 at 89.

37. Ratner, supra note 9 at 591.
connection exists between administrative borders and the polity of the post-colonial state.\textsuperscript{38} Both Antony Anghie and Makau wa Mutua have laid out external attacks, but each author has a distinctly different approach. Anghie argues that sovereignty is a European concept, imposed on the colonies and protectorates of the colonial era, and foreign to the non-Western world.\textsuperscript{39} \textit{Uti possidetis juris} and sovereignty are concepts that were imposed on the colonial polity, and should not be inherited by the post-colonial polity.\textsuperscript{40} Mutua attacks statehood itself, labeling it “false statehood,” and disassociating the term “nation-state” from post-colonial African identity.\textsuperscript{41}

The internal attack targets the title “administrative” of administrative borders, arguing that the remnant social, political, and economic structure of the post-colonial governance has created obstacles to democracy. In other words, it is not the post-colonial borders that are the problem; it is the colonial administrative legacy within those borders that is impeding the modern African state.\textsuperscript{42} Mahmood Mamdani has posited this attack, arguing that post-colonial borders embody a self, but whether the self may be able to democratize will depend on rectifying the

\textsuperscript{38} Frontiers had been a foreign concept before European colonization, as “frontiers were zones through which one clan or tribe passed from one region to another; and any borders depended solely on who would be paid tribute. When European powers drew borders, they did so “with only slight knowledge of or regard for local inhabitants or geography,” instead making allocations “to reduce armed conflict among themselves.” See \textit{id}. at 595.

\textsuperscript{39} We have been engaged . . . in drawing lines upon maps where no white man’s feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.


\textsuperscript{40} \textit{Id.} Anghie paints with a broader brush than Mutua: Anghie attacks Asian, African, and Latin American post-colonial identity, whereas Mutua focuses solely on Africa. But the underlying argument for both is the same: the polity created by colonial administrative borders is not a self for the purposes of self-determination, nor is it conducive to democratization.


\textsuperscript{42} \textit{Mahmood Mamdani, Citizen and Subject: Contemporary Africa and The Legacy of Late Colonialism} (Sherry B. Orner, Nicholas B. Dirks & Geoff Eley eds., 1996). This is an Africa-specific argument and will be applied only to \textit{Cameroon v. Nigeria} and \textit{Botswana v. Namibia}. 
imbalance of political power between urban and rural.\textsuperscript{43}

These attacks will provide a lens by which to analyze the consequences of these decisions to the relationship between \textit{uti possidetis juris} and democracy. This paper will look at three particular disputes that have been brought to the I.C.J.—\textit{Qatar v. Bahrain},\textsuperscript{44} \textit{Botswana v. Namibia},\textsuperscript{45} and \textit{Cameroon v. Nigeria}\textsuperscript{46}—where the court has been confronted with new interpretations of borders.\textsuperscript{47} In each case, the Court has upheld the borders as they were at independence, but has departed from the idea of administrative borders in each decision. These departures suggest, both implicitly and explicitly, two alternate interpretations of post-colonial borders.

The first interpretation is of borders as representative of the economic interests of the state.\textsuperscript{48} Economic interests physically manifest as oil,\textsuperscript{49} tourism,\textsuperscript{50} and fishing,\textsuperscript{51} but also have a temporal dimension where such interests represent past,\textsuperscript{52} present\textsuperscript{53} and future\textsuperscript{54} economic interests. The second interpretation is of borders as international cooperative arrangements. I will consider these interpretations in light of the attacks of the post-colonialist theorists. I will suggest that these

\begin{itemize}
\item \textsuperscript{43} \textit{Id.} at 18.
\item \textsuperscript{44} Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 2001 I.C.J. 40 (March 16) [hereinafter \textit{Qatar v. Bahr.}].
\item \textsuperscript{45} Case Concerning Kasikili/Sedudu Island (Bots./Namib.) 1999 I.C.J. 1045 (Dec. 13) [hereinafter \textit{Bots./Namib.}].
\item \textsuperscript{46} Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening) 2002 I.C.J. 303 (Oct. 10) [hereinafter \textit{Cameroon v. Nig.}].
\item \textsuperscript{47} There is a fourth case that was decided in the past year—Case Concerning the Frontier Dispute (Benin/Niger) 2005 I.C.J. (July 12) [hereinafter \textit{Frontier Dispute (Benin/Niger)}], http://www.icj-cij.org/icjwww/idocket/bnn/bnnframe.htm. This was regarding a disputed border between Benin and Niger along the Niger River, and who owned title to the islands along the river border. The Court applied \textit{uti possidetis juris} in its decision. I do not include this decision because unlike the other three decisions, neither party presented a new interpretation of its borders in its arguments. Rather, the dispute involved more technical aspects of the application of \textit{uti possidetis juris}, particularly whether the Court must turn to \textit{effectivité} (evidence of title “in order to complete or make good doubtful or absent legal titles, but can never prevail over titles with which they are at variance.”) to determine the border. I also do not include the decision because there is no discussion within the case, or dissent attached, about the colonial practices surrounding the creation of the border.
\item \textsuperscript{48} Economic disputes over borders are not a new phenomenon. \textit{See Shaw}, \textsuperscript{12} note 12 at 195-96 (“Although economic reasons have underlain a number of territorial claims, direct economic claims have been very rare.”).
\item \textsuperscript{49} \textit{See generally Cameroon v. Nig.,} supra \textsuperscript{46}; \textit{Qatar v. Bahr.,} supra \textsuperscript{44}.
\item \textsuperscript{50} \textit{Qatar v. Bahr.,} supra \textsuperscript{44}.
\item \textsuperscript{51} \textit{Cameroon v. Nig.,} supra \textsuperscript{46}.
\item \textsuperscript{52} \textit{Qatar v. Bahr.,} supra \textsuperscript{44}.
\item \textsuperscript{53} \textit{Bots./Namib.,} supra \textsuperscript{45}.
\item \textsuperscript{54} \textit{Cameroon v. Nig.,} supra \textsuperscript{46}.
\end{itemize}
interpretations may have further attenuated the relationship between *uti possidetis juris* and self-determination, perhaps to the extent where there may no longer be any basis upon which to posit the existence of such a relationship.

In Section II, I will establish the foundations of these two interpretations in *Qatar v. Bahrain*.\(^5\) In Section III, I will explore the first interpretation as it is may be found in *Botswana v. Namibia* and *Cameroon v. Nigeria*. In Section IV, I will explore the second interpretation as it is discussed in the *Botswana* decision, and how it is briefly explored in the *Cameroon* decision. In Section V, I will use the theoretical attacks above as means of analyzing the effect of these interpretations on *uti possidetis juris* alone and on the relationship of *uti possidetis juris* to self-determination and democracy. In Section VI, I will utilize the summary of the results of my analysis to paint an overall sense of whether the concept of *uti possidetis juris* should be entirely discarded.

II. The Hawar Islands Dispute

The most explicit manifestation of the two alternate interpretations of administrative borders is the I.C.J.'s decision regarding the Hawar Islands in *Qatar v. Bahrain*.\(^6\) The Hawar Islands lie within 3 to 12 nautical miles of the coast of Qatar,\(^5\) but were unofficially given to Bahrain by the British Political Agent in 1936, a decision officially affirmed by the British government in 1939.\(^5\)\(^8\) Qatar had objected to the decision since 1939, claiming that it had not been informed of the British

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\(^5\) Chronologically, the Court ruled on *Bots./Namib* two years before *Qatar v. Bahr.* I choose to use *Qatar v. Bahr.* as the basis for my argument because it is the most explicit manifestation of the two interpretations. Concededly, this order also reflects the logical development of my thesis.

\(^6\) There are two additional elements of this case involving border delimitation: the maritime delimitation of the Qatar-Bahrain border, and the dispute over Janan Island, one of the Hawar Islands. The Janan Island dispute is interesting because it relies on the same 1939 decision as the Hawar Islands, but has an outcome favorable to Qatar. Bahrain challenges this ruling based on language in a letter by the same Political Agent who originally determined the Hawar Islands to be in Bahrain's possession for reasons to be discussed infra. See *Qatar v. Bahr.*, supra note 44 at 90. Moreover, the Court relies on subsequent letters from the British Government to the Rulers of Qatar and Bahrain in 1947 to affirm their conclusion. But, as will be seen below, the Court does not rely upon a subsequent British Foreign Office Memo that establishes Qatar to have had original title to the Hawar Islands. See id. The decision by the Court as to Janan Island suggests that the Court was seeking to avoid any ruling that would have awarded the Hawar Islands to Qatar.

\(^5\) Id. at 70.

\(^8\) Concededly, Qatar challenges this title of Protectorate, but in all likelihood to avoid the Court upholding the British decision as an arbitral decision or as an administrative decision. Id. at 73.
decision of 1936, nor had it consented to it. The I.C.J. intervened at the request of both parties, which have been in dispute over the islands since the 1939 award.

The Court ruled in favor of Bahrain, holding the British award as having had legal effect and therefore as binding on both parties. Fundamental to its decision was the conclusion that despite the existence of treaties with the British Commonwealth for both nation-states dating back to the eighteenth century, as well as evidence that the British Foreign Agent may have been directly involved in the decision to award the Hawar Islands to Bahrain, neither Qatar nor Bahrain was ever a Protectorate of the British Empire.

The issue of whether both nation-states had been Protectorates prior raises two uncertainties in the case, which the dissent targets. First, there is the historical uncertainty of Qatar and Bahrain’s geographic and political identities from the eighteenth century on—first under the Ottoman Empire, and subsequently as independent Sheikdoms with treaties of Protection with the British Commonwealth. The multi-faceted history of these states constructed by the Court provides little foundation to pinpoint as to whether these states were independent before 1970 or if they could have ever been considered Protectorates of the British Empire.

Second, given the uncertainty of the identities of these states, it is unclear as to how the Hawar Island border between them should be conceptualized. If Qatar and Bahrain were Protectorates of the British Commonwealth, then the border should be conceived of as a former administrative boundary of the British Commonwealth. In this case, *uti possidetis juris* would apply, and the British Government’s decision in 1939 would be considered an administrative decision. But if it was a border dispute between two independent countries resolved by a third party, *uti possidetis juris* by definition cannot apply.

The dissent attempts to address both uncertainties by offering two alternate interpretations of post-colonial borders as a means of resolution: first, as the economic interest of the former colonial power, and second, borders as a cooperative arrangement between countries. As

59. Id. at 59-60.
60. *Qatar v. Bahr.*, supra note 44 at 85.
61. Great Britain’s Treaties of Protection with Qatar and Bahrain were officially ended in 1971. See id. at 62.
62. The majority substantially focus on the details of both Qatar’s and Bahrain’s post-Ottoman history, and both countries’ identities established via their Treaties with Great Britain. Within this history, Qatar’s status develops from Bahraini rule to independence to Ottoman rule and then ultimately to independence secured by a Treaty with Great Britain. Bahrain’s status is portrayed as that of an independent state whose security is ensured by Great Britain. See generally id. at 55-58.
will be seen below, the majority is implicitly cognizant of these arguments, and chooses to avoid them. Nevertheless, in having done so, it recognizes their existence.

A. Post-Colonial Borders as the Economic Interests of the Former Colonial Power

The dissent regards the decision of the British Government to award the Hawar Islands to Bahrain as an economic decision made for political reasons, and hence, "of questionable legal value."

63 The dissent relies upon evidence that states the British motives in awarding the islands to Bahrain in 1936 were to secure maximum oil concessions. This motive is suggested but not addressed in the Court's opinion, which chooses to avoid discussion of the relevant evidence.

64 The dissent focuses on a confidential British memorandum that Great Britain had considered the Hawar Islands part of Qatar until 1936, but changed its consideration based on "the local policy of certain British representatives and the rush for oil with the advent of off-shore exploration." 65 The dissent presents the Ruler of Bahrain as having needed more concessions to fulfill a promise to the British, and so he laid claim to the Hawar Islands. 66 In response, the British Political Resident—who in 1933 had stated "Hawar Island is clearly not one" of Bahrain’s group—in 1936 agreed with the British Political Agent’s assessment that "it might suit us politically to have as large an area as possible included under Bahrain." 67 It was this decision that underlay the original 1936 British recognition of Bahraini sovereignty over the Hawar Islands, and which then underlay the 1939 British award of the islands to Bahrain.

68 The dissent's construction of events is interesting when looking at the concept of administrative borders. First, the British Political Agent’s decision to recognize the Hawar Islands as belonging to Bahrain has the

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63. See id. at 154 (joint dissenting opinion).
64. Id. at 155 note 8. In the Court's decision, it briefly lays out a series of communications between the British Political Agent, the Adviser to the Government of Bahrain, and Petroleum Concessions Ltd. regarding ownership of the Hawar Islands.
65. Qatar v. Bahr., supra note 44 at 155 note 9. The "confidential letter" is from 1964, but explicitly confirms the motives that appear to have been determinative of the original 1936 award of the Hawar Islands to Bahrain.
66. Id. at 155 (joint dissenting opinion).
67. Id. at 155-56. For an understanding of this relationship, see 2001 I.L.M. at para. 38: "[r]epresentation of British interests in the region was entrusted to a British Political Resident in the Gulf, installed in Bushire (Persia), to whom British Political Agents were subsequently subordinated in various sheikdoms with which Great Britain had concluded agreements." Id. at 54.
68. Id. at 156 (joint dissenting opinion).
appearance and substance of an administrative decision by the British regarding the border between two of its Protectorates. This is suggested in the majority's opinion, but the dissent explicitly cites this decision as having been determinative of the border.69

Second, the dissent explicitly suggests the impetus behind this award was purely economic. There was a political element to this decision as well, as the British Political Agent perceived this award to Bahrain as important to Bahraini-British relations.70 But the political was an outgrowth of the economic, as the decision was made by the British for the purpose of securing offshore oil concessions. Great Britain appears to have been seeking to maximize its oil concessions from the region, particularly from Bahrain, and secretly adjusted the border accordingly.

These two elements, when combined, suggest the Hawar Islands border was an administrative border between two British Protectorates, but established upon economic considerations solely and not upon the administration of the polity. It is for this reason that the dissent is unwilling to use *uti possidetis juris* as “relevant title” for the “real motives underlying the legal contrivance which was the British decision of 1939, directly inspired as it was by rival oil interests.”71 Thus, the dissent suggests that not only may the Hawar Islands border have been founded upon the economic interests of the British, but that such a determination is objectionable and a “contrivance.”

B. Borders as Representing a Cooperative Arrangement Between Countries

The second interpretation of borders, borders as representing a cooperative arrangement between countries, is suggested by the dissent as an alternate solution to the dispute. It is proposed at the conclusion of the dissent’s analysis of the claim of *effectivités* by Bahrain which the

69. Bahrain argued that the decision was an arbitral award, which the Court holds the award was not. The Court attempts to then prove that the British Government had been an independent third party asked to administer the dispute. But the Court also cites a series of treaties which show to the contrary that Britain had agreements of exclusive protection with both parties. The implications of these agreements will be discussed more below. See infra Part II.C

70. See MAMDANI, supra note 42.

71. *Qatar v. Bahr.*, supra note 44 (joint dissenting opinion) at 214. Also lurking in the background of this ruling is the fact that the Hawar Islands may still have large oil reserves for both states to take advantage of. Such a fact, if true, would also present the Hawar Islands border as representing a present economic interest of both sides. But there is little evidence of oil concession works on the island. The dissent notes a lack of evidence of civilian works on the islands. *Id.* at 172. Nonetheless, a similar interest presents itself in *Bots./Namib.* See infra Part III
majority chose not to explore.\footnote{Qatar v. Bahr., supra note 44 (joint dissenting opinion) at 167-72.} Effectivités, as defined by the I.C.J. in Frontier Dispute (Faso v. Mali), are administrative activities that demonstrate jurisdiction over territory.\footnote{Id. at 168.} The dissent refutes Bahrain’s claim, writing that Qatar’s persistence in refusing to acquiesce quietly to Bahrain’s claim to the islands prevented effectivités.\footnote{Id. at 150.} But, the dissent concedes, given the majority’s decision to base its ruling in the 1939 British award, perhaps the islands should be shared between the two parties.\footnote{Id. at 150.}

The dissent notes that this proposed solution mirrors the principle of condominium, which is a principle of international law.\footnote{Brownlie explains that “[i]nternational law recognizes the condominium, which exists when two or more states exercise sovereignty conjointly over a territory.” See IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 113-14 (6th ed., 2003). He adds, “[w]orthy of comment is the fact that the theoretical consequences of this type of regime may be qualified by agreement. Moreover, national legislation and jurisdiction will not automatically extend to territory under the special regime of condominium. On occasion it has been suggested that in certain cases, for example with reference to land-locked lakes and bays bounded by the territory of two or more states, the riparian states have condominium over the area by the operation of law. This is doubtful, but it is possible for the regime to arise by prescription.” Id. at 113 (references omitted).} Condominium is a cooperative arrangement over territory; however, there seems to be additional justification for this proposal. One such justification appears to be the dissent’s desire to rectify a perceptibly unjust decision. It recognizes the significance of the Hawar Islands to both sides, and is ultimately disturbed by the motives behind the British award and the 1936 decision not to inform Qatar. But the dissent also recognizes that the British decision cannot be reversed for the same reasons.\footnote{Id. at 150.} The dissent concludes, “[i]t is more essential than ever that judicial settlement fulfill to the utmost its calming, peace-making function in a case such as this, where each Party fears being unjustly despoiled by a Judgment depriving it of the Hawars.”\footnote{Id. at 150.}

The dissent also empathizes with the sentiments of the polities of each country. The dissent envisions Bahrain’s loss of the Hawars as “a truly alienating capitis diminutio . . . the loss of a vestige of bygone
splendor. . . . _Hawar is Bahrain's 'Alsace-Lorraine.'_”

As for Qatar,

the loss of, or failure to recover, the Hawars . . . would give rise to a sense of disappointment as intense as its confidence in international justice was great. At the end of every day for 61 years now, each and every Qatari sees his lost illusions swept away on the waves of the daily ebb.\(^7\)

The dissent appears to believe a cooperative border remedies the loss of identity that a loss of territory entails. In other words, the dissent idealizes a cooperative border as a means recapturing of lost identity for a polity.

The dissent thus bases a cooperative arrangement on three grounds: _condominia,_ the sentiments of the polities, and the dissent's desire to rectify a perceptibly unjust decision. All three suggest a concern for the polities of both states in this proposition, but they are ultimately abstract. The international legal grounds are unclear—_condominia_ is an actual international legal principle, but it is not directly proposed as a solution. The grounds of empathy may be considered to be genuine or diplomatic gesture by the court in attempt to craft a just solution to a perceived historical injustice, but again, is not a clear-cut solution. Last, the interpretation of a cooperative border is rooted in the identity of the polity, but this relationship is tenuous as it is unclear where one polity begins and the other ends, either historically or administratively.

Thus, in exploring the gray areas between the administrations of two separate nation-states, the dissent has not rooted its bases for a cooperative border in any practical administrative considerations. Therefore, neither can this conception of a cooperative border be rooted in practical considerations, and instead may be best considered to be an attractive alternative in the abstract.

**C. The Dissent's Interpretations Reflected in the Court's Opinion**

The two interpretations of the dissent are present in the majority's decision in its handling of Qatar and Bahrain's historical status and in its choice not to address _uti possidetis juris._

Fundamental to the majority's opinion is the conclusion that neither Qatar nor Bahrain were ever Protectorates of the British Commonwealth. It bases this opinion on an Exclusive Protection Agreement of 13 March 1892 between the Sheikh of Bahrain and the British Political Resident in the Gulf and an exclusive agreement between Great Britain and Qatar dated 3 November 1916 that, for all intensive purposes, rendered Qatar a

\(^{79}\) _Id._ at 149-50 (emphasis in original).

\(^{80}\) _Id._ at 150.
Protectorate of Great Britain. But these treaties seem to indicate that Qatar and Bahrain were Protectorates of the British Commonwealth.

Yet the majority does not label either state as former “Protectorates” or “protected States.” Moreover, it is unclear in the majority’s decision what the appropriate label for their colonial status should be. The decision suggests both states were either post-Ottoman independent nation-states, or Protectorates of the British Commonwealth. But in having done so, the Court rules out the application of *uti possidetis juris* altogether; instead, the implication appears to be that each party was an.

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81. *Qatar v. Bahr.*, supra note 44 (joint dissenting opinion) at 56, 57.
82. This is concededly an arguable conclusion as to the status of Qatar and Bahrain under the British Commonwealth. Different sources provide different answers to the question of what defines a Protectorate. Before the I.C.J., Qatar contends that neither Bahrain nor Qatar was ever a Protectorate; rather than address the assertion, the majority avoids this issue in its decision. Brownlie does not provide a clear answer as a reference either, saying only,

the dominant partner, state A, has acquired a significant role in the government of state B, and particularly in the taking of executive decisions relating to the conduct of foreign affairs. The legal aspects of the relationship will vary with the circumstances of each case, and not too much can be deduced from the terminology of the relevant instruments. It may be that the protected community or “state” is a part of state A and, as a colonial protectorate, has no international legal personality, although for purposes of internal law it will have a special status.

Brownlie at 114. Based on Brownlie’s example, both Qatar and Bahrain could be defined as former Protectorates. A more clear definition of Qatar’s and Bahrain’s status at the time comes from Owen Hood Phillips, who writes that within the British Commonwealth, it was possible to draw a distinction between (i) those territories in which the Crown exercises an effective sovereignty without actual annexation, and (ii) those in which the administration is carried on by and in the name of the native sovereign with British advice. The former may be called, “Colonial Protectorates” and the latter “Protected States.”

O. HOOD PHILLIPS, THE CONSTITUTIONAL LAW OF GREAT BRITAIN AND THE COMMONWEALTH (1952). Hood characterizes Bahrain and Qatar as “British Protected States, but are dealt with administratively through the Foreign Office; internationally, they are in the same position as the Protected States... with which the Colonial Office is concerned.” Hence, the conclusion that can best be drawn from these two external sources, Brownlie and Hood, is that Bahrain and Qatar were considered Protectorates under Commonwealth law, and thus should be characterized as such.

As Hood’s description depicts Protectorates as equivalent in Commonwealth status to colonies, there exists a strong argument that *uti possidetis juris* should apply here. Why the Court does not explore *uti possidetis* is discussed subsequently.

83. Interestingly, though the dissent conveys both Qatar and Bahrain as having been Protectorates, it also refuses to label both states as such. Rather the dissent states that, the “special relationship of protection” between the United Kingdom and the two States parties to the present dispute gave rise to a flexible division, evolving over time, of responsibilities between the protecting Power and the protected State, as a result of which the State retained its personality; this was not the case for most countries in Africa.

*Qatar v. Bahr.*, supra note 44 (joint dissenting opinion) at 214.
independent state at the time.\textsuperscript{84} Thus, it seems that it is implicitly true that both states were Protectorates, but explicitly, the Court carefully avoids not stating or defining this.\textsuperscript{85}

Having made this definitional decision, the Court appears to avoid the implications suggested by the dissent. Nevertheless, the concepts of \textit{uti possidetis juris} and “administrative borders” manifest in the case, largely because of the formula presented by Bahrain and agreed to by both parties. The “Bahraini formula” permits the Court to “embrace[] all questions relating to the Hawar Islands, including the dispute concerning the 1939 British decision.”\textsuperscript{86} Under this formula, both Qatar and Bahrain confront the court with arguments based on \textit{uti possidetis juris}, original title, and \textit{effectivités} as questions for the Court to address.

Despite this significant leeway, the Court does not address these arguments, rather relying solely on the 1939 decision.\textsuperscript{87} The advantage of such an approach, it appears, is that there is some certainty to a decision made by a previous colonial administrator, as in disputes involving borders established by \textit{uti possidetis juris}.\textsuperscript{88} Additional certainty may be found in the relationship between the British Commonwealth and the Rulers of Qatar and Bahrain found in Protection Agreements since 1886. But as the Court refuses to characterize either state as a former Protectorate, and the decision as an administrative

\begin{itemize}
\item \textsuperscript{84} This approach to \textit{uti possidetis juris} by the Court is somewhat evident in its strategy for the ruling. The majority focuses on the nature and validity of the 1939 decision, rather than the three other legal issues it perceived to exist in the case: the existence of an original title to the islands for either side; effectivités; and, whether Bahrain’s defense of \textit{uti possidetis juris} was applicable to this dispute. All three issues all touch upon both \textit{uti possidetis juris} and the traditional assumption of \textit{administrative borders}, but the Court ultimately addresses none of them. \textit{Id.} at 75.
\item \textsuperscript{85} Ultimately, then, neither a concrete conceptualization of borders nor a ruling on the application of \textit{uti possidetis juris} to this matter may be found in the majority’s decision. Rather, it seems that the Court simply regards the states as they are today— independent members of the international community. The Court appears to create the fiction that Qatar and Bahrain were independent Sheikhdoms who sought out the opinion of the British Government as an independent third party. This is most evident where the majority writes, the 1939 decision is not an arbitral award. . . . This does not, however, mean that it was devoid of all legal effect. Quite to the contrary, the pleadings, and in particular the Exchange of Letters referred to above . . ., show that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on those same States after 1971, when they ceased to be British protected States. \textit{Id.} at 83.
\item \textsuperscript{86} \textit{Id.} at 77; \textit{id.} (joint dissenting opinion) at 163.
\item \textsuperscript{87} \textit{Qatar v. Bahr.}, supra note 44 at 85.
\item \textsuperscript{88} In other words, the certainty created by a ruling of original title in border disputes between former colonies when such an analysis may be applied, is still feasibly reached via an alternate route.
\end{itemize}
decision, these arguments are not recognized, but lurk within the decision nonetheless.

But the Court also seems to implicitly recognize the 1936 decision was a fundamentally economic one. It recognizes the communications that led to the decision were tied to the "negotiations then in progress for the grant of an oil concession." However, it does not address the decision itself at all, except to say it stands, and rather focuses only on the 1939 decision. Moreover, the Court's recitation of the facts suggests that the British Political Resident and British Political Agent both engaged in roles resembling an administrator more than a diplomat. Some indication of this point is evident in the fact that the Resident had to refer back to the India Office—the heart of Britain's colonial empire in the region—for an opinion on the matter. Most indicative of this point is the failure of either the Agent or the Resident to contact Qatar regarding this decision.

Were the issue of *uti possidetis juris* not present or had there not been Protectorate treaties in existence, perhaps the 1936 decision could have been regarded as an unfortunately unfair decision by the British Government. It appears this is the angle that the majority hoped to adopt by ruling that the 1939 decision stands because both Bahrain and Qatar consented to it. But because both issues are recognized in this case, the Court recognizes a border determination by the administrators of a colonial power was solely for economic purposes, and not for the polity, and chooses to uphold that border nonetheless. The Court thus appears unwilling to undermine the fundamental assumption of *uti possidetis juris* that colonial borders were necessarily administrative.

It is for similar reasons that the Court does not reconcile either party's claims with the dissent's proposal for a cooperative arrangement. Were the Court to do so, it would have to overrule that the 1939 decision was not binding on either side. Moreover, it appears that any grounds other than the 1939 decision would suggest that the Hawar Islands were originally Qatar's until 1936. Last, it would be forced to recognize the economic rationale behind the border and then would have to redefine it. Such a decision would undermine *uti possidetis juris* entirely, though the ironic result would be a border more associated with the polities of both states than as it currently stands. Therefore, the Court cannot create a cooperative arrangement like *condominia* as a solution to the dispute, as it is a highly problematic path from a variety of angles.

89. *Id.* at 58-59.
90. *Id.* at 84.
91. *Id.* at 59.
92. *Id.* at 83-84.
93. An interesting question raised by this problem is whether the Court would
Interestingly, it is also important to note that by dismissing the effectivités angle, the Court dismisses a means of resolving the dispute that is entirely congruent with the definition of uti possidetis juris. That is, the permission granted to the Dawasir to settle the Hawar Islands by the Sheikh of Bahrain in the eighteenth century, and the sworn allegiance of the Dawasir to the Sheikh of Bahrain, not only constituted effectivités, as Bahrain argues, but also a part of the Bahrain self, which is the implicit argument. In doing so, the Court directly avoids out the grounds of self-determination for applying uti possidetis juris. This choice also appears congruent with its approach to avoiding the term protectorate—any angle of argument that follows the logic of an act of self-determination would imply that both countries had been protectorates. But as the Court seeks to avoid this line of argument altogether, as there can be no act of self-determination congruent with the decisions of the British Foreign Agent. If there were, then both Qatar and Bahrain were Protectorates, and uti possidetis juris applies.

It thus appears that the majority carefully avoids grounds of uti possidetis juris as a basis for its decision, as it implicitly would acknowledge that the basis for the border was historically an economic interest of the British.

III. The African Border Disputes

In post-colonial African nation-states, post-colonial identity is predicated on uti possidetis juris. Border disputes still remain, but often target the ambiguities of the histories of colonial borders. A recent form of dispute has been one that arises because of current or future economic interests.

Whereas Qatar v. Bahrain implicitly dealt with uti possidetis juris and economic interests in a border dispute, two recent African border disputes before the I.C.J. explicitly address the matter: in Cameroon v. Nigeria regarding the Bakassi Peninsula and Lake Chad regions, and in Botswana v. Namibia regarding Kasikili/Sedudu Island in the Chobe River. Both the parties to the dispute and the Court appear to regard the disputed borders as economic, but from a different temporal and conceptual angle than the Court did in Qatar v. Bahrain. As will be evident below, despite these subtle differences, the Court appears to be

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impose such an arrangement as a solution to the dispute. It apparently has before, but in the context of maritime borders. There are multiple economic and political implications of such an arrangement, but those will not be explored in this Article.


95. Concededly, this decision is not entirely surprising.
uncomfortable with any conception of borders as representing the economic interests of the state.

A. Botswana v. Namibia (Kasikili/Sedudu Island)

Namibia and Botswana sought I.C.J. intervention in a dispute over the title to Kasikili/Sedudu Island in the Chobe River, which lies north of Botswana and South of Namibia. The island, about 1.5 square miles in area, creates a fork in the river before it meets with the Zambezi, resulting in a northern channel bordering Namibia and a southern channel bordering Botswana. Botswana’s Chobe National Park, a protected wildlife reserve, lies directly south of the island. To the north in Namibia lies a flood plain known as the “Caprivi Strip.” The closest Namibian village is across the river from the island, whereas the closest village in Botswana is 1.5km downstream.

There is no question as to the post-independence status of either Namibia or Botswana—both were former colonies whose borders have been internationalized via _uti possidetis juris_. Nor is there any question as that the border had been a colonial-era administrative border—the island formed part of the demarcation of the spheres of influence between Germany and Great Britain in Southwest Africa, embodied in the Anglo-German Agreement of 1890. Additionally, there is no contention as to whether the treaty is binding on either party—both acknowledge that they are bound by the 1890 Agreement. Thus, according to these three international legal standards, it is arguably indisputable to conclude the border was an administrative border for both Germany and Great Britain.

The similarity to the _Qatar v. Bahrain_ dispute lies in the border itself, established by a colonial power largely for economic reasons—in this case the “transportation of commerce.” But whereas in that dispute the Court had been asked to overturn a border determination that _had been_ predicated on economic interests, here the Court has been asked to resolve a border dispute that _is_ predicated on an economic interest of both parties. The economic interest is tourism, which for Botswana’s

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96. _Bots./Namib., supra_ note 45 at 1053.
97. _Id._ at 1054.
98. _Id._ at 1057, Sketch-Map No. 3. The closest village in Namibia is Kasane, which lies inland on the northwestern bank of Chobe, and the closest village in Botswana is Kasika, which lies 1.5km downstream from the island.
99. _Id._ at 1059.
100. _Id._ Interestingly, under the Vienna Convention on the Law of Treaties of 23 May 1969, neither party would be considered a party to the original agreement as neither was a signatory to it. However, in addition to the express consent of the parties, the Court cites the OAU’s Cairo Resolution and customary international law as bases for this treaty to apply to both Botswana and Namibia. _Bots./Namib., supra_ note 45 at 1059.
economy is one of its “key sectors,” and where Chobe National Park is an integral attraction. Namibia, on the other hand, is heavily dependent on the minerals industry; tourism is not even considered a key source of income. But it does possess a tourist industry, and has an interest in developing it.

Again, the Court shows discomfort with recognizing economic interests as determinative of a post-colonial state border, whereas the dissent’s explicitly regards economic interests as the determinative factor. Justice Weeramantry writes: “[a]s Namibia informed the Court at the oral hearings, tens of thousands of tourists from all over the world come to Namibia to visit its game parks[.]” He notes additionally, “[t]he use of the southern channel to observe the wildlife on Kasikili/Sedudu Island would be a natural and important part of the agenda of the tourists in both countries.”


102. Id.

103. Bots./Namib. (dissenting opinion of Judge Weeramantry) at 1177. An interesting perspective on the growing importance of the tourist industry to both parties may be found in Joseph R. Berger’s article. He writes: Although the “buffalo fence” is not electric and is broken by elephants, the Botswana wildlife authorities use problem animal control techniques—scaring elephants with firecracker-type devices, shooting them if necessary—to try to keep them from crossing the fence on a regular basis (lions that jump over the fence are likewise a problem). To the north, the elephant population spreads through Namibia’s Caprivi strip, then thins into war-torn Angola. To the north and east, it also spreads into Zambia and Zimbabwe. When I visited Botswana in December 1999, I was informed by a local naturalist about a decision of the International Court of Justice handed down days earlier, settling a decades old dispute between Botswana and Namibia over Sedudu Island in the Chobe River, which forms their border, awarding sovereignty over the island to Botswana. See Case Concerning Kasikili/Sedudu Island [Bots./Namib.], Dec. 13, 1999, 39 I.L.M. 310. I passed the island, and it appeared an empty grassland. But during the dry season (which is the southern hemisphere winter), the island teems with elephants, buffalo and other wildlife. Although wildlife was not a historical basis for the dispute, wildlife has made the island more valuable to both Botswana and Namibia, as tourism in the area has increased rapidly. Elephant populations frequently straddle international borders, and while this often causes disputes, particularly over ivory poaching, it may also from the basis for international cooperation, under the right circumstances.

104. Bots./Namib.(dissenting opinion of Judge Weeramantry), supra note 46 at 1178. Namibia appears to have subtly attempted to convey the importance of wildlife to its tourist industry in its arguments regarding which channel should be considered the main channel. It did so by introducing evidence consisting of photographs of “a herd of elephants crossing the two channels of the Chobe[.]” The Court took note of this evidence, but found it unconvincing. See id. at 1066.

105. Id. at 1178.
sensitive to Botswana's interests in a favorable ruling: "[t]he principal loss and inconvenience to Botswana would not be in regard to navigation, but in regard to the tourism and preservation of wildlife which would ensue from the fact that the teeming wildlife on the Botswana side has habitually crossed over to the Island and that the Island is in a sense an integral part of this wildlife preserve." \(106\)

The Court, on the other hand, only recognizes the importance of tourism to both countries when it notes the "economic importance" of "the use of the southern channel by flat-bottomed tourist boats." \(107\) It instead explicitly rests the decision upon its interpretation of \textit{thalweg}, which the Court states may mean: "the most suitable channel for navigation on the river, 'the line determined by the line of deepest soundings,' or 'the median line of the main channel followed by boatmen travelling downstream.'" \(108\) All three meanings laid out by the Court suggest an inherent commercial meaning to \textit{thalweg}. \(109\)

But unlike \textit{Qatar v. Bahrain}, the Court is comfortable with this fact. The border was established on \textit{thalweg}, but also stood as an administrative division between the spheres of influence. Therefore, the

\(106\). \textit{Id.} Interestingly, Weeramantry does not regard this factor as grounds for an economic interpretation of borders, but rather as grounds for an interpretation of the border as a cooperative arrangement for the purpose of ecological protection. \textit{See infra} Part IV.A.

\(107\). \textit{Id.} at 1071. However, the Court refuses to use this as a basis for establishing the border as the southern channel, despite Namibia's argument in favor of such an interpretation.

\(108\). \textit{Bots./Namib.}, supra note 45 at 1061-62. Akweenda offers an alternative way of stating these three different meanings. For Akweenda, \textit{thalweg} marks the line which connects the deepest points in the river; the line which connects the deepest points in a channel; or the centre of the normal principal navigation channel. \textit{See AKWEENDA, supra} note 18 at 56. For the purposes of this paper, however, I will follow the Court's definition, as its use of the terms "navigation" and "boatmen" inhere a more commercial meaning to the term \textit{thalweg}. Additionally, how \textit{thalweg} is translated in the English version of the treaty is a non-issue in the case. \textit{See Bots./Namib.}, supra note 45 at 1062.

\(109\). Also, when determining navigability of the watercourses, it notes "Those conditions [of varying navigability] can prevent the use of the watercourse in question by large vessels carrying substantial cargoes, but permit light flat-bottomed vessels[.]" \textit{See id.} at 1071. The point here is that rather than focusing solely on the technical meaning of \textit{thalweg}, the Court additionally focuses on the commercial implications of the proper interpretation of this term. Moreover, the Anglo-German Agreement of 1890 was very much a commercial treaty—it was signed by the British to protect north-south trade routes in south-west Africa, and by Germany to secure British recognition of its access to the Zambezi. \textit{Id.} at 1054.

Hence, the problem with \textit{thalweg} in this dispute is that the dividing line between the spheres of influence between Great Britain and Germany was agreed to be upon the "main channel" of the Chobe River and it is unclear whether the agreed main channel was the northern channel or the southern channel. The Court rules, based on three different surveys conducted between 1912 and 1985, that the northern channel is the main channel. \textit{Id.} at 1072.
Court resolves the ambiguity underlying \textit{thalweg}, but is unwilling to do otherwise.

The alternate ground for a holding was to have ruled in favor of a party based on the significance of the island to that party. However, given the descriptions of the island presented by both parties, this island and border has little use for either party, except for the tourist industry. Namibia argues that the Masubians, who inhabit the Caprivi Strip in Kasika village, have had “continuous, exclusive, and uninterrupted” occupation of the island, “in so far as the physical conditions of the Island allowed.”\footnote{Bots./Namib., supra note 45 at 1093. This argument is part of Namibia’s broader argument of prescriptive title to the island, which claims that this behavior of the Masubia “constituted a key component of the system of ‘indirect rule’ which prevailed in the region.” Id. The Court dismisses this first ground for two different reasons. First, it does not see any evidence that the Masubians occupied the island \textit{à titre de souverain}, but rather for their own needs, primarily agricultural but also in response to the flood season. Second, Botswana’s predecessors never acquiesced to Caprivi claims of the border’s location in the southern channel, and moreover, treated the issue of the Masubia as independent from the border issue. \textit{Id.} at 1105-06. The Court additionally dismisses Namibia’s argument by pointing out that it was not “uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border.” \textit{Id.} at 1094.} Namibia portrays the Masubians as moving “in accordance with the dictates of the annual flood.”\footnote{\textit{Id.} at 1181 (dissenting opinion of Judge Weeramantry).} Botswana, on the other hand, portrays the island as an occasional habitat for wildlife, to which Justice Weeramantry further adds: “[i]t is a place where they meet and feed and breed.”\footnote{\textit{Id.}, (citing Counter-Memorial of Namibia, vol. III, p.34, para. 11.9). In other words, this is a point that Botswana argued and Namibia reaffirmed.} Moreover, “[t]he grazing on the island is excellent and there is a daily elephant migration to the island.”\footnote{I will suggest below that this decision takes into account the environmental concerns of Weeramantry because it awards the island to the country with the best resources and experiences in the tourist industry to protect wildlife. \textit{See infra} Part IV.A.} Namibia thus claims occupation of the island when there is no flooding, but recognizes the importance of the island to wildlife, whereas Botswana claims the significance of the island is only for wildlife.

Therefore, the Court does not have much ground for a decision based on the importance of the island to any particular interest of either side, except for tourism and \textit{thalweg}. The Court appears to rest the decision on \textit{thalweg}, and thus the former colonial administrative borders, because to do so otherwise would be to determine a border based on the current economic interests of the state.\footnote{Bots. \textit{v.} Namib., supra note 45 at 1093.} As was suggested in the analysis of the \textit{Qatar v. Bahrain} decision above, the Court appears uncomfortable with this latter course. Nonetheless, the Court’s
avoidance of the issue, especially in light of the facts presented by Judge Weeramantry’s dissent opinion, suggests that the Court still recognizes a border may represent economic interests for a state. However, it will not rule that such interests may be or have been determinative of that border.

B. Cameroon v. Nigeria

The border dispute in Cameroon v. Nigeria mirrors the cases discussed above in the sense that a disputed border represents an economic interest of the state. Unlike the others, however, the disputed border represents a future economic interest of the parties to the dispute.

Nigeria’s and Cameroon’s borders rest upon the spheres of influence established by a series of treaties between Germany, France, and Great Britain between 1906 and 1913.115 The boundary of the Bakassi Peninsula specifically rests upon a Treaty of Protection between Great Britain and the local Kings and Chiefs of the region (known as Old Calabar) from 1886, but also two subsequent agreements reached between Great Britain and Germany in 1913 that established the “Frontier between Nigeria and the Cameroons, from Yola to the Sea.”116 The Lake Chad border was created by the Milner-Simon Declaration of 1919, and clarified in subsequent agreements between the French and British during their period of control by Mandate of the region.117 This border has also been subsequently clarified by the work of the Lake Chad Basin Commission.118 Thus, the roots of both the Lake Chad and Bakassi Peninsula borders are geopolitical arrangements, and have been internationalized by uti possidetis juris. Neither border was established on necessarily economic or administrative grounds.119

There are three elements to the disagreement over these particular borders. As in the other two disputes discussed in this paper, these

115. Cameroon v. Nig., supra note 46 at 331. The history of the identities of the two nations is actually quite complicated, largely as a consequence of the division of Germany’s territories between France and Great Britain under the Treaty of Versailles. As the Court does not delve into this history for an answer, neither will I. However, there will be some reference to this history in understanding the Court’s approach to the Bakassi Peninsula.
116. Id. at 333. This agreement placed the Bakassi Peninsula in German territory, and therefore in modern-day Nigeria.
117. Id. at 344. This region did not have any border delimitations or demarcations derived from spheres of influence, and thus had been left open under most pre World War I agreements. Additionally, the Court turns to the work of the Lake Chad Basin Commission (“LCBC”), established in 1964 and given, among other tasks, the task of dealing with certain boundary and security issues.
118. See id. at 351.
119. There is discussion of demarcation versus delimitation, but as this is a related argument not integral to the decision, I will not explore it. See Cameroon v. Nig., supra note 46 at 334-35. See also id. (dissenting opinion of Ajibola) at 542-43.
borders represent economic interests. The Lake Chad border, a settlement for Nigerian fishermen,\(^{120}\) represents a current economic interest of Nigeria, and the Bakassi Peninsula represents a future alternative to the Persian Gulf as a major supplier of oil to the US and other major importers.\(^{121}\) Second, like the Kasikili/Sedudu Island and Qatar v. Bahrain disputes, these borders are not necessarily defined by the treaties above.\(^{122}\) Last, like the Kasikili/Sedudu Island dispute, the population of a party is involved, but to a much greater extent. There is a significant Nigerian population in both regions—over 150,000 Nigerians in the Bakassi Peninsula,\(^{123}\) 33 Nigerian villages settled in the disputed Lake Chad territory,\(^{124}\) and over three million Nigerians in Cameroon.\(^{125}\) Nigeria's arguments thus confront the Court with a novel problem: it has an economic and legal rationale for disputing these territories, but the unprecedented additional rationale that Nigerians inhabit those territories.

The Court holds for both the Bakassi Peninsula and Lake Chad that the borders were established by the agreements cited above and thus cannot be altered as Nigeria seeks to alter them.\(^{126}\) Although these holdings are not based upon \textit{uti possidetis juris}, they follow the same rationale. Yet the presence of Nigerian villages governed by the Nigerian government in the Lake Chad region, and of Nigerians in the Bakassi Peninsula, suggests that the Court’s decision to uphold the border may be too simple a solution.

This is first evident in the Court’s decision as to Lake Chad. Nigeria argues that the Lake Chad region is a historically undefined territory, and the historical consolidation of the region by Nigerians is a consequence of this ambiguity.\(^{127}\) The Court rejects these arguments,

\(^{120}\) See id. at 330.
\(^{121}\) See “U.N. ruling Favors Cameroon,” Anthony Deutsch AP Online, 10/10/02.
\(^{122}\) Nigeria claims as to the Lake Chad region that a subsequent agreement to the Milner-Simon Declaration (the Thomson-Marchand Declaration of 1929-30) did not provide a final delimitation of the Anglo-French boundary in regard to Lake Chad. See Cameroon v. Nig., supra note 46 at 334. The Court agrees to an extent, holding “the Declaration does have some technical imperfections and that certain details remain to be specified” but that the “Declaration provided for a delimitation that was sufficient in general for demarcation.” See id. at 341.
\(^{123}\) Id. (dissenting opinion of Ajibola) at 539.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) An additional argument was made by Cameroon that Nigeria was bound by the work of the LCBC in the 1980s and 1990s in the demarcation of the border, but the Court holds that Nigeria was not bound by that agreement. See Cameroon v. Nig., supra note 46 at 335-40.
\(^{127}\) Nigeria argues historical consolidation on three grounds: long occupation by Nigeria and Nigerian nationals constituting historical consolidation of title; effective administration by Nigeria, acting as sovereign and an absence of protest; and,
instead holding that Cameroon had original title to the land. But the Court recognizes this title as problematic in the treaties that had established this border:

Despite the uncertainties in regard to the longitudinal reading of the tripoint in Lake Chad and the location of the mouth of the Ebeji, and while no demarcation had taken place in Lake Chad before the independence of Nigeria and Cameroon, the Court is of the view that . . . , certainly by 1931, the frontier in the Lake Chad area was indeed delimited and agreed by Great Britain and France.

Moreover, it makes this decision despite the fact that the 33 villages have been established on territory recently created by unprecedented environmental conditions: dried-up lakebed, islands perennially surrounded by water, or on locations that are islands in the wet season only. Last, the villages appear to have been established with Cameroon’s tacit consent—the existence of these villages had been challenged only once by Cameroon before it filed suit in 1994. The above factors suggest shaky evidence of original title to the region for Cameroon, and novel issues underlying the settlement of Nigerians in the region, but the Court still upholds the border as it was originally founded.

The Court takes a similar approach to the Bakassi Peninsula, where the history of historical title is similarly problematic, and the territory’s inhabitants are Nigerian. Nigeria attempts to argue that there are ambiguities in the transfer of title in the historical treaties. It argues that the Treaty retained original title with the Kings and Chiefs of Old Calabar, and because Bakassi was a protectorate, Great Britain did not have the authority to give Bakassi to Germany in 1913. The Court

manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over Darak and the associated Lake Chad villages. See id. at 349.

128. The Court specifically holds that “there was no acquiescence by Cameroon in the abandonment of its title in the area in favour of Nigeria. Accordingly, the Court concludes that the situation was essentially one where the effectivités adduced by Nigeria did not correspond to the law,” and cites Frontier Dispute (Faso v. Mali) as grounds for ruling in favor of Cameroon. See id. at 354-55.

129. Id. at 341.

130. Id. at 349. The dried up lake-bed presents a novel issue, as it is land newly created by an environmental problem and an ambiguous border.

131. Cameroon v. Nig., supra note 46 at 349-50. Moreover, Nigeria points out that Cameroon does not provide evidence as to the settlement of “a substantial number of villages,” thereby implying that Cameroon had implicitly allowed the settlement of those villages in the past. The implicit suggestion is that Cameroon did not perceive these settlements to be problematic until Nigeria’s behavior became more aggressive along the border.

132. Id. at 366. See also id. (Nigeria insists that the Agreement of 1913 was not put into effect and was invalid because, among other things, Great Britain did not possess title to the Bakassi).

133. See id. at 400.
rejects both arguments, finding as to original title “no evidence of any protest in 1913 by the Kings and Chiefs of Old Calabar[.]”134 Moreover, the Court finds that the treaty may not have established an international protectorate, but it confirmed “British administration by indirect rule.”135 The Court thus rejects Nigeria’s arguments that historical ambiguity may open the door to a claim of title to this land, also.

Unlike the other cases discussed in this paper, it is not the dissent who is aware of the questionable grounds of the Court’s decision.136 Rather, it is the Court itself, which rests original title to the region on a Note Verbale of 1962 from Nigeria to Cameroon regarding oil licensing blocks despite historical evidence that suggests otherwise. Although this note explicitly states that Nigeria recognized Bakassi as having belonged to Cameroon at one point in the 1960s,137 it does little else to clarify historical ambiguities surrounding the question of original title. The Court also uses this evidence as grounds to refute the Nigeria’s claim of historical consolidation,138 though Nigeria’s arguments present a much more complex relationship with the region, including the establishment of health centers, community schools and the collection of tax from villages.139 Nigeria uses these arguments to claim historical consolidation of the region since independence, claiming they collectively constitute independent and self-sufficient title to Bakassi.140 But the Court holds that Cameroonian title had already been established in Bakassi, tenuous though title may be.141

Thus, with Cameroon’s historically ambiguous title to the region,

134. Id. at 406-07.
135. Additionally, the Court cites historical evidence that the British did not refer to Old Calabar in any British Orders of Council. See id. at 407. It appears that Old Calabar ceased to exist as an international personality following this Treaty of Protection, but it remained as a local one. When analyzed within the context of the internal attacks on post-colonial borders, this will be significant. See infra Part V.B.

In an interesting twist, the Court cites Qatar v. Bahrain to support the proposition that “a characteristic of an international protectorate is that of ongoing meetings and discussions between the protecting Power and the Rulers of the Protectorate.” Cameroon v. Nig., supra note 46 at 407. But, as was evident above, the Court would not characterize either Qatar or Bahrain a Protectorate or a protected state. This also suggests that the Court is extremely careful with the language it uses with respect to post-colonial borders for the purpose of reaching a particular conclusion.

136. There are two dissenting opinions in this case, Judge Ajibola’s and Judge Koroma’s. Judge Ajibola agrees with Nigeria’s arguments as to original title. See generally id. (Ajibola dissent) at 547-52. Judge Oda’s dissent in Bots./Namib. takes issue with the specificity of the Court’s delineation of the Lake Chad region. See Bots./Namib. (separate opinion of Judge Oda), supra note 45 at 1116.
138. See id. at 411-12.
139. See id. at 413.
140. See id. at 412-13.
141. Id. at 413-14.
and Nigeria's administrative and representative presence in both the Bakassi Peninsula and Lake Chad regions, there exist historical and representative grounds for Nigeria's claim to the region. But the Court does not accede to them, and it is explicitly unclear from the decision as to why. But it is implicitly clear that the economic interests of Nigeria both regions—agrarian in Lake Chad and oil concessions in Bakassi—substantially affected the Court. The Court appears most troubled by Nigeria's intentions, as Nigeria's acts constitute a naked challenge to border stability, if not an attempt to revive *terra nullius*. The Court seems troubled enough that it would rest much of its decision on a Note Verbale, while spending much of its discussion avoiding the historical uncertainties that plague the region. Moreover, it does so despite the substantial Nigerian population present in Cameroon, specifically in the disputed territories. Thus, the ruling may be best regarded as an explicit rejection of Nigeria's treatment of post-colonial borders as *terra nullius* for the sake of potential future economic interests. Put in alternate terms, the Court is rejecting Nigeria's implicit interpretation of a border as a future economic interest for a state. But, in having done so, it has also rejected arguments for redrawing post-colonial borders for the interests of the polity.

IV. The Cooperative Border

The concept of borders as a cooperative agreement between two nations is fundamental to the notion of borders themselves—that is, a border marks the mutual recognition of defined territory between states. The idea of a border as a shared region between two nations is a concept that exists in international law. Such a concept is indeed suggested by the dissent in *Qatar v. Bahrain*. But a border as a cooperative arrangement for the sake of honoring both nation-states' duties under an international agreement for the protection of the environment appears to be unprecedented. In such an instance, neither state's identity is bound to its own polity, but rather to its duties to the

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142. For the Lake Chad region, the Court cites Cameroon's argument that Nigeria's border incursions at the Lake Chad region are "acts of conquest which cannot found a valid territorial title under international law." *Cameroon v. Nig.*, *supra* note 46 at 351. Moreover, it is troubled enough to devote the last three pages of its decision to a discussion of the deployments of force by both sides in the disputed regions. *Id.* at 450-53.
144. This is perhaps derivative of the concept of "spheres of influence," but it should also be considered that in the arbitration of *Rann of Kutch*, Pakistan and India were asked to share a border. R. P. ANAND, STUDIES IN INTERNATIONAL ADJUDICATION 223 (1969).
145. This assertion is based on the author's research.
international polity, if such a thing exists.

Such an approach is suggested by Judge Weeramantry in *Botswana v. Namibia* as a potential solution to the dispute. Justice Weeramantry suggests a joint regime for the island, whereby Namibia would be awarded the island but would be “obliged to negotiate with Botswana towards a mutually acceptable joint regulatory regime.” The suggestion is based on his perception of a “tension between principles of territorial sovereignty and principles of ecological protection which involve a fiduciary responsibility towards the ecosystems of the States concerned.” Such a regime presents the possibility “for the incorporation of environmental concerns into boundary delimitation, and with the development of the concept of joint regimes for conserving the common environmental heritage.”

As in *Qatar v. Bahrain*, a joint regime is suggested here as an alternate solution. But Weeramantry seems to have taken this regime a step further by suggesting that the identity of states should be subordinate to a cooperative regime based on their international obligations to international environmental law. Weeramantry’s rationale appears to be affected by an argument of Botswana:

> if the Court were to rule in favour of Namibia, the decision would immediately remove the Island from the range of the wildlife, as they would be hunted down on the Island, as was done in the rest of the Caprivi. Thus, in the interest of conservation, and for all the other

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146. Weeramantry believes Namibia should be awarded the island primarily on the grounds that the southern channel has been the primary channel for navigational use, while ruling out the grounds of the majority’s opinion. See generally, *Bots./Namib. (dissenting opinion of Judge Weeramantry)*, supra note 45 at 1165-79. He also regards the use of the island by the Masubia as state sponsored, as colonial governments “depended heavily on chiefly authority at a local level, and the claims and movements of chieftains were not matters of indifference to them.” *Id.* at 1164-65. This is an interesting observation that will be discussed further in light of Mamdani’s theory.

147. *Id.* at 1195.

148. *Id.* at 1179. He cites four grounds for his argument: his concern for a judicially-imposed boundary delimitation that involves the dismantling or division of an ecologically integral unit of biodiversity; the role of equity in delimitation; a distinction between colonial treaties that indicated spheres of influence and those that designated boundaries; and, “the notion of joint regimes over ecologically vital portions of territory which, despite the ecological unity of the territory, straddle national borders.” It is this last ground that is most interesting, and thus this paper will focus on it. *Id.* at 1181.

149. *Bots./Namib. (dissenting opinion of Judge Weeramantry)*, supra note 45 at 1195. The regime would cover such issues as: the protection of flora and fauna; the right of access to the Island for citizens of both States; the regulation of tourist traffic; river management and conservation; the licensing of river craft; the freedom of movement of wildlife to and from the island; supervision by game wardens; permitted and prohibited activities on the island; the adoption of a common set of principles for the protection of the natural resources of the area, including in particular the care and custody of wildlife. See *id.* at 1194.
reasons to be advanced by Botswana in this case... the Court should rule in favour of Botswana. By doing so, the Court would make a clear statement on conservation to all mankind, including Namibians.150

In particular, Weeramantry believes the obligations of both countries for ecological conservation under the Biodiversity Convention of 1992 justifies the creation of such a regime.151

Furthermore, whereas the Qatar dissent did not have a particular precedent or type of precedent in mind, Weeramantry does:

Joint management regimes have been established for the integrated development of resources in river basins with States splitting costs and responsibilities and sacrificing sovereignty as needed to facilitate the management process. Many agreements have been worked out for the joint management of continental shelf areas, and some with many specific provisions relating to protection of the marine environment and its flora and fauna.152

In addition, Weeramantry cites Article 123 of the 1982 United Nations Convention on the Law of the Sea, as a “legal framework for cooperation,” as it “obliges States bordering enclosed or semi-enclosed seas to co-operate with each other, inter alia, over environmental protection.”153

This opinion seems to reflect the non-administrative aspect the cooperative border suggested by Justice Weeramantry in Qatar v. Bahrain. Weeramantry regards Masubian use as suggestive of title, but not determinative.154 But as to a cooperative border, there is no mention of Masubian use as a rationale for this suggestion. Rather, like the Hawar Islands, Weeramantry seems to suggest that there is a shared identity to Kasikili/Sedudu Island, but an identity that shares both an economic resource and a duty to an international regime.

Weeramantry’s arguments appear to have influenced the final outcome of this case. Above, Botswana raises the concern that Namibia could not protect wildlife on the island from poachers. Given the minimal role of the tourist industry in the Namibian economy, the destitute condition of the economy relative to Botswana, and the absence of a national game park in Namibia for the protection of wildlife, this is a believable assertion. Namibia does not appear to have the experience,

150. Id. at 1179 (citing Botswana’s oral pleadings, CR 99/6, p.22).
151. Id. at 1191.
152. Id.
153. Bots./Namib. (dissenting opinion of Judge Weeramantry), supra note 45 at 1191.
154. Id. at 1188.
the ability, nor the resources to protect wildlife on this island.\textsuperscript{155} Botswana, on the other hand, has all three. By awarding Kasikili/Sedudu Island to Botswana, it may be inferred that the Court recognizes this is the best solution for both countries to honor their obligations under the UN Treaty on Ecology and the Treaty on the Environment.

Given that both parties have obligations under the Biodiversity Convention, the Court perhaps recognizes that an award to Namibia would prevent both parties from necessarily being able to satisfy their obligations to this convention. An award to Botswana, on the other hand, awards the island to the party with the resources, capability, and developed tourist industry to protect the wildlife and its habitat. Moreover, such a decision allows the Namibia to continue to develop its tourist industry and the resources to protect wildlife crossing the Chobe. The suggestion, then, is that economic considerations underlie the Court’s recognition of the international legal obligations of both parties.

It is also for these reasons that a cooperative award along the lines of Judge Weeramantry’s dissent is not yet feasible. It does not seem that Namibia currently has the resources or is able to abide by its obligations to this Convention. Perhaps in the future, as Namibia develops its tourist economy, a cooperative arrangement at this border may be feasible. However, it appears that the Court may have implicitly recognized Judge Weeramantry’s concern, and thus regards Botswana as the party more able—economically and administratively—to abide by these obligations to the Biodiversity Convention.

V. External and Internal Attacks on the Post-Colonial State

The effect of these decisions on \textit{uti possidetis juris} may be best understood when framed against the internal and external attacks on post-colonial state. The external attack on post-colonial state argues that statehood is an imposed concept, and therefore post-colonial identity is a false construct. The internal post-colonialist attack argues that the administrative legacy has preserved inequalities from the colonial era, and therefore that legacy must be addressed and reformed. Both arguments ultimately regard \textit{uti possidetis juris} as a flawed legacy, but from different angles.

A. External Attack

The effects of external attack may be best understood by analyzing it against two interpretations of borders that presented themselves in the cases above: borders as the economic interests of the state, and borders

\textsuperscript{155} This conclusion is inferred from information on the website. \textit{See supra} note 101.
as a cooperative arrangement between states. In the first case, a border represents an economic interest only. In the second case, the border may be cooperatively governed by both bordering states.

i. Borders as the Economic Interests of the State

In the three cases analyzed above, it appears that the Court does not believe there is a relation between the identity of the polity and the borders of the state. There are three relationships suggested by an economic interpretation of borders: pre-independence borders may not have represented the polity (Qatar v. Bahrain); post-independence borders may not currently represent the polity (Namibia v. Botswana; Cameroon v. Nigeria); and post-independence borders must be altered to represent the polity (Cameroon v. Nigeria).

The first proposition comes from Qatar v. Bahrain,\(^{156}\) the Hawar Islands border was established on the economic interests of Great Britain. Moreover, the decision to establish that border was made without the consent of the Sheikh of Qatar, and was finalized by Great Britain. The self that was created upon independence in 1970 was an artificially imposed self, whereas for Bahrain it was an artificially created self. Therefore, Mutua and Anghie would argue, both the international identity and the sovereignty of both Qatar and Bahrain as defined by the Hawar Islands are false constructs. In other words, *Qatar v. Bahrain* is proof of the pudding for the external attacks.

Put in alternate terms, the inherited border never represented the polity.\(^{157}\) The border did not represent a *self*, nor does it today. Moreover, the inherited border was not necessarily an administrative border at all, and rather represented the interests of Great Britain. A pre-independence border had been established primarily, if not only, for the purpose of securing oil concessions for the British Commonwealth. Anghie and Mutua would argue the Court has upheld an unjustly established colonial-era border by ruling in favor of Bahrain.

Although *uti possidetis juris* does not necessarily apply to Qatar and Bahrain as post-commonwealth independent states, the implications to the concept are present. There does seem to be in its application in this decision an attenuated relationship between *uti possidetis juris* and self-determination. The Court inadvertently further attenuates this

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156. The internal attack will not be addressed here, as Mamdani does not direct it at the Middle East. Whether Mamdani’s argument could apply to the former Protectorates of the British Commonwealth in the Middle East is an interesting question, but will not be explored here.

157. Then again, there is no mention of any population having been affected by the British decision or by the Court’s decision. Perhaps they are indirectly by having less oil reserves, but whether this is necessarily so is unclear.
relationship by refusing to base the grounds of its decision on effectivités. Bahrain’s arguments regarding the Dowasir were fundamental to this rationale, along with a wide variety of other forms of argued effectivités, whereas Qatar was unable to produce similar evidence of effectivités. The grounds that suggest a selfmay exist on the disputed territory are not a factor in the Court’s decision. In avoiding these grounds of self-determination as a basis for territorial delineation, the Court inadvertently finds another means to confirm the external attack that post-colonial borders do not represent a self.

The second proposition comes from both Namibia v. Botswana and Cameroon v. Nigeria: disputed post-independence borders may currently represent an economic interest of the post-colonial state. This suggestion alone does not necessarily relate to the arguments of Mutua and Anghie; however, both cases add in the complicating factor of members of the polity inhabiting the disputed territories. Put in alternate terms, then, a disputed territory traditionally inhabited by members of the polity represents a current economic interest of the post-independence state.

It is unclear what the external attack would argue as to a state seeking to alter a border based on present economic interests. Although the state is attempting to remedy an imposed identity, it is unclear whether the state is seeking to remedy an injustice or to predatorily accumulate resources at the expense of its neighbor. But Namibia introduces the additional historical factor of Masubian habitation and migration on Kasikili/Sedudu Island, and Nigeria introduces the additional factors of Nigerian habitation on the Lake Chad and Bakassi regions. Therefore, it could be argued that the state is seeking to remedy an imposed post-colonial identity by seeking a more representative border. In such a case, the external attack supports the states’ arguments. But as the implications of the economic motives of the state make such an argument unwieldy, so does the suggestion that the external attack supports such an argument. Nevertheless, the external attack suggests

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158. See Qatar v. Bahr., supra note 44 at 71. These effectivités include Bahraini passports issued to residents of the Hawar islands and former Hawar Islands residents who now live elsewhere in Bahrain.

159. Concededly, the grounds for self are arguably implicit in the Court’s reliance on the 1939 decision, which highlights the Dawasir’s historical use of the Hawar Islands as evidence of Bahraini occupation. See id. at 80-81. The point here, however, is that the Court explicitly avoids utilizing either uti possidetis juris or self-determination as grounds for this decision.

160. Given the tone of Anghie’s and Mutua’s pieces, it is doubtful they would view the latter scenario as a justified remedy to the past injustices of colonial-era borders and rule.

161. On the other hand, there is something to be said for a post-colonial state that is seeking to improve its economic resources. Perhaps this is a sign of strengthening
that to the extent that the border disputes are over the inhabitants in the disputed regions, the disputes are indicative of an imposed identity. This additionally makes it unclear whether Mutua and Anghie would necessarily attack the Court’s holdings that do not alter the borders as unjust.162

The third proposition comes from Cameroon v. Nigeria, where a state seeks to alter its post-independence borders to represent the polity. In other words, Nigeria’s arguments for original title, specifically to the Bakassi Peninsula, are arguments for an adjustment of a colonial border for the interests of its polity. The Court’s reasoning suggests that had this proposition been presented by Nigeria without the implication of its economic interests, then the external attack on post-colonial borders would have been applied in an I.C.J. case in its purest form. But arguments for original title and historical consolidation seem tainted by the reality of the future oil prospects on the Bakassi Peninsula. Assuming that this argument had been presented as the only grounds for a decision by the Court, Mutua and Anghie would arguably support a remedy that would rectify the border to be representative of the Nigerian polity. As this argument presents the border as not representing the polity, the border should be altered in favor of Nigeria’s arguments. For this reason, Mutua and Anghie would disagree with the Court’s ruling, perhaps even critiquing it for having failed to rectify a historical falsehood.

Thus, in light of the external attack, the Court’s three cases suggest that the external attack has substantial grounds to argue that uti possidetis juris does not reflect a self.

ii. Borders as a Cooperative Arrangement Between States

The alternative proposition comes from Qatar v. Bahrain and Botswana v. Namibia, and it argues that a remedy to a post-colonial border dispute is the establishment of a cooperative border. Put in the terms of the external attack, the proposition states that the post-colonial border is a lasting wound of the colonial era, and the best remedy is one identity within the post-colonial borders. Then again, Mamdani’s argument that the city-based central government exerts control over the pastoral areas of the state through economic control of rural markets may also apply. In this light, a post-colonial state exerting control over pastoral resources may in fact be a centralized, non-democratic government further solidifying control.

162. This dilemma presents an interesting issue: should a state’s borders be rectified to represent the polity, despite the loss of an economic advantage to the other country? This is an implicit issue in all three cases discussed above. The Dissent in Qatar v. Bahrain suggests a financial payment from one side to the other. See Qatar v. Bahrain, supra note 44 at 145 (joint dissenting opinion). But does a financial payment necessarily rectify a flawed representation of the polity?
that recognizes the interests of both affected parties. Interestingly, such an argument is closest to Anghie’s perspective, but may also reflect Mutua’s.

For Anghie, sovereignty and statehood are foreign concepts that were imposed on the non-European world. Any model of statehood and/or borders that suggests that a region could be cooperatively governed, and therefore transcend the identities of both states, could thereby transcend the European model of statehood. Perhaps the same conclusion could be reached for Mutua, but the answer is less clear, as both states would still exist as states beyond the shared border. Regardless, neither suggests that a border should be established in international law for the sake of an international treaty or the particular concerns of that treaty, as Weeramantry suggests.

However, a cooperative border may also be a return to pre-colonial frontiers. For Anghie, a cooperative border may be a territory when sophisticated forms of political and social organization may exist, but not be a state. But for this to be acceptable, a polity must exist within this cooperative region. Perhaps, then, Kasikili/Sedudu Island would provide such an opportunity. But the Weeramantry’s exclusion of Masubian use of this island as a rationale for a cooperative regime suggests that an alternative to sovereignty was not what he envisioned.

B. Internal Attack

Mahmood Mamdani argues that the administrative structure preserved within the borders of the post-colonial state has preserved a political and economic structure not conducive to democracy. In

163. See Anghie, 40 HARV. INT’L. L.J. 1 at 71.

164. It is unclear where either Mutua or Anghie would stand on this issue. Anghie appears to be interested most in the mandate system and globalization. Mutua seems most interested in deconstructing the post-colonial legacy. Neither seems to have touched upon this interesting middle ground. Cf. Malgosia Fitzmaurice, Water Management in the 21st Century, in LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 428-36 (Antony Anghie & Garry Sturgess, eds., 1998).

165. The model was a single model of customary authority in precolonial Africa. That model was monarchical, patriarchal, and authoritarian. It presumed a king at the center of every polity, a chief on every piece of administrative ground, and a patriarch in every homestead or kraal. Whether in the homestead, the village, or the kingdom, authority was considered an attributed of personal despotism. MAMDANI, supra note 42 at 39. Decentralized despotism is Mamdani’s term for this structure of the post-colonial state, (id. at 145) a divided world where “on one side free peasants closeted in separate ethnic containers, each with a customary [legal] shell guarded over by a Native Authority, on the other a civil society bounded by the modern laws of the modern state....” See id. at 61. (The Native Authority was the administrative entity for the nonsettler parts of the colonies. See id. at 21-22.) This
particular, a legacy of central government control over rural markets and economies, particularly the pastoral economy, has imposed restrictions on traditional agrarian life in post-colonial African states. This model has also concentrated non-agrarian power in the central government. Through this model, the internal attack suggests that both an economic interpretation of borders and a cooperative interpretation of borders may further disassociate *uti possidetis juris* from, and from being conducive to, democracy.

The Court’s holdings in the Botswana and Nigerian disputes uphold the borders as they were established under *uti possidetis juris*.167 Because Kasikili/Sedudu Island border represents the economic interest of tourism for both Botswana and Namibia, but also represents an agrarian economic interest for the Masubian people, the internal attack suggests three different aspects to this decision. First, the holding in favor of Botswana further restricts the Masubian’s pastoral culture, already circumscribed by colonial-era borders.168 Second, Mamdani’s argument suggests that a decision in favor of Botswana’s tourist industry may reinforce a history in Botswana of redrawing borders in favor of the state’s interests over those of the pastoral farmer.169 Third, Namibia’s arguments suggest that were it to have been awarded Kasikili/Sedudu Island, the importance of the award would not have been for the Masubian people but for the development of its own tourist industry. All three angles suggest that the interests of the rural economy are or would be undermined by the economic interests of the state in the region, as paralleled in the dichotomy inherited by the post-colonial state. For

structure created a dual-faceted problem in post-colonial Africa—states that preserved decentralized despotism, and states that created a much more centralized model. Id. at 170. The problem, Mamdani argues, is that at efforts to reform one form ultimately results in the other. MAMDANI, supra note 42 at 291.

166. Mamdani only implicitly attacks borders as having imposed fixed borders and identities on a pastoral culture where “[m]obility was the precondition not only for the optimal utilization of resources, but also for their optimal conservation.” Id. at 166. The result of these borders is the exacerbation of ethnic divisions, as tribes were allotted counties within borders. Therefore, Mamdani argues that decentralized despotism exacerbates ethnic tensions. Additionally, he argues the alternative, centralized despotism, exacerbates the urban-rural division by establishing power within the city centers. The result he describes as a seesaw effect—centralization resolves the ethnic tensions created by decentralization, but decentralization resolves the divide between urban and rural created by centralization. Id. at 291.

167. Again, the internal attack does not apply to the Middle East, so it will not be discussed in this context.

168. See id. at 165-66. It is unclear from Mamdani how environmental issues would factor into his argument.

169. Mamdani writes, “[i]n Botswana it is estimated that if one added together the land set aside for commercial ranching, national parks, and game reserves (and the newly proposed Wildlife Management Areas), the sum would amount to 41 percent of Botswana’s total land area!” Id. at 322 note 77.
Mamdani, such a result would only reinforce the inherited structures that are not conducive to democracy.

The disputes over the Lake Chad and Bakassi regions present arguments that entangle state economic interests with the interests of the polity. These interests play out in the Court's decision in a way that both reinforces and undermines the internal attack. The decision reinforces Mamdani's model by upholding a border that has divided the Nigerian peoples in the Bakassi region, and that does not recognize the migratory settlements of Nigerian peoples in the Lake Chad region. In other words, the Court's decision that there must be a reversion to the norm only reinforces the inherited flaws of the post-colonial state. However, the Court also undermines the attack by not allowing a state to predatorily consolidate its oil interests, which to Mamdani would be prioritizing a colonial economic legacy over the traditional rural economy. Either way, the Court's holdings and Nigeria's arguments suggest an incompatibility with an economic conception of post-colonial borders and democracy.

As for the suggestion that a border may be cooperatively administered, a cooperative region as a border would have two opposite effects, depending on its application by the Court. A cooperative border could merely extend the flaws of two post-colonial states to a region. But if a polity inhabits this region, perhaps Mamdani would regard cooperative governance as a return to pre-colonial inhabitance. In such circumstances, though, the regime would be one where the local customs would govern beyond either state, and perhaps ultimately, within itself. Perhaps this would mark a return to freely moving peoples in the region, now constrained by colonial era administrative boundaries.

Thus, the internal attack suggests indirectly that *uti possidetis juris* has preserved structures internal to the state that are incompatible to self-
determination. This, in essence, is a statement that *uti possidetis juris* may be incompatible with self-determination—the post-colonial state may reflect the vision of a former power, but not the vision of those within it. Moreover, when posited against economic and cooperative conceptualizations of borders, the internal attack explicitly reinforces this incompatibility by suggesting that such interpretations may reinforce a colonial legacy of economic and political inequalities. By preserving colonial-era structures of governance, the post-colonial state can prevent a self from manifesting, especially a self-governing self.

VI. Conclusion

In light of the three cases above, where might *uti possidetis juris* stand now?

I began with the argument that *uti possidetis juris* is tenuously linked to democracy via another tenuous link to self-determination. The decision and dissent in *Qatar v. Bahrain* suggested two alternate interpretations of post-colonial borders: an economic interpretation and a cooperative interpretation. The economic interpretation was evident in alternate forms in two other disputes. Those parties to the disputes that suggested the economic interpretation did not regard their borders as representative of the polity—the only exception being Nigeria. The Court has reacted to this interpretation by implicitly recognizing a disputed border may be economic, but avoiding resting its decision upon these grounds or altering the border to better represent these interests.

The Court has followed the logic of *uti possidetis juris* in these decisions, refusing to alter borders as they were established in the relevant pre-independence documentary evidence. But the Court has not explicitly relied upon *uti possidetis juris* as grounds for these decisions.

The Court upholds the colonial-era administrative borders as the post-colonial borders. But by implicitly suggesting the economic interests of a party were a determinative factor in these decisions, the Court is also recognizing that these borders were not necessarily administrative (*Qatar v. Bahrain*), nor are they currently (*Cameroon v. Nigeria, Botswana v. Namibia*). This recognition may have unintentionally led to the suggestion that the post-colonial borders may not have been, nor currently be, representative of the polity or of the administration of the polity, and rather, of the economic interests of the state.

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The external and internal attacks on the post-colonial state reinforce this point, if not add further depth to it. The external argument suggests that by upholding the borders, the Court is reinforcing the imposition of a foreign concept and a foreign identity. In *Cameroon v. Nigeria* and *Botswana v. Namibia*, the Court further reinforces the external attack by disregarding arguments regarding the occupancy of the disputed territory by a state’s polity, and instead upholding borders that are consequently unrepresentative of the polity. However, if in either case the Court was to have determined a border based on the economic interests of a state, it would also have reinforced a conceptualization of a border as unrepresentative of the polity.

Additionally, the internal attack suggests that an economic interpretation of borders would only reinforce the colonial economic and political legacy within the post-colonial state. But the internal attack also suggests that by upholding the colonial-era borders, the Court may also be assisting in preserving the colonial legacy. Post-colonial borders and the economic interpretation of these borders have presented the Court with a catch-22: if it upholds the borders, it is preserving the flaws of the colonial legacy; if it alters the borders based on economic considerations, it is preserving the flaws of the colonial legacy.

The only solution suggested in these attacks is a cooperative interpretation of borders. This solution may avoid the issues inherent in *uti possidetis juris* by re-creating the post-colonial border in such a manner that identity is not inherent in the shared region. Moreover, a border may be both non-representative and representative of the polity at the same time. However, *Botswana v. Namibia* suggests that even a cooperative border may exist for economic purposes also, and in light of the internal attack, that which was sought to be undermined would only be reinforced.

Where does *uti possidetis juris* stand now? Perhaps Stephen Ratner’s assessment of *uti possidetis juris* as an idiot rule is the best assessment of where it stands now. As an idiot rule, *uti possidetis juris* serves as the last barrier between *terra nullius* and order. But it is evident above that to call *uti possidetis juris* a “rule” is to give it too much credibility, especially when the I.C.J. has actively avoided using it as grounds for a decision. Thus, *uti possidetis juris* is not an “idiot

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175. See Ratner, *supra* note 9 at 617. “Uti possidetis thus represents the classic example of what Thomas Franck has called an ‘idiot rule’—a simple, clear norm that offers an acceptable outcome in most situations but whose very clarity undermines its legitimacy in others.”

176. This is true even after *Frontier Dispute (Benin/Niger)*, where the principle was applied because both parties had signed a Special Agreement to refer the case to the I.C.J., in which they stated they “are in agreement on the relevance of the principle of uti
Rather, it is a conceptual barrier increasingly unrelated to issues of
democracy and increasingly challenged by economic development. Its
only remaining justification for existence appears to be as the last wall
between order and disorder in the post-colonial world.

Where will *uti possidetis juris* end up? Perhaps most apparent
above is that post-colonial borders are increasingly under attack, both
legally and diplomatically, over present or future economic interests.
Nowhere is this more present than in Latin America, where *uti possidetis
juris* has its roots. These new disputes are not over polities. Nor are
they over conflicting identities of the polities within post-colonial
borders. Rather, the disputes are over resources. The ultimate irony,
then, is that the states that benefited from the stability afforded to them
via *uti possidetis juris* are seeking to create instability in their hunt for
natural resources and economic advantage.

Going forward, the question will be whether the Court will continue
to rely on the logic of *uti possidetis juris* as a guiding concept for
stability as states increasingly seek to undermine it. The Court’s
decisions in these three cases suggest that it will continue to uphold post-
colonial borders in the face of increasingly complicated issues. Given
the already tenuous link between post-colonial states and democracy,
such an approach may only serve to further undermine prospects for
democracy in the post-colonial world.

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*possidetis juris for the purposes of determining their common border.* See Frontier
Dispute (Benin/Niger), *supra* note 47 at para. 23. Therefore, it is arguable that the Court
in this instance is only applying *uti possidetis juris* because both parties requested its
application.

177. Jack Epstein sums up the current disputes in Latin America:
A dispute between Chile and Peru over a maritime dividing line persists despite
a 1999 pact; Guyana and Surinam are fighting over an oil-rich marine area off
the Corentyne River that separates the two nations; at least 1,000 Honduran
fishermen have been arrested by Nicaragua during the past 10 years over sea
rights in the shrimp-rich Gulf of Fonseca; and Venezuela claims Guyana’s
Florida-sized Essequibo area, home to gold, diamond and timber investments.
Caracas argues that it was unfairly stripped of the region in a 19th-century
arbitration decision.
