Approaches to Solving Territorial Conflicts

Sources, Situations, Scenarios, and Suggestions

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CONTENTS

SUMMARY

Territorial disputes are notoriously difficult to resolve peacefully and enduringly. The outcome of adjudication on border issues is unpredictable, and political leaders are often unwilling to accept the risks of losing territory. Arbitration or mediation (or nonbinding arbitration) provide a more flexible and balanced way to reach a satisfactory outcome, but their finality also makes politicians nervous.

An award of territory to one nation or another should be consistent with international law, even if the award is the result of negotiations by the parties that have led to mutually agreed terms. International adjudicative and arbitral bodies usually emphasize the legal determinants of a territorial dispute. Nevertheless, they also sometimes consider equitable factors—either directly at the request of the parties, or in order to apply the relevant law most reasonably and fairly under the circumstances.

Other approaches to territorial disputes—including conciliation and other forms of facilitation by third parties—may be more attractive, although they too may be resisted by states with weak claims but strong political interests. Conciliators, facilitators, and often mediators have greater flexibility to design outcomes that are oriented primarily toward reaching a conclusion that might be satisfactory to both sides in a boundary dispute.

What is often needed to resolve a territorial conflict, however, is to devise a "no lose" (non–zero sum) solution. It is difficult for judges and arbitrators to achieve such a result, since they are usually required to take a legalistic approach, remaining strictly within the terms of the submitted case (in adjudications) or mandate of the parties (arbitrations). Conciliators and other facilitators have the ability to be more responsive, yet may still have difficulty identifying workable approaches.

As indicated in the Introduction, The Carter Center has initiated a project on border disputes, in order to collect information on the resolution of territorial disputes, identify novel ways to resolve them, and draw lessons learned from previous experience in this area. This report is a background paper prepared during the first phase of this project.

Part I, Institutions and Methods, reviews mechanisms and procedures for international boundary dispute resolution, including analyzing the case law of the International Court of Justice to identify relevant factors and principles in determining sovereignty over territory. It concludes that—while a number of other factors may play a role in delineating precise borders—the three primary legal factors establishing sovereignty over territory are treaties, recognized historical boundaries (uti possidetis juris), and evidence of effective control (effectivités).

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Part II, Cases of Special Interest, focuses on four situations: internal boundaries in Bosnia and Herzegovina (especially the Brcko and Mostar arbitrations); the (current) internal boundary between the province of Abyei and northern Sudan; and the protracted terr

position, and strong connection to the popularity of the government. The prominence of territorial conflicts derives from their nature

retain a special master to advise the judges on such matters. While arbitral procedures are more efficient, and an appropriate arbitral panel could be selected to deal with factual or equitable issues, the parties may yet be unwilling to commit themselves in advance to accept an award based on such factors.

Except where arbitration or adjudication has previously been agreed to, the most flexible approaches to the resolution of border disputes would combine elements of the nonbinding methods and equitable approaches to problem solving. This involves focusing on the practical elements of a territorial dispute, including the resource and other i

may nonetheless consider equitable principles *infra legem*,[21] in order to assist it in interpreting and applying the law to the facts and circumstances of a case.

While having the force of law, ICJ decisions are unfortunately not always fully respected by the parties to a case. There is no enforcement mechanism as such for ICJ judgments, although the U.N. Security Council could take up a dispute about noncompliance if it poses a threat to international peace and security. A party could attempt to return to the Court for further judicial action, such as an interpretation of the decision or a ruling on whether certain actions are consistent with it. But the Court has tended to respond negatively to requests for modifications or interpretations of its decisions, particularly if such requests would re-open matters that had already been adjudicated. Also, the ability of a party to return to the Court with respect to such a matter could be limited if the Court had taken jurisdiction or proceeded to consider a case pursuant to a special agreement between the parties, or if the respondent subsequently limits its acceptance of the Court's compulsory jurisdiction.

Critical Reactions. Criticism has been directed at the International Court of Justice, largely from developing countries and particularly in sub-Saharan Africa. Perhaps for that reason African countries have been less willing to submit territorial disputes to the Court—as well as to the Permanent Court of Arbitration (PCA), for similar reasons—than developed countries or countries in other regions, especially Latin America. The bases of this critical attitude toward the ICJ involves the history and composition of the Court, as well as its primary reliance, in territorial cases, on the *uti possidetis* principle applied on the basis of treaties and practice (*effectivités*) dating from the colonial period.

A recent article by an African scholar provides a useful reflection of objections to ICJ (and PCA) organization, procedures and doctrine, especially as regards territorial cases.[22] The author perceives "institutionalized bias against the interests of African States and … continuing damage to the reputation and relevance of the courts [including the ICJ and PCA] to developing states in general,"[23] which has resulted in "a situation where former states would not take their disputes in Africa and African states shy away from international arbitral institutions."[24] On the latter point, the author refers primarily to the "Eurocentricity of the Applicable Law,"[25] especially the dominance of the principle of *uti possidetis* in boundary resolution.

Indeed, the author argues that "the time is ripe for the jettisoning of *uti possidetis* in relation to the resolution of African disputes."[26] This approach is based on the idea that "the origins of the concept are foreign to the Continent and … is inconsonance with the principles of self-

[21] "Under law."
[22] See Gbenga Odentun, "Africa before the International Courts: The Generational Gap in International Adjudication and Arbitration," *Indian Jrn. Int. Law*, 44:4, (Oct.-Dec. 2004), pp. 701-748.
[23] Id., p. 704.
[24] Id., p. 705.
[25] Id., p. 710ff.
[26] Id., p. 717.

determination of peoples," and arguably "was designed to have a different effect from its present stifling limitations and manifestations."[27]

According to this author, not only does application of uti possidetis "preserve ethnic incoherence and to [continue the colonial objective of] divide and rule."[28] But it also inherently needs to be supplemented by reference to the often-incomplete border surveys conducted by colonial authorities.[29] All in all, according to this author, "The sanctity of colonial treaties in many international proceedings is an unfortunate legal fiction. In many cases the insufficiency or unreliability of these very treaties are the causes of the entire disagreement or conflict."[30]

More generally, the author argues that the International Court of Justice and Permanent Court of Arbitration have been unresponsive to claims of

Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua Intervening). El Salvador and Honduras brought this case to a chamber of the International Court of Justice under special agreement and pursuant to a 1980 General Treaty of Peace between them, which

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia). The parties brought this case under special agreement, to determine sovereignty over certain islands off the coast of the large island of Borneo (Kalimantan), which is divided between them. The Court found no basis in treaties, including between the two colonial powers (Britain and the Netherlands), to establish ownership under *uti possidetis*. Turning to *effectivités*, the Court found that those cited by Indonesia did not have a "legislative or regulatory character," whereas Malaysia's regulation of turtle egg collection and establishment of a bird sanctuary was sufficiently administrative in nature to demonstrate its effective control.

Frontier Dispute (Benin/Niger).[50] This case, regarding the border of Benin and Niger along the Niger River, was submitted under special agreement by the two states, and was considered by a five-judge chamber of the International Court of Justice. The issues included the precise demarcation of the river boundary as well as sovereignty over a number of islands. The panel decided the case according to the doctrine of *uti possidetis*, basing its decision on French law at the time of the independence of the two states in 1960.

The Court concluded that French law concerning the boundary on a river at the time followed the deepest soundings of the main navigation channel,[51] and that would govern assignment of sovereignty to islands in the river as well, except when there were other circumstances such as effective control (*effectivités*) indicating otherwise. In this case, the Court found, that in one sector, islands had been administered by authorities from the other side of the deepest channel, and those islands were awarded according to those effectivités. In another area, where the boundary was formed by the Mekrou River, the boundary was found to have been established by *effectivités* at the median line of the river and not along its deepest points.

Kasikili/Sedudu Island (Botswana/Namibia).[52] In this case, the Court awarded an island in the Chobe River to Botswana based on an 1890 treaty between the United Kingdom and Germany. The treaty, which had English and German versions, described the boundary of their colonies and protectorates along the river as running at the "center of the main channel" or thalweg. The treaty had been implemented through various survey and demarcation exercises.

While it wasn't always clear where the center of the main channel would be, the Court found the main channel in the area of the island to be between the island and Namibian territory. It rejected various claims by Namibia related to subsequent practice under the treaty, occupancy and use of the island, and prescription (adverse possession).

With respect to Pedra Branca/Pulau Batu Puteh, the Court found that original sovereignty was with the Sultanate of Johor, subsequently incorporated into Malaysia. While the Sultanate had been divided, with the British acquiring Singapore and adjacent islands and the Dutch obtaining influence in other areas, the island in question was not terra nullius when Britain began colonial administration in the area. Instead, the island continued to be recognized as being part of the remaining Sultanate, and was regularly visited by seafaring people associated with Johor. However, subsequent construction of Horsburgh Light on the island by the British, nonassertion of sovereignty by Johor, and effective administration, including construction of a military facility and plans to expand the land area through reclamation, by Singapore had resulted in the latter acquiring sovereignty by 1980.

With respect to Middle Rocks, the Court found that sovereignty was retained by Malaysia as the successor of the Sultanate of Johor, and that Singapore's claim that the status of these features were linked to Pedra Branca/Pulau Batu Puteh could not be supported.

Finally, with respect to South Ledge, the Court noted that it was a mere "low-tide elevation," sovereignty over which would go to the state in the territorial waters of which it was located. Since the territorial waters surrounding the two forgoing island groups overlap in the area of South Ledge, and no agreement existed on the alignment of the maritime boundary, the Court could not definitely assign sovereignty.

Territorial and Maritime Dispute (Nicaragua v. Colombia).[54] In a preliminary decision on this long-running case, the Court found that sovereignty over three islands (San Andres, Providencia, and Santa Catalina) specifically mentioned in a 1928 treaty lay with Colombia. The treaty provision would be applied regardless of Nicaragua's claim that the treaty violated its 1911 constitution, in effect at that time, and that Nicaragua was under U.S. military control. Nicaragua had not raised those claims for 50 years or more. The court retained jurisdiction over the remaining boundary issues.

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras).[55] The Court ruled that numerous islands and other maritime features north of approximately 15 degrees north latitude claimed by Nicaragua were under the sovereignty of Honduras. This resulted from an award by the king of Spain in 1906, which the International Court of Justice had determined to be binding in a 1960 decision in an earlier case. An 1896 boundary treaty between the two countries incorporated the principle of uti possidetis and provided for arbitration by the king in the 1906 award.

The Court found that colonial records did not support the establishment of a maritime boundary per se. On the other hand, it found that Honduras had presented convincing evidence of postcolonial effectivités demonstrating its control of the islands and nearby sea area. In later times, Honduras had granted oil exploration licenses in areas northward to the 15th parallel, while Nicaragua issued licenses in areas southward toward the parallel.

[54] Decision on Preliminary Objections, December 13, 2007.
[55] Judgment, October 8, 2007.

The Court, which had been requested by the parties to demarcate their maritime boundary, decided to identify a starting point at the shifting mouth of the Rio Coco, demarcated a boundary that approximately followed the 15th parallel seaward, except going around the 12-nautical mile territorial seas of the islands whose possession by Honduras had been confirmed, and continued the boundary generally along the same parallel. The parties were asked to negotiate in good faith

has been successful both at extending arbitration as a dispute resolution methodology and securing its own role as a central institution in this area.[59]

The Permanent Court of Arbitration only publishes materials concerning arbitrations that are authorized by the parties. It is in the process of making past cases accessible, but this has been complicated by the authorization requirement. Nonetheless, the available information contains material concerning a number of arbitrations of territorial disputes. Importantly, the PCA has just begun a new arbitration of the Abyei dispute (Sudan v. the Sudan People's Liberation Movement), described elsewhere in this paper.

Representative PCA Cases

Island of Palmas. Perhaps the best-known PCA territorial arbitration was the Island of Palmas (U.S. v. Netherlands) case.[60] To make a long story short, the United States claimed the island as a successor of Spain, with which it had concluded a treaty after the Spanish-American War. In the treaty Spain ceded to the United States its Pacific island territories. Spanish maps of the territories showed the island, which lay approximately midway between the Philippines (a Spanish colonial territory) and the Dutch East Indies. The arbitrator, M. Huber, concluded that the Spanish had never exercised effective control over the island, but that the Dutch had developed it to some degree. He therefore ruled in favor of the Netherlands.

Timor. In the Boundaries in the Island of Timor (Netherlands v. Portugal) case,[61] the parties had commissioned a joint commission to establish the borders of their respective colonial holdings on the island, and eliminate enclaves of territory on the other side of the border. However, in several areas the commissioners could not agree on such matters as identified geographical features, named areas, and the identity and course of rivers; so they referred these matters back to the governments. In very complex factual circumstances—including incorrect names for rivers and other features—the arbitrator, C. E. Lardy, attempted to give effect to the intention of the parties in concluding their treaty to resolve their territorial claims. In effect, there would appear to have been an application of equity *infra legem*.[62] The intention of the parties explicitly included permitting Portugal to retain the entire enclave of Oecussi-Ambeno (now an enclave of East Timor within Indonesian West Timor), but of eliminating other enclaves. Dispositions were also made according to geographical features, such as river channels and ridgelines, as well as the ethnographic composition of border areas.

Red Sea Islands. In a case involving sovereignty over certain Red Sea islands (Eritrea v. Yemen), an arbitral panel issued its first-stage award, concerning territorial sovereignty and the

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[59] T. Van den Hout, "Resolution of International Disputes: The Role of the Permanent Court of Arbitration—Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes," Leiden Journal of International Law, 21 (2008), pp. 643–661.

[60] PCA, "The Island of Palmas Case (or Miangas)," Award of the Tribunal, April 4, 1928.

[61] PCA, "Boundaries in the Island of Timor," Award of the Tribunal, June 24, 1914.

[62] Mr. Lardy referred only once in the award to equity, commenting that "if one takes the point of view of equity, which it is important not to lose sight of in international relations," the boundary he delineated would recognize that Portugal had retained the entire enclave of Oecussi-Ambeno and that a boundary along a certain ridgeline was at once more than it could have expected, under an earlier treaty, and also avoided penalizing the Dutch, who as part of the same earlier agreement had ceded another enclave to Portugal.

scope of the dispute, in 1996.[63] The arbitration had been arra

should take actions prior to the end of November 2007, indicating that demarcation work could resume. Otherwise, the Commission would dissolve itself and, “Until such time as the boundary is finally demarcated, the Delimitation Decision of 13 April 2002 continues as the only valid legal description of the boundary.” Thereafter, on November 30, 2007, the EEBC issued a press release calling attention to its announcement the year before. No discernible progress has been made on boundary demarcation since then.[65]

On the substantive issues, Eritrea was apparently satisfied with the EEBC award and accepts the boundaries as described by the Commission. Ethiopia was not satisfied and does not accept the boundaries. Eritrea acknowledges “both final and valid” the map coordinates specified by the Commission. It considers that the EEBC “legally resolved” the border, and says that the border is demarcated. Nevertheless, it recognizes that the legal demarcation is only “an important step forward towards the demarcation on the ground.” Ethiopia insists the EEBC award has no legal force or effect, and that “the demarcation conducted are invalid because they are not the product of a demarcation process recognized by international law.”[66]

The African critic of international adjudication and arbitration as conducted by (or through) the International Court of Justice and Permanent Court of Arbitration is highly critical of the decision of the arbitral panel in this case. While this critic concedes that the “very seeds for the failure of the Commission’s work were already laid in the formulation of the task given to the commission” by the parties,[67] he goes on to criticize what he views as a “relentless effort to exclude anything that allows the application of initiative or discretion in line with the peculiarities and realities of creation and maintenance of Africa’s large artificial borders.”[68] The concrete issue was the extent to which land identified as “Irob” (belonging to the Irob people) were entirely in Ethiopia, as held by the Commission, although some Irob villages and hamlets were nonetheless located in Eritrea.[69]

Actually, the question of the status of the Irob lands and the key Badm

As the African critic cited above acknowledges, the Eritrea-Ethiopia Boundary Commission arbitral mandate called upon the panel "to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902, and 1908) and applicable international law. The Commission shall not have the power to make decisions ex aequo et bono." But according to him the Commission applied these instructions inconsistently.

For example, the EEBC indicated that under its mandate, "the Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis [of] an express request agreed to and made by both Parties." But at the same time the Commission also stated: "A demarcator must demarcate the boundary as it has been laid down in the delimitation instrument, but with a limited margin of appreciation enabling it to take account of any flexibility in terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable."[71]

While one might criticize some aspects of the Commission's award, the critic's arguments really are directed primarily at more general issues, namely the tendency in international adjudication and arbitration to resolve territorial issues through the principle of uti possidetis juris based on colonial-era treaties and practice (effectivités). But one must wonder if abandoning these bases for determining sovereignty could enable the creation of a reasonably coherent and consistent jurisprudence on the wide variety of territorial disputes, or instead would open the door to all sorts of other claims that could not be adjudicated reliably or predictably. Following such an approach would also encourage claimants to take action to support their claims through administrative assertions or even military measures, which could create instability or threaten the peace.

Reclamation in the Straits of Johor.

directing Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of a group of international experts. Subsequently, however, it determined that it had no jurisdiction over the merits and that the dispute should be referred to arbitration instead.

Arbitration in General

Arbitration in general is becoming an increasingly frequently-used method of international dispute resolution, not only for transnational commercial disputes but also for disputes involving public law.[74] While the Permanent Court of Arbitration has often played a role (e.g., serving as registry for written submissions, making facilities available for proceedings, and/or providing other services or assistance), especially in intergovernmental cases, the realm of international arbitration, particularly in the commercial area, is much greater.

Perhaps the milestone for arbitration in disputes between states was the Iran–United States claims tribunal at The Hague, established in 1979. The tribunal resolved over 4,000 claims between individuals and organizations in the two countries arising out of the seizure of U.S. diplomats in Tehran, freezing of Iranian assets by the United States, and other claims that arose out of these actions. The extensive documentation published by the tribunal has provided a rich source of information concerning pertinent issues and arguments, both legal and substantive.[75] It is noteworthy that an Eritrea-Ethiopia Claims Commission is currently operating under the auspices of the Permanent Court of Arbitration.

A number of other significant territorial issues have been resolved through arbitration over the years outside the Permanent Court of Arbitration, including the Taba (Egypt/Israel),[76] Rann of Kutch (India/Pakistan), and Beagle Channel (Argentina/Chile) cases.

exceed it (i.e.,by proceeding

agreement.[80] Depending on the arrangements that are consented to, a mediator can meet both separately and jointly with the parties, and a mediator can (once again with the parties' consent) also suggest proposals for resolution of the dispute. The term mediation is also commonly used to apply to various forms of facilitation that may not enjoy complete cooperation by the parties.

"Conciliation" refers to a process through which a third party, with the consent of the parties to a dispute, consults with the parties separately and may make suggestions to each of them about how they could resolve their dispute.[81] A conciliator is expected to remain neutral, but may communicate proposals between the parties.[82] This communications process is often referred to as "proximity talks" if it is conducted at a single venue at which the parties are present.

If also called upon to do so, a conciliator can present a formal, but nonbinding, proposal to the parties for resolution of their dispute.[83] If so, the responsibility of the mediator could be concluded at that point, although the parties may request further services if necessary. The term conciliation is also used in a secondary, weaker, sense in which a third party urges the parties to a dispute to come to an agreement,[84] but may also work with each of them separately to develop proposals for its resolution.[85]

"Facilitation" refers to any effort by a third party to facilitate an ADR process. Facilitation can be pursued by any interested organization, person, or other party that is viewed by the parties to a dispute as a legitimate participant in an ADR process.

"Good offices" will be taken to mean facilitation by a senior international official with a 3d(wit5 -5.619s)5(a leak-6(ezer rs -be tauic)] gaC /S,ken tDR processdsibrs /Sprs s0are not

tends to use different skills, focusing on how matters could be resolved through negotiation, if

social development projects. The two sides continued to disagree on the validity of the Rio Protocol.

Serious fighting erupted in 1995 in the Cordillera del Condór sector, and a ceasefire was reached only after nearly a month. Under the Peace Declaration of Itamaraty, the parties agreed to disengagement and bilateral talks together with the Rio Protocol guarantors. Pursuant to the agreements reached at that time, the parties the following year identified the border “impasses” that concerned them and later, through the Santiago Agreement, committed themselves to direct talks.

It can be commented that both Ecuador and Peru, in connection with consideration of the boundary impasses, made positive overtures. Peru began to refer to the “inexecutability” of the Rio Protocol as “partial;” while Peru, by agreeing to submit its impasses and enter into discussions, for the first time conceded

3. Ecuador was granted a one square kilometer parcel of territory on the Peruvian side, at the site of a 1995 battlefield. It would hold title to the territory under Peruvian national law, with the exception that the title could not be transferred. This conveyance of land would not entail any "consequences as to sovereignty."

4. Ecuadorian nationals would enjoy free passage along a single public road, up to five meters wide, connecting the Ecuadorian enclave parcel with its national territory.

5. Under the Treaty of Trade and Navigation, Peru granted Ecuador free, continuous, and perpetual access to the Amazon River, and Peru agreed to the establishment of two Ecuadorian centers for trade and navigation capable of processing goods and re-exporting products. Each center would be located on the banks of the Marañón River, have an area of 150 hectares, and be managed by private companies designated by Ecuador but registered in Peru.

6. There was an exchange of diplomatic notes concerning water supply to the Zarumilla Canal, along the border at the point the canal reaches the Pacific Ocean. Brazilian conciliation in 1944 located part of the border in this area on the canal, which is an old riverbed, and provided that Peru should divert water into the canal for the use of Ecuadorian towns located along it—something Ecuador has asserted the Peruvians have not always done. This issue was resolved by the parties during operation of the commissions.

The Brasilia Agreements were ratified by the two parties under their respective constitutional processes in November 1998. Some elements of the agreements came into effect only after actual demarcation of the boundary was completed.

Beagle Channel Dispute

The Beagle Channel dispute between Argentina and Chile involved maritime boundaries, sovereignty over islands, and associated rights of navigation in an area at the extreme southern tip of South America.[98] Like nearly all borders in Latin America, the boundaries between these two countries were defined as those established during the colonial period, as divisions between different colonial administrations; this was reflected in an 1810 treaty between Argentina and Chile. Of course, in remote areas, such as high mountains and subpolar areas, there would be limited evidence concerning relevant colonial practice. In such cases, these two states often advanced claims based on a so-called "Oceanic principle," namely, whether an area was in the watershed or primarily under the influence of the waters of the Atlantic, in which case it could be claimed by Argentina, or the Pacific, in which case it could be claimed by Chile.

[98] A collection of documents, including the original arbitral award (1977), exchanges of diplomatic notes,

education" and other activities in support of a peaceful solution, and ensure that the southern zone should be viewed as a zone of peace. The communiqué indicated that the accompanying proposals were made in part ex bono et aequo.

Accepting the Papal proposals, the parties signed a Joint Declaration of Peace and Friendship at the Vatican in January 1984. The declaration was followed by a detailed Treaty of Peace and Friendship later that year.[106] With respect to dispute resolution, the treaty provides for the use of "means of peaceful settlement of...chosen by mutual agreement."[107] If no agreement is reached, then conciliation is provided for, as described in Annex 1.[108] If conciliation is unsuccessful, then arbitration, also described in Annex 1, is mandatory.[109]

Detailed procedures are established in Annex 1 for conciliation and arbitration activities. In the case of conciliation, a permanent conciliation commission was established consisting of three members who would be supplemented by an additional two if a dispute were brought before it. With respect to arbitration, a panel of five members would be specially created; three members would not be selected by the parties themselves (either separately or jointly), and the Swiss government would be called upon to make the selection. Unusually, it is provided that an arbitral tribunal is not to be terminated until it has determined that its decision has been carried out; disputes over implementation of an arbitral award may also be referred to the tribunal. The decision of the tribunal is to be based on international law, unless the parties agree otherwise.

The Peace and Friendship Treaty also definitively delineated the borders of the two countries in the southern zone using definite points and courses. The boundary so delimited was to apply to the sea, seabed, and subsoil in the area as well, so the 200 nautical mile exclusive economic zones of the two states would extend east for Argentina and west for Chile of the established border.[110] In one area, the legal effects of the territorial seas of the two states with respect to each other were limited to three nautical miles rather than the full 12; but the regular territorial sea limit would continue to apply to third-country vessels.[111] The two sides also agreed to a delimited maritime boundary at the eastern entrance to the Straits of Magellan, with Argentine waters lying to the east and Chilean waters to the west, with the proviso that this division would have no effect on navigation by vessels of other states.[112]

In a detailed series of articles in another annex, Chile agreed to grant Argentina certain navigational facilities in, into, and out of Argentine localities, and both parties agreed to permit navigation of third-state vessels "without obstacles" in the special route created under the annex.[113] The success of the conciliation approach that led to the conclusion of the Treaty of Peace and Friendship, together with its detailed terms, show the advantages of that approach and also of taking a wider view of the detailed interests of the parties than is usually possible as part of an arbitration process.

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It should be remembered that Chile's main port in the southern zone, Punta Arenas, lies on the Straits of Magellan; whereas Argentina's main port in the zone, Ushuaia, lies on the Beagle Channel. It is important for Chile's vessels to be able to transit the straits east to the Atlantic, and for Argentine vessels to transit west to the Pacific. It is also important for vessels of third states to be able to transit the straits in both directions. Argentina also wants to have unimpeded navigational access from the Beagle Channel north to the Straits of Magellan and south toward the Antarctic. Chile in return wants unimpeded access into and through the Beagle Channel.

Straightforward application of the navigation rules adopted through the U.N. Convention on the Law of the Sea could complicate navigation in the region, particularly in inland waters (i.e., waters within the baselines of the territorial sea) and to a lesser extent in the territorial seas of the two states. At the same time, the states have legitimate interest in safety, security, and environmental protection in the area. It can be seen from the following description of Annex 2 of the Peace and Friendship Treaty that a delicate balance of these interests was developed to resolve the boundary dispute.

Under Annex 2, a special, exclusive navigation route was created through Chilean internal waters and its exclusive economic zone between the Straits of Magellan and Argentine ports in the Beagle Channel. In this route, Argentine vessels would be required to have a Chilean pilot, give advance notice of their entry, pick up the pilot at designated spots, and use the advice of the pilot between the ports of Ushuaia and Puerto Williams. The pilots travel to their assignments on Argentine means of transport, but pilotage fees are to be paid pursuant to the Chilean schedule.

While using the route, much of which is in Chilean internal waters, the passage of Argentine vessels is to be "continuous and uninterrupted," which is consistent with Law of the Sea principles for innocent passage through the territorial sea. If they must stop due to force majeure, the captain must inform the nearest Chilean naval authority. Also consistent with LOS rules applicable in the territorial sea, vessels using the special route must refrain from military activities, aerial operations, boarding or disembarkation of persons, fishing, carrying out investigations, hydrographic work, or interference with the security and communications of the coastal state. Submarines must operate on the surface, and all vessels must show navigational lights and flags. Use of the exclusive route may be suspended by Chile for reasons of force majeure, and no more than three Argentine warships may use the route at the same time.

A separate, exclusive route was established for transit between the Beagle Channel and Antarctica, and between the channel and areas of the Argentine exclusive economic zone. The requirements for pilotage and advance notice do not apply on this route, nor enroute to the Strait of Maire, but the other limitations on vessel operations do.

Looking to navigation in the Beagle Channel itself, the rules in the annex establish freedom of navigation for both sides across their boundary. When on each others' sides of the boundary, their ships must carry pilots from the coastal state.

Third-country shipping is also permitted throughout the Beagle Channel, but third-party warships must provide prior notice to the coastal states. Third-party vessels must also use pilots, who are picked up at their port of embarkation or disembarkation in the Channel.

The two parties accepted reciprocal responsibilities for maintaining the channels and furnishing aids to navigation in the area. They were also to jointly develop and operate a vessel traffic control system for the area.

Recent Examples

A number of facilitations are underway or have occurred recently with respect to conflicts described elsewhere in this paper or otherwise of interest, including:

Cameroon-Nigeria. In 2006, with facilitation by then U.N. Secretary-General Kofi Annan the two countries signed an agreement on implementation of the International Court of Justice 2002 decision recognizing Cameroonian sovereignty over the Bokassi Peninsula and other contested areas, following several failed agreements to carry out the judgment. The 2006 agreement followed the operation of a U.N.-sponsored Cameroon-Nigeria Mixed Commission (CNMC), chaired by the secretary-general's special representative for West Africa, Ahmedou Ould-Abdallah.[114]

Equatorial Guinea–Gabon. In September 2008, U.N. Secretary-General Ban Ki-moon announced he had appointed the former legal chief of the United Nations, Nicolas Michel, as his special adviser and mediator for the continuing maritime border dispute between Equatorial Guinea and Gabon, which also involves sovereignty over an island. Earlier in the year the parties had issued a joint statement saying they had made substantial progress, with assistance of neighboring countries, towards preparing their maritime border dispute for submission to the International Court of Justice.

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PART II: CASES OF SPECIAL INTEREST

BRCKO

Arbitration and Joint Administration

The Dayton Agreement (1995), which ended the war in Bosnia and Herzegovina, provided for division of the national territory between two political entities—a Bosniak-Croat Federation and the Republika Srpska (RS)—the territories of which would be separated by an "inter-entity boundary line" (IEBL). At the Dayton negotiations, the parties could not agree to the location of the IEBL at the critical juncture of the Municipality of Brcko; so Annex 2 of the Agreement, on the IEBL, provided for arbitration on this question.

The status of Brcko was of particular importance in ensuring the success of the peace agreement, since both sides (the Federation and the RS) considered access to the municipality essential to their viability and future prosperity. For the Republika Srpska, Brcko was the sole geographic link between its two constituent geographic parts. For the Federation, the municipality was the exclusive corridor for access to the Sava River and the Central and Eastern European ports on the Danube. Brcko itself had an ethnically diverse population, including mainly Bosniaks and Serbs; and, during the civil war, the municipality had been the scene of fierce warfare and forced displacement of the population.

The annex committed the parties to arbitration of the disputed portion of the IEBL in the Brcko area and provided, "The arbitrators shall apply relevant legal and equitable principles." The arbitration was supposed to be completed in a year, but it was not concluded for some four years. The arbitration was protracted by the intractable nature of the issues involved, and affected by political issues primarily related to the attitude of RS authorities. A report of the International Crisis Group (ICG) proposed a number of solutions, such as including the entire municipality in the boundary resolution; creating an interim international administration for the contested area; creating "an administration under the common institutions of Bosnia and Herzegovina as a subsequent and permanent solution"; and establishing a free economic zone.[115]

Since the schedule for arbitration had slipped, the chief arbitrator (Roberts Owen, who served with three other arbitrators appointed by the parties) issued interim rulings to respond to the evolving situation. The first, preliminary award (February 14, 1997) temporarily left the IEBL at the ceasefire line, but established international supervision for the entire area. The international supervisor was to have complete civil administration authority, with the main objectives of facilitating a phased and orderly return of refugees and displaced persons; enhancing democratic government and multiethnic administration in the town; ensuring freedom of movement and establishment of regular policing; working toward establishing efficient customs controls; and promoting economic revitalization. In the second interim award (March 15, 1998), the arbitrator warned the RS authorities that they would have "to show significant new achievements in terms of returns of former Brcko residents," and also criticized implementation of similar responsibilities by Federation authorities in other areas, particularly Sarajevo.

[115] International Crisis Group, "Brcko Arbitration, Proposal for Peace," January 20, 1997.

The final award, handed down on March 5, 1999, established a special district for the entire Brcko region (which previously contained three local administrations), under the sovereignty of the entire nation of Bosnia and Herzegovina. In the award, the territory in the district was characterized as belonging simultaneously to both entities (Federation and RS) as a "condominium." The district would be self-governing and have a unitary, multi-ethnic, and democratic local administration. There was to be a unified, multi-ethnic police force; and the area would be demilitarized. The IEBL itself would remain in its previous alignment, until such time as the international supervisor determined that it should be re-aligned according to changes in districts or eliminated entirely.

The question arose whether this award was within the terms of reference of the arbitral panel, since the IEBL in the Brcko area was apparently not delineated as instructed in the Dayton Annex. In the final award, Mr. Owen indicated that this result had been foreshadowed in previous awards, and also that there was wide support for continuing international administration of the area on a unified basis. He also indicated in his comments that such an outcome was necessitated particularly by the continuing lack of cooperation by RS authorities.

The legal validity of the award of course turns on whether the arbitrators were authorized to reach this result through applying "relevant legal and equitable principles" pursuant to the annex. As a practical matter, however, acceptance of the award was ensured not by its perceived validity

conflict and laid a basis for municipal governance and development. Such a solution, however, might well not have been accepted by the parties in the absence of a strong international military, as well as civil presence. Encouragingly, despite internal tensions between the entities within Bosnia and Herzegovina,[118] the federal authorities have enacted the first amendment to their postconflict constitution, incorporating the geographical and governance structures of the Brcko district.[119]

Other Yugoslavian Experiences

Mostar. Experience elsewhere in Bosnia and Herzegovina further illustrates the difficulty of designing and implementing joint administration approaches to resolving conflicting territorial claims.[120] Regarding the city of Mostar, the Bosniak and Croat sides agreed in 1995 that the city would be cooperatively governed, but did not specify the delineation of municipal districts, which were to include a central, jointly-administered zone. The Croats envisioned a small central district, while the Bosniaks desired a larger central district including areas largely from the western (Croat) side of the city. The two sides agreed to refer the matter to arbitration by Hans Koschnik, the EU representative and civil administrator in Mostar.

The arbitral award favored the Bosniak approach, and its announcement was followed by violent demonstrations by Croats, including an attack on Mr. Koschnik himself. The Croat president of the Bosniak-Croat Federation indicated that the award was unacceptable for constitutional reasons, namely that it required the creation of an additional, seventh municipality within Mostar that was not provided for in law. After a period of diplomatic activity and continued tension, the award was modified pursuant to a Bosniak-Croat agreement reached during a summit meeting held the following year to address various issues about implementation of the Dayton Agreement. While the modifications reduced the size of the central district, it provided for immediate freedom of movement in the city by all.

While this arrangement held, the Bosniaks continued to be dissatisfied by the smaller size of the jointly-administered district as well as with the implementation of freedom of movement by the Croat authorities. Cooperative governance was impeded by the presence of seven different sets of municipal authorities, each with their own police force. Politically, three of the districts elected a majority of councilors from the leading Bosnian-Croat-based party, and another three from the leading regional Muslim-based party. In the central district a slight majority on the council was obtained by the Bosniak side based on votes cast at out-of-country voting centers in Europe.

Rijeka. As a postscript, it may be added that a previous instance of special municipal administration with blended sovereignty also occurred in the southern Balkans. For a few years

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[118] See *Economist*, "Bosnia's Future: A Tearing Sound," April 2, 2009.
[119] Office of the High Representative (OHR

commencing in 1920, Italy and the Kingdom of the Serbs, Croats, and Slovenes (Yugoslavia) shared sovereignty over the city of Fiume (now Rijeka) as a free state.[121]

ABYEI

The civil war between the Sudan People's Liberation Movement/Army (SPLM/A) and the government of Sudan was ended through a comprehensive peace agreement (CPA) signed in January 2005. The negotiators of the CPA could not reach agreement on the boundary between northern and southern Sudan in the Abyei area, however, and in a protocol to the CPA provided that an Abyei Boundaries Commission (ABC) would be formed to settle this matter. Under the protocol, it was the task of the commission to "define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan [province] in 1905." Once the area of Abyei was defined, the protocol called for the residents of Abyei to vote in a referendum in 2011 on whether Abyei would remain in northern Sudan or instead join southern Sudan, thereby finalizing the border between the north and south.

The historical and social causes of the conflict in Abyei have been described generally as follows:[122] Abyei forms a geographical and social transition zone between northern and southern Sudan. The resources, including grazing land, in the region have been shared by the Ngok Dinka and Misseriya groups since the 18th century, when they both inhabited Kordofan province. In 1905, an Anglo-Egyptian Condominium in Sudan transferred jurisdiction over the nine Ngok Dinka chiefdoms from Bahr el-Ghazal province to Kordofan province. More recently, during the civil war between northern and southern Sudan, the Misseriya were armed by the government of Sudan and the African Ngok Dinka aligned themselves with the SPLM/A. By the end of the wars, the Ngok Dinka had been displaced from Abyei, and the Misseriya claimed it as their territory.

Abyei Boundaries Commission

The Abyei Boundaries Commission presented its final report to the parties in July 2005; but the government of Sudan refused to accept it and President Omar al-Bashir prevented its official

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[121] Fiume had been run as a "free port" by the Hungarian Empire in the late 19th century under a governor appointed by Budapest. After division of the Austro-Hungarian Empire into a dual monarchy, the city—the only international port of the Hungarian Monarchy—competed with the port of Trieste, controlled by the Austrian crown.

Shortly after the collapse of the Austro-Hungarian empire during World War I, Fiume was seized by Italian nationalist irregulars. Subsequently, under the Treaty of Rapallo (1920), Italy and Yugoslavia agreed to share sovereignty; but within two years the Italians retook the city. Subsequently, under the Treaty of Rome (1924), Fiume became an Italian city and the port of Sušak was awarded to Yugoslavia.

Italy retained control of Fiume until World War II, when it was retaken by Yugoslav forces and then awarded to Yugoslavia under the Treaty of Paris (1947). Once Yugoslavia took control of Rijeka, many of the Italian residents of the city and neighboring Croatian province of Istria fled amidst acts of retribution and purges.

[122] See U.S. Institute of Peace, "Peace Brief: Resolving the Boundary Dispute in Sudan's Abyei Region," by D. Bekoe, K. Campbell & N. Howenstein (October 2005).

publication. According to one of the five expert members of the commission, Ambassador Donald Petterson, however, the panel made the following award:

> The Ngok have a legitimate dominant claim to the territory from the Kordofan–Bahr el-Ghazal boundary north to 10 degrees 10 minutes north latitude, stretching from the boundary with Darfur to the boundary with Upper Nile;

Within that belt, the respective peoples would have primary or secondary rights according to whether an area was north or south of the established halfway point.

The Abyei Boundaries Commission's conclusions are appealing on the standpoint of equity. No doubt the historical record was imperfect, terms of traditional use were poorly defined, and both indigenous societies could benefit from consultation of their customary uses of the territory in question. It would also have been useful to determine these uses, and their relative priority, since changing environmental and social conditions in the Sudano-Sahelian region have led to more extensive and shifting pastoral (grazing and livestock-raising) activities.

The U.N. secretary-general applauded commencement of this arbitration.[126] His report also took note, however, that this step was taken only after very slow implementation of other CPA-directed actions in Abyei. The report also describes the nature and extent of the violence that

defined provincial boundaries, limited administrative control of the area, sketchy knowledge of the extent of Ngok Dinka territorial use, and the purpose of the 1905 transfer to pacify the area and protect the Ngok Dinka from raids.

While accepting the overall interpretation of its mandate by the ABC experts, the tribunal found that they had exceeded their mandate in several ways while implementing it to define borders. In each of these cases, the tribunal made this determination based on a finding that the ABC experts had failed to state sufficient reasons for their conclusions:

> With respect to establishing the northern boundary of the Abyei area, the tribunal accepted the validity of the ABC's finding that it was at latitude 10 degrees 10 minutes North, said to be the northern limit of permanent Ngok Dinka habitation in 1905. But the tribunal objected to the establishment of the northern limit of the shared rights of the Ngok Dinka and Misseriya people at 10 degrees 35 minutes North latitude, based on the ABC's own admission that the evidence on this point was "inconclusive."
>
> Concerning the southern boundary of Abyei, the tribunal accepted the ABC's conclusion that it mainly followed a parallel at approximately 9 degrees 20 minutes North, as well as current provincial boundaries, in view of the fact that this had not been a point of contention during either the ABC nor tribunal proceedings.
>
> On the eastern and western boundaries of Abyei, the tribunal held that establishing them along existing provincial boundaries based simply on the statement, "All other boundaries … shall remain as they are," was unjustified by sufficient reasoning. Instead, the tribunal established these boundaries at lines of longitude that were described as the extent of Ngok settlements by a credible observer in 1951[129] to the east, along the meridian at 29 degrees East, running south from the northern border of Abyei to the border with Upper Nile; and to the west along the meridian at 27 degrees 50 minutes East down to the border with Darfur. The tribunal indicated that these determinations were made in light of "the predominantly tribal interpretation of the mandates, as the best available evidence" based on the known distribution of Ngok Dinka settlements. It is hard to understand how such incomplete and anecdotal evidence could result in definite boundary features.
>
> With respect to traditional user rights, the tribunal noted that the CPA (including Abyei Protocol) confirmed the parties' intention to accord special protection to traditional rights of peoples in the Abyei area, including specifically the grazing rights of the Misseriya and other nomadic peoples. The award reflected that under international law traditional rights are unaffected by territorial delimitation or boundary changes.

[129] P.P. Howell, a British district commissioner and anthropolog

Dissent. The dissenting arbiter,[130] who had been appointed by the GoS, filed a scathing separate opinion. The dissent argues that the ABC experts had violated their mandate by adopting a tribal approach to the question of the boundaries of the Ngok Dinka chiefdoms transferred to Kordofan Province in 1905. As a result, the tribunal should not have limited its review of the ABC's conclusion to issues of evidence and reasoning within that structure, but should instead have found the ABC to have exceeded its mandate ab initio. This, according to the dissenter, constituted a violation of the tribunal's own mandate, and was according to him motivated by a desire to protect the ABC report and salvage much of it despite its denial of the rights of Northern tribes in the area, especially the Misseriya. In addition, the dissent argues that the tribunal itself (like the ABC before it) made arbitrary territorial assignments based on partial and fragmentary evidence, such as on the extent of Ngok settlement in 1951.

Effects. The shape and size of the Abyei area resulting from the determinations of the Abyei Arbitration are dramatically different from that

justified award in the absence of such authority, it is highly recommended that they should request further instructions from the parties.[134]

BOLIVIA-CHILE-PERU

Latin American nations have a long history of border disputes, some arising from poorly defined and sometimes shifting boundaries of the Spanish governorates during the colonial period and others from more particular or recent concerns. Wars were fought during earlier periods, but

of the Chaco War with Paraguay in 1932, which was fought over territory with access to the Atlantic via the Paraguay River.

At the time of the War of the Pacific, there was no peremptory norm of international law preventing states from undertaking warfare for retributive, coercive, or even aggressive purposes. Explicit norms preventing aggression and resort to force were effectively established only through the U.N. Charter.[137] While Chile has obtained direct economic benefits from the acquisition of the former Bolivian and Peruvian Atacama territories, events over the years reflect economic as well as political losses for all the parties. Consider the following examples:

> In 1975, under the Pinochet regime, Chile offered to swap territories with Bolivia in a way that would have created a corridor between Bolivia and the sea, but Peru objected under the Ancón Treaty since the area in question was formerly Peruvian territory;
>
> A counterproposal by Peru for establishment of shared (triple) sovereignty over Arica was rejected by Chile;
>
> Diplomatic relations between Bolivia and Chile were cut by Bolivia in 1978, and remain cut off;
>
> Opposition in Bolivia prevented export of natural gas through Chilean-held territory, and precluded agreement on construction of a proposed liquefied natural gas terminal on the coast in 2003-04—a proposed investment of $6 billion that would have facilitated the export of Bolivian natural gas;
>
> It also seems unlikely that Bolivia will agree to direct export of natural gas to Chile;
>
> Books confiscated from the Peruvian National Library des:

Chilean President Michelle Bachelet was embarrassed when, while she was visiting Cuba in February 2009, former Cuban President Fidel Castro published an article supporting Bolivia's claim to its former Pacific coastline—an incident that played a role in the resignation of her Foreign Minister.[141]

The lengthy and convoluted nature of the Bolivia-Chile-Peru dispute over the Atacama region makes it extraordinarily difficult to formulate constructive proposals that would be accepted by all three states. Over the course of the conflict, many interesting and creative proposals were made, and sometimes adopted. These include shared sovereignty over certain areas, sharing of revenues from resource development,

would be accepted

the limited progress of the UNDP Tumen Area Development Program, primarily involving

Russia ownership of the Amur and Ussuri rivers; beyond that boundary the treaty did not assign sovereignty but instead provided for joint administration. But a later treaty (1860) explicitly granted the lands between the rivers and the sea to Russia.[148]

Politics was certainly a factor in successful resolution of these issues. Negotiations were held throughout the 1980s, and were facilitated when the Chinese withdrew their characterization of the earlier treaties as unequal. The 1991 agreement was made during the regimes of Deng Xiaoping in China and Mikhail Gorbachev in the Russian Federation, both reformist leaders who were willing to resist nationalist pressures. Popular concern reportedly persists in Russia, however, based on the conviction that the Chinese believe that they will someday achieve full control of the formerly contested area due to demographic and economic factors.[149]

Japan-Russia (Southern Kurile Islands)

Occupation of the southern Kurile Islands (Japan's "Northern Territories")—the islands of Shikotan, Etorofu (Iturup), Kunashiri, and the Habomai group—by the Soviet Union following World War II has posed a significant obstacle to postwar political rapprochement and economic cooperation between Japan and the Soviet Union and, more recently Japan and the Russian Federation. In addition to their resources (principally fisheries) and other values, during the Cold War the islands' positions along straits separating the Soviet coastal waters from the Pacific Ocean gave the Kurile chain considerable military and strategic importance.

Czarist Russia recognized Japanese sovereignty to the southern Kurile Islands under an 1855 treaty; and Russia later recognized Japanese sovereignty over the entire Kurile (Chishima) chain through an 1875 treaty under which Japan withdrew its claims to Sakhalin Island. Following the Russo-Japanese war, the peace treaty of 1905 granted the southern half of Sakhalin to Japan; but Japan later abandoned areas under its control in the Soviet Far East. Under the 1951 Treaty of San Francisco, which was not signed by the Soviet Union, Japan renounced its claim to the Kuriles; but Japan insists that action did not include its Northern Territories, since they had never been under Russian or Soviet sovereignty and had continuously been administered as part of Japan.

Ever since, continued control of the southern Kuriles by the Soviet Union and now Russia has prevented conclusion of a bilateral peace agreement with Japan.[150] A reported 1956 Soviet overture to return the islands nearest to Japan, Shikotan and the Habomais, was not taken up by the Japanese.

For a time in the mid-1990s, it appeared that progress in resolving the issue might be made through special economic and other measures. There were numerous diplomatic and other contacts between Russia and Japan during 1996 and 1997 with respect to the southern Kurile Islands.[151] But generally speaking, these contacts did not result in significant progress since

[148] Id.
[149] Hyer, op. cit.
[150]

Further efforts to address the southern Kuriles situation were made over the following year.[152] Russian Foreign Minister Igor Ivanov commented that it was his country's intent to create "an atmosphere conducive to joint economic and other types of activities" in the southern Kuriles, "without detriment to the national interests and political positions" of the two sides. It appears that the Russians were proposing formation of a "special zone" on the islands in order to sidestep sovereignty issues, but without implying that a boundary adjustment would follow.

Some secrecy characterized the discussions that followed, especially regarding an "interesting additional proposal" from the Japanese that "merits serious consideration from our side," which was referred to by President Yeltsin at the conclusion of an informal summit meeting with Prime Minister Ryutaro Hashimoto in the resort town of Kawana, Japan in April 1998. Meanwhile, on the Russian side, consideration was reportedly being given to concluding a treaty of peace, friendship, and cooperation with Japan prior to the resolution of the boundary issue.

In November that year, Japanese Prime Minister Keizo Obuchi paid an official visit to Moscow, where he met with President Yeltsin, who had visited Tokyo the two years earlier. The "Moscow Declaration" signed by the two presidents on this occasion explicitly made 2000 the target year to conclude a peace treaty between the two countries. The two countries also formed a subcommission on boundary issues within the already-established commission to prepare a treaty. Since that time, however, little progress has been made on the southern Kuriles situation.

With the recovery of Russia from post-Soviet economic and political dislocation, and increased development of the resources of the Russian Far East, there is less incentive for Russia to yield on the southern Kuriles. In 2005, however, President Vladimir Putin's administration again offered returning Shikotan and the Habomais to Japan, and in 2008 invited Prime Minister Yasuo Fukuda to visit Moscow to discuss the issue.

Since then, however, political passions have been inflamed, as is so often the case, by Japanese government adoption of revised educational curriculum guidance. In this case, new guidelines for school textbooks in 2008 directed that children be taught that the southern Kurile Islands are within Japanese sovereignty. Nonetheless, in 2009, when Japanese Prime Minister Taro Aso attended the official opening of a new Russian liquefied natural gas terminal on Sakhalin Island,[153] it was reported that he would raise the southern Kuriles issue with Russian President Dmitry Medvedev.[154] Later, in May, the Russian prime minister visited Japan for the signing of a nuclear energy cooperation pact, and he and Mr. Aso promised to "study all options" to resolve the sovereignty dispute.[155]

China-North Korea-Russia (Tumen River Area)

Another place where cooperative management, also sometimes referred to as "joint development," has been proposed in strategic border areas is in the area surrounding the Tumen River,[156] which flows through China, the Democratic People's Republic of Korea (North Korea),

[152] See generally Zimberg, op. cit., 1998-99.
[153] New York Times, op. cit., February 19, 2009.
[154] Asahi Shimbun, "Aso, Medvedev to get down to business," February 10, 2009.
[155] Economist, "The World this Week," May 16, 2009.
[156] See generally Richard Pomfret, "The Tumen River Area Development Programme," IBRU Border and Security Bulletin, Winter 1997-98, pp. 80-88.

and Russia. For the first 16 kilometers from its mouth, the river forms the border between North Korea and Russia, and above that point the border between China and Russia.

Jilin Province in China, and especially the border prefecture of Yanbian, has become an increasingly important commercial center and entrepôt. Jilin is, however, cut off from direct access to the sea by a narrow coastal strip of Russia territory. It has sometimes been suggested that China could offer to purchase a portion of this territory, but it now seems unlikely that such an offer would be entertained.

Responding to overtures by China and (previous expressions of interest by Russia) regarding cooperation in this region, in 1991 the U.N. Development Program proposed the Tumen River Area Development Program (TRADP). In addition to the three riparian states, Mongolia and South Korea also participated in the framework as interested parties, and Japan was also included in discussions.

Aside from planning and coordinating activities, the main activities of TRADP were to include a Tumen River Area Development Incorporated Company capitalized by the three neighboring states, and land leases by the three to the company, which would administer a special Tumen River Economic Zone. Problems soon emerged, however, when Russia raised constitutional (related to supranational land management) and environmental (concerning the Tumen estuary) issues; and all three parties proved unwilling to contribute capital.

Unable to move forward on these key components, the TRADP has continued to operate in a planning and coordinating mode. The parties have taken different approaches based on their situation and interests: China has been the most active of the partners in promoting regional development, particularly in infrastructure (especially railway and other transportation) linked to manufacturing and merchandise exports. Russia has shown less interest, since much of the development in the Russian Far East is of the primary, resource-based type, and Russia is not dependent on the Tumen River for maritime access. North Korea has continued to show relatively little interest in cooperative measures, especially involving special economic zones or direct investment by foreign partners. The fact that it has a few special zones for South Korean and other investors has led to numerous political and other problems in North Korea, which has put S$50.0Ko

PART III: PERSPECTIVES

There is a substantial

Turning to the data, Hensel found that more than half of all military conflicts and over two-thirds of all full-scale, interstate wars over a lengthy period (1816-1992) began between contiguous adversaries. There was no decrease in this tendency during the later stages (1945-1992) of this period, and in fact the two-thirds of conflicts between neighboring states that resulted in war

Hensel observes that territorial disputes are very

Magnitude: size of area in question, number of inhabitants, natural resources, access to trade or invasion routes, and number of casualties (those killed);

Nature: land or maritime, number of claimants, legal framework, status of negotiation/arbitration, and "type."

Among these three elements, the magnitude of the dispute was found to be most significant, followed by intensifying factors and the nature of the dispute. Overall, recent violence, followed by ethnic conflict and third-party involvement, was found to be the most important intensifying factor; and weak government was the least.

Ranked by intensity the top 10 rated conflicts were: Armenia-Azerbaijan (Nagorno-Karabakh), Iran-Iraq-Turkey (Kurdistan), Georgia (Abkhazia), Moldova (Transdniester), Iran-UAE (Abu Jusa and Tunb Island), India-Pakistan (Kashmir), Caspian Sea maritime boundaries, Japan-Russia (Kurile Islands), China-India (Himalayan border), and Burma-Thailand.

Ranked by magnitude of the dispute, the top 10 ranked border issues were in rank order: Kashmir, Kurdistan, Nagorno-Karabakh, Egypt-Sudan, Iran-UAE (Strait of Hormuz islands), Abkhazia, Russia-Ukraine (land/maritime boundaries), China-India (Himalayas), and China-Vietnam (Gulf of Tonkin maritime boundary and islands).

Ranked by the nature of the dispute, the following ranking emerged: Spratly Islands (South China Sea and Gulf of Tonkin), Kurdistan, Belize-Honduras land boundary, China-India (Himalayas), China-Japan-Taiwan (Senkaku/Diaoyutai Island), Strait of Hormuz islands, Egypt-Sudan, Colombia-Nicaragua (San Andres Island), Bulgaria-Romania (maritime boundary), and Bulgaria-Turkey (maritime boundary).

Finally, with respect to their prominence as viewed from the U.S. perspective, the following conflicts emerged in the top 10 ranking: Kurdistan, Senkaku/Diaoyutai Island, southern Kurile Islands, Kashmir, Hormuz Strait islands, China–South Korea maritime boundary, Spratly Islands (involving China, Malaysia, the Philippines, Taiwan, Vietnam, and Brunei), Japan–South Korea (maritime boundary and rocky islands), and Nagorno-Karabakh.

ETHNO-TERRITORIAL CONFLICT: INITIATION AND RESPONSE

Increasingly, most civil conflicts, and many cross-border wars, seem to result from ethnic separatism or state irredentism. Mary Duffy Toft has attempted to determine what situations ethnic factors may lead to war with the state.[160] Her overall conclusion was:

[160] M. D. Toft, "Indivisible Territory and Ethnic War," Weatherhead Center for International Affairs, Harvard University, Working Paper No. 01-08 (December 2001), 47 pp., a revised version of which was published as "The Resilience of Territorial Conflict in an Era of Globalization," in M. Kahler & B. Walter, eds., Territoriality and Conflict in an Era of Globalization (Cambridge University Press, 2006), 352 pp. , pp. 85-110.

> [T]he likelihood of ethnic violence is largely a function of how the principal antagonists—a state and its dissatisfied ethnic minority—think about territory. Attempts to negotiate a resolution short of war will fail when: (1) the ethnic minority demands sovereignty over the territory it occupies and (2) the state views that territory as indivisible. Ethnic war is less likely to break out if only one of these conditions is met, and very unlikely if neither condition is met.

According to Toft, these conclusions lead to "three implications: [that] ethnic groups are rational; that certain settlement patterns will not be amenable to outside intervention; and [that] partition may not be a good policy option to end violence."

Reviewing the literature, Toft classified five major theories of ethnic conflict:

1. The "Ancient Hatreds" approach views violent ethnic conflict as the result of long-standing historical enmity among competing ethnic groups.

2. The "Modernization" approach focuses on the relative economic and political development of regionally-concentrated ethnic groups within a state and attributes ethnic conflict and violence to uneven patterns of modernization among groups.

3. The "Relative Deprivation" approach focuses on groups' perception that their political or economic status in society is declining, leading them to organize to compete more effectively, including through violent means.

4. The "Security Dilemma" approach focuses on the fear by constituent ethnic groups within collapsing multiethnic states that the central regime will no longer be able to protect them, driving them to compete—including violently—by establishing and controlling a new regime.

5. The "Elite-Manipulation" approach posits that desperate political leaders use nationalism to manipulate a passive public, and once unleashed nationalism "takes on a life of its own" and fuels hostility and violence among different ethnic groups.

While Toft does not deny that these approaches have some value, she argues that they are neither universal nor clearly explanatory of the propensity of certain ethnic conflicts to lead to violent insurrection and/or state repression. Instead, according to her, the key point is whether there is an irresolvable conflict between the interests of a group and the state concerning sovereignty over territory.

Toft also concludes that the best predictor of the likelihood of a violent outcome is whether the group in question is settled in a concentrated manner, particularly outside cities. She tested her hypotheses primarily with respect to the different reactions of the Russian Federation to separatist activities in Tatarstan and Chechnya from 1991 to 1994, and also provides more detailed commentary about the settlement patterns of affected groups as they pertain to the propensity for violent, ethnic-based conflict with a state.

With respect to the settlement patterns of ethnic minorities in a state, Toft classified these as falling into four patterns: settled in certain regions in which they are the majority of population ("concentrated majority"); settled in regions in which they are a minority of the population ("concentrated minority"); concentrated in a city or cities ("urban"); or dispersed among various areas. Toft reflected that these patterns could result in differences in both the capability and legitimacy for separatist causes:

> Capability for a separatist struggle would include the number of their population; the strength of their economic, political, and social networks and institutions; access to communications and media; and the capital goods to support a movement. In this respect, a minority concentrated in urban areas would have the greatest potential to organize a successful struggle, followed by a concentrated majority, concentrated minority, and dispersed populations.
>
> The situation is different with respect to the legitimacy of separatism. In this respect, a majority concentrated in an ethnic homeland would rank highest and would also have high capability for struggle. As a result, this pattern results in the highest likelihood for the creation of separatist movements able to use violence to achieve their end. They are followed by concentrated, urban, and dispersed minority populations. Toft notes that urban minorities are "especially weak" in terms of the legitimacy of separatist struggle, since they do not live in an ethnic homeland and many of them may be new arrivals to their cities of residence.

Toft's predications were borne out by analysis of a set of cases during the period from 1980 to 1995, for which her analysis yielded the following results:

> Fully 78 percent of groups in "large-scale rebellion" were distributed in the concentrated minority pattern; only 37 percent of these did not engage in any sort of violent activities; and of the 63 percent that did engage in some sort of political violence, 25 were involved in large-scale rebellion;
>
> An overwhelming 93 percent of urban populations of minorities were uninvolved in any rebellion;
>
> With respect to concentrated minorities, 68 percent were not engaged in any political violence, and only 10 percent were involved in large-scale violence; and
>
> Of dispersed minorities, 80 percent were not engaged in violent political activities, and only 5 percent became involved in large-scale conflicts.

Characterizing such conflicts as "enduring internal rivalries" (EIR), the authors enquired into whether separatist claims to territory increase the impacts of such conflicts in terms of their proclivity to evolve into a continuing (enduring) dispute which tends to lead to violence, recurrence of violent conflict, and shorter periods ("spells") of peace.

The authors conclude that internal territorial conflicts do contribute to the development of enduring internal rivalries, and that EIRs involving territory are "particularly problematic in terms of conflict recurrence and shortening of the periods of post-conflict peace." These authors observe that "territorial issues dominate EIRs even though less than one-half of domestic armed conflicts are fought over territory."

These general observations suggest to them that conflicts without a territorial component tend to be comparatively less problematic than those with one. So they reviewed their data-set[162] to see whether it supported the hypotheses: that (a) internal territorial disputes are likely to evolve into EIRs; and (b) territorial EIRs are more likely to recur and shorten peace spells than other types of internal conflicts. Finding support for these results, they argue for further research on the territorial dimension of internal conflicts as well as a greater focus on conflict management and prevention in such cases.

Reviewing previous literature, Fuhrmann and Tir found that there has been a focus on territorial aspects of the onset of internal conflict. Yet most studies did not address territory as a principal focus of research. They argue that, as a result, there is a lack of understanding why territory is such an important contributor to conflict.

Following previous studies, the authors address the importance of territory to a state, including in terms of the tangible and intangible resources associated with territory, as well as its importance to the reputation of a state and the domestic political interests of its government. At the same time, ethnic minorities value their territorial homelands for cultural (identity) and psychological, as well as other, factors.

For these reasons, internal disputes

Whether long wars lead to longer peace spells, and whether such peaceful interludes reduce the likelihood of recurrence of violent conflict.

The authors found that over two-thirds (67.9 percent) of internal armed conflicts connected to an EIR include a territorial element, while for all internal conflicts, less than half (44.4 percent) included a territorial element. They also found that more than half (56.7 percent) of all EIRs develop due to territorial disputes. The presence of a territorial dispute in an EIR, in turn, nearly doubled the probability of armed conflict, from 0.17 to 0.31. Previous military victory was most effective in reducing the potential for EIR development. So the worst-case scenario for development of an EIR is when conflicts stem from territorial disputes and do not end in military victories.

In terms of other variables of interest, the authors found that previous military victory and the duration of peace spells had consistent effects, significantly reducing the probability of an EIR. The other variables did not behave as expected, however. The authors did not find a significant relationship between democracy and enduring internal rivalries, but note that since most of the cases they studied involved autocratic regimes this finding may not be valid. Overall ethnic diversity, war intensity, and oil exports also did not tend to have significant effects on EIR development.

With respect to the potential for recurrence of internal conflict, however, wealth (GDP per capita) and state power did have significant negative effects on the recurrence of conflict. Democracy, on the other hand, actually had a positive effect on conflict recurrence, but this effect was marginal. The length of the peace spell had the most salient, and negative, effect on recurrence. Another negative factor was the previous occurrence of intense conflict, which actually reduced rather than increased the probability of recurrence.

Peace spells were found to be much shorter in enduring internal rivalries than in other conflicts, with the length of such periods longer by an average of 41 percent (from 2,774 to 3,920 days) for all internal conflicts as opposed to territorial EIRs. This was especially true in oil-exporting states.

BORDERS AS INTERNATIONAL INSTITUTIONS

Beth Simmons has published several studies concerning the willingness and propensity of states to participate in dispute resolution processes related to territorial disputes. In one work, she identified three types of strategies for states toward such processes, and conducted research on whether the willingness of states to engage in them was influenced by this typology.[163]

The three types of approaches by states postulated by Simmons are "realist," "rational functionalist," and "democratic legalistic." To make a long story short: states pursuing the realist approach would be disinclined to participate in dispute resolution, instead pursuing their own interests in the most efficacious way, including resorting to force. States taking a rational functionalist position would understand that while taking a cooperative approach to dispute

[163] Beth Simmons, "See You in 'Court'? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes," in P. Diehl, ed., A Road Map to War: Territorial Dimensions of International Conflict (1999).

recognized borders is so important that traditional realist and emerging globalist viewpoints about how states should agree about the importance and value of contested and settled borders. To demonstrate this, Simmons conducted a systematic study of the levels of trade for countries with established borders and for countries with contested borders. While greater trade flows were generally associated with undisputed borders, the effect was particularly pronounced in Latin America.[167]

[167] Simmons's own abstract, from the article, reads as follows: "Territorial disputes between governments generate a significant amount of uncertainty for economic actors. Settled boundary agreements produce benefits to economic agents on both sides of the border. These qualities of borders are missed both by realists, who view territorial conflicts in overly zero-sum terms, and globalists, who claim borders are increasingly irrelevant. Settled borders help to secure property rights, signal much greater jurisdictional and policy certainty, and thereby reduce the transactions costs associated with international economic activities. The plausibility of this claim is examined by showing that territorial disputes involve significant economic opportunity costs in the form of foregone bilateral trade. Theories of territorial politics should take into account the possibility of such joint gains in their models of state dispute behavior."

PART IV: MODELS AND METAPHORS

This section addresses various models for potential resolution of territorial or similar conflicts through cooperative interstate measures. While most of these models have been applied only in particular circumstances, they could nevertheless serve as metaphors, suggesting approaches to or components of resolving more general disputes.

TRANSPORTATION CORRIDORS

Corridors in General

Kaliningrad. International attention concerning how best to arrange for appropriate access among noncontiguous areas of a state has been highlighted by the situation regarding the Kaliningrad region ("Kaliningrad"). Following the dissolution of the Soviet Union and the restoration of the sovereignty of the Baltic states, Kaliningrad became separated from the Russian Federation by several hundred kilometers of Lithuanian territory. The Russian government and the Kaliningrad authorities reacted negatively to the imposition of visa and customs controls by Lithuania, and demanded that special arrangements be made to ensure the free passage of Russian citizens and merchandise to and from Kaliningrad.

The approaches advocated by Russia included the establishment of a special transportation corridor, which could include special procedures, as well as potential operational arrangements, and even structural facilities. The Lithuanian government was unwilling to agree to such an approach.[168] The immigration and customs issues associated with transportation to Kaliningrad

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corridor and corridors connecting former West Berlin and its dependencies with the Federal Republic of Germany.

Danzig Corridor. In 1919, after World War I, Poland acquired a strip of territory 30 to 90 kilometers wide connecting its territory with the Baltic Sea coast. This resulted in the splitting off of the area of East Prussia including the city of Danzig as an exclave. Under the Paris Treaty (1921), rules were established to facilitate travel and transportation between Germany and the exclave. The rules permitted free travel for Germans through the corridor on Polish trains, without immigration or customs formalities. But drivers had to obtain a visa, were subject to customs controls (including duties), and had to use certain routes. Sealed rail cars crossed the territory without customs checks, however.

In 1938, the Nazi government of Germany demanded the creation of an extraterritorial highway through Polish territory. Poland demurred, which was one of the claimed justifications for the Nazis' subsequent invasion of Poland. After World War II, of course, Poland regained access to the Baltic coast, including the city of Gdansk, formerly Danzig.

West Berlin Corridors. The West Berlin corridors established after World War II included three territorial alignments and a network of designated rail lines and vehicle roads. The corridors went through three phases. Phase one: 1945-49, prior to the formation of the Federal Republic of Germany and German Democratic Republic (GDR), when the corridors traversed the Soviet occupation zone (including during 1948-49, the period of the Berlin Airlift, which was operated by the Allies after Soviet authorities threatened to block access). Phase two: 1949-71, when the corridors crossed GDR territory and were regulated by GDR authorities. And phase three: 1971/72-1990, after a transportation agreement was signed and Soviet authorities took ultimate responsibility to assure transit. During the latter period, transit was considerably facilitated and the volume of goods moving to/from Berlin grew dramatically.

Plainly, corridor-like arrangements have existed in a wide variety of forms, and tend to evolve over time in response to conditions. Proposed corridors and other means of facilitating transportation through national territory for the resolution of territorial disputes should be reviewed in connection with the range of previous examples.

Future Israeli-Palestinian Settlement. If an agreement on territory between Israel and the Palestinians can be achieved, providing the basis for establishment of a Palestinian state in the West Bank and Gaza, a means will be required to provide for direct travel and transportation between the two territorial units. Presumably a nonterritorial, special corridor would be the only feasible solution to this problem. One concrete suggestion is the creation of an internationally-monitored road/rail link through Israeli territory connecting the West Bank and Gaza.[177]

ICJ Case on Passage to Former Portuguese Enclaves Within India

The International Court of Justice has been asked only once to consider rights related to transit to enclaves; the case was between Portugal and India regarding Portuguese enclaves (Dadra and

[177] Economist, "Briefing: America and Israel," February 14, 2009, pp. 32-33.

Nagar-Aveli), which were surrounded by Indian territory.[178] The case arose in 1954-55 when, after Indian activists seized control of the two enclaves, Port

The LOS Treaty provides for the right of access of land-locked states to and from the sea and freedom of transit in that connection.[180] While there is a general right of access for such states

referred to here as “joint development agreements,” although the individual terms will be used in connection with particular stages of joint mineral activities.

For example, sometimes, international cooperation begins at the predevelopment stage, usually during exploration. This permits the parties to reach a common assessment of the feasibility of developing a field and their respective equities in its development and production. Recently, for example, China and Japan reached an agreement on future joint development of a field, prior to determination of their precise maritime boundaries in the area, beginning with Japanese investment at the exploration stage.[187] Previously, the state oil companies of China, the Philippines, and Vietnam entered into an agreement for joint marine scientific research in the South China Sea.[188]

One well-known researcher in the field of joint development agreements has listed numerous examples of such agreements both in cases where the boundaries of national jurisdiction have been delineated, and in cases where they have not.[189] It should be noted that even when boundary issues have been set aside for the purpose of resource development, they may still come into play on related matters such as the enforcement of national laws with respect to actions on ships and platforms in the field.[190]

Vietnam, and the Spratly Islands, claimed by nearly all.[191] So far no concrete moves have been taken toward negotiating a JDA in the South China Sea, but the Association of Southeast Asian Nations (ASEAN) has agreed with China on a broadly declaratory code of conduct as well as an informal multilateral approach.[192]

In the South China Sea, specific disputes have also occurred between China and the Philippines, including with respect to the so-called Mischief Reef in the

basic “models” for joint development agreements can be discerned, including those that require licensees of the parties to enter into compulsory joint ventures (e.g., the 1974 Japan-South Korea agreement); establish a supranational agency with licensing and development authority over the development zone (e.g., the 1979 Malaysia-Thailand agreement); or provide that one state will administer and develop all or part of the area for the benefit of both.[200]

While joint development agreements for mineral resources are quite common in Europe and the Middle East, they are utilized to a lesser degree in other regions, particularly Africa and Latin America.[201] Perhaps this is due to sovereignty concerns and poorly-defined boundaries, especially at sea, as well as the unwillingness of politicians to take the difficult step of entering into cooperative relationships with long-time national competitors.

There are some examples of joint development agreements in these regions, however, such as a recent one between Nigeria and São Tome and Príncipe in which they have agreed to lease blocs offshore the Niger Delta as part of a joint development zone, from which the parties will ultimately share 60:40 in the proceeds from production.[202] But in more serious disputes, such as between Cameroon and Nigeria, the political will to cooperate and resolve the conflict over resources by such means has been lacking.[203]

MANAGEMENT OF SHARED AND COMMON RESOURCES

Internationally “shared” resources are those, like fresh water supplies, of which the available

of geographical, historical, as well as legal factors. These, combined with regional economic, cultural, and social factors, give each situation unique characteristics.

A great deal of materials related to international water law and practice has become available online.[204] Recently, this material has been augmented by the inclusion of a specialized collection of documents on the Middle East.[205] The managers of these materials reviewed 145 treaties to included in the database, through statistical classification and analysis.[206] Before proceeding to present their analysis, the authors made several trenchant observations:

> Competition for water supplies has created political tensions, especially in the Middle East but also throughout Africa and Asia.
>
> Despite the potential for conflict over water, the historical record reflects that the importance of access to water supplies has motivated societies to cooperate in this regard even when they differ on other issues.
>
> The U.N. Food and Agriculture Organization (FAO) has identified over 3,600 treaties related to water resources in the roughly one millennium period from 805 to1984 AD; the majority of which deal with navigation.
>
> While polities are known to have signed thousands of treaties concerning uses of freshwater, only seven "minor international skirmishes" have occurred, each of which also involved other, nonwater related issues. The only known water war between states occurred some 4,500 years ago.

The authors' analysis of water treaties addressed the following factors: water basin; principal focus; number of signatures; nonwater linkages, such as money land or concessions in exchange for water supply or access; provisions for monitoring, enforcement, and conflict resolution; method/amount of water division, if any; and date signed. Their conclusions follow:

Signatories: The vast majority (124 of 145) of the water treaties were bilateral, although of the multilateral treaties developing countries participated to a greater extent (13 of 21); an additional two multilateral agreements went unsigned.

Since water resources are generally contained within watersheds, the noninclusion of all riparian states in an agreement can prevent comprehensive management of the resources. The Jordan River basin, for example, is regulated under a series of bilateral agreements, and the only proposed regional instrument (1955) was not ratified. India has a standing policy of dealing with its neighbors individually, so neither the Ganges-Brahmaputra nor the Indus River systems are

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regulated multilaterally. There is a multilateral agreement, among Cameroon, Niger, Nigeria, and Chad (1964) for the Lake Chad basin, but the treaty lacks allocations and the lake and its tributaries are subject to overly high withdrawals and other use issues. The treaty does, however,

South Ossetian side. Under the agreement, all aspects of the hydropower operation will be equally and jointly controlled by Georgia and the Russian company, Inter RAO. The agreement has been criticized within Georgia, however, and could also be threatened by the attitude of the South Ossetian authorities.[207]

Groundwater: Groundwater was a focus of only a small number (2 percent) of the treaties, including the 1994 Jordan/Israel and 1995 Palestinian/Israeli agreements. The regulation and protection of groundwater resources is very complex, but some approaches were suggested in the 1989 Bellagio Draft Treaty on this subject.

Nonwater Linkages: Nonwater issues are often addressed together with water issues, helping negotiators to bridge, so to speak, intractable disagreement over supply and allocation. Often (30 percent) these include payments for water called for under the treaty. Somewhat under half (47 percent) of treaties contained such linkages, including the following: capital (44 percent), land (6 percent), political concessions (1 percent), and other (7 percent). Some examples are treaties that allocate less, but higher-quality, water, obtained through pollution-control; compensate for land lost due to dam construction; or provide compensation for loss of hydropower potential (e.g., Russia-Finland Vuoksa Agreement, 1972).

Enforcement: Over one-third (36 percent) of the water treaties included councils, commissions, or other arrangements to deal with implementation; less than one-quarter (22 percent) contained any provision for dispute resolution; some treaties (10 percent) provided for conflicts to be referred to a third party or the U.N.; and nearly a third (32 percent) were incomplete or uncertain with respect to how disputes would be handled.

In general, the researchers concluded that there was considerable room for improvement in the formulation of water treaties, even in their most rudimentary aspects:

> The 145 treaties which govern the world's international watersheds, and the international law on which they are based, are, in their respective infancies. More than half of these treaties include no monitoring provisions whatsoever and, perhaps as a consequence, two-thirds do not delineate specific allocations and four-fifths have no enforcement mechanism. Moreover, those treaties which do allocate specific quantities, allocate a fixed amount to all riparian states but one—that one state must then accept the risk of the river flow, regardless of fluctuations.[208]

Even more could be accomplished to resolve disputes, according to the authors, by applying modern data collection and monitoring technology for enforcement purposes. They recommend the inclusion of such facilities in future water treaties.

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[207] New York Times, "Georgia's Energy Minister is Assailed for Deal with Russia," January 14, 2009. The dam provides 40-50 percent of Georgia's electricity supply, but Inter RAO would pay a relatively modest $9 million per year for sharing in its utilization.

[208] Hammer & Wolf, op. cit.

At the same time, it should be observed that even the best technology cannot surmount the institutional deficiencies of many treaties, and could even lead to additional tension or conflict if the information obtained through sophisticated technology reveals that a treaty regime is not satisfactorily addressing relevant issues, or that one or more parties are not complying with their obligations. The authors' systematic study of water treaties has made some of these deficiencies evident, and attention should be directed at addressing institutional issues as well as providing for additional technical means for enhancing monitoring and enforcement. Even with strengthened monitoring provisions, shortcomings in dispute resolution would still have to be addressed in future water agreements.

Yet improved legal measures and regulatory activity cannot in themselves address scarcity of fresh water resources arising from overuse or waste.[209] At the national level, some progress has been achieved in rationalizing water use by adopting economic measures, such as through issuing major users tradable usage rights based on historical patterns of consumption, and permitting them to be transferred in the market so that greater efficiencies can be achieved—an approach widely referred to as "cap and trade."[210] Applying such measures at the international level as well should definitely be considered in future water agreements.

The main causes for scarcity of water supplies are demographic growth; diet, primarily the switch toward increased consumption of meat in rapidly-developing countries; climate change, regional changes in precipitation; urbanization and other national development; and energy policy, such as response to climate change by expanding agricultural production of "bio-fuels." To compensate for the emergence of greater demand

conservation uses.[216] Elsewhere, for example in Australia and South Africa, the issues largely involve ranching, aboriginal uses, and conservation.[217]

Whatever the nature of the conflict, the current recommended approach to managing terrestrial commons is to strengthen individual or communal ownership rights, provide more effective assistance and support, and increase protection of the environment.[218] Special attention is being paid to analyzing user rights and tenure, and improving security and incentives for investment and conservation.[219]

Since so many current territorial conflicts involve competition among groups over the use of terrestrial commons, further attention should be given to developing models for cooperative management of such areas. Such models should attempt to reconcile conflicting claims and encourage cooperation among competing interests. In particular, mutual sovereignty or joint administration could be established for such areas and become a tool for intervention in conflicts of this nature.

[216] See, e.g., D. Wear, U.S. Department of Agriculture, Forest Service, "Public Timber Supply under Multiple Use Management," in E. Sills et al., eds., Forests in a Market Economy (Dordrecht, Kluwer Academic Publishers, 2003), Chap. 12, pp. 203-220.

[217] See Australia and New Zealand Environment and Conservation Council, and Agriculture and Resource Management Council of Australia and New Zealand, National Principles and Guidelines for Rangeland Management: Managing Australia's Rangelands (1999), 37 pp.; K. Pinaar et al., Legal Resources Centre (South Africa), "Comment on the Range and Forage (Veld) Policy" (prepared by the Directorate: Animal and Aqua Production Systems: Department of Agriculture: March 2006 and as published for public comment on July 7, 2006 by virtue of notice 873 of 2006 in

PART V: CONCLUSIONS AND SUGGESTIONS

CONCLUSIONS

Territorial disputes are so intractable because considerable economic and political interests may be at stake, clear legal rights are often difficult to determine, and distrust between the sides may

States are generally willing to pursue reasonable, functionalist approaches to interstate conflicts over territory, including cooperative and facilitated methods of dispute

Adjudicators, arbitrators, and, to a lesser extent, conciliators must operate strictly in accordance with their capacity and mandate. If they are mandated to delineate a boundary, they should straightforwardly do so. While they are entitled to consider the equities in a case, these should be applied *intra legem* ("under the law") unless the parties have specifically authorized them to proceed *ex aequo et bono* ("based on equity and welfare"). For example, equitable factors can be applied under law to enable the gaps in an otherwise legally-based boundary determination to be filled in—but not to avoid

alleviate many practical, as well as legal and