

# Approaches to Solving Territorial Conflicts

Sources, Situations,  
Scenarios, and Suggestions

May 2010

THE  
CARTER CENTER



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## 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 (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 lead 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*).

Part I also describes the expanding role of the Permanent Court of Arbitration and arbitration more generally, as well as representative arbitration cases involving boundary disputes. In addition, it considers the role of other dispute-resolution methods, including conciliation and mediation. In particular, it examines the successful resolutions of a long-running and sometimes violent conflict between Ecuador and Peru in the Amazonian region, as well as of the Beagle Channel dispute between Argentina and Chile.

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; the protracted territorial disputes among Bolivia, Chile, and Peru over the Atacama Desert along the Pacific coast of South America; and border issues in Northeast Asia involving China, Japan, North Korea, and Russia.

In Brcko, an arbitration regarding the boundary between the two political entities within Bosnia and Herzegovina in the area of Brcko municipality led to an award that created an area of mixed subnational jurisdiction, under the overall sovereignty of the federal state as a whole. While this solution presents some legal difficulties under the mandate, derived from the Dayton Agreement, which ended the Bosnian war, the result was largely well received within Bosnia and Herzegovina; backed strongly by the international community; and has prevented further violence, or even dissolution of the Bosnian state, over this issue.

The Abyei Boundaries Commission was established under the comprehensive peace agreement that ended the civil war between the government of Sudan and the Sudan People's Liberation Movement (SPLM). It was charged with ascertaining the boundary of the region based on historical assignments and transfers of territory among Sudanese provinces. At stake between the parties was political control of the affected region, as well as ownership of the underlying mineral resources. The Abyei Boundaries Commission made a boundary determination reflecting in addition the pattern of use of the area by northern and southern Sudanese tribes, and would have created a zone of mixed sovereignty with two subzones where the rights of the northern or southern tribes were respectively predominant. The government of Sudan refused to accept the award or even release the report. By agreement of the two parties the matter has now been referred for a new arbitration under the auspices of the Permanent Court of Arbitration.

The Bolivia-Chile-Peru border dispute arises from the War of the Pacific among the three countries in the 19th century. The victorious power, Chile, obtained mineral-rich coastal territory from the losers, and as a result Bolivia was cut off from territorial access to the Pacific coast. This centuries-old dispute remains very much alive in the thinking of the antagonists, and in view of the convoluted history a novel approach is very hard to construct. However, perhaps a nonterritorial transportation corridor arrangement to benefit both Bolivia and Peru could be considered.

In Northeast Asia, the dispute between China and Russia over islands in the Amur and Ussuri rivers was successfully resolved recently. Sovereignty over the southern Kurile Islands (Japan's "Northern Territories") is still disputed between Japan and Russia, however. While subregional cooperation has been proposed for the Tumen River area bordering China, Russia, and North Korea, little practical progress has been made. Joint development, special economic zones and other formal cooperation have been mentioned in all three situations, but with little effect.

Part III, Perspectives, characterizes how both states and separatist minorities approach territorial conflicts, based on the work of several political scientists. According to these authors, such conflicts are particularly difficult to resolve since national territory is viewed as having high inherent values, both tangible and intangible, importance to a state's reputation and strategic

position, and strong connection to the popularity of the government. The prominence of territorial conflicts derives from their nature, magnitude, and intensifying factors—with recent violence, ethnic conflict, and third-party involvement being the most important intensifying factors.

According to this research, the likelihood of violent conflict results from how the antagonists view territory. War is likely to erupt when an ethnic minority demands sovereignty over its territory, but the state views its territory as indivisible; while violence is most likely to occur when the settlement pattern of the minority makes it the majority in particular regions. Contests over territory by population groups in turn are likely to lead to enduring internal rivalries that lead to protracted and violent conflict; but a military victory by one side, an intense period of fighting, or a lengthy period of peace reduce the chances for a recurrence of violence.

According to one author, states are generally willing to pursue reasonable, functionalist approaches to interstate conflicts over territory, including cooperative and facilitated methods of dispute resolution. At the same time, many border issues remain unresolved for long periods, during which the absence of the important international institution of defined and recognized borders tends to retard national development due to adverse effects on investment and trade.

Part IV, *Models and Metaphors*, examines a range of approaches to specific types of disputes that might suggest ways to address other, structurally similar territorial disputes. The approaches considered include transportation corridors for access over the territory of a neighboring state; joint development agreements, used mainly in the largely maritime oil-and-gas sector; and cooperative regulation of shared resources, such as fresh water, and terrestrial commons, such as areas in which human activities, including pastoral and agricultural uses, intermingle without definite entitlements.

Part V, *Conclusions and Suggestions*, draws on the background materials contained in this study to offer some preliminary observations on how to approach territorial disputes through greater reliance on alternative mechanisms for cooperative or joint management of disputed areas.

## INTRODUCTION

Border disputes are notoriously difficult to resolve. International law does not contain a clear, prioritized set of norms—established through international conventions or jurisprudence—for determining national sovereignty over territory in the face of competing factual claims (e.g., based on cultural, ethnic, historical, religious, and other political, economic, and social factors). Governments are unwilling to “lose” boundary disputes since they might suffer political consequences as well as loss to national interests.

Border disputes often flare up after they become linked with important economic or social interests. Disputed territories may contain important natural resources, such as hydrocarbon, mineral reserves, or water sources; provide access to the sea or shared terrestrial resources, such as grazing areas; or be a strategic location. Such areas also may be subject to irredentist claims based on historical or cultural factors or demands for self-determination by their inhabitants.

Competition for contested or shared resources has become more intense in recent years due to economic developments, such as higher commodity prices, and environmental changes, such as overutilization of agricultural land, overgrazing, and desertification, as well as regional and global climate change. It is unlikely that increasing stresses among states resulting from these factors can be successfully resolved using traditional legal methods, particularly adjudication.

The same factors that make it difficult for parties involved in a border dispute to reach agreement among themselves often also make them unwilling to submit their dispute to international adjudication or arbitration. Such proceedings tend to focus on issues of sovereignty, and the parties to a dispute may fear losing their claims or being forced to undertake unpleasant concessions. Indeed, in many cases judicial or arbitral awards of territory have not been implemented by the losing side.

Two cross-cutting distinctions between approaches to the resolution of border disputes form the basis for a matrix of approaches. The first distinction is between binding and nonbinding procedures, with the former encompassing adjudication and arbitration and the latter including “good offices” or facilitation, for example utilizing the services of international leaders or eminent persons for conciliation and mediation. Mediation is distinguished from arbitration in that the resulting award must be accepted by the parties to the dispute. Nonbinding international means of resolving disputes, especially good offices and conciliation, allow for participation of the parties throughout the process of dispute resolution.

The second distinction is between approaches based primarily on law and those that permit the dispute resolution agent or panel to explore alternative approaches based on equity and natural justice. Depending on their terms of reference, arbitrators may be granted the power to make an award on this basis. Even the International Court of Justice, under its statute, may decide cases *ex aequo et bono* (i.e., based on equity and welfare) at the request of the parties.

Even so, parties to a territorial dispute may be unwilling to submit their competing claims to arbitration or adjudication. The International Court of Justice, constituted of judges, has limited capacity to resolve factual issues related to equity; and in any event it would in all likelihood

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 to accept in advance 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 issues at stake, as well as how to address them in a way that is acceptable to the parties while avoiding, or at least deferring, legal issues related to sovereignty.

Many cooperative approaches to resource and border issues have been implemented by states on an agreed basis or as a result of dispute resolution assistance. Examples of such approaches include: joint management and exploitation of contested or shared resources, including hydrocarbon reserves or fishery stocks; joint regulation, or cooperative sharing, of contested and/or shared resources, such as grazing rights or water supplies; negotiated access to the sea for landlocked states or through territorial waters for neighboring states; agreed rights of transit for states with noncontiguous territories; and/or commitments to respect the cultural, historical, or social heritage, as well as political autonomy of national minorities.

The Carter Center Conflict Resolution Program will develop a cluster of expertise on border disputes and on creative solutions to address such disputes in collaboration with partner institutions and private law firms around the world providing *pro bono* services. While developing the cluster of expertise, the program will focus initially on a few regions/countries where creative solutions can be tested. Subsequently, the initiative could be extended to other regions and countries.

With the assistance of a consultant, Dr. Daniel Finn, the Conflict Resolution Program has conducted thorough research on existing efforts in the area of border disputes and on institutions and methodologies applied in this area. The program will invite partner institutions and private law firms willing to contribute *pro bono* to a series of round-table consultations where existing instruments and mechanisms used recently in cases of border/maritime disputes will be discussed, areas of research identified, and new and creative solutions explored.

Following the workshops, the program will summarize in a matrix document the deliberations during the workshops and the creative solutions explored in them. This document will serve as a guide to subsequent interventions by The Carter Center, including in participation with partner organizations in border disputes. The lessons learned from each case in which the Carter Center Conflict Resolution Program is called upon to intervene will be reflected in future reports.

The purpose of this working paper is to summarize the consultant's research to date, and help provide a foundation for the workshop proceedings and further products.



## PART I: INSTITUTIONS AND METHODS

### THE UNITED NATIONS

#### General

In addition to avoidance of threats or use of force (Article 2.4), the United Nations Charter places states under an affirmative obligation to “settle their international disputes by peaceful means, in such a manner that international peace and security, and justice, are not endangered” (Article 2.3.). The Charter<sup>1</sup> additionally obliges the state parties to a serious dispute to seek alternative, peaceful means for its resolution.<sup>2</sup>

The Security Council is, of course, the U.N. body with primary authority<sup>3</sup> to address international conflicts, and states are obliged to abide by and implement its decisions in this regard.<sup>4</sup> Security Council jurisdiction includes disputes that are likely to endanger international peace and security,<sup>5</sup> as well as threats and breaches of the peace and acts of aggression.<sup>6</sup> Its proceedings with respect to disputes are oriented mainly toward their peaceful resolution (under Chapter VI of the Charter), but its actions related to threats to peace and security may take the form of crisis response and the employment of mandatory political or economic sanctions or even use of force (under Chapter VII).

#### International Court of Justice

**General Considerations.** Since the Security Council is a political body, the U.N. Charter envisions that disputes of a legal nature involving states would normally be referred to the International Court of Justice (ICJ).<sup>7</sup> The ICJ receives submissions of cases from states (“contested cases”) or through requests from authorized U.N. bodies and agencies for advisory opinions. The Court is constituted under a separate statute,<sup>8</sup> of which all U.N. member states are considered signatories.<sup>9</sup>

Only states may bring contested cases before the International Court of Justice.<sup>10</sup> Optionally, states may declare that they accept the compulsory jurisdiction of the Court without special

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<sup>1</sup> U.N. Charter, Chapter VI, “Pacific Settlement of Disputes.”

<sup>2</sup> *Id.*, Article 33.1: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, conciliation, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

<sup>3</sup> *Id.*, Chapter V, Article 24.

<sup>4</sup> *Id.*, Article 25.

<sup>5</sup> *Id.*, Chapter VI.

<sup>6</sup> *Id.*, Chapter VII.

<sup>7</sup> *Id.*, Article 36.3.

<sup>8</sup> Statute of the International Court of Justice, adopted and annexed to U.N. Charter, June 26, 1945; entered into force October 24, 1945.

<sup>9</sup> U.N. Charter, Article 93.1.

<sup>10</sup> ICJ Statute, Article 34.1.

agreement in cases brought by other states that have accepted the same obligation.<sup>11</sup> Optional declarations of this sort may be made unconditionally, or on the basis of reciprocity or for a temporary period of time.<sup>12</sup>

**Territorial Jurisprudence.** The International Court of Justice has considered numerous cases regarding the extent of maritime jurisdiction of coastal states. But so far it has issued decisions in only 14 cases involving land territory. Due to the large variety of situations in which conflicting territorial claims arise, it is difficult to categorize and prioritize the various factors relied upon by the Court in its decisions. This has tended to make the Court an unattractive forum for parties to territorial disputes.

One interesting recent study<sup>13</sup> concluded that nine types of factors are relevant to adjudicating territorial claims: treaty law, geography, economy, culture, effective control, history, *uti possidetis juris*,<sup>14</sup> “elitism”,<sup>15</sup> and ideology.<sup>16</sup> The author examined nine terrestrial boundary cases that the International Court of Justice had decided by the time the article was written, and concluded that while disputants regularly base arguments on all the factors listed, only three of them have consistently served as a basis for decision of the Court: treaty law, *uti possidetis*, and effective control. Nonetheless, the number and unclear prioritization of legal norms continues to make decision making by the Court in territorial cases somewhat unpredictable.

The sources of law for the International Court of Justice are set forth in its Statute.<sup>17</sup> Under the statute, the Court is to apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and, subject to the Court’s own decisions not having precedential value,<sup>18</sup> judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>19</sup>

The sources of law prescribed by the ICJ statute “shall not prejudice the power of the Court to decide in cases *ex aequo et bono*, if the parties agree thereto.”<sup>20</sup> Only when a decision on legal grounds is not possible will the Court address the equities. So far the territorial cases considered by the Court have not been decided based directly on equitable principles. But it should be observed that, in applying the sources of law available to it, the International Court of Justice

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<sup>11</sup> *Id.*, Article 36.2.

<sup>12</sup> *Id.*, Article 36.3.

<sup>13</sup> Brian Taylor Sumner, “Note: Territorial Disputes at the International Court of Justice,” *Duke Law Journal*, 53, pp. 1779-1812 (2004).

<sup>14</sup> *Uti possidetis juris* (“to whom possesses by law”) is the doctrine that sovereignty over territory is based on previously-recognized borders, and in particular that the territorial boundaries of newly-independent states remain the same as their administrative borders prior to independence.

<sup>15</sup> The term has been used to describe a claim based on a special privilege (including a right or duty) by a state to occupy certain territory.

<sup>16</sup> This term is used to describe colonialism, imperialism, world revolution, or other expansionist claims.

<sup>17</sup> Statute of the International Court of Justice, annexed to the Charter of the United Nations (1945), entered into force, October 24, 1945.

<sup>18</sup> *Id.*, Article 59.

<sup>19</sup> *Id.*, Article 38.1.

<sup>20</sup> *Id.*, Article 38.2.

may nonetheless consider equitable principles *infra legem*,<sup>21</sup> 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.<sup>22</sup> 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,”<sup>23</sup> which has resulted in “a situation where foreign states would not settle their disputes in Africa and African states shy away from international arbitral institutions.”<sup>24</sup> On the latter point, the author refers primarily to the “Eurocentricity of the Applicable Law,”<sup>25</sup> 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.”<sup>26</sup> This approach is based on the ideas that “the origins of the concept are foreign to the Continent and ... is not in consonance with the principles of self-

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<sup>21</sup> “Under law.”

<sup>22</sup> 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.

<sup>23</sup> *Id.*, p. 704.

<sup>24</sup> *Id.*, p. 705.

<sup>25</sup> *Id.*, p. 710 *ff.*

<sup>26</sup> *Id.*, p. 717.

determination of peoples,” and arguably “was designed to have a different effect from its present stifling limitations and manifestations.”<sup>27</sup>

According to this author, not only does application of *uti possidetis* “preserve ethnic incoherence and to [continue the colonial objective of] divide and rule.”<sup>28</sup> But it also inherently needs to be supplemented by reference to the often-incomplete border surveys conducted by colonial authorities.<sup>29</sup> 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.”<sup>30</sup>

More generally, the author argues that the International Court of Justice and Permanent Court of Arbitration have been unresponsive to claims of African states against Western ones. He also asserts that the appointment of judges and staff of international tribunals have insufficient African representation. This, he believes, undermines the requirement that the courts, under their charters, should represent “the principal legal systems of the world.”

**Territorial Cases.** Following are brief summaries of the 14 decisions of the International Court of Justice to date in cases involving terrestrial boundaries.<sup>31</sup>

*Minquiers and Ecrehos (France/United Kingdom).*<sup>32</sup> The parties submitted this case, concerning sovereignty over two groups of Channel Islands, by special agreement. The arguments of the parties were based on treaty law, history, and effective control. Historical, including Feudal, evidence regarding land title and fishery entitlements was disregarded due to its vagueness and since, as one judge, in a separate opinion, commented, “Suzerainty is not sovereignty.” Instead, the Court declared U.K. sovereignty over the islands based on the evidence of its long-established, effective control of civil affairs there.

*Sovereignty over Certain Frontier Land (Belgium/Netherlands).*<sup>33</sup> The two parties made claims to territorial enclaves that cross their established border, based on treaties and effective control. The Court awarded the enclaves on the Dutch side to Belgium, based on a boundary treaty, the work of a commission under that treaty, and inclusion of the commission’s findings in a subsequent boundary treaty. The Court found that the Netherlands had not undermined these bases of sovereignty by limited control over an enclave. The administrative actions in question were found to have been of a local and ministerial nature, and to have occurred without the opportunity of Belgium to detect and respond to them.

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<sup>27</sup> *Id.* The latter argument is based on the observation that the doctrine arose in Latin America to prevent postcolonial Latin American territories from being decolonized (or recolonized under the Monroe Doctrine) as *res nullius*. *Id.*, n. 31.

<sup>28</sup> *Id.*, p. 717.

<sup>29</sup> *Id.*, p. 718.

<sup>30</sup> *Id.*, p. 719.

<sup>31</sup> The summaries of the first nine cases are derived from Sumner, *op. cit.*, pp. 1792-1803; the remainder are original. In each case, the decision itself was also reviewed.

<sup>32</sup> 1953 ICJ Reports (ICJ) 47 (17 November).

<sup>33</sup> 1959 ICJ 209-212 (20 June).

*Temple of Preah Vihear (Cambodia/Thailand)*.<sup>34</sup> Cambodia sought to confirm its sovereignty over an ancient temple, which the Thai government claimed was on its side of a border that had been established through a treaty with France during its colonization of Cambodia. The temple is located on an escarpment that cannot be climbed from the Cambodian side, but could only be reached from Thai territory. Delineation of the border pursuant to the treaty had been performed by French officials, with the consent of the Thais.

Although the demarcation was supposed to follow the boundaries of the watershed (which stops at the base of the escarpment), the French included the area in question within French Indochina (later in Cambodia); and Thailand did not object. The Court concluded that the principle of *uti possidetis* applied: that Thai authorities had not exercised sufficient control to prevent its application; and that when the Thais began to display control France had quickly objected through diplomatic channels. The International Court of Justice characterized as only “incidental equitable considerations” various arguments that were made based on the “physical, historical, religious [or] archeological character” of the area.

Postscript: During the summer of 2008, there was a confrontation at this temple between Cambodian and Thai military forces. A few months before, Cambodia, with support of the prime minister of Thailand, successfully petitioned the U.N. Educational, Scientific and Cultural Organization (UNESCO) to designate the temple complex a World Heritage site in Cambodia. The tension may have been exacerbated by domestic political factors on both sides. The Thai government was under pressure from rightist groups; and in Cambodia, parliamentary elections were underway.<sup>35</sup> Fighting between Thai and Cambodian forces erupted again, subsequently, in October 2008,<sup>36</sup> and more recently, in March 2009.<sup>37</sup> Curiously, the new rightist Thai government was under pressure from leftist supporters of the former government during the most recent confrontation. Despite the previous adjudication of territorial rights by the International Court of Justice, conflicting claims remain over a small area adjacent to the actual temple site.<sup>38</sup>

*Frontier Dispute (Burkina Faso/Mali)*.<sup>39</sup> Burkina Faso (then Upper Volta) and Mali submitted a case by special agreement, involving competing claims to a strip of territory along their border, which contained a valuable seasonal watercourse. The Court disregarded claims of sovereign and administrative control over the area, seeking instead to establish legal title. This could not be ascertained from colonial *effectivités*,<sup>40</sup> but the Court held that the border should be determined under *uti possidetis* as of the year 1932, since France, the colonial power, had established the border at those limits in 1947. Because the exact alignment of the border could not be determined factually, however, the Court divided the contested territory in half on an equitable basis—applying equitable considerations, ostensibly not directly, under the principle of *ex aequo et bono*, but rather *infra legem*.

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<sup>34</sup> 1962 ICJ 6, 9 (June 15).

<sup>35</sup> See, e.g., *Economist*, “ASEAN and the Temple of Doom,” July 24, 2008.

<sup>36</sup> See *New York Times*, “Gunfire on Thai-Cambodian Border,” October 15, 2008; “Thailand-Cambodia Agree to Joint Border Patrols” (AP), *id.*, October 16, 2008.

<sup>37</sup> See Reuters, “One Dead in Clash Between Thai and Cambodian Troops,” *New York Times*, April 3, 2009.

<sup>38</sup> See Reuters, “Cambodian PM Says Thai Border Clash Won’t Get Worse,” *Id.*, October 17, 2008.

<sup>39</sup> 1986 ICJ 570 (December 22).

<sup>40</sup> This term refers to administrative actions, such as those by colonial authorities, which support a claim to territory.

*Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua Intervening)*.<sup>41</sup> 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 provided for adjudication of border disputes. The case involved the entire land border between the two states, and also jurisdiction over islands and maritime zones in offshore waters. Nicaragua intervened in the case only with respect to the maritime issues.

The Court's decision reaffirmed the primacy of the doctrine of *uti possidetis*, basing its judgments on the borders that existed in Spanish colonial times whenever they could be determined. The doctrine of effective control was also applied when the colonial boundaries could not be determined, but was also viewed as an indicator of where those boundaries had actually been, particularly with respect to the islands. Equity was also applied, *infra legem*, where no other factors permitted a full legal determination; but general equitable claims were ignored.

Novel aspects of the decision, as far as maritime claims were concerned, were that the inland waters of the Gulf of Fonseca should be administered as a condominium by the littoral states (El Salvador, Honduras, and Nicaragua), subject to each of them retaining exclusive three nautical mile territorial seas immediately offshore their coasts. The closing line of the gulf as internal waters would also constitute the baseline of maritime jurisdiction seaward, and all three parties would have the right to a seaward maritime zone, notwithstanding that the coast of Honduras was only in the gulf and did not front the sea directly.<sup>42</sup>

*Territorial Dispute (Libya/Chad)*.<sup>43</sup> Libya and Chad submitted a dispute over the Aozou Strip, a resource-rich territory annexed by Libya in 1973. The Court based its decision, that the strip was Chadian territory, on a 1955 Treaty of Friendship and Good Neighborliness between the two countries when interpreted in good faith and with ordinary meanings. Since the treaty, which contained annexes specifying the boundary from other agreements, made the result clear, there was no need to consider other claims.

*Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*. Qatar instituted proceedings against Bahrain concerning disputed land on the Qatar peninsula and two sets of islands. With respect to the peninsular area, the Court found that there had been a long-settled assignment of the entire peninsula to Qatar, evidenced by many settlements there; and it found that evidence proffered by Bahrain about effective control actually reflected acts of piracy.

With respect to the islands, one set was awarded to Bahrain, and the other to Qatar, both based on *uti possidetis*, since the colonial power, Britain, had clearly assigned them in this manner. Claims based on other principles were rejected.

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<sup>41</sup> 1992 ICJ 351, 356 (September 11).

<sup>42</sup> Keith Highet, "The Gulf of Fonseca and St. Pierre and Miquelon Disputes," *IBRU Boundary and Security Bulletin*, April 1993, pp. 87-91; see especially p. 89.

<sup>43</sup> 1994 ICJ 21-26.

*Land and Maritime Boundary (Cameroon v. Nigeria, Equatorial Guinea intervening).*<sup>44</sup>

Cameroon brought action against Nigeria concerning sovereignty over the Bokassi Peninsula and territories in the Lake Chad region. Two plebiscites had supported annexation of the disputed territories by Cameroon, but this was prevented by minorities in the affected regions. The International Court of Justice ruled in favor of Cameroon based on *uti possidetis* under a colonial-era agreement between Britain and France known as the Thomson-Marchand Declaration (1929-1930). The U.N. Trusteeships established over both countries after World War II referred to the declaration as well as an exchange of diplomatic notes by the colonial powers that elevated it to an international agreement. The declaration had also been relied on by the Lake Chad Basin Commission. Nigeria's claims to have acquired title to these territories through colonial *effectivités* and postindependence influence were rejected as inadequate to prevail over legal sovereignty based on *uti possidetis*.

The African critic of the International Court of Justice (and the Permanent Court of Arbitration) cited earlier calls the Court's decision in this case "one of the most controversial decisions reached by the Court in recent times."<sup>45</sup> That was certainly the case in Nigeria, where some sections of the country called for rejection of the decision, and even a military solution to the dispute. The Nigerian government itself called the decision "difficult to implement," but entered into a mixed commission regarding implementation, with a subcommission for boundary demarcation in 2002.<sup>46</sup>

Nigeria claimed original title to the Bokassi Peninsula based on a Treaty of Protection of 1884 between Great Britain and the Kings and Chiefs of Old Calabar. It argued that Britain did not have the right, under that treaty, to alienate their land to Germany under a subsequent 1913 treaty. While the Court found that this transfer had not been protested in the diplomatic or legal sense, the author argues that the Court ignored traditional (nondiplomatic) forms of protest.

The author also criticizes the Court for relying on a colonial treaty, rather than local developments such as *effectivités* and "historical consolidation."<sup>47</sup> Instead, the Court found that the *effectivités* presented by Nigeria were not *contra legem*, and therefore irrelevant.<sup>48</sup>

The author is particularly harsh on the Court's reliance on the British treaty with Germany, notwithstanding the previous agreement with the local rulers, commenting that this gives the impression that "there is a hierarchy of colonial treaties, and those between Western colonial powers would take precedence over treaties with native African communities and political systems."<sup>49</sup>

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<sup>44</sup> 2002 ICJ 240. See generally N. Udombana, "The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute Between Cameroon and Nigeria," *10 African Yearbook Int. Law* (2002), pp. 13-61. (The proceedings in this case were complicated by two unsuccessful efforts by Nigeria to limit its scope. The first was at the preliminary stage, when Nigeria unsuccessfully opposed inclusion of the Lake Chad areas as well as references to Nigerian activities aimed at undermining Cameroonian control of the Bokassi Peninsula. The second occurred after the judgment, when Nigeria unsuccessfully sought an interpretation to limit the effect of the judgment on such activities.)

<sup>45</sup> Odentun, *op. cit.*, p. 722.

<sup>46</sup> See *id.*, p. 723.

<sup>47</sup> *Id.*, p. 726.

<sup>48</sup> *Id.*, p. 727.

<sup>49</sup> *Id.*

*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 posseditis*. 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)*.<sup>50</sup> 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,<sup>51</sup> 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*. And, 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)*.<sup>52</sup> 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 along 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 run 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).

*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore)*.<sup>53</sup> This case involved sovereignty over three groups of rocky islands in the Strait of Malacca; the results are below.

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<sup>50</sup> 2005 ICJ 90 (July 12). See generally F. Spadi, “The International Court of Justice Judgment in the Benin-Niger Border Dispute: The Interplay of Title and ‘Effectivités’ under the *Uti Possidetis Juris* Principle,” *Leiden Journal of International Law*, 18 (2005), pp. 777–794.

<sup>51</sup> The principle of dividing a river along its deepest points, which is common in comparative law, is referred to as following the *Thalweg*.

<sup>52</sup> 1999 ICJ 1045 (December 13)

<sup>53</sup> ICJ Decision of May 23, 2008.



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)*.<sup>54</sup> 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)*.<sup>55</sup> 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.

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<sup>54</sup> Decision on Preliminary Objections, December 13, 2007.

<sup>55</sup> 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 for further demarcation, including with respect to the alignment of the boundary in outlying areas as it approached the maritime zone of another state.

## PERMANENT COURT OF ARBITRATION AND ARBITRATION GENERALLY

### Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA), located in The Hague, is an intergovernmental body with a membership of over 100 states; it was founded by treaties concluded in 1899 and 1907. The PCA has developed into an institution that plays a role in the resolution of an increasing number of arbitrations, including concerning territorial cases. PCA procedures are quite flexible, with special rules to address cases between states<sup>56</sup> and between states and nonstate actors.<sup>57</sup>

The PCA rules in turn may be modified by agreement of the parties, including by inserting model provisions. Or the parties may submit a case by special agreement, under mutually-agreed rules and procedures.

The PCA's Secretariat provides registry services and legal and administrative support to tribunals and commissions. The Permanent Court of Arbitration can assist in the selection of arbitrators, and may designate or act as appointing authority. It is also prepared to offer conciliation services.

The sources of law for a PCA arbitration<sup>58</sup> include the same ones as for the International Court of Justice under the ICJ Statute, Article 38, namely international conventions (treaties), international customs, the general principles of law recognized by civilized nations, and Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means of interpretation. Also, as in the case of the ICJ, a PCA tribunal may also proceed *ex aequo et bono*, if the parties so agree.

The PCA's former secretary-general recently wrote an article for the 100th anniversary of the 1907 treaty. He notes that the caseload of the Permanent Court of Arbitration is steadily growing, as are the services it provides in connection with arbitrations more generally. He stresses the flexibility of arbitral procedures—particularly with respect to the designation of arbitrators and the involvement of the parties to a dispute in that process—in explaining the increased recourse to arbitration of international disputes. He also argues that the PCA's service-oriented approach

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<sup>56</sup> PCA, Optional Rules for Arbitrating Disputes between Two States (The Hague, n.d.)

<sup>57</sup> PCA, Optional Rules for Arbitrating Disputes between Two Parties Only One of Which is a State (The Hague, n.d.)

<sup>58</sup> See, e.g., PCA, Optional Rules for Arbitrating Disputes between Two States, *op. cit.*

has been successful both at extending arbitration as a dispute-resolution methodology and securing its own role as a central institution in this area.<sup>59</sup>

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 Palma.** Perhaps the best-known PCA territorial arbitration was the Island of Palmas (U.S. v. Netherlands) case.<sup>60</sup> 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,<sup>61</sup> 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 a river; 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*.<sup>62</sup> 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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<sup>59</sup> 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.

<sup>60</sup> PCA, "The Island of Palmas Case (or Miangas)," Award of the Tribunal, April 4, 1928.

<sup>61</sup> PCA, "Boundaries in the Island of Timor," Award of the Tribunal, June 24, 1914.

<sup>62</sup> 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 yielded another enclave to Portugal.

scope of the dispute, in 1996.<sup>63</sup> The arbitration had been arranged following Eritrean armed seizure of some of the islands, possession of which could establish claims to maritime regions in which oil reserves were being developed. With reference to the scope of the dispute, the panel decided that the territorial dispute involved all islands concerning which conflicting claims had been made.

On the territorial claims, the panel concluded that the islands, rocks, and low-tide elevations in three groups belong to Eritrea, those in another two groups belong to Yemen, and the award of sovereignty to Yemen “entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.” Note that this panel, unlike the Abyei Boundaries Commission whose conclusions are discussed later, was careful to assign territory definitively to one party or the other, which permitted maritime boundaries to be determined and access to mineral resources assigned, as well as to respond to concern about traditional activities in the areas under dispute.

**Eritrea-Ethiopia Boundary Commission.** The Permanent Court of Arbitration served as registry for the Eritrea-Ethiopia Boundary Commission (EEBC) established under a December 2000 peace agreement between the two countries ending their ruinous border war of 1998-2000, and the arbitral proceedings were held in the Peace Palace at The Hague. The mandate of the Commission was to “delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) [between Italy and Ethiopia] and applicable international law.” The EEBC delivered its decision in April 2002;<sup>64</sup> but the next month Ethiopia submitted a “Request for Interpretation, Correction and Consultation.” In June 2002, the Commission found the request inadmissible since it found that the issues raised by Ethiopia did not involve uncertainty about the meaning of the award but rather indicated disagreement with parts of the binding decision itself.

Pursuant to its mandate, the Eritrea-Ethiopia Boundary Commission moved to establish a field office to conduct actual demarcation of the border on the ground, and in November 2002 met with the two sides to discuss conduct of the demarcation process. After a series of meetings over several months, the Commission determined in July 2003 that special arrangements had to be developed for the designation of “field liaison officers” by the parties. The arrangements had the effect that previously-designated liaison officers were terminated and newly-designated field liaison officers would be accepted by the EEBC only if they had not had any military service or responsibilities since 1989, and subject to vetting by the other party. Later that month, the EEBC adopted a schedule for the demarcation work, but by November there was a continued lack of progress in the field.

Finally, on March 13, 2006, the Eritrea-Ethiopia Boundary Commission announced that it had met again with the parties concerning the nonresumption of demarcation activities after 2003 “due to circumstances beyond the Commission’s control.” Further meetings were held with the parties, and additional statements issued about the situation, including on November 27, 2006, when the EEBC announced that it could not remain in existence indefinitely, and the parties

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<sup>63</sup> October 3, 1996; the second stage concerned maritime claims exclusively.

<sup>64</sup> U.N., *Reports of International Arbitral Awards*, Delimitation of the Border (Eritrea-Ethiopia), April 13, 2002 - November 7, 2002, Vol. XXV, pp. 83-202.

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.<sup>65</sup>

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 as “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 coordinates are invalid because they are not the product of a demarcation process recognized by international law.”<sup>66</sup>

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,<sup>67</sup> 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.”<sup>68</sup> The concrete issue was the extent to which lands 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.<sup>69</sup>

Actually, the question of the status of the Irob lands and the key Badme area of the Eritrean-Ethiopia border is very complicated. Before and after the incorporation of Eritrea into Ethiopia in the early 1950s, there was considerable to-and-fro between the local authorities in Ethiopia’s Tigre province and the Eritrean side. The Italian colonial authorities did not clearly define the boundary in this area, and administrative *effectivités* cannot be easily established. During Eritrea’s independence war, there were border skirmishes between the Eritrean Liberation Front (ELF) and the Tigre People’s Liberation Front (TPLF). The Tigre People’s Liberation Front is the military arm of the Tigrean secessionists, which had been instrumental in the fall of the Mengistu regime (“the Dergue”), and later became part of the ruling coalition.<sup>70</sup>

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<sup>65</sup> See *Report of the Secretary-General on Ethiopia and Eritrea*, U.N. Doc. S/2008/40 (January 23, 2008), pp. 4-6.

<sup>66</sup> *Id.*, p. 4.

<sup>67</sup> Odentun, *op. cit.*, p. 716.

<sup>68</sup> For a wide-ranging but brief discussion of the effect of the boundaries established in Africa during the colonial period, see Ali A. Mazrui, “The Bondage of Boundaries,” *IBRU Boundary and Security Bulletin*, April 1994, pp. 60-63.

<sup>69</sup> *Id.*, n. 30

<sup>70</sup> See Jean-Louis Péninou, “The Ethiopian-Eritrean Border Conflict,” *IBRU Boundary and Security Bulletin*, Summer 1998, pp. 46-50. Péninou goes on to say that this area of the border had originally been inhabited by the Kunama people, and “Badme” was their word for a village in an area that cannot be definitively located. Subsequently there were encroachments by Eritrean and Tigrean agriculturalists, and the Kunama influence

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.”<sup>71</sup>

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.** The final territorial boundary case published by the Permanent Court of Arbitration thus far, in summary form, concerned activities (*viz.*, reclamation, or land creation) by Singapore around islets in the Straits of Johor near Malaysia. The PCA acted as registry in this case, which involved issues similar to the ICJ case related to geographical features in the Strait of Malacca (see above). The case was submitted in 2003; but the parties settled their dispute in 2005, and the tribunal issued an Award on Agreed Terms the same year.<sup>72</sup>

The proceedings in this matter were complicated somewhat by the fact that Malaysia, subsequent to submitting to arbitration—which is the default method of settling maritime boundary disputes under the Law of the Sea (LOS) Convention<sup>73</sup>—petitioned the International Tribunal for the Law of the Sea for provisional measures of relief. The tribunal granted limited measures, including

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diminished. After 1991, the TPLF had primary influence there and sought to establish their right to all lands within the front line with the ELF, an area that included a number of Eritrean villages. According to Péninou, the Coptic Christian Asimba people within Ethiopia are closely related to the Muslim Irobs in Eritrea, and both groups were active in the earlier fighting in the Badme area. A similar situation occurred in another border area, around Bada, where Afars from both sides were involved in fighting between the ELF and TPLF.)

<sup>71</sup> EEBC, “Observations” (March 21, 2003) [[www.pca-cpa.org/PDF/Obs.EEBC.pdf](http://www.pca-cpa.org/PDF/Obs.EEBC.pdf)]

<sup>72</sup> PCA, Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Award on Agreed Terms, September 1, 2005. The award did not include the terms of the settlement.

<sup>73</sup> LOS Convention, Article 287.3.

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.<sup>74</sup> While the Permanent Court of Arbitration has often played a role (e.g., by 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.<sup>75</sup> 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),<sup>76</sup> Rann of Kutch (India/Pakistan), and Beagle Channel (Argentina/Chile) cases.<sup>77</sup> The ICJ decision in the Nicaragua v. Honduras case, discussed earlier, also proceeded on the basis of an earlier arbitration by the King of Spain.

A few technical issues should be discussed in connection with arbitration more generally.

First are the sources of law or policy to guide the arbitrator. It has also been noted that the principle of *ex aequo et bono* can also be applied, with consent of the parties, in arbitral proceedings, enabling the arbitrator to make direct use of equitable considerations in reaching a decision on the merits. Short of this, arbitrators also often consider equitable factors, but do so *infra legem*, only to guide the application and interpretation of the law in a particular case. Arbitrators have only the power granted to them through the terms of reference agreed by the parties; however, so arbitrators must be extremely careful to fulfill their mandate and not to

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<sup>74</sup> See generally K. Böckstiegel, “The Role of Arbitration in Today’s Challenges to the World Community and to International Law,” *Arbitration International*, 22:2, pp. 165-177 (2006).

<sup>75</sup> *Id.* See generally C. Drahozal & C. Gibson, *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration* (Oxford University Press, 2007), p. 452.

<sup>76</sup> U.N., Reports of International Arbitral Awards, “Case Concerning the Location of Boundary Markers in Taba between Egypt and Israel” (September 29, 1988), Vol. XX, pp. 1-118.

<sup>77</sup> *Id.*, p. 170.

exceed it (i.e., by proceeding *ultra vires*, or in excess of their powers under the referral). Several instances are referred to in this paper in which questions were raised concerning whether the determinations of arbitrators were consistent with their mandate.

On a related point, arbitrators are also sometimes instructed to proceed as *amiables compositeurs*, literally, as “friendly composers.” Such clauses “permit the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law,” and to “disregard legal technicalities and strict constructions which they would be required to apply in their decisions if the arbitration agreement contained no such clause.” The resulting awards are frequently based on equity or on the basis of general law (in commercial disputes, the *lex mercatoria*, or Law Merchant).<sup>78</sup>

A second issue is the potential enforcement of international arbitral awards through the courts. Arbitral awards are not self-enforcing, but can be subject to enforcement orders by international judicial bodies such as the International Court of Justice or regional courts. There also appears to be a potential for enforcing international arbitral awards, even those of a public law or policy-related nature, through national courts, under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by 142 states to date.<sup>79</sup> While primarily addressed toward commercial arbitration, the language of the convention does not exclude interstate or other international public arbitrations from coverage. So there is a potential for enforcement of such arbitral decisions by national courts, particularly in case the national government fails to respect them.

## OTHER DISPUTE-RESOLUTION METHODS

### In General

As has been seen, in arbitration the parties to a dispute not only agree to submit their dispute for third-party resolution but also to accept the resulting award, except in case of intrinsic fault such as blatant error or *ultra vires* actions, or extrinsic factors such as fraud or undue influence. Other approaches to alternate dispute resolution (ADR) focus more on process than result, and aim to facilitate agreement between the parties themselves.

In this paper, “facilitation” will be used as the general term for ADR methods other than arbitration. It will also be used as the residual term for approaches that are not within the scope of another term. A variety of other terms must also be introduced, in view of the wide variety of means of facilitation. These include the following:

- “Mediation” has the core meaning of a process by which a third party, with the consent of the parties to a dispute, takes an active role as an intermediary in bringing them to

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<sup>78</sup> William Tetley, McGill Law Faculty (Montreal, Canada), “Glossary of Conflict of Laws” (available online at [www.mcgill.ca/maritimelaw/glossaries/conflictlaws](http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws)).

<sup>79</sup> Entered into force, June 7, 1959. The treaty was concluded under U.N. auspices before the formation of the U.N. Conference on International Trade Law, but it currently falls within UNCITRAL’s mandate.



agreement.<sup>80</sup> 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.<sup>81</sup> A conciliator is expected to remain neutral, but may communicate proposals between the parties.<sup>82</sup> 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.<sup>83</sup> 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,<sup>84</sup> but may also work with each of them separately to develop proposals for its resolution.<sup>85</sup>

- “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 relevant international mandate. Such officials could include the U.N. secretary-general or the secretaries-general of regional international organizations. With respect to a specific technical dispute, good offices could also be offered by senior officials of international organizations with a relevant specialized mandate, such as the secretaries-general of specialized U.N. agencies.

In any event, it has been observed that facilitation of various kinds tends to diminish the focus on legal considerations in favor of approaching the issues in dispute in a way that can optimize the result for the parties. While adjudication can be a “zero-sum game,” facilitated solutions are not only less risky to the parties but may also be more durable. Even with respect to mediation, where a formal recommendation is made to the parties, the stress is still more on their equities and how best to adjust them, rather than legalities. A mediator, as opposed to an adjudicator,

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<sup>80</sup> See Carl D. Schneider, “Mediation/Conciliation,” online at [www.mediationmatters.com](http://www.mediationmatters.com); David C. Verge, Chartered Arbitrator, Mediator, and Conciliator, online at [www.goodbyecourts.com](http://www.goodbyecourts.com).

<sup>81</sup> Law Library, *American Law and Legal Information: American Law Encyclopedia*, Vol. 4, description of U.S. Federal Mediation and Conciliation Service, available online at <http://jrank.org>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Schneider, *op. cit.*

<sup>85</sup> *American Law Encyclopedia*, Vol. 4, *op. cit.*

tends to use different skills, focusing on how matters could be resolved through negotiation, if the parties were able to do so directly, rather than adjudication.<sup>86</sup>

## Ecuador-Peru Conflict

The conclusion of the Brasilia Agreements in 1998 resolved a long-running and often violent conflict between Ecuador and Peru regarding their border in the Amazonian region. Since 1884, the conflict had resulted in 34 bloody military confrontations. This case is particularly instructive in terms of territorial conflict resolution since it contains several institutional as well as practical elements, including: framework for conciliation by third states (“guarantors”) and their representatives; arbitration of remaining issues by the guarantors; innovative border arrangements; conclusion of a Treaty of Trade and Navigation addressing additional issues; and resolution of a water supply issue.<sup>87</sup>

Following a 1941 border war between the two countries, the framework for resolution of this dispute was established under a 1942 treaty—the Protocol of Peace, Friendship, and Boundaries (“Rio Protocol”).<sup>88</sup> This treaty was entered into by the disputants as well as four “friendly powers”—Argentina, Brazil, Chile, and the United States—acting as guarantors. The Rio Protocol called for avoidance of conflict;<sup>89</sup> withdrawal of military forces from the disputed area;<sup>90</sup> and involvement by the guarantors, including their assistance in resolving “doubt or disagreement” in execution of the agreement,<sup>91</sup> until such time as the borders were definitively demarcated.<sup>92</sup> The protocol also provided a basis for reciprocal concessions to be made between the parties with respect to adjusting the demarcated boundary to reflect geographical realities,<sup>93</sup> and for Ecuador to enjoy concessions for navigation on the Amazon River and its northern tributaries, in addition to any concessions that might be agreed under a Treaty of Commerce and Navigation designed to facilitate “free and untaxed navigation” of these rivers.<sup>94</sup>

Initial implementation of the Rio Protocol went well, with the parties benefiting from Brazilian conciliation on technical issues, which arose in connection with the activities of a mixed border commission. In 1946, however, the U.S. Army completed an aerial survey of the area and

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<sup>86</sup> See generally T. Wälde, “Methods for Settling Boundary Disputes; Escaping from the Fetters of Zero-Sum Outcomes,” *Transnational Dispute Mgmt*, 1:1 (February 2004).

<sup>87</sup> See generally Beth A. Simmons, “Territorial Disputes and Their Resolution: The Case of Ecuador and Peru,” U.S. Institute of Peace, *Peaceworks*, No. 27 (Washington, April 1999); Ronald Bruce St. John, “Ecuador-Peru Endgame,” *IBRU Boundary & Security Bulletin*, Winter 1998-99, pp. 79-85; Bradford L. Thomas, “Ecuador and Peru Discuss Border Impasses,” *IBRU Boundary & Security Bulletin*, Summer 1997, pp. 69-71; R. B. St. John, “Conflict in the Cordillera del Condór: The Ecuador-Peru Dispute,” *IBRU Boundary & Security Bulletin*, Spring 1996, pp. 78-85. These works will not be individually cited in the account of the case given here, except in connection with particular perspectives by the individual authors.

<sup>88</sup> The Rio Protocol—Peace, Friendship, and Boundaries between Peru and Ecuador; Protocol Between Peru and Ecuador (Signed also by representatives of the United States of America, Argentina, Brazil, and Chile); Signed at Rio de Janeiro, January 29, 1942; Approved by the Congresses of Ecuador and Peru, February 26, 1942.

<sup>89</sup> *Id.*, Article I.

<sup>90</sup> *Id.*, Articles II & IV.

<sup>91</sup> *Id.*, Article VII.

<sup>92</sup> *Id.*, Article V.

<sup>93</sup> *Id.*, Article IX.

<sup>94</sup> *Id.*, Article VI.

discovered a flaw in the general delineation of the border in one area as set forth in the protocol.<sup>95</sup> In this area the border was supposed to be divided along the limits of the watersheds of two rivers. A conciliator had already secured the agreement of the parties that the border would follow a ridgeline (the Cordillera del Condór) that was assumed to divide them. It turned out, however, that a third river actually existed in between.<sup>96</sup>

The Ecuadorian government declared that the Rio Protocol could not be implemented in this section of the frontier and reinstated its broader territorial claims, protesting all Peruvian activities in the region. Ecuador also reasserted its claims to sovereign (as opposed to concessionary) navigational access to the Amazon River, which could be reached through the Marañón River, which connects to one of the rivers (the Santiago) in the boundary sector subject to renewed dispute. While Ecuador formally sought sovereign right of access to the Amazon and even navigation to the Atlantic Ocean, in fact, rapids on the Marañón River make direct navigation to the Amazon impossible.

Ecuador's immediate objective of securing greater access to the northern tributaries, however, was bound to be strategically threatening to Peru. The latter rejected Ecuador's navigational claim, insisted that the Rio Protocol and its conciliation process remained applicable, denied the existence of any new border issue, and opposed any review of the already-delineated boundary.

The disagreement continued for decades, preventing successful conclusion of the boundary demarcation process. By 1960, Ecuador had declared the Rio Protocol invalid, at which time the four guarantors sent identical statements to the parties emphasizing the sanctity of the treaty. In 1977, U.S. President Jimmy Carter met separately with the presidents of Ecuador and Peru, hoping to make progress on the issue. Perhaps reflecting the established policy of the U.S. State Department, President Carter expressed the hope that the dispute could be resolved in a way that would give Ecuador access to the Marañón River. This was criticized in Peru, but the U.S. government restated its position that the Rio Protocol was still valid and that the process established under the protocol should be followed.

In January 1981, there were military skirmishes when Ecuador attempted to establish outposts on the eastern side of the Cordillera del Condór. Although a ceasefire was reached between the parties, U.S. Secretary of State Alexander Haig offered Ecuador the good offices of the United States in resolving the dispute. When Peru sought clarification, the U.S. government once again indicated that it continued to consider the Rio Protocol valid and that the United States would work within its terms. In 1991, Ecuadorian forces infiltrated the border in an area near the junction of the Santiago and another river. Armed conflict was avoided only after the two sides agreed to create a common security zone in the region and for both to withdraw two kilometers back from existing positions.

After the 1991 incident, Ecuador proposed Papal arbitration of the continuing boundary dispute. Peru rejected the proposal, and instead offered a Treaty of Commerce and Navigation, which could include port facilities for Ecuador in the Amazon basin, as well as joint economic and

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<sup>95</sup> *Id.*, Article VIII.

<sup>96</sup> *Id.*, Article VIII.B. 1. The Cenepa River was discovered to flow between the Zamora and Santiago Rivers.

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 in effect the existence of dispute.<sup>97</sup> The key issues in the subsequent talks, which began in 1997, remained the location of the border in the Cordillera del Condór sector and the right of navigation for Ecuador in the border region more generally because it is necessary for Ecuadorian vessels to pass through Peruvian territory while traveling between locations in Ecuador.

The Brasilia Agreements of 1998, which provide the basis for a final resolution of the Ecuador/Peru border conflict, include: a Presidential Act signed by the presidents of the two countries and countersigned by the presidents of Argentina, Brazil, and Chile, as well as a personal representative of the U.S. President; a Treaty of Trade and Navigation; and a Treaty of Frontier Integration, including the delineation of the land border and establishment of a Binational Commission on Measures of Mutual Confidence and Security.

The Agreements were prepared by four commissions agreed to by the parties at a meeting in Rio de Janeiro early that year. The commissions each focused on a single component of the final set of agreements, but negotiations proceeded slowly until U.S. President Bill Clinton met with President Mahuad of Ecuador and President Fujimori of Peru later in the year. That meeting resulted in the parties’ accepting arbitration of the remaining items in dispute by the four guarantor states. With respect to the basic issue in question, the decision of the guarantors was that the border in the unmarked sector would follow the summit of the Cordillera del Condór, as had originally been decided through conciliation.

Other elements of the decision were novel and could well serve as models for other border resolution efforts:

1. The entire area in dispute was devoted to environmental protection, with national parks being established by the respective parties on each side of their common border. The two national parks would both bear the same name, but the parties did not agree to the establishment of a single binational park.
2. Native communities in the area would enjoy free passage between the parks on both sides of the border.

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<sup>97</sup> See B.L. Thomas, *op. cit.*, p. 71.

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-owned 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 further 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.<sup>98</sup> 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.

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<sup>98</sup> A collection of documents, including the original arbitral award (1977), exchanges of diplomatic notes, communications by the parties to the Papacy, which subsequently acted as mediator/conciliator, the acts establishing a system of negotiations between the parties, the Act of Mediation (1979) requesting involvement by the Holy See, and the text of the Treaty of Peace and Friendship (1984) between the two countries that resolved the dispute, are available at U.N., *Reports of International Arbitral Awards*, Vol. XXI, pp.53-264 (2006). The description here of the historical and legal basis for the dispute are based on that contained in the arbitral award.

In a later treaty<sup>99</sup> (1855), the sides restated that their borders were to be based on colonial practices, as established as of the year 1810. They also agreed “to defer the questions that have arisen or *may arise* regarding this matter in order to discuss them later ... and in case of not being able to reach a complete agreement, to submit the decision to arbitration of a friendly nation.”<sup>100</sup>

Subsequently, in 1881, the parties entered into a more comprehensive border agreement.<sup>101</sup> With respect to the large island of Tierra del Fuego, the border between the two countries was established as following a certain meridian (line of longitude) all the way from the area of the Straits of Magellan in the north to the shore of the Beagle Channel in the south.<sup>102</sup> The rule assigned all the islands south of Beagle Channel to Chile, but was less clear with respect to other islands.<sup>103</sup>

The 1881 treaty also provided for arbitration of all disputes between the two countries, except that the specified borders would remain immutable.<sup>104</sup> The treaty also provided for the demilitarization of the Straits of Magellan, and for freedom of passage for ships of all nations.<sup>105</sup>

By the 1970s the area described in the clause concerning the southern islands had become of greater economic, political, and strategic importance. The fisheries of the southern Atlantic and Pacific Oceans, as well as the adjacent Southern Ocean, had become subject to greater exploitation by national fishing interests as well as blue water fleets. The Third U.N. Conference on the Law of the Sea convened in 1973, and would result in an expansion of the jurisdiction of coastal states over marine resources, including fisheries and oil and gas. Technology for recovering hydrocarbon resources from the continental shelf in polar and in deep-water areas was advancing, including the development of deep-sea mining techniques.

The Third U.N. Conference on the Law of the Sea would consider the rules for navigation through various zones of maritime jurisdiction, including territorial waters and international straits. It would also result in extension of claims by coastal states to their continental shelves to deeper and farther-offshore areas. In addition, the Antarctic Treaty (1959) had only “frozen,” but not resolved, territorial claims to the southern continent and its islands; prior to that several claimants—including countries, like Argentina and Chile, with coasts at the southern tips of different continents—had asserted claims to “pie slices” of Antarctic territory intersecting at the

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<sup>99</sup> Treaty of Peace, Friendship, Commerce, and Navigation (1855).

<sup>100</sup> *Id.*, Article 39.

<sup>101</sup> Treaty on Boundaries (1881).

<sup>102</sup> *Id.*, Article III.

<sup>103</sup> *Id.*, “As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.”

<sup>104</sup> *Id.*, Article VI: “Any question which may unhappily arise between the two countries, be it on account of the present Arrangement, or be it from any other cause whatsoever, shall be submitted to the decision of a friendly Power; but, in any case, the boundary specified in the present Agreement will remain as the immovable one between the two countries.”

<sup>105</sup> *Id.*, Article V: “The Straits of Magellan shall be neutralized for ever, and free navigation assured to the flags of all nations. In order to assure this freedom and neutrality, no fortifications or military defenses shall be constructed on the coasts that might be contrary to this purpose.”

South Pole. In the case of the islands in the Beagle Channel area, the alignment of the relevant “slice” would be affected by their ownership, which could ultimately determine sovereignty over one of the most interesting areas of the Antarctic continent, West Antarctica including the Antarctic Peninsula. Making the strategic issues more prominent was the fact that by this time both Argentina and Chile had come under military governments.

Under the Treaty of Santiago (1902), Argentina and Chile agreed that the government of the United Kingdom would conduct the arbitration of any dispute under the 1881 treaty. The U.K. government would form a panel, but the role of the arbitrator *ex officio*, the Queen, was limited to accepting or rejecting the award made by the U.K. government’s appointees.

In the event, the May 1977 award of the panel, which was accepted by the U.K. government, largely favored Chile and was rejected by the Argentines the following January. The main rationale for the Argentine action was that the panel had misconstrued and unfairly treated Argentina’s arguments; applied different theories in different areas; nullified parts of the 1881 treaty; and, in particular, had considered matters outside its terms of reference, examining historical evidence regarding other border areas and making decisions about the relative equities of the assignments of territory to Argentina and Chile overall. Chile responded to the Argentine action by emphasizing the legally-binding nature of the arbitration, and indicating that it might be compelled to invoke mandatory adjudication under the 1972 Treaty on the Judicial Settlement of Disputes.

Soon, however, the parties to the dispute, recognizing the tense situation and potential for conflict, recommenced negotiations in an effort to proceed more constructively. The Act of Puerto Montt (1978) between the Argentine and Chilean presidents, Generals Videla and Pinochet respectively, established a system of negotiations between the parties. In this agreement, they committed themselves to direct negotiations, including with respect to the southern zone as a whole; provided that the conduct of negotiations would in no way modify the existing positions of the parties on the issues; instructed the authorities in their southern zones to avoid “actions or attitudes inconsistent with the spirit of peaceful coexistence;” and agreed to a three-phase process. This process included: (phase one) the formation of a joint commission on interim conditions of harmony and equity, and avoidance of applying special rules of boundary delimitation or creating facts to support future claims or give raise to friction or difficulties, which would report within 45 days; (phase two) a second commission for definitive delimitation of the border and cooperative measures—including economic, natural resources, and environmental protection—on the Straits of Magellan, and on drawing of straight baselines for maritime jurisdiction, which would report six months later; and (phase three) the submission of proposals to their respective governments, provided that such proposals would not including anything affecting the status of Antarctica.

When the unassisted negotiation process encountered difficulties, the parties—in response to a message from Pope John Paul II the previous month—concluded the Act of Montevideo of January 1979 requesting intervention and mediation in their dispute by the Holy See. The pope had expressed a desire to send a special representative, Cardinal Antonio Samoré, to the two states. The Papal Proposal in the dispute was communicated in December 1980; in it the pope called on the parties to make an “audacious gesture in choosing peace;” to engage in “peace

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.<sup>106</sup> With respect to dispute resolution, the treaty provides for the use of “means of peaceful settlement chosen by mutual agreement.”<sup>107</sup> If no agreement is reached, then conciliation is provided for, as described in Annex 1.<sup>108</sup> If conciliation is unsuccessful, then arbitration, also described in Annex 1, is mandatory.<sup>109</sup>

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 described; the 200 nautical mile exclusive economic zones of the two states would extend east for Argentina and west for Chile of the established border.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> The success of the conciliation approach that led to the conclusion of the Treaty of Peace and Friendship, together with its detailed contents, 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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<sup>106</sup> Signed at the Vatican, November 29, 1984.

<sup>107</sup> Joint Declaration (1984), Article 4.

<sup>108</sup> *Id.*, Article 5 and Annex 1, Chap. I.

<sup>109</sup> *Id.*, Article 7 and Annex 1, Chap. II.

<sup>110</sup> *Id.*, Article 8.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, Article 10.

<sup>113</sup> *Id.*, Article 13 & Annex 2.



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 navigational rules adopted through the U.N. Convention on the Law of the Sea could complicate navigation in this 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 a 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 navigational 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, 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.<sup>114</sup>
- *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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<sup>114</sup> U.N. News Center, "Under Intensive U.N. Mediation, Nigeria and Cameroon Sign Accord Ending Border Dispute," June 12, 2006.

## 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.<sup>115</sup>

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.

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<sup>115</sup> 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 or correctness. Implementation of the award was guaranteed instead by the presence of a large international military force, the Stabilization Force, (SFOR) in country, as well as determined political and administrative supervision by the Office of the High Representative.

The legal issues concerning whether the final award was *ultra vires* are highlighted by the explanation of the arbitrator himself. Going beyond the characterization of the Brcko area as a condominium, Mr. Owen commented that “the territories of the two entities will overlap throughout this new district although both must surrender control to the new district government. Thus, all territories within Bosnia and Herzegovina will continue to be assigned to one entity, or the other, or both.”<sup>116</sup>

As in other condominiums, where legal rights or systems overlap or are commingled, there had to be a determination of what laws and institutions would apply within the subject area.<sup>117</sup> Mr. Owen alluded to this issue when he commented, “For the time being, Federation law and Republika Srpska law will continue to apply in the district as before. Any inconsistencies will be eliminated under supervision.” On August 18, 1999 the arbitrator issued an annex to the final award addressing a number of such matters and outlining how district institutions should be organized.

Regardless of the legal issues, it must be said that the indefinite joint administration of Brcko by municipalities, under the constitutional authority of the Bosnian state, has prevented further

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<sup>116</sup> Statement by Roberts B. Owen, presiding arbitrator for the Brcko Arbitral Tribunal (Sarajevo, March 5, 1999).

<sup>117</sup> For example, in the New Hebrides Islands (now Vanuatu) British and French colonial authorities operated a condominium, sometimes jokingly referred to as a “pandemonium.” Foreigners entering the islands had a short period of time to declare which legal system they wished to be subject to. Most are said to have selected the French.

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 rising internal tensions between the entities within Bosnia and Herzegovina,<sup>118</sup> the federal authorities have enacted the first amendment to their postconflict constitution, incorporating the geographical and governance structures of the Brcko district.<sup>119</sup>

### 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.<sup>120</sup> 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 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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<sup>118</sup> See *Economist*, "Bosnia's Future: A Tearing Sound," April 2, 2009.

<sup>119</sup> Office of the High Representative (OHR), Brcko, Press Release: "Brcko District Added to the BiH Constitution," March 26, 2009.

<sup>120</sup> See generally Mladen Klemenčić & Clive Schofield, "Mostar: Make or Break for the Federation?," *IBRU Boundary and Security Bulletin*, Summer 1996, pp. 72-76.

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.<sup>121</sup>

## 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 region, 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:<sup>122</sup> 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. More recently, during the civil war between northern and southern Sudan, the Arab 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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<sup>121</sup> 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.

<sup>122</sup> See U.S. Institute of Peace, “Peace Briefing: 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;
- North of 10 degrees 10 minutes north latitude, through the Goz up to and including Tebeldia (north of latitude 10°35' N) the Ngok and Misseriya share secondary rights;
- The two parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them and locate the northern boundary in a straight line at approximately 10 degrees 22 minutes 30 seconds north latitude; and the Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary.

In its report, the Abyei Boundaries Commission had also explained the detailed historical and social factors that led them to this result.

Note that the decision had several elements and bases: The Ngok were said to have a “legitimate dominant claim,” dating back to 1905, up to the parallel at 10 degrees 10 minutes north latitude. From there to the parallel at 10 degrees 35 minutes north latitude, the Misseriya and Ngok were found to have equal, commingled, secondary rights, also dating back to 1905. So the commission drew the northern boundary of Abyei halfway between these parallels, at 10 degrees 22 minutes 30 seconds north latitude.

Whatever the government of Sudan’s reasons for rejecting the award and preventing publication of the report, the award’s formulation posed both legal and practical difficulties for successful implementation. The mandate of the Abyei Boundaries Commission appeared to call for a clear delineation of the historic boundaries of the land occupied or controlled by the Ngok Dinka chiefdoms based mainly on legal factors, notably the transfer of jurisdiction over the nine Ngok Dinka chiefdoms from one province to another in 1905. Since the commission was tasked with defining a border, and due to the lack of detailed and comprehensive British condominium records on Abyei in and preceding 1905, the commission evaluated a variety of written, map, and oral history evidence and applied equitable principles to draw the northern boundary of Abyei in an area of historically shared usage by the Ngok Dinka and Misseriya peoples.

Thus the Abyei Boundaries Commission awarded rights in the entire shared area, both north and south of the halfway point, to both population groups based on their established uses of the shared territory. In order to delineate a more definite boundary, the commission might have filled the gaps in the historical record by reference to the traditional uses of the area by the two groups, applying equitable considerations *infra legem*. Or it could have made a determination of the boundary while retaining rights for traditional users, under the approach exemplified in the Red Sea Islands arbitration (see above). But the commission instead concluded that a definite boundary could not be determined, so there should be shared rights within a belt of territory.

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 from the standpoint of equity. No doubt the historical record was imperfect, patterns of traditional use were poorly defined, and both indigenous societies could benefit from continuation 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.<sup>123</sup> This, in combination with ethnic and religious divergences, has resulted in greater conflict between different groups and displacement of traditional settlements.

But the question put to the Abyei Boundaries Commission by the parties to the comprehensive peace agreement actually were posed in terms of other issues. Their intent was to have a division of the territory of northern and southern Sudan. While there were political reasons as well, the underlying issue (so to speak) regarding the location of Abyei's boundaries involved ownership of mineral, especially hydrocarbon, resources. While the other social and historical factors addressed by the commission might have been given due consideration (*infra legem*) in delineating the boundary, their assigned task was to determine definite boundaries of Abyei, which would allow eventual settlement of the boundary between the north and the south in connection with implementation of the peace agreement.

Perhaps, in retrospect, it would have been better to separate the social and historical issues from the resource claims prior to beginning the arbitration process. For example, the parties could have separated the question of boundary demarcation from division of the mineral resources. They could have attempted to negotiate the mineral issues directly, for example, by attempting to conclude a joint development agreement (see relevant section below), and assign only the territorial boundary questions *per se* be referred to the arbitrators. Or they could have tried to negotiate all the issues together or, failing that, referred all the questions to arbitration based on law and equity (*ex aequo et bono*)

## Abyei Arbitration

More recently, the parties once again agreed to arbitrate their dispute over the findings of the commission. The parties formally concluded a new arbitration agreement,<sup>124</sup> under which arbitration was to be conducted under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, except as modified by the parties, with the PCA providing registry and administrative support services.<sup>125</sup>

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<sup>123</sup> See M. Turner and P. Hiernaux, "Changing Access to Labor, Pastures, and Knowledge: The Extensification of Grazing Management in Sudano-Sahelian West Africa," *Human Ecology*, 36:1 (February 2008); T. Bassett & M. Turner, "Sudden Shift or Migratory Drift? FulBe Herd Movements to the Sudano-Guinean Region of West Africa," *Id.*, 35:1 (February 2007).

<sup>124</sup> Arbitration Agreement between the government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (Khartoum, July 7, 2008).

<sup>125</sup> PCA Announcement: "Government of Sudan v. Sudanese People's Liberation Movement/Army (Abyei Arbitration)," The Hague, July 11, 2008.



The U.N. secretary-general applauded commencement of this arbitration.<sup>126</sup> 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 occurred in the region between April and June 2008. This violence resulted in 89 fatalities during one week in May, the displacement of more than 50,000 civilians, and the destruction of most parts of Abyei town. In addition, there was considerable organized fighting between regular military forces (the Sudanese Armed Forces and the SPLA) and also involving irregular forces (including Misseriya and other tribesmen) sometimes supported by local popular defense force elements.<sup>127</sup> Since then, the violence in Abyei has continued and grown more complex, including additional intertribal conflicts which may be stirred up by interests outside the region.

The mandate of the Abyei Arbitration Tribunal included two main tasks. The first task was to answer the question whether the ABC arbiters had exceeded the scope of their mandate under the Abyei Protocol and related documents. If it found that the previous arbiters (“experts”) had not exceeded their mandate, the new tribunal would be obliged to make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report. Or, if the new tribunal found that the experts had exceeded their mandate, the tribunal would be required to make a declaration to that effect, and proceed to the second task. In that event, the tribunal was mandated to define (i.e., delimit) on a map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on submissions by the parties.

**Award.** The award of the Abyei Arbitration was announced in July 2009.<sup>128</sup> The five-member tribunal, with one arbiter dissenting, interpreted the question of whether the ABC experts had exceeded their mandate as applying to each specific boundary determination that they had made. Each such determination would be assessed not with respect to its correctness but only with regard to whether there was a “manifest breach” of the mandate. Such a conclusion could be based on a conclusion that a determination was unsupported by sufficient reasons, or if the reasoning was incoherent, contradictory or frivolous.

Going to the interpretation of their mandate by the ABC experts, the tribunal accepted that adopting a “tribal” approach to resolving boundary issues was within the scope of their mandate. Adopting such an approach was justified, in the view of the tribunal, as within the literal meaning of the mandate as formulated; related to the function of the ABC exercise within the CPA context (establishing the area within which the population would be asked to decide by referendum whether to be associated with North or South Sudan); in line with relevant authorities such as the CPA and the history of the Abyei Protocol; and “reasonable in light of the historic facts of the 1905 [territorial] transfer.” The latter reflected uncertainty concerning the

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<sup>126</sup> U.N. Security Council, “Report of the Secretary-General on the Sudan,” U.N. Doc. S/2008/485 (July 23, 2008), p. 5.

<sup>127</sup> *Id.*, pp. 1 and 4-6.

<sup>128</sup> *In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 Of The Arbitration Agreement between the Government of Sudan and the Sudan People’s Liberation Movement/Army on Delimiting Abyei Area, and the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is A State, between the Government Of Sudan and the Sudan People’s Liberation Movement/Army, Final Award*; Permanent Court of Arbitration, Registry; The Peace Palace, The Hague (22 July 2009), 270 pp. The award is summarized in PCA Press Release, “Abyei Arbitration: Final Award Rendered” (The Hague, 22 July 2009), 12 pp.

defined provincial boundaries, limited administrative control of the area, sketchy knowledge of the extent of Ngok Dinka territorial use, and the 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<sup>129</sup>—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 anachronistic evidence could result in definite boundaries being established along these meridians, however, since they were only approximations of the extent of human settlements and locations of important geographic 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 reflects that under international law traditional rights are unaffected by territorial delimitation or boundary changes.

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<sup>129</sup> P.P. Howell, a British district commissioner and anthropologist. In his “Notes on the Ngork Dinka of Western Kordofan” (1951) 32 SUDAN NOTES AND RECORDS 239, p. 242, Howell stated: “The Ngork Dinka occupy the area between approximately Long. 27°50' and Long. 29° on the Bahr el Arab [river system], extending northwards along the main watercourses ...”.

**Dissent.** The dissenting arbiter,<sup>130</sup> 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 overall. 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 under the earlier conclusions of the ABC. Under the tribunal award, the territory of the Abyei area would include some 10,460 square kilometers (km<sup>2</sup>) overall. The loss of the areas to the north of 10 degrees 10 minutes North latitude would total some 18,559 km<sup>2</sup> between that latitude and 10 degrees 20 minutes 30 seconds N, and some 25,293 km<sup>2</sup> between the latter and latitude 10 degrees 35 minutes N—both of which would have been shared by Abyei based on traditional use of these areas. Thus the overall territory of the Abyei area or subject to claims on behalf of its inhabitants would be reduced to approximately one-quarter of the result reached by the ABC.

In addition, two other large parcels would be lost to the east and west; and the remaining Abyei area (aside from that within the more irregular southern boundary) would have a strange, geometric shape, including a rectangular block of territory protruding northward into Kordofan province.<sup>131</sup> The reassignment of territory in the East would result in control of a current Chinese-operated oil field and other potential fields being shifted to Northern Sudan, and the hydrocarbon development potential of the remaining Abyei area is not yet established.<sup>132</sup> Notwithstanding these factors, the reactions of both the GoS and SPLM/A after announcement of the award were positive.<sup>133</sup> Nonetheless a high level of tension remains in the area, and the situation threatens to explode as the date of the Abyei referendum continues to approach.

The Abyei arbitrations illustrate the difficulty of legally determining borders in situations in which detailed historical and geographic records largely do not exist. In such cases, only equitable principles can be applied to fill in the gaps in the legal chain of ownership. While parties to border disputes are seldom willing to permit arbitrators to make an award *ex aequo et bono*, but if not they should address the issue of to what extent equitable principles may be applied *infra legem*. When arbitrators doubt whether their mandate enables them to reach a

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<sup>130</sup> Judge Awn Shawkat Al-Khasawneh, who was and is a judge of the ICJ

<sup>131</sup> These points are best appreciated by examining the "Comparative Map of the Abyei Area" published by the Abyei Arbitration tribunal.

<sup>132</sup> J. Crook, "Abyei Arbitration – Final Award," American Society of International Law (ASIL), ASIL Insight, Vol. 13, Issue 15 (16 September 2009)

<sup>133</sup> *Id.*

justified award in the absence of such authority, it is highly recommended that they should request further instructions from the parties.<sup>134</sup>

## 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 during the 20th century full-scale conflicts were relatively infrequent. Some of the factors to which these trends have been attributed include: relative isolation from great power competition evident in other parts of the world; regular recourse to dispute resolution mechanisms such as arbitration; the existence of regional institutions to preserve the peace; and involvement by the United States. While these factors are positive, they can also create a moral hazard that states will push their claims too far, and end up in conflict.<sup>135</sup>

The territorial disputes among Bolivia, Chile, and Peru are particularly convoluted, both in terms of their narrative history and the various legal and other arrangements that were made during the period of conflict and thereafter. The following account is compiled from various publicly-available sources.<sup>136</sup>

Due to its isolated and desolate nature, the boundaries of individual territories in the coastal Atacama Desert had not been clearly determined by the colonial authorities. The first boundary treaty was agreed by Chile and Bolivia in 1866, delineating the boundary as lying along the parallel at 24 degrees north latitude, but with the two countries sharing the tax revenues on mineral exports from the area between 23 degrees and 25 degrees north latitude. A second treaty in 1874 superseded that and entitled Bolivia to collect full tax revenue between the 24th and 25th parallels, but fixed the tax rates on Chilean companies for 25 years.

Increased interest in the Atacama resulted from the discovery there of substantial mineral resources, mainly nitrates (guano and saltpeter) and copper. Guano was used as fertilizer, and saltpeter was used as a component of gunpowder. Chilean companies were increasingly moving into these extractive activities, with the support of foreign interests, notably the British.

In 1878, the Bolivian government decreed a tax increase on the companies, retroactive to 1874. The leading Chilean company refused to pay, the Bolivians threatened to confiscate its property, and Chile sent a warship to the area. Later that year, the Bolivians announced they would seize the company's assets and auction them early the following year. Chile responded by declaring that such action would render the border treaty invalid; and on the day of the auction Chilean soldiers landed at the port city of Antofagasta.

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<sup>134</sup> This observation was made by the dissenting arbiter in the Abyei Arbitration with respect to the proceedings of the previous ABC panel.

<sup>135</sup> See generally J. Dominguez et al., "Boundary Disputes in Latin America," U.S. Institute of Peace (n.d.).

<sup>136</sup> See especially Ronald Bruce St. John, "Stalemate in the Atacama," *IBRU Boundary and Security Bulletin*, April 1994, pp. 64-68.

Shortly thereafter, Bolivia declared war and triggered a secret defensive treaty that it had with Peru. At first, Peru attempted to avoid conflict; but Chile declared war on it as well, and Peru was unwilling to step back in view of its own concerns about Chile's increasing influence along the coast. Meanwhile, Chile reached an agreement with Argentina under which it withdrew its claims to a large area of Patagonia; and Argentina declined to become involved in "the War of the Pacific."

Overall, Chile proved its military (including naval) superiority during the war, and quickly seized control of Bolivia's coastal province, Antofagasta, commonly referred to as "Littoral." Subsequently, after weakening and finally neutralizing the Peruvian navy, Chilean forces made a series of landings in Peru's coastal provinces of Tarapacá, Arica, and Tacna. Although the Peruvians continued to resist, Chilean forces reached the capital, Lima, in early 1881.

The Treaty of Ancón was subsequently concluded in 1883 between Chile and Peru, under which the province of Tarapacá was ceded to Chile. Under the treaty, Chile would also be permitted to occupy Arica and Tacna for two years, after which a plebiscite was to be held to determine their nationality. The plebiscite was never held due to disagreement between the parties, however; and in 1929, with mediation by the United States, an agreement was reached for Chile to keep Arica, while Peru reacquired Tacna and received an indemnity payment and other concessions, including right of access to a port in Arica.

Bolivia was forced to give up its coastal province, the Littoral, as well under a truce with Chile signed in 1884, a disposition that was made permanent under a treaty reached in 1904. In return, Chile was to build a railway connecting the Bolivian capital of La Paz with the port of Arica, and guarantee free transit for Bolivian goods through its ports and territory.

As a result of acquiring the former Bolivian and Peruvian provinces along the coast, Chile has obtained considerable economic benefits. For some time now, guano deposits have been largely depleted around the world, and demand for mined nitrates more generally has been reduced by the introduction of synthetics. But Chile's state mining company continues to exploit some of the world's largest copper reserves in the area.

Chile permits unrestricted transportation from Bolivia to the sea, but Bolivia retains its claim to its former Atacama territory. Chile and Peru did not agree on implementation of the last components of the Lima Treaty, providing Peru a port in Arica, until 1999.

In 1992, Bolivia and Peru concluded a 50-year renewable agreement allowing Bolivia to set up shipping and customs operations in a duty-free port and industrial park at the port of Ilo. In return, Peru received similar privileges at Bolivia's Puerto Suarez on the Paraguay River, with access to eastern South America and ultimately the Atlantic Ocean. Peru also leased a five kilometer strip of coastline near Ilo for 99 years as a Bolivian tourist zone, which the Bolivians promptly named "Bolivia Mar."

The loss of its former Littoral province remains very much a live issue in Bolivia, and it is said that there is a widely-shared public perception that the loss of direct access to the sea has been a major reason for its limited economic development. This perception contributed to the outbreak

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.<sup>137</sup> 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 during the occupation of Lima (estimated at 30,000 in number) only began to be returned in 2007, at which time some 4,000 volumes were given back.

The complexity of the Bolivia-Chile-Peru boundary dispute has been increased by recent actions. In November 2005, Peru enacted legislation extending its exclusive economic zone over an area claimed by Chile. Under the new law, the boundary of Peru's zone with the Chilean zone would continue out to sea following the diagonal line (southwest to northeast) of their current land boundary, not according to the normal equidistance principle. Chile claims this move violates treaties dating to the 1950s,<sup>138</sup> and has also objected diplomatically to Peru's declaration of the southern boundary of its land territory as the baseline for its maritime claim.<sup>139</sup> Subsequently, Peru instituted proceedings before the World Court to confirm its maritime claim.<sup>140</sup> Recently,

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<sup>137</sup> Abolition of warfare as an instrument of state policy was also envisioned by the earlier Kellogg-Briand Pact, "General Treaty for the Renunciation of War as an Instrument of National Policy" (1928), 94 LNTS 57, and under the Charter of the League of Nations (1924), Article 10.

<sup>138</sup> BBC, "Peru-Chile border row escalates," November 4, 2005, 03:42 GMT.

<sup>139</sup> Objection by the government of Chile to the "Ley de Lineas de Base del Dominio Maritimo del Peru" (n.d.).

<sup>140</sup> ICJ Press Release, "Peru Institutes Proceedings Against Chile with Regard to a Dispute Concerning Maritime Delimitation Between the Two States," No. 2008/1 (The Hague, January 16, 2008).

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.<sup>141</sup>

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, territorial swaps, creation of a territorial corridor, sharing sovereignty over a port or larger coastal area, various commitments to facilitate transportation, and the like. But each time the arrangements failed to be adopted or implemented; or, if they were, broke down after a time.

One additional potential approach that could be mentioned is the creation of a special transportation corridor of a nonterritorial nature (see separate section on Transportation Corridors). Typically, states with sovereign rights to certain territory are unwilling to create transportation corridors with extraterritorial-like characteristics. But perhaps the diversity of experience with corridors in international practice could suggest a workable approach that would reconcile the different perspectives of the parties.

The specific legal, operational, and procedural characteristics of a corridor would have to be the subject of intensive, and perhaps facilitated, discussion by the three states. In addition to a corridor *per se*, free zones or other special customs facilities could be established at the associated port. In the case of Bolivia, a landlocked state, this would be consistent with Law of the Sea principles with respect to transit access to the sea<sup>142</sup> (see discussion under Transportation Corridors).

## NORTHEAST ASIA

Perhaps one of the most dangerous areas in the world in terms of the potential for military conflict among states is Northeast Asia, where a number of unresolved political and territorial claims exist between the neighboring states: China, Japan, North Korea, South Korea, and Russia. The prospects for dispute resolution, including on territorial and border issues, are impeded by deep cultural differences and historical grievances, and by the lack of a regional international organization in the subregion as well as in Asia more generally.

Despite these factors, successful resolution of a difficult and longstanding border dispute, concerning islands in the Amur and Ussuri rivers, was achieved recently between China and Russia. But despite numerous contacts, no settlement has been worked out between Japan and Russia concerning administration of the southern Kurile Islands (Japan's "Northern Territories"). Even when territorial disagreements are not involved, it has proved difficult to achieve formal cooperation among states in this subregion due to political and other factors, as demonstrated by

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<sup>141</sup> *Economist*, "Courting Castro," March 21, 2009.

<sup>142</sup> See U.N. Convention on the Law of the Sea, *infra*, Article 128.

the limited progress of the UNDP Tumen Area Development Program, primarily involving China, North Korea, and Russia.

It also should be mentioned that in all of these cases the concepts of “joint development” and “special zones” have been suggested at various times as a way of facilitating agreement on cooperative measures by side stepping objections based on territorial sovereignty. In none of these cases, however, have such measures actually been implemented.

### China-Russia (Amur and Ussuri River Islands)

A notable success in boundary dispute resolution occurred on July 21, 2008, when China and Russia at last agreed on demarcation of their entire 2,670 mile-long (4,300 kilometer) common border pursuant to an agreement signed in 2004. The final pieces of the puzzle involved disputed islands in the Amur and Ussuri rivers, over which military skirmishes had occurred in 1969.<sup>143</sup> After the breakup of the Soviet Union, the borders along the Amur and Ussuri rivers were the only remaining major problem area for China and Russia, since a previous dispute between them in the Pamir Mountain region became a dispute between China and Tajikistan instead.

The islands in question are Tarabarov (Yinlong) and Bolshoi Ussuriysky (Heixiazi, or Bear) islands. Since the 1960s, China had been claiming that these territories had been illegally taken by the Soviet Union in 1929. Under the recent agreement, China receives Tarabarov Island in its entirety, as well as a portion of Bolshoi Ussuriysky, which had been partially settled by Russians.<sup>144</sup>

While nationalists in both countries have criticized the deal, the successful result may reflect their growing “strategic partnership” against the West.<sup>145</sup> It presumably also reflects greater Russian interest in economic cooperation, particularly in developing the natural resources of the Russian Far East, as well as Russia’s desire to expand energy (oil and gas) exports to East Asia.<sup>146</sup>

In fact, China and Russia had long since moderated their enmity over this issue, originally signing a border agreement in 1991. Initially, the dispute encompassed many islands in the rivers as well as a Chinese-settled area on the other shore, since the Soviet Union had claimed that the boundary lay on the Chinese side of the river; but the Soviets subsequently acknowledged the applicability of the *Thalweg* principle, under which the boundary along a river follows the center of the main channel.<sup>147</sup>

The Chinese position was that Russian occupation of the islands was a consequence of “unequal treaties” forced on the Qing Dynasty by outside powers. The first of these (1858) granted Czarist

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<sup>143</sup> *Economist*, “The Sino-Russian Border: The Cockerel’s Cropped Crest,” July 24, 2008.

<sup>144</sup> Eric Hyer, “The Sino-Russian Boundary Settlement,” *IBRU Boundary and Security Bulletin*, Summer 1996, pp. 90-94.

<sup>145</sup> *Economist*, *op.cit.*, July 24, 2008.

<sup>146</sup> See, e.g., *New York Times*, “Russia, Looking Eastward, Opens a Gas Plant to Supply Asian Markets,” February 19, 2009.

<sup>147</sup> Hyer, *op. cit.*



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.<sup>148</sup>

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.<sup>149</sup>

### 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 (primarily 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.<sup>150</sup> 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.<sup>151</sup> But generally speaking, these contacts did not result in significant progress since

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<sup>148</sup> *Id.*

<sup>149</sup> Hyer, *op. cit.*

<sup>150</sup> Yakov Zinberg, "The Moscow Declaration, the Year 2000 and Russo-Japanese Deadlock over the 'Four Islands' Dispute," *IBRU Boundary and Security Bulletin*, Winter 1998-99, pp. 86-95.

<sup>151</sup> See generally Yakov Zinberg, "The Kuril Islands Dispute: Towards Dual Sovereignty," *IBRU Boundary and Security Bulletin*, Winter 1997-98, pp. 89-98.

Russia was primarily interested in economic participation by Japan, while Japan was focused on sovereignty and determined to avoid any measures that would weaken its claim.

In 1997, two Japanese warships were permitted to transit without incident through a strait between two lesser islands controlled by Russia, and a Russian naval ship visited Tokyo Bay. Russia also offered the possibility of joint naval exercises in the region.

Japanese citizens are permitted by their government to visit the southern Kuriles on a visa-free basis under an arrangement with the Soviet Union dating to April 1991. In October that year, the Japanese government indicated that permitted travel by its citizens would be limited to former residents of the islands, members of organizations seeking return of the lands to Japan, and the media. The visa-free tours actually began in April 1992, serving several hundred travelers each year. In 1997, for the first time, a senior Japanese official, the vice minister of foreign affairs, accompanied a tour.

During November 1996, the Russian and Japanese foreign ministers met. Minister Evgeny Primakov expressed a willingness to discuss “joint development,” which, according to him, could provide “a new stimulus” to the conclusion of a peace treaty that was being negotiated. Primakov indicated that, if Japan responded positively, the Russian side could propose a project suitable for joint cooperation.

The Japanese indicated an unwillingness, however, to set aside sovereignty issues, as had been suggested in discussions with China over oil-and-gas development in the Senkaku/Diaoyutai Islands in the East China Sea. The Japanese side was also concerned that a November 1997 Sino-Russian agreement on contested islands in the Amur and Ussuri rivers addressed only cooperation and joint development, and had set aside territorial claims, saying such moves established a “negative precedent.”

During the Primakov talks with Minister Yukihiko Ikeda, discussions also addressed cooperative fisheries management, which was complicated by Russian apprehension of Japanese fishing vessels in the area, and further visa-free travel between the countries. Japan unfroze a U.S.\$500 million commercial credit for Russia.

By the next year, however, it was clear that Russian and Japanese priorities were fundamentally inconsistent. In June 1997, Russian Vice-Premier Boris Nemtsov, on an official visit to Tokyo, indicated that joint economic activities and national sovereignty were “two different things;” the former could include such things as investment by Japanese companies or joint ventures, or possibly special tax advantages or conditions for Japanese investors. Later that month Russian Federation President Boris Yeltsin’s press secretary indicated that the proposal was mainly directed toward natural resource development, and that the Russian attitude toward sovereignty was unchanged. Some Russian advisors and regional authorities subsequently proposed special administrative status, or even joint administration, for the southern Kuriles as a way of skirting the sovereignty issue and addressing Japanese concerns, but these were never embraced by the Russian government.

Further efforts to address the southern Kuriles situation were made over the following year.<sup>152</sup> 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 "requires 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 three 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,<sup>153</sup> it was reported that he would raise the southern Kuriles issue with Russian President Dmitry Medvedev.<sup>154</sup> 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.<sup>155</sup>

### 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,<sup>156</sup> which flows through China, the Democratic People's Republic of Korea (North Korea),

<sup>152</sup> See generally Zimberg, *op. cit.*, 1998-99.

<sup>153</sup> *New York Times*, *op. cit.*, February 19, 2009.

<sup>154</sup> *Asahi Shimbun*, "Aso, Medvedev to get down to business," February 10, 2009.

<sup>155</sup> *Economist*, "The World this Week," May 16, 2009.

<sup>156</sup> 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; Japan was also included in discussions.

Aside from planning and coordination 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 also not been in a good position to offer capital for investments.

In terms of the other TRADP participants and neighboring states, South Korean investors have been very active in Jilin, and to some degree also in special economic zones in North Korea. Mongolia has a strong interest in infrastructure improvements, both of a general nature and with respect to maritime access. Japan, which had been looked to for infrastructure funds, possibly related to its interest in economic development of its own western coast, has taken a cautious approach in view of the limited direct benefit of projects in the Tumen River area.

## PART III: PERSPECTIVES

There is a substantial body of research on the causes and courses of territorial disputes, especially in academic history and political science literature. This section contains a description of several interesting works in this field, which are briefly summarized at the outset.

Paul Hensel has contributed to the understanding of the effect of territorial factors in causing and intensifying interstate conflict. For Hensel, the importance of territory lies not only in its value, both tangible and intangible, but its importance to the reputation and strategic position of a state, as well as the popularity of its government.

Daniel Dzurek has developed a methodology to assess the “prominence” of territorial conflicts as a product of their intensifying factors, magnitude, and nature. He found that recent violence, followed by ethnic conflict and third-party involvement, were the most important intensifying factors, and weak government was the least.

Mary Duffy Toft argues that the likelihood of violent conflict between a state and a minority is a function of how the antagonists think about territory. War is most likely to occur when an ethnic minority demands sovereignty over the territory it occupies, but the state views its territory as indivisible. The key determinant whether conflict will occur is the settlement pattern of the minority within the state.

Matthew Fuhrmann and Jaroslav Tir claim that “enduring internal rivalries” pose the highest risk of internal conflict, and that such rivalries are most likely to lead to protracted and recurrent violent conflict when the underlying dispute between a minority and the state includes territorial issues. Among the circumstances lessening the potential for conflict is previous military victory by one side, intense conflict, or a long period of peace. Those circumstances heightening the chance for recurrence of violence include wealth, state power, and possibly democracy.

Several studies by Beth Simmons, largely based on experience from Latin America, indicate that most states are willing to take a reasonable, functionalist approach and utilize noncoercive, cooperative, and facilitated approaches to resolve territorial conflicts. Yet she concludes, regardless, that many governments still do not recognize the importance of legitimate, determinate boundaries as important international institutions that enhance trade and investment and benefit overall national development.

### TERRITORIAL DISPUTES AS CAUSE OF MILITARY CONFLICT

Paul Hensel has examined various aspects of the question to what extent military conflicts are caused by territorial disputes.<sup>157</sup> Reviewing previous studies, he found that most early research focused on the characteristics of states themselves or of the interstate system rather than geography as the main cause of conflict. “Realist” approaches of the 1960s and 1970s enlarged that approach, and have further expanded since the 1970s to include other factors, including the capabilities and alliances of states, as well as nongeographic topics such as democracy, norms, and historical context.

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<sup>157</sup> Paul R. Hensel, “Territory: Theory and Evidence on Geography and Conflict,” in John A. Vasquez, ed., *What Do We Know About War?* (Rowman & Littlefield, Boulder, CO, 2000), pp. 57-84.

Even after the focus shifted toward geography, the question remained whether geographical factors are a source or only “facilitating condition” for interstate conflict. Or did the apparent influence of geography instead reflect other considerations, such as military reach (the “proximity” perspective) or the frequency of interstate interaction (“interaction” perspective)?

Based on Hensel’s own research on a large number of conflicts, as well as a review of the literature,<sup>158</sup> he concludes that the territorial explanation of the relationship between geography and likelihood of conflict is best supported. But there is also substantial evidence that mere proximity also affects the likelihood of conflict. The interaction perspective is the least demonstrated by the evidence.

Much of the research in the field focuses on the “salience” of various factors as causes of military conflict and war. The salience of territorial factors results from the “tangible contents or attributes” of territory, its “intangible or psychological value,” and its “effects on a state’s reputation.” Among the tangible factors are valuable commodities or resources (such as strategic minerals, oil, fresh water, or fertile agricultural land) as well as access to the sea or other commercial routes, or population (including ethnic or religious groups).

Another tangible factor attaching to territory is its “contribution to a state’s perceived power and security,” in other words, its strategic value. Less tangible reasons for the importance of territory as a source of conflict include national identity or cohesion, historical connections, and other psychological factors. Indeed, the psychological importance of territory may exceed its intrinsic value.

For Hensel, the salience of territorial disputes arises since they create “effective individual issues” that prevent successful compromise. While issues between states are always divisible in principle, allowing issues to be addressed by territorial swaps and divisions, side payments, or other reciprocal means, territorial issues are often rendered indivisible by domestic political considerations. In turn, the rise of nationalism (perhaps in both senses, state and ethnic) has worked to prevent states from using the flexible approaches such as those mentioned, which had been available to them in the past.

Another intangible is also at stake for states and their governments: reputation. If a state loses territory to another state, then other adversaries, both external and internal, could be encouraged to press demands, including of a territorial nature.

While all these reasons appear to point to territorial issues as the source of conflict, could in fact the real cause be simple proximity? One factor would be the “loss of strength gradient” between a state and its neighbors. The closer a rival, the greater is the threat from its military strength, as well as from internal developments there, such as political instability, revolutionary change, or entry into external alliances.

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<sup>158</sup> Hensel particularly relied on John Vasquez and Marie T. Henahan, “Territorial Disputes and the Probability of War 1816-1992,” *Journal of Peace Research*, Vol. 38, No. 2 (March 2001), pp. 123-138.

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 trend even during the later stages (1945-1992) of this period, and in fact the two-thirds of conflicts between neighboring states that resulted in war increased to nearly all during the latter period. Of course, the fact that most conflicts involved contiguous states does not mean that their conflicts were territorial in nature.

Hensel also found, however, that over one-quarter of all military conflicts explicitly involved territorial issues, in addition to other significant issues including the composition of governments and specific policies. Over half of the wars involved territorial disputes. While the latter figure may be declining, it is still very significant.

Thus, according to Hensel, wars are primarily attributable to territorial causes, while lesser military conflicts may also be generated by other interactions with contiguous states. Contiguity was also found to be strongly linked to military conflict escalation, from military preparations or movements, toward lethal clashes, to all-out war.

Hensel points out that proximity itself is not really a variable, since state borders do not usually change much over time. Thus it is difficult to view proximity itself as the precipitating cause for conflict. With respect to the more frequent interactions between states in proximity, it is also not clear why they would increase rather than actually decrease the tendency to enter into interstate conflict.

The greater force-projection capabilities of modern militaries have not, according to Hensel, significantly reduced the role of proximity in raising the chances for military conflict between states. This is of course especially true of developing countries, which generally do not have such capabilities.

Hensel claims that military actions in disputes involving territory are more likely to be met with a military response than in other kinds of disputes; this reflects the salience of territorial disputes. Also, territorial disputes tend to be more recurrent than other types. Hensel also notes that borders are most likely to be challenged when the territory in question has strategic location, high economic value, or shared linguistic/ethnic groups.

In terms of the prospects for peaceful resolution of territorial disputes, Hensel observes that bilateral negotiations are most likely to occur when an area has highly salient values and past settlement attempts were unsuccessful. This generalization does not hold for islands.

Nonbinding, third-party methods of territorial dispute resolution are most likely to occur under the same circumstances and when the parties are actually engaged in military conflict or have fought a full-scale war. Third-party methods are less likely to occur if there were successful bilateral negotiations between the parties in the past. Citing Beth Simmons (see below), Hensel also observes that a history of unratified border treaties increases the likelihood of submission of a territorial dispute to binding, third-party resolution, such as arbitration or adjudication.

Hensel observes that territorial disputes are very persistent. Over half of the territorial disputes that were reported during the period from 1950 to 1990 went unresolved. The prospects for peaceful resolution increase if the territory has high value and the challenger was previously unsuccessful. Peaceful resolution was least likely when a territory has strategic value, bordering minorities, or shared ethnic/linguistic groups; when a state was attempting to change the *status quo*; or when military conflict had occurred previously.

Hensel concedes, “Territorial issues do not give rise to the majority of militarized confrontations between states.” Indeed, about half of the over 3,000 disputes studied involved neither contiguity nor territorial disputes. But he nevertheless found that territorial issues were found to greatly increase the probability of conflict, and for such conflict to escalate. In terms of peaceful resolution, the experience with respect to territorial disputes was as follows:

- Bilateral negotiations occurred in over half the disputes, with slightly under half of high-salience territorial claims being negotiated and about two-thirds of the low-salience ones;
- Militarized conflict was the second most common outcome, in about one-quarter of the disputes, ranging from 17 percent to 33 percent according to the salience of the territorial issues;
- Nonbinding, third-party resolution was the third most-likely outcome, and occurred in less than a fifth of cases; and
- Binding, third-party resolution was the least-likely outcome, occurring in just over one-twentieth of cases.

## RELATIVE PROMINENCE OF TERRITORIAL DISPUTES

Daniel Dzurek has attempted to develop a methodology for assessing the “prominence” of territorial disputes, or their perceived significance.<sup>159</sup> Dzurek’s results are based on application of an “analytic hierarchy process,” which relies on systematic comparison of pair-wise comparisons of variables. In order to focus on “lesser known” border disputes (42 in number) disputes involving North American or Western European states were omitted, as were disputes involving Israel. The significance of disputes was also characterized in terms of the U.S. perspective.

Dzurek divided the relative prominence of border disputes as resulting from their intensifying factors, magnitude, and nature.

- Intensifying factors: ethnic conflict, recent violence, historic animosity, weakness of claimant governments (to control developments along the border, or take unpopular initiatives) and third-party involvement;

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<sup>159</sup> Daniel J. Dzurek, “What Makes Some Boundary Disputes Important?,” *IBRU Boundary and Security Bulletin*, Winter 1999-2000, pp. 83-95; the author has updated and expanded this work in the article “What Makes Territory Important: Tangible and Intangible Dimensions,” *GeoJournal*, Vol. 64, pp. 263-274 (2005).



- 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 a 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 (Transdnier), 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 in what situations ethnic factors may lead to war with the state.<sup>160</sup> Her overall conclusion was:

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<sup>160</sup> 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 or 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 risk 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.

## **ETHNO-TERRITORIAL CONFLICT: CONTINUATION AND RECURRENCE**

In a recent paper, Matthew Fuhrmann and Jaroslav Tir presented the results of a study on protracted internal violent conflicts between governments and insurgent groups.<sup>161</sup>

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<sup>161</sup> M. Fuhrmann & J. Tir, “Territorial Dimensions of Enduring Internal Rivalries,” prepared for the Annual Meeting of the American Political Science Association, Chicago, August 31–September 2, 2007.

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<sup>162</sup> 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 tend to lead to violence when an ethnic minority is seeking territorial autonomy or outright independence. When a government is weak, it might prefer to offer autonomy to a separatist movement; but when the state is powerful, or rebels are distrustful of its capacity or willingness to deliver on its promises, the sides might resort to violent confrontation.

Fuhrmann and Tir also looked at several variables suggested by the literature, including:

- Whether democracy serves as a vehicle to permit disputes to be addressed short of resorting to violence;
- Whether a previous military victory by one side leads to longer peace spells;
- Whether the propensity for initial and continued conflict is higher in oil-producing states;
- Whether the intensity of previous conflict is directly related to recurrence, for example due to continuing feelings of insecurity and mistrust; and

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<sup>162</sup> The data were derived from a set compiled by DeRouen and Bercovitch in 2007, based on two previous sets by previous authors related to civil war termination and armed conflict. Fuhrmann and Tir looked at armed internal conflicts between governments and insurgents from 1946 to 2004, including 220 such conflicts in their study.

- 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.<sup>163</sup>

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

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<sup>163</sup> 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), pp. 205-237.

resolution may not guarantee success, it is reasonable to consider in view of potential benefits and risks. States approaching international conflicts from a standpoint reflecting their own democratic legalism would tend to embrace cooperative, legalistic approaches as part of their internal and external commitment to democracy and the rule of law.

Simmons then tested this hypothesis against a list of territorial conflicts in Latin America. She notes that this region has not only had a large number of territorial disputes but has displayed a greater-than-usual willingness to submit them to international adjudication. Overall, she found that the resort to dispute resolution methods was best explained by the rational-functionalist model, and the comparative willingness to resort to such means was not distinguishable between traditional, realist and democratic, legalistic polities. What was especially significant in terms of predicting states' willingness to enter a dispute resolution process was failure to obtain ratification of previous agreements. This strongly suggests that a major factor is the desire of governments to avoid domestic political disagreements by moving the responsibility of resolving conflicts to outside institutions.

Another major factor in predicting the successful conclusion of a dispute resolution process (in terms of completing the process itself) was the existence of agreements or institutions calling for such procedures. Simmons also foreshadowed some of her later work (see below) by observing that established international boundaries are themselves important institutions with many advantages, including increasing overall certainty and security, decreasing the level of military expenditures, increasing investment and trade, and reducing opportunity costs to development especially in the affected areas.

In a later work,<sup>164</sup> Simmons expanded her analysis of the opportunity and other costs of failing to resolve disputes through international procedures. Once again relying on detailed experience from Latin America, she found little difference between the type of state and its recourse to formal dispute resolution or acceptance of the outcome. What appeared to be most critical, apart from domestic political considerations, were the other costs of failing to resolve a dispute. Her research indicated that trade and investment levels, in particular, were markedly different between states that accepted international dispute resolution and those that did not.<sup>165</sup>

In a more recent work,<sup>166</sup> Simmons expanded on these themes, arguing that established international borders are important institutions with a range of benefits. Achieving fixed and

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<sup>164</sup> B. Simmons, "Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes," *Journal of Conflict Resolution*, Vol. 46, No. 6, December 2002, pp. 829-856.

<sup>165</sup> Simmons's own abstract for the article reads as follows: "Why should governments delegate decision-making authority over territorial issues to an international institution? This study argues that governments are motivated to reach territorial solutions to reduce the opportunity costs associated with a festering dispute. The evidence suggests that domestic political incapacity to negotiate concessions is associated with a commitment to arbitrate. Compliance is a function of the net costs and benefits involved in accepting the arbitral decision. These costs include the loss of valuable territory, but noncompliance also exacts costs with respect to governments' reputation, both domestically and internationally. This research speaks to a broader debate about the role of international legal institutions in foreign policy making and international outcomes. It shows that governments have good reasons, under certain political and economic conditions, to use international legal processes as a substitute for domestic political decision making."

<sup>166</sup> B. Simmons, "Rules over Real Estate: Trade, Territorial Conflict, and International Borders as Institution," *Journal of Conflict Resolution*, Vol. 49, No. 6, December 2005, pp. 823-848.

recognized borders is so important that traditional realist and emerging globalist viewpoints about how states should agree about the importance and value of uncontested 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.<sup>167</sup>

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<sup>167</sup> 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 transactions. 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.<sup>168</sup> The immigration and customs issues associated with transportation to Kaliningrad were accentuated as Lithuania progressed toward admission into the European Union (EU), after which its border with Russia would also be an external boundary of the European Union.<sup>169</sup> The EU moved to address the matter through the means outlined below.<sup>170</sup>

A new definition of “Kaliningrad transit” was proposed by the European Commission and approved by the EU Council under which facilitated travel documents would be available to Russian citizens traveling to/from Kaliningrad. However, Russia was not satisfied with the decision since the travelers would still have to contact Lithuanian consulates. In November 2002, the EU and Russia agreed to a joint statement encouraging Russian citizens traveling to/from Kaliningrad to replace their visas with Facilitated Rail Transit Documents (FRTD) and Facilitated Transit Documents (FTD). Once such documents were obtained, eligible Russian residents traveling to/from Kaliningrad region would no longer have to contact Lithuanian consulates. Responsibility for the check and control of Russian citizens transiting through the so-called Kaliningrad Corridor was assigned to Lithuania.

Perhaps the key element of the arrangement was not legal or procedural, but rather financial. Consistent with the European Commission’s earlier recommendations, the EU provided

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<sup>168</sup> BBC World Service, “Lithuania Rejects Kaliningrad Corridor,” May 3, 2002, 17:21 GMT.

<sup>169</sup> See European Commission, *Communication from the Commission to the Council: The EU and Kaliningrad* (Brussels, January 17, 2001).

<sup>170</sup> See Lithuania, Ministry of Interior press release, “The European Union is Not Afraid of the Russian Transit Through Lithuania,” April 26, 2006.



Lithuania with considerable funding and technical support to enable it to carry out its responsibilities under the agreement.<sup>171</sup> In addition to such support, Lithuania also achieved political gains, as it became the first Baltic state to secure a border agreement with Russia.<sup>172</sup>

The Kaliningrad arrangement has been referred to as a “corridor-like solution” by Evgeny Vinokurov, a researcher associated with a Kaliningrad nongovernmental organizations.<sup>173</sup> Vinokurov observes that the arrangement has special corridor characteristics in terms of the movement of people, but not goods, which are still subject to the EU’s general transit regulations. He also provides detailed information concerning the evolution of the current arrangements.<sup>174</sup> As Vinokurov reports, Russia continues to suggest that a dedicated road link to Kaliningrad should be constructed.

**Other Corridors.** Vinokurov’s work on Kaliningrad issues led him to conduct an extensive analysis of transportation corridors, including cases involving “exclaves” of national territory such as Kaliningrad.<sup>175</sup> He provides valuable information on many additional corridors and corridor-like situations.<sup>176</sup> Undoubtedly, the most significant of these were the former Danzig

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<sup>171</sup> The Special Kaliningrad Transit System Implementation Program received EUR 40 million in the years 2004-06 and was authorized EUR 108 for the period 2007-13. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Association of International Experts on the Kaliningrad Region (AIKE); see [www.kaliningradexpert.org](http://www.kaliningradexpert.org).

<sup>174</sup> Vinokurov explains that prior to mid-2003 transit for Russian citizens through Lithuanian territory was visa-free, and travel into Lithuania was also visa-free for residents of Kaliningrad. The new scheme, involving FRTDs and FTDs, was introduced in July that year. An FTD is used for car/bus travel; it must be obtained from a Lithuanian consulate and is valid for a year, and is issued free of charge. The FRTD is used for travel on Russian transit trains. Until 2005, it could be obtained through presentation of a Russian internal passport, but after that time only with an external passport. Transit rail travelers must purchase their tickets 26 hours before departing, and submit passport details at that time. After boarding they obtain forms to fill out, which are collected by a Lithuanian consular official. The official distributes the FRTDs just before the train crosses the Lithuanian border. The FRTD remains valid for a return trip within three months. Unlike transit travel, entry for Russian citizens into Lithuania or travel through Lithuania on a nontransit train is governed by the regular visa regime, requiring application to a Lithuanian consulate. Vinokurov, “Establishment of Corridors in the Context of Exclave-Mainland Transit” (December 2004), available through AIKE.

<sup>175</sup> *Id.*; see also E. Vinokurov, *A Theory of Enclaves*, Lexington Books (Lanham, MD, 2007). A so-called exclave is a portion of national territory that can only be reached overland through another state, as opposed to an enclave, which is totally surrounded by the territory of another state.

<sup>176</sup> The corridors described by Vinokurov also include those to Danzig corridor (German transportation across a strip of Polish territory giving it access to the Baltic sea after World War I); three main and several secondary corridors to West Berlin prior to the unification of Germany; Livia (a Spanish enclave in France reached by a neutral road); the Neum corridor (territorial access to the sea for Bosnia and Herzegovina, provided under the Dayton Agreement, which has caused a portion of Southern Dalmatia to become noncontiguous with the rest of Croatia); the Cooch Behar enclave groups (106 Indian enclaves in Bangladesh, and 92 Bangladeshi enclaves within India, one of which is connected to Bangladesh through the short Tin Bigha corridor); and small enclaves around former West Berlin (including Steinstücken, Eiskeller, Erlengrund, and Fichtewiese, with the first being connected to West Berlin through its own corridor, and the last two being connected through the Erlengrund Corridor). He also cites a number of additional cases in which corridors have been proposed and either rejected or not yet accepted; these include: Büsingen (German enclave in Switzerland), Pogiry (Lithuanian enclave in Belarus), Nagorno-Karabakh (Armenian-controlled province in Azerbaijan), Nakhichevan (Azerbaijani exclave across Armenian territory), Oecussi-Ambeno (East Timorese enclave in Indonesian West Timor), and Temburong (enclave of Brunei within Malaysian Sarawak). It may also be observed that the dedicated roadways for Israelis living in settlements in the West Bank could also be viewed as corridors, as could other *de facto* corridors created among such settlements or between them and Israel proper due to the erection of security fences or walls.

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.<sup>177</sup>

### 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

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<sup>177</sup> *Economist*, "Briefing: America and Israel," February 14, 2009, pp. 32-33.

Nagar-Aveli), which were surrounded by Indian territory.<sup>178</sup> The case arose in 1954-55 when, after Indian activists seized control of the two enclaves, Portugal sought to move arms and military forces through India to the enclaves, and India prevented their passage. The application to the Court by Portugal did not, however, address any role that India may have had in connection with developments in the enclaves, and the case was limited to its legal right of passage over Indian territory.

Portugal had originally obtained rights to the enclaves under a 1779 treaty with the ruler of Maratha, which were implemented through subsequent decrees of the rulers. The Court found that the original treaty and its implementation had not clearly established full Portuguese sovereignty over the enclaves, but had at least granted Portugal revenue and other powers. The Court concluded, nevertheless, that by the eve of the crisis Portugal had obtained sovereign rights due to their recognition by the British authorities and acceptance by the Indian government. The historical pattern of passage, as established by usage, led the Court to conclude that Portugal had right of passage from the coastal district of Daman, ruled by Portugal, to the enclaves, and also between the enclaves themselves.

This right, however, according to the Court only pertained to civil and commercial matters, that is “with regard to private persons, civil officials and goods in general.” The Court found that Portugal had no established right to move arms or military forces through Indian territory, and that instead established practice (including treaties, declarations, and practice by the parties, as well as Indian legislation) required special permission to be obtained in such cases. Thus such passage could be prevented by India.

One additional matter remained, concerning controls applied by India in 1954 denying passage to Portuguese nationals of European origin, native Indian Portuguese in the employ of the Portuguese government, and a civil delegation proposed by the governor of Daman. While these might have constituted violations normally, the Court found that the overthrow of Portuguese authority in the enclaves had created tensions in the surrounding Indian district, and India’s refusal of passage was within its power to regulate and control the right of passage by Portugal.

### Access to the Sea

Proposals have been made from time to time to develop corridor-like arrangements to ensure access to the sea for land-locked countries. This is not per se required by international law, but could nevertheless be useful in facilitating such access and enabling land-locked states to achieve the economic benefits of unfettered access to maritime transportation and other maritime activities. The relevant principles of international law in this area have been codified in the U.N. Convention on the Law of the Sea<sup>179</sup> (LOS Treaty), which has been widely ratified and many provisions of which are viewed as having achieved the status of customary international law, which is applicable to all states.

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<sup>178</sup> ICJ, *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Decision on the Merits, April 12, 1960, 1960 I.C.J. 6.

<sup>179</sup> U.N. Doc. A/CONF. 62/122 (10 December 1982); 21 I.L.M. 1261 (1982).

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.<sup>180</sup> While there is a general right of access for such states under the treaty, freedom of transit to the sea through the territory of another state (“transit state”) must be obtained through further agreements between them, and transit states have the right to ensure that transit does not infringe their legitimate interests.<sup>181</sup>

Traffic in transit between a land-locked state and the sea may not be subject to customs duties, taxes, or other charges levied by transit states, except for specific services rendered in connection with the transit; and transport charges and fees shall not be higher than those in the states in which the charges and fees are incurred.<sup>182</sup> Transit states shall take measures to avoid delays or technical difficulties for transit,<sup>183</sup> and free zones and other customs facilities may be developed for that purpose.<sup>184</sup> These treaty provisions are not intended to derogate from existing transit arrangements that are more generous, or prevent such privileges being granted.<sup>185</sup>

## JOINT DEVELOPMENT AGREEMENTS

Cooperation among states regarding competing interests in mineral resources has often been achieved through joint development agreements (JDA). Such arrangements can often be concluded even if the boundaries of state territorial or other sovereignty have not been precisely determined. This is most often the case in maritime areas, where precise boundaries may not have been agreed and/or demarcated, especially with respect to zones of extended maritime jurisdiction such as the 200 nautical mile exclusive economic zone or continental shelf. But the concept is compatible with terrestrial application, and there are a number of examples of joint development agreements being adopted on land.

But even when boundaries can be precisely determined, joint development agreements may be put in place nonetheless. This is particularly true in the case of hydrocarbon (oil and gas) resources, since operations in one area of an oil or gas field may negatively affect the recoverability of resources from other areas, and even result in the recovery of resources from areas under the sovereignty of a neighboring state. Such considerations can be addressed not only through cooperative, shared development but also under the concept of “unitization,” which refers to management of the entire resource in the best way regardless of jurisdictional aspects.<sup>186</sup>

A note on terminology: Mineral resource activities go through several overall stages, including “prospecting” (initial survey), “exploration” (determining the location, extent, and recoverability of the resources), “development” (designing and installing the facilities necessary for recovery), and “production” (actually mining the resource and bringing it to market). The various cooperative interstate arrangements for jointly-conducted mineral activities are collectively

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<sup>180</sup> *Id.*, Part X, Articles 124-132.

<sup>181</sup> *Id.*, Article 125.

<sup>182</sup> *Id.*, Article 127.

<sup>183</sup> *Id.*, Article 130.

<sup>184</sup> *Id.*, Article 128.

<sup>185</sup> *Id.*, Article 132.

<sup>186</sup> See A. Bastida et al., “Cross-border Unitization and Joint Development Agreements: An International Law Perspective,” *Houston Journal of International Law*, Winter, 2007.

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.<sup>187</sup> 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.<sup>188</sup>

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.<sup>189</sup> 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.<sup>190</sup> To date, all known JDAs have been bilateral in nature; but some preliminary attention has been given to a multilateral approach in the South China Sea in view of the number of countries that have interests in the resources there and various overlapping territorial claims.

In fact, the frontier for joint development agreements may be in the South China Sea, where numerous states—including Brunei, China (also Taiwan), Indonesia, Malaysia, Philippines, Singapore, and Vietnam—make conflicting or overlapping claims of territorial jurisdiction. The key areas of contention are with respect to the Paracel Islands, claimed mainly by China and

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<sup>187</sup> *Xinhua (New China) News Agency*, “CNOOC Pledges to Share Investment, Risk with Japan on Joint Development of East China Sea” (Beijing, June 26, 2008). The field, Chunxiao oil and gas field in the East China Sea, is mainly under Chinese jurisdiction but operations there could affect resources under Japanese ownership. On the other hand, a proposal by the Philippine president to China and other states to carry out joint seismic surveys has been criticized as yielding too much on issues of sovereignty, since it would permit states without a legal interest to obtain information about resources under the jurisdiction of other states. See B. Wain, “Manila’s Bungle in the South China Sea,” *Far Eastern Economic Review* (January/February 2008).

<sup>188</sup> “Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the South China Sea by and among China National Offshore Oil Corporation (CNOOC), the Vietnam Oil and Gas Corporation and [the] Philippine National Oil Company” (n.d., 2005).

<sup>189</sup> Reported JDAs without boundary delimitation include Kuwait–Saudi Arabia (1961), Iran–Sharjah (1971), Japan–South Korea (1974), Malaysia–Thailand (1979), Australia–Indonesia (1989), Malaysia–Vietnam (1992), Colombia–Jamaica (1993), and Argentina–U.K. (1995). JDAs with delineated boundaries included Bahrain–Saudi Arabia (1958), France–Spain (1974), Saudi Arabia–Sudan (1974), Iceland–Norway (1981), Libya–Tunisia (1988) and Guinea–Bissau–Senegal (1993). M. Miyoshi, “Basic Legal Issues of Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation,” *Maritime Briefing*, Vol. 2, No. 5 (1999). See also M. Miyoshi, “Legal Regime of Joint Development and Management Zones” in P. Payoyo, *Ocean Governance: Sustainable Development of the Seas*, United Nations University Press (Tokyo, 1994).

<sup>190</sup> Recall the related discussion, on the question of the applicability of the laws of the respective Bosnia and Herzegovina political entities (Federation and RS) within the area of joint municipal administration in Brcko, Bosnia and Herzegovina, above.

Vietnam, and the Spratly Islands, claimed by nearly all.<sup>191</sup> 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 purely declaratory code of conduct as well as an informal multilateral approach.<sup>192</sup>

In the South China Sea, specific disputes have also occurred between China and the Philippines, including with respect to the aptly-named Mischief Reef in the Spratlys, which China occupied and fortified in 1995,<sup>193</sup> and Scarborough Reef, a relatively large and isolated atoll.<sup>194</sup> Recently, soon after the Philippines enacted a law claiming the Spratlys, China responded by announcing it would apply additional patrol craft to the area.<sup>195</sup> And a recent display of Chinese naval forces in Qingdao has been interpreted as a message from China that it is determined to support its maritime claims through its modernized and expanded naval forces.<sup>196</sup>

Another particularly tense spot is the Senkaku/Diaoyutai islands in the East China Sea, which are closer to Japan but on the extended continental shelf of China and also claimed by Taiwan. In June 2009, a Japanese patrol boat unintentionally sank a Taiwanese recreational fishing boat. Taiwan nationalists later returned to the area for a demonstration.<sup>197</sup> Even the Chunxiao/Shirakaba field, now the scene of joint development by China and Japan, was the site of a confrontation between Chinese naval forces and Japanese aircraft and vessels in 2005.<sup>198</sup>

The issue of boundaries per se is not the only reason to create a joint development agreement. Other factors include the desire to proceed quickly with development, to avoid the delays involved with territorial delimitation, and to enjoy the benefits of international cooperation, as recommended in various international instruments.<sup>199</sup>

Another consideration in moving toward, as well as designing, a joint development agreement is the relative equities and capabilities (financial and technical) of the parties. Thus a number of

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<sup>191</sup> See, e.g., H. Djalal, "South China Sea Island Disputes," *Raffles Bulletin of Zoology*, Supplement No. 8 (The Biodiversity of the South China Sea): 9-21 (Singapore, 2000). See generally Craig Snyder, Center for Strategic and International Studies, York University (Toronto, Canada), "The Implications of Hydrocarbon Development in the south China Sea" (n.d., available online).

<sup>192</sup> Djalal, *id.*

<sup>193</sup> See Daniel J. Dzurek, "China Occupies Mischief Reef in Latest Spratly Gambit," *IBRU Boundary and Security Bulletin*, April 1995, pp. 65-71.

<sup>194</sup> See Zou Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?," *IBRU Boundary and Security Bulletin*, Summer 1999, pp. 71-81.

<sup>195</sup> *New York Times*, "Naval Show to Feature Submarines from China," April 22, 2009. (The Philippine law was enacted on March 10, 2009, and the Chinese announcement was made on March 20.)

<sup>196</sup> *Id.*

<sup>197</sup> *Economist*, "Profit over Patriotism," June 19, 2008.

<sup>198</sup> *Id.*

<sup>199</sup> See Bastida et al., *id.* As these authors point out, U.N. General Assembly Resolution 3129 (December 13, 1973), on "Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States," drew attention to the need to establish "adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States," with such cooperation being developed "on the basis of a system of information and prior consultation ...." And the 1974 Charter of Economic Rights and Duties of States, UNGA Resolution 3281, Article 3, provides: "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."

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.<sup>200</sup>

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.<sup>201</sup> 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 Saõ Tome and Principe, 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.<sup>202</sup> 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.<sup>203</sup>

## MANAGEMENT OF SHARED AND COMMON RESOURCES

Internationally “shared” resources are those, like fresh water supplies, of which the available supply is used by more than one state, and the right of use arises from geographical factors, custom and history, and through agreements. “Common” (or “common property”) resources, on the other hand, are those (like grazing or other marginal lands) that are exploited by multiple users or for multiple purposes without definite entitlement. Examples of cooperative international regulation of shared and common resources, particularly fresh water resources and shared fisheries, abound. There are fewer examples of such cooperation with respect to managing common-property resources, however. In both areas, disagreements and conflicts continue to arise, and often overuse and/or misuse of the resources leads to their degradation and impaired use by all.

### Fresh Water Resources

The premier example of a shared resource requiring cooperative management on the international level is that of fresh water. Surface waters, such as lakes, rivers, and streams, become international when they lie within or flow through the territory of more than one state; and subsurface water becomes international when the aquifers holding these resources are transboundary in nature. The sharing of international water resources is based on a complex mix

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<sup>200</sup> H. Fox et al., *Joint Development of Offshore Oil and Gas, A Model Agreement for States for Joint Development with Explanatory Commentary*, British Institute of International and Comparative Law (London, 1989), 426 pp.

<sup>201</sup> Bastida et al., *op. cit.*, present a lengthy list of joint development agreements.

<sup>202</sup> *OilGasArticles* (online), “Niger Delta Joint Development Zone” (April 5, 2006).

<sup>203</sup> See C. Okafor, “Joint Development: An Alternative Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?,” *Int. Jrn. Marine & Coastal Law*, 21:4 (Netherlands, 2006).

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.<sup>204</sup> Recently, this material has been augmented by the inclusion of a specialized collection of documents on the Middle East.<sup>205</sup> The managers of these materials reviewed 145 treaties to included in the database, through statistical classification and analysis.<sup>206</sup> 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 to 1984 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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<sup>204</sup> See: Oregon State University, Institute for Water and Watersheds, Program in Water Conflict Management and Transformation, “The Transboundary Freshwater Dispute Database,” [www.transboundarywaters.orst.edu](http://www.transboundarywaters.orst.edu).

<sup>205</sup> *Id.*, “Middle East Water Collection.”

<sup>206</sup> J. Hammer and A. Wolf, “Patterns in Transboundary Water Resource Treaties: The Transboundary Freshwater Dispute Database,” *Colorado J. Int. Env. Law & Policy*, 1997 Yearbook (1998). (The treaties reviewed included those dated 1870 or later and which address “water *per se*,” excluding others which deal only with boundaries, navigation or fishing rights.)



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, create a commission to implement policies and attempt to resolve disputes.

*Principal focus:* Most treaties focus on hydropower (39 percent), distribution of water supplies (37 percent), and flood control (9 percent); other subjects include industrial uses (6 percent), navigation (4 percent), and other issues (4 percent) such as pollution, and only one (<1 percent) primarily dealt with fishing. About half the treaties (54 percent) include a provision for monitoring, the rest (46 percent) do not. Information-sharing provisions are generally weak, indicating that the parties do not wish to disclose information about water volume, uses, and conditions, and may also lack aptitude or capacity to monitor regularly. More information sharing could help engender goodwill and reduce suspicions.

*Method of Water Division:* Relatively few treaties (37 percent) clearly allocate water supplies, and only a small number (2 percent) contain definite allotments. About three-quarters (72 percent) of those that define an allotment establish a specific means of allocation, while the rest allocate shares equally.

Trends are observable among the treaties that specify water allotments:

- The approach shifts during negotiations from “rights-based” (e.g., hydrographical or chronological) to “needs-based” (e.g., irrigable land or population served) criteria.
- In providing for existing and future uses of water, the rights of the downstream riparians are more often delineated, but existing uses are also protected.
- Economic benefits are not directly used to determine water allocation, but economic principles are applied in defining beneficial uses and the range of benefits from such uses.
- The uniqueness of the water basin in question is regularly emphasized, leading to special access to water for certain uses and allocations among competing riparians for existing and potential future supplies.

*Hydropower:* Hydropower treaties (39 percent of the total) are most often entered into by mountainous nations, in particular Nepal, at the headwaters of rivers. The particular share of a hydropower focus in water treaties could decline elsewhere, due to deficiencies in available financing, lack of suitable sites, and environmental concerns.

An unanticipated example of cooperation with respect to a shared water resource has recently occurred between Georgia and South Ossetia. Despite the hostilities that occurred over the latter region between Georgian and Russian forces during 2008, later that year Georgia entered into a contract with a Russian state-owned energy company for joint management of a valuable hydropower resource, the power plant at the Inguri Dam. The reservoir is shared between Georgia and South Ossetia: the dam is located in Georgia, but the control facilities are on the

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.<sup>207</sup>

*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 allocated 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 balance of the river flow, regardless of fluctuations.<sup>208</sup>

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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<sup>207</sup> *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.

<sup>208</sup> 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 activities cannot in themselves address scarcity of fresh water resources arising from overuse or waste.<sup>209</sup> 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.”<sup>210</sup> 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 for water, greater efficiencies in its use will be required.<sup>211</sup>

While a straightforward tax would be the best approach under economic theory, the tradable user rights model preserves the interests of current users and makes a market-based water regime more politically feasible. At the same time, however, it tends to incorporate existing imbalances at the outset, and its effectiveness can be reduced through cheating.<sup>212</sup> Cap-and-trade arrangements are currently being envisaged for international and regional environmental agreements in other areas, such as for control of greenhouse gases and other air pollutants. In view of its success at the national level, this model should also be considered for application to international water resource issues.

## Terrestrial Commons

Lands used by traditional shifting pastoralists and cultivators are an important terrestrial “commons” in such areas as the Middle East, the Sahelian region in Africa, and elsewhere (e.g., the Amazon Basin, Madagascar, and South Asia). Such “commons,” or “common-property resources,” are areas where multiple users also exploit the available resources, such as water and

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<sup>209</sup> See *Economist*, “Awash in Waste: Tradable usage rights are a good tool for tackling the world’s water problems,” April 8, 2009, pp. 13-14.

<sup>210</sup> *Id.*

<sup>211</sup> See *Economist*, “*Sin aqua non*: Water Shortages Are a Growing Problem, But Not for the Reasons Most People Think,” April 8, 2009, pp. 59-61.

<sup>212</sup> See *Economist*, “Awash in Waste ...”, *op. cit.*

vegetation, not based on individual claims of ownership but because the area is legally or practically open for all to use.

It was noted previously that the dispute over the Abyei region in Sudan reflected tensions between agriculturalists and pastoralists; both groups were users of the land in a region where political control was disputed by formerly warring parties. A similar but even worse situation exists in Darfur, in western Sudan, where tensions between African farmers and village dwellers and Arab-influenced herdsman has led to conflict between the government and its supporters and local tribespeople.

But the competition between pastoralists and agriculturalists represents only one component of the problem of managing a terrestrial commons in a way that supports their different traditional lifestyles. In effect, the two cultures practice different and potentially conflicting uses of the land, and the attempt to reconcile such different uses is referred to as an issue of “multiple-use” management.

The competition between pastoral and agricultural lifestyles in marginal areas has intensified for a number of reasons, including cultural factors, changing climate, human pressure on natural resources, and water shortages.<sup>213</sup> In the past development assistance for such groups, especially pastoralists, was promoted by strategies that emphasize management of the common area through cooperatives. Such cooperatives often did not have the capacity to manage an area effectively, however; and in recent years governments have been focusing more on establishing smaller “reserves” for certain activities, especially grazing. Such reserves can be monitored and serviced more effectively by government agencies, but represent a kind of “privatization of rangelands by the state.”<sup>214</sup>

Efforts to improve terrestrial commons have mainly addressed the problem of rangeland management, namely protecting and preserving grazing lands. The problems of conflicts among multiple uses have not been addressed to the same degree, partly due to political factors. Agricultural activities pose problems for management of areas such as rangeland since such activities result in the conversion of some land, utilize water supplies, and lead to degradation of rangeland due to fuel-wood collection and other subsistence activities.<sup>215</sup> The lifestyles of agricultural communities are also vulnerable to interference, and even criminal action, by pastoralists since the latter tend to move in larger, mobile groups, and are often drawn from different ethnic groups.

“Multiple-use management” is a concept more often associated with management of public lands in developed countries, such as the United States or Australia. The statutory mandate of U.S. agencies that exercise such authority is largely based on implementing a multiple-use concept where the issues involve conflicts among a number of commercial, recreational, and

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<sup>213</sup> See Turner & Hiernaux, *op. cit.*, and Bassett & Turner, *op.cit.*

<sup>214</sup> S. Reynolds & J. Frame, *Grasslands: Developments, Opportunities, Perspectives* (Science Publishers, 2005), pp. 390-393.

<sup>215</sup> *Id.*

conservation uses.<sup>216</sup> Elsewhere, for example in Australia and South Africa, the issues largely involve ranching, aboriginal uses, and conservation.<sup>217</sup>

Whatever the nature of the conflict, the currently-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.<sup>218</sup> Special attention is being paid to analyzing user rights and tenure, and improving security and incentives for investment and conservation.<sup>219</sup>

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, mixed sovereignty or joint administration could be established for such areas and become a tool for intervention in conflicts of this nature.

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<sup>216</sup> 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.

<sup>217</sup> 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 Rangeland* (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 *Government Gazette*, No. 28994), August 10, 2006.

<sup>218</sup> See, e.g., T. Telahigue & A. Abdouli, International Fund for Agricultural Development (IFAD), “Strategies for Institutional Options for Rangeland Management in the Nena Region: IFAD Experience,” prepared for the International Conference on Policy and Institutional Options for the Management of Rangeland in Dry Areas (Tunisia, May 2001) (Draft).

<sup>219</sup> See, e.g., Legal Resource Center (South Africa), “Comment on the Range and Forage (*Veld*) Policy”, *op. cit.*; W. Kisamba-Mugerwa et al., International Food Policy Research Institute (IFPRI), “Impacts of Individualization of Land Tenure on Livestock and Rangeland Management in Southwestern Uganda,” paper presented at 11th Annual Conference of the International Association for the Study of Common Property (Bali, Indonesia; June 19-23, 2006), 30 pp.

## 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 prevent them from working cooperatively to achieve a mutually-satisfactory resolution. In this situation, the available means of seeking agreement—through direct negotiation, conciliation, or other forms of facilitation and adjudication/arbitration—may not prove acceptable or workable for the parties.

Border disputes are largely viewed by participants as zero-sum games, as a straightforward contest over territory among states or between states and nonstate groups. Individuals and organizations who seek to intervene in such disputes by facilitating direct negotiations or pursuing other means of dispute resolution should generally take a flexible approach, applying mainly diplomatic and negotiating skills. Once a dispute has moved into adjudication, arbitration, or formal mediation, however, the third-parties involved must scrupulously observe the legalities and operate strictly within the terms of reference agreed by the parties to the dispute.

The results of political science research may help guide potential interveners as to which territorial disputes are most likely to result in violence, and what methods to apply to various kinds of conflicts:

- Territorial conflicts are particularly difficult to resolve since national territory is viewed as having high value and importance to a state's international reputation and position as well as the popularity of the government. Recent violence, ethnic conflict, and third-party involvement are reportedly the most important intensifying factors for such conflict.
- Bilateral negotiations are most likely to occur when a disputed area has highly salient values and past settlement attempts were unsuccessful. Nonbinding, third-party methods of territorial dispute resolution are most likely when the parties also are actually engaged in military conflict or have fought a full-scale war. Third-party methods are less likely to be applied if there were successful bilateral negotiations between the parties in the past. But a history of unratified border treaties, indicating internal opposition to a settlement, increases the likelihood of submission of a territorial dispute to binding, third-party resolution.
- With respect to conflict between a state and nonstate actors, war is likely to erupt when an ethnic minority demands sovereignty over its territory, and the settlement pattern of the minority puts them in the majority in particular regions. Contests over territory by population groups are likely to create enduring internal rivalries that lead to protracted and violent conflict; but a military victory by one side, an intense period of fighting, or a lengthy period of peace reduces the chances for a recurrence of violence.

- States are generally willing to pursue reasonable, functionalist approaches to interstate conflicts over territory, including cooperative and facilitated methods of dispute resolution. At the same time, many border issues remain unresolved for long periods, during which the absence of the important international institution of recognized borders tends to have adverse economic effects.

It would also be most helpful if potential interveners have the capacity to suggest alternative substantive means of resolving such disputes in a nonzero-sum way, by suggesting models for the resolution of the dispute that the parties could agree on and which could have a neutral or even positive-sum outcome. Intervenors should also help the parties to recognize their overarching interest in settling their dispute in a cooperative manner, since the existence of boundary issues create enormous opportunity costs in terms of economic development and political relations.

Judicial adjudication and arbitration—and to some extent conciliation—have the disadvantage of focusing on complex legal doctrines that are so unpredictable in application that the parties cannot fully assess their risks before entering into these processes. The same issue arises if the parties permit the third party to base an award on equitable considerations. The risks for the parties in both cases involve the unpredictability and finality of the outcome.

Other forms of facilitating resolution of territorial disputes, including by conciliation, cannot reach a final outcome without agreement by the parties. But many facilitation efforts fail because they cannot offer the sides a truly constructive solution to their dispute. This paper has identified some of the issues with respect to conduct of adjudication and arbitration, related to their techniques and mandates. In some cases, the technique of conciliation has shown greater potential for identifying broader solutions for territorial conflicts. For intervenors generally, however, the problem remains how to identify, construct, and propose creative solutions to the underlying issues.

Potential intervenors in territorial conflicts could benefit from examining existing examples of special transboundary cooperation for potential direct application in helping to resolve disputes or as metaphors for other cooperative approaches. The models described in this report include transportation corridors for special access to certain areas of interest to a state across the territory of another state; joint development agreements, for the exploration, development, and production of mineral resources in areas where the boundary between states has not been determined or where development of the resources could affect states on both sides of a boundary; cooperative regulation of shared resources, such as freshwater supplies; and multiple-use management of common-property resources, such as marginal lands subject to various uses without clear legal entitlement.

## SUGGESTIONS

The analysis contained in this report also permits some suggestions to be made concerning how intervenors in territorial disputes should organize their activities to achieve the best results.

- 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 *infra 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 delineating a boundary or to create a nonboundary based solution, such as a zone of mixed sovereignty or administration, or intermingled rights.
- An exception to the avoidance of special equitable solutions, such as zones of mingled sovereignty, occurred in a situation in which a solution that would normally be *ultra vires* was essential to resolving a crucial territorial issue; a repository for unified sovereignty, such as a federal or national government, existed; the solution was popularly supported; establishing a definite boundary would have been dangerous; and an international framework existed to supervise and enforce the arrangement over the long term. This is reflected in the success of the 1999 Brcko arbitral award thus far; but if these conditions change this successful resolution could still be threatened.
- Other exceptions to avoiding awarding rights directly based on equitable considerations is to permit continued customary uses of territory by nonnationals engaging in traditional activities (see the Red Sea Islands arbitration, preliminary award, 1996); or to fill in the gaps in an otherwise legally-determined boundary by applying equity *infra legem* (see the ICJ decision in the Land, Island, and Maritime Frontier Dispute [El Salvador/Honduras, Nicaragua Intervening], 1992). It would also be acceptable to identify zones in which one user or use has primary and the other(s) secondary, equitable rights (see the Abyei Boundary Commission Award, 2005); but the nonacceptance of the ABC award indicates that it was problematic for such considerations to have been applied also to delineate the boundaries of territorial sovereignty, since the arbitrators were not authorized to delineate the boundary based directly on equity.
- Conciliation, especially when undertaken by powerful third states—such as big powers, major regional states, and even the Holy See—has in some cases led to comprehensive agreements being concluded between territorial claimants that include detailed, constructive elements that may prevent their dispute from lingering. The formally nonbinding nature of conciliation gives disputant states greater willingness to enter into a conciliation process and flexibility to consider broader, equitable approaches to the underlying problems. It might be possible for respected nongovernmental organizations to become part of a conciliation process between states, with the nongovernmental organization’s role being primarily to promote reconciliation and generate ideas for constructive solutions.
- Transportation corridors have a rich historical background and could provide a way to mediate disputes that involve past territorial conflicts, and as a result of which a state has lost contiguity with portions of its own territory or to other valuable resources, such as access to the sea. The experience with corridors shows that flexibility in design can



alleviate many practical, as well as legal and political, issues; and corridor arrangements can be combined with other elements, such as port and warehouse facilities, or special export-import zones, to make them even more effective. Where access to the open sea is also at issue, the ICJ decision in the Land, Island, and Maritime Frontier Dispute (see above) suggests the possibility of designating a maritime zone for a state even though it has no coastline directly facing the sea.

- Joint development agreements, as regularly used in the mineral mining industry, especially for offshore hydrocarbon operations, have already enjoyed considerable success in addressing boundary issues and avoiding conflict, and even confrontations, over ownership and exploitation of oil and gas fields. In such arrangements, the state parties agree to share the costs and proceeds of mining, under several different operating approaches chosen according to the circumstances and their relative capacities. Particularly with reference to oil and gas reserves, unitization of operations in a field permits optimal utilization of the resources while preventing their degradation and/or adverse effects on transboundary portions of the field. In some parts of Africa and Asia, however, political factors have prevented even the best-integrated, joint approaches from being adopted.
- With respect to international cooperation to manage shared resources, especially fresh water, the record is mixed. Many, mainly bilateral, treaties have been adopted, but fresh water systems all over the world have become subject to overuse and pollution. While it is feared that “water wars” may occur in certain parts of the world, particularly the Middle East, historical experience suggests that the importance of continued access to fresh water supplies will often prevent open conflict from erupting. But it would certainly appear that further bilateral and especially multilateral arrangements should be developed, with much greater provision for improved monitoring and enforcement. In addition, consideration should be given to including market-based approaches, such as tradable water usage rights, in international water agreements.
- Many current regional crises, including two in a single country (Sudan, in the west and south) and others involving more than one country (e.g., Chad, Sudan, and the Central African Republic), arise from conflicts among users of “common property” resources. The “common property” resources are typically marginal lands supporting shifting agricultural and pastoral activities. These conflicts have been exacerbated by climate change (including drought), pressure on terrestrial resources due to increased human activities, and the desire of national and subnational authorities and groups to secure their territorial holdings. In these situations, it would be desirable to create special, joint commissions to regulate use rights and protect the resources, while providing additional support and assistance to the inhabitants.