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Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution

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CONDOMINIUM ARRANGEMENTS IN INTERNATIONAL PRACTICE: REVIVING AN ABANDONED CONCEPT OF BOUNDARY DISPUTE RESOLUTION

*Joel H. Samuels**

I. THE CONDOMINIUM IN HISTORICAL PERSPECTIVE.....	732
A. <i>The Experience of Condominium over Land</i>	737
B. <i>Water Condominia</i>	753
II. CONDOMINIUM DISTINGUISHED	758
A. <i>Coimperium</i>	758
B. <i>Mandates, Trusts, Non-Self-Governing Territories, and Protectorates</i>	759
1. Mandates.....	760
2. The United Nations Trusteeship System.....	763
3. Non-Self-Governing Territories.....	764
4. Protectorates	765
C. <i>Other International Territorial Arrangements</i>	766
III. ON PROPERTY AND SOVEREIGNTY	768
IV. A FLOOR PLAN OF THE MODEL CONDOMINIUM	772
V. CONCLUSION	774

Boundary disputes pose an ongoing threat to international peace and security across the globe. Some of these disputes involve line drawing along a frontier,¹ while others involve the fate of entire towns or provinces.² Some involve little more than a small island in the middle of a

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1. In the 1990s, Ethiopia and Eritrea fought a bloody war over their frontier line. The two sides ultimately agreed to submit the dispute to binding arbitration. *See* Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eri. v. Eth.), Eritrea-Ethiopia Boundary Commission, Apr. 13, 2002, *reprinted in* 41 I.L.M. 1057. The arbitration panel issued its decision in April of 2002, which resulted in the drawing of a line that pleased neither side fully. *See id.* At present, Ethiopia is threatening the stability of the region by rejecting the arbitration panel's award.

2. Although they intended to develop a peace plan for the former Yugoslavia, the participants in the Dayton Peace Process in the mid-1990s found themselves struggling to identify a solution to a dispute between Serbia and Bosnia-Herzegovina over the status of Brčko, a town (and province) with important cultural and strategic interests for each State. *See infra* note 10 (offering more information on this dispute).

river,³ while others, like Kashmir or Jerusalem, have important historical, cultural, and strategic value.

Despite their differences, however, boundary disputes have been strikingly consistent in one respect: they have defied durable solutions. Political leaders, international law jurists, and scholars have, for the most part, failed to successfully fashion solutions for the many complex problems created by boundary disputes. Therefore, in light of this failure and the current geopolitical landscape, the time has come to revisit a largely abandoned theory of boundary dispute resolution: the condominium.

A condominium in international law exists when two or more States exercise joint sovereignty over a territory.⁴ Often used as measures of last resort when efforts to resolve territorial disputes through negotiation have failed, condominium arrangements have generally been designed to be temporary in nature.⁵ However, as Hersch Lauterpacht, one of the leading twentieth-century international law scholars, noted, “[T]here is nothing in legal theory or in the nature of sovereignty to render impossible a permanent and agreed division of sovereignty as suggested by the very nature of a condominium.”⁶

Indeed, a negotiated condominium arrangement may be the ideal model for creating a durable resolution to many boundary disputes. Other resolution devices rely upon indivisible notions of sovereignty, which means that, regardless of whether a dispute is resolved peacefully or through armed conflict, one side invariably loses on a claim it believed to be valid.⁷ As past experience shows, this type of resolution is

3. For example, Botswana and Namibia disputed the ownership of Kasikili/Sedudu Island, an uninhabited sandbar in the middle of the Chobe River, which divides the two nations. Unable to reach a solution, the neighbors agreed to submit their dispute to the International Court of Justice (ICJ), which ultimately awarded the territory to Botswana. *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1108 (Dec. 13).

4. See 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 453 (H. Lauterpacht ed., Longmans, Green & Co., 8th ed. 1955). A condominium arrangement for real persons, as opposed to States, involves common ownership by two or more persons holding undivided fractional shares in the same property and having the right to alienate their shares. Thus, in the Anglo-American legal culture, a condominium is comparable to a tenancy in common, as opposed to a joint tenancy with rights of survivorship. John E. Cribbet, *Condominium—Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207, 1215 (1963).

5. In some instances, a condominium was used as a temporary measure pending the final adjudication of a territorial dispute. See 1 HERSCH LAUTERPACHT, *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 370 (E. Lauterpacht ed., 1970). For example, in the Peace Treaties of 1919, the Central Powers ceded territories to the Allied and Associated Powers, which held those territories under joint sovereignty until final action had been taken. See *Treaty of Peace Between the Allied and Associated Powers and Hungary* arts. 53, 74, June 4, 1920, 6 L.N.T.S. 187, available at http://wwi.lib.byu.edu/index.php/Treaty_of_Trianon.

6. 1 LAUTERPACHT, *supra* note 5, at 371.

7. When line drawing is involved, a resolution that splits the claims of the boundary will not give either side the full territory that it claims. In a case in which one side is awarded the full territory, the losing party in that dispute will have lost the entire territory that it had claimed.

often temporary, as the losing side maintains its interest in the territory and seizes opportunities to recapture it.⁸

In recent years, condominium has been proposed as a solution to several prominent boundary disputes, including Gibraltar,⁹ Brčko in the former Yugoslavia,¹⁰ the West Bank and Gaza,¹¹ the Caspian Sea,¹² the Barents Sea,¹³ and the Orange River.¹⁴ However, with the exception of

8. See *supra* note 1 (providing a recent example of this problem).

9. This dispute is between Britain and Spain. See, e.g., Francois Raitberger, *Britain and Spain Pledge to Continue Talks on Gibraltar*, REUTERS, Dec. 6, 1985.

10. When the Dayton Peace Accords were signed in December of 1995, and Yugoslavia was officially partitioned, only one issue was explicitly left open by the parties: what to do with the town of Brčko and its surrounding areas. See Peter C. Farrand, Comment, *Lessons from Brčko: Necessary Components for Future Internationally Supervised Territories*, 15 EMORY INT'L L. REV. 529, 531 (2001). Brčko, a town in northern Bosnia, and its lightly populated municipality (the Brčko opština) had for centuries been a Muslim region. At the time, Brčko was not just another war-ravaged Bosnian town; it was the strategic linchpin for Serbia, lying at the nexus of the east-west route linking Serb-held western Bosnia with Serbia itself. RICHARD HOLBROOKE, *TO END A WAR* 271 (1998). None of the delegations to the Dayton Peace Process would concede on the status of Brčko, and that issue alone threatened to derail the entire Dayton Process. Farrand, *supra*, at 532. The creation of an arbitration panel to decide the fate of Brčko, however, led to the resolution of this issue. *Id.*; see Brčko Final Award (Bosn. & Herz. v. Serb.), 38 I.L.M. 534 (Arb. Trib. For Dispute over Inter-Entity Boundary in Brčko 1999), available at http://www.ohr.int/ohr-offices/Brčko/default.asp?content_id=5358 (last visited Mar. 20, 2008) (providing the text of that panel's decision).

11. This dispute involves Israel, the Palestinian Authority, and Jordan. See, e.g., Dore Gold, *From Polarity to Unity: World Leaders' Eyes on Us*, JERUSALEM POST, Nov. 10, 1995, at 8; Richard N. Haass, *A Time for the U.S. to Hold Back in the Middle East*, CHRISTIAN SCI. MONITOR, Jan. 7, 1988, at 13.

The international community has long sought to find a cooperative solution to the problem of Jerusalem. In 1947, the U.N. General Assembly requested that "[t]he city of Jerusalem [] be established as a *corpus separatum* under a special international regime and [] be administered by the United Nations." G.A. Res. 181 (II), at 146, U.N. Doc. A/181 (Nov. 29, 1947). The resolution called on a Trusteeship Council to develop and apply a detailed Statute of the City. *Id.* at 146–47. However, "[i]t has never been possible to apply the statute, as Israel and Jordan were opposed to it." OMAR MASSALHA, *TOWARDS THE LONG-PROMISED PEACE* 219 (1994).

12. Until 1998, condominium was the arrangement proposed by Russia and backed by Iran to resolve the dispute among those two nations, as well as Kazakhstan, Turkmenistan, and Azerbaijan. Moscow has acquiesced in its demands, but continues to favor a condominium arrangement for the center of the sea, which would give all five States common rights to the sea's rich oil and fishing resources. See, e.g., Michael Bronner, *Oil Economist Says Sanctions Hurt U.S. Firms*, WASH. TIMES, Nov. 22, 1997, at A8; Steve Levine, *Iran Backs Russia on Caspian Sea Claim*, FIN. TIMES, May 17, 1995, at 3; Clive Schofield & Martin Pratt, *Claims to the Caspian Sea*, JANE'S INTELLIGENCE REV., Feb. 1, 1996, at 75; *Turkmenistan Details Caspian License Round*, OIL & GAS J., Sept. 29, 1997, at 39.

13. This dispute is between Russia and Norway. See, e.g., David Scrivener, *The Border Dispute in the Barents Sea*, JANE'S INTELLIGENCE REV., June 1, 1992, at 252. As in the Caspian Sea dispute, Russia was pushing for joint sovereignty over the water and its resources, whereas Norway resisted any language in an agreement that would imply joint sovereignty over any part of the Sea.

14. South Africa and Namibia are the parties to this dispute. See, e.g., James Lamont, *S Africa-Namibia Border Dispute Grows*, FIN. TIMES, June 6, 2001, at 13.

Brčko, these proposals for condominium have not been taken seriously, nor have they, for that matter, generated meaningful debate about how a condominium could operate to solve territorial disputes.¹⁵ Ultimately, condominium could be the solution to the disputes over sovereignty of Jerusalem,¹⁶ Kashmir, and the Caspian Sea. However, before adopting a condominium there, international actors must first fully understand how condominiums work.

Over the past fifty years, the international community has overwhelmingly dismissed condominium as a meaningful solution to boundary disputes. Critics have argued—and continue to argue—that if two or more States have not been able to reach a peaceful arrangement for even temporary resolution of a dispute, it is hard to imagine how those States will be able to collaborate in the day-to-day administration of the disputed territory.¹⁷ Even a leading international law treatise has adopted a dismissive tone toward condominium when merely providing an encyclopedic definition of the term:

In an age when the idea of sovereignty is uppermost, the concept of the condominium is unlikely to attain greater importance since, within the dogma of sovereignty, the notion of an association of sovereignties over a single territory is incompatible with the idea of a territory subject to a community of States. In these terms, condominiums appear as historical relics from the age of feudal and patrimonial States or as patently inadequate anomalies. However, even during the [twentieth] century, when the dogma of sovereignty grew less rigorous, the condominium did not establish itself as anything greater than an emergency or temporary solution or a measure of last resort. The condominiums established after World War I testify to this point.¹⁸ Because of

15. See Farrand, *supra* note 10, at 546, 548–49 (discussing the Arbitral Tribunal's decision to create a condominium in Brčko). Perhaps it should not be surprising that condominium has been suggested only in the most extreme cases, those in which no other solution has proven successful. However, by proposing condominium only in such disputes, decision-makers lose the opportunity to resolve other, perhaps smaller, disputes that might benefit from a shared sovereignty arrangement.

16. See Hady Amr & Joel H. Samuels, Op-Ed, *For Jerusalem, Shared Sovereignty*, WASH. POST, July 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001816.html>.

17. See I LAUTERPACHT, *supra* note 5, at 371–72 (suggesting that a condominium “may be practicable only between States between which there exists an atmosphere of understanding or co-operation—in which case solutions more simple than a condominium will be found in the first instance”).

18. The entities created after World War I were not condominiums. See *infra* Part II. Therefore, the experiences of those territories do not speak to the viability of condominium; rather, they speak to the general problem of short-term solutions to delicate territorial problems.

this, it is not now, nor has it ever been possible, to derive specific general rules from the existence of individual condominiums, which together might make up an institute of international law. The special character of each individual case prevents any such attempt.¹⁹

As is apparent from the above quotation, condominium has been burdened historically by the primacy of sovereignty as a consideration in the state system. Today, however, the diminished power of sovereignty as the dominant consideration of state behavior creates more hospitable conditions for condominium. It was not more than thirty years ago that Hedley Bull suggested that the time “is ripe for the enunciation of new concepts of universal political organization which [will] show how Wales, the United Kingdom and the European Community [can] each have some world political status while none la[y] claim to universal sovereignty.”²⁰ Today, the European Union is taken for granted—an institution with its own legislature, its own courts, and even its own currency. The fact that European States, the paramount forces in the creation of sovereignty in the Westphalian order, have increasingly ceded authority to a non-state entity shows that States are reevaluating their traditional notions of sovereignty.

The development of the European Union is but one important manifestation of the metamorphosis underway in international law, as States redefine not only themselves, but also the processes by which they interact with one another. The willingness of States to cede sovereignty to other bodies suggests that condominium could, at last, serve as a viable long-term mechanism to resolve boundary disputes. At the height of its use from the mid-nineteenth century through the early twentieth century, condominium failed, in large part, because States defined themselves by their sovereignty and conceived of that sovereignty as indivisible.²¹

19. James Schneider, *Condominium*, in I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 732, 734 (Rudolf Bernhardt ed., 1992).

20. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 258 (2d ed. 1977). Bull also emphasized that “one reason for the vitality of the states system is the tyranny of the concepts and normative principles associated with it . . .” *Id.* at 265.

21. See JONATHAN SCHELL, *THE UNCONQUERABLE WORLD: POWER, NONVIOLENCE, AND THE WILL OF THE PEOPLE* 292–96 (2003). As an aside, Edmund Burke was one of the earliest international legal scholars to criticize the doctrine of sovereignty. Before the American Revolution, Burke warned British officials that “[a]ssertions of indivisible British sovereignty might provoke the rebellion in the United States . . .” *Id.* at 296. But, as Schell later pointed out, “[there] could have been another, more flexible conception of state power that would have permitted the American states to govern their own local affairs, while remaining conjoined in a voluntary, multinational union.” *Id.* Of course, the simple truth is that the primacy of sovereignty as a defining characteristic of the State rendered any thoughts of shared sovereignty all but impossible in the late eighteenth century. Also, this notion of

However, now that sovereignty considerations have changed, condominium should be reconsidered in this new, encouraging light.

This Article attempts to revive the consideration of condominium as a possible solution to contemporary boundary disputes. Part I describes specific historic instances of condominia and derives relevant lessons from each instance. Part II notes that some critics of condominium have in fact confused condominium with other forms of joint dominion over territory. This Part proceeds, therefore, to distinguish condominium from these other arrangements. Next, Part III discusses how experiences with common property regimes over common resources (such as water supplies) might inform the contemporary use of condominium. Finally, informed by lessons articulated in Parts I through III, Part IV develops a model for a successful condominium that could be tailored to resolve a contemporary boundary dispute.

One basic lesson of past condominium experience is that, as a quick solution to pressing problems, condominium is not a successful solution to territorial disputes. Therefore, condominia must be built with a long-term vision and a strong support structure. Taken as a whole, the process of building a condominium must be viewed like the construction of any physical structure: the façade of the structure has no value if the structure itself is not built on solid foundations. This Article attempts to provide the foundation on which solutions to particular disputes can be built.

I. THE CONDOMINIUM IN HISTORICAL PERSPECTIVE

The earliest condominium recorded in detail arose in the thirteenth century B.C.²² This condominium appeared after many years of war between the empires of Egypt and Hatti.²³ In 1294 B.C., the two sides fought a particularly brutal battle at Kadesh, which led them to seek reconciliation.²⁴ Thereafter, Ramses II and Hattusilis III the Hittite king, entered into a treaty that ended their hostility in Asia Minor.²⁵ The two

sovereignty greatly influenced the failed outcome of condominia in the nineteenth and early twentieth centuries. See JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* 8 (2003) (focusing primarily on the development of theories of title to territory from their roots in Roman law and identifying sovereignty as a prime consideration).

22. See GEORGE LISKA, *IMPERIAL AMERICA: THE INTERNATIONAL POLITICS OF PRIMACY* 13–14 (1967).

23. See *id.* at 13.

24. See *id.*

25. See O.R. GURNEY, *THE HITTITES* 63 (1952) (noting that this treaty was signed in the early thirteenth century B.C. (perhaps around 1258 B.C.)). Two copies of the treaty were made, one for each ruler. See *id.* One of the copies was discovered on an inscription on the

rulers not only renounced all projects of conquest against one another and pledged mutual assistance in the case of attack from any third party, but also undertook to cooperate in subduing delinquent subjects, most likely in Syria.²⁶

While the Egyptian-Hittite condominium was less formal than the condominiums of the nineteenth and twentieth centuries, it shared the distinguishing features of condominiums: joint sovereignty over a territory and legitimate rights for both sovereigns.

However, “[t]he emergence of condominium as a term of international law was largely the result of Roman and civil law influences.”²⁷ The underpinnings of the condominium concept can be traced to the Roman law rules of *communio pro indiviso* (undivided joint property).²⁸ From the Latin for joint lordship, condominium refers to a concept of shared sovereignty and administration that reached the modern world from the feudal system of medieval Europe. Although the institutions may have existed in some form under Roman law, condominium was imported into international law in the Middle Ages when Roman law was received by the Germanic States and much of the rest of Western Europe. It appears that the term was coined by Italian writers on civil law, but was quickly introduced into works on international law by both Italian and other European scholars.²⁹

The golden age of the condominium, to the extent there was one, lasted from the early nineteenth century through the middle of the twentieth century. During the nineteenth century, condominiums were employed by European statesmen more actively than in any period before or since.³⁰ As a solution to border disputes and conflicting colonial claims, and as a key tool at the Congress of Vienna after the Napoleonic wars,

wall of the Temple of Amun at Karnak, while the other, written in Akkadian, was discovered on a tablet in Boghazkoy in modern Turkey. *See id.*

26. JAMES H. BREASTED, *A HISTORY OF EGYPT FROM THE EARLIEST TIMES TO THE PERSIAN CONQUEST* 438 (2d ed. 1916). The precise area of the condominium and indeed the arrangement's precise features are unknown, given the limited documentation that survives from that era. *Id.* at 438–39.

27. Schneider, *supra* note 19, at 732.

28. ABDALLA A. EL-ERIAN, *CONDOMINIUM & RELATED SITUATIONS IN INTERNATIONAL LAW* 50 (1952). The term condominium itself does not appear in the works of Gaius, Justinian, or Roman jurists because the institution existed under another name. *Id.* *See generally* P. Van Warmelo, *Aspects of Joint Ownership in Roman Law*, 25 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 125 (1957) (providing a deeper inquiry into Roman conceptions of co-ownership and condominium).

29. *See* 2 CHARLES DU FRESNE SIEUR DU CANGE, *GLOSSARIUM MEDIAE ET INFIMAE* 490 (Leopold Favre ed., 1883) (discussing works on “Condominus” written in 1357 and 1476); Avv Umberto Corrado, *Condominio Internazionale*, 3 *NUOVO DIGESTO ITALIANO* 737 (1938) (describing the importation of the term “condominium” to international law).

30. *See infra* notes 64–101 and accompanying text (discussing condominiums over Mo-resnet and Schleswig-Holstein).

the condominium was seen as a quick answer to maintain the nineteenth-century European balance of power. In the twentieth century, condominiums became a vehicle for resolving disputes among colonial powers over far-flung territories.³¹ At times, a functional condominium existed, even though the two parties did not formalize the arrangement.³²

Condominium largely disappeared from the lexicon of international law during the late twentieth century. Its disappearance was due primarily to the fact that its basic tenets ran counter to the conception of a state system, which is founded upon the primacy of sovereignty as the defining characteristic of States.³³ Of course, international law cannot, without admitting a condition of anarchy, contemplate a territory that is not subject to some ultimate authority capable of making final decisions. That authority, however, need not be a single State. If two States jointly exercise territorial sovereignty, the ultimate authority can be provided by methods agreed upon by the sovereign States.³⁴

Two distinctions can be identified among past condominium experiences. The first distinction occurs between frontier condominiums (where the disputed territory borders on all of the condominium partners) and colonial condominiums (where the disputed territory does not border on the condominium partners). The second occurs between condominiums over land and condominiums over water. These two distinctions are important in considering the lessons that can be drawn from past experience.

31. See *infra* notes 42–63 and accompanying text (discussing the condominium over the Hebrides). Another example of a frontier condominium was the condominium between Russia and Japan over Sakhalin Island. That condominium was established in 1855 by the Treaty of Shimoda. See ALAIN CORET, *LE CONDOMINIUM* 163–64 (1960). The condominium remained in place until 1875, when, through the Treaty of Saint Petersburg, Japan ceded sovereignty over Sakhalin to Russia. See *id.* at 164.

32. For example, from 1879 to 1908, Bosnia-Herzegovina was, at least in theory, under the joint sovereign authority of Austria-Hungary and the Ottoman Empire. Originally, Article 25 of the Final Act of the Congress of Berlin recognized that Bosnia and Herzegovina would be “occupied and administered” by Austria-Hungary. *Id.* at 105. However, Austria-Hungary entered into a later agreement with the Ottoman Empire that provided that Article 25 of the Final Act “does not prejudice the right of sovereignty of His Imperial Majesty the Sultan over these two provinces.” *Id.* at 106.

33. The principal form of political organization since the seventeenth century has been the nation-state. Since dominant powers in geopolitics generally seek supremacy rather than compromise, they rarely treat competitors as equals. Their relationships are defined by tension and discord, rather than by harmony and cooperation. Condominiums themselves have, over history, been the product of wars or colonial pretensions. When countries have established a condominium, struggles over the terms of administration have impeded the governance of the territory and have generally resulted in the dissolution of the condominium or, as in the case of the Gulf of Fonseca, have been resolved only after protracted legal action.

34. For example, the parties may vest ultimate authority in a condominium governor selected by them. They may also choose to create an independent arbitral or judicial body to resolve disputes that may arise while the condominium is in place.

Since the frontier condominium was devised to resolve border disputes between or among contiguous States, it can be far more difficult to manage than a colonial condominium. The nineteenth century condominiums over Moresnet (Germany and Belgium) and over Schleswig-Holstein and Lauenburg (Austria and Prussia) highlight some of these difficulties. Practical issues such as boundary crossings and currency flow complicate the administration of frontier condominiums. In addition, issues of nationality, citizenship, and voter participation arise more often in frontier condominiums in which ethnic differences are either minimal or nonexistent. As a result, frontier condominiums have, in general, been of shorter duration than colonial condominiums.³⁵

The colonial condominium was devised in the nineteenth century and existed as late as 1980, the year that the last colonial condominium, the New Hebrides, gained independence.³⁶ Colonial condominiums were viewed as more permanent solutions to the colonial pretensions of the European powers in the nineteenth and twentieth centuries. These condominiums benefited from their geographical distance from the colonial powers that administered them.³⁷

In recent years, condominium has been proposed (and indeed adopted) as a solution to otherwise intractable disputes over water.³⁸

35. The Andorra experience is an excellent example of this point. From the Middle Ages, the tiny territory of Andorra was a condominium, the sovereignty of which was commonly owned by the Bishop of Urgell in Catalonia and the Comte de Foix of southern France. Schneider, *supra* note 19, at 732. After the French Revolution, Spain and France took over their respective rights. A Concise History of Andorra, <http://www.medinnus.com/andorra/history/html> (last visited Oct. 2, 2008). Since 1419, Andorra has had a representative assembly, the Council of the Land, which provided local participation in governance of the territory. *Id.* However, in the second half of the twentieth century, residents of Andorra became disenchanted with their status. History of the Principality of Andorra, http://www.andorramania.com/histoire_gb.htm (last visited Oct. 2, 2008). In 1993, after nearly two decades of agitation for independence, Andorra was granted full independence and was admitted as a member of the United Nations. Bureau of European and Eurasian Affairs, U.S. Dep't of State, Background: Andorra (May 2008), available at <http://www.state.gov/t/pa/ei/bgn/3164.htm>. However, the Bishop of Urgell and the French president are still joint presidents of Andorra. *Id.*

36. See John G. Peck & Robert J. Gregory, *A Brief Overview of Old New Hebrides*, 7 ANTHROPOLOGIST 269, 269 (2005). An additional example of a colonial condominium arrangement is the joint administration of the Canton and Enderbury Islands by the United Kingdom and the United States. See Exchange of Notes Constituting an Agreement Regarding the Administration of the Islands of Canton and Enderbury, U.S.-Gr. Brit.-N. Ir., Apr. 6, 1939, 196 L.N.T.S. 343, available at http://untreaty.un.org/unts/60001_120000/19/29/00037415.pdf [hereinafter Islands of Canton and Enderbury Agreement]. The Canton and Enderbury Islands, important links for aviation routes in the Pacific, were held in condominium from 1939 to 1979.

37. By the twentieth century, the United States also had become involved in colonial acquisition, and so it too became a party to colonial condominiums. See generally M. Moyer, *La question des îles Samoa*, 6 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 125 (1899).

38. See, e.g., Kamyar Mehdiyoun, *Ownership of Oil and Gas Resources in the Caspian Sea*, 94 AM. J. INT'L L. 179, 179-89 (2000) (noting arguments made in favor of a

Condominia over water present less delicate demands for joint cooperation than most condominia over land because, in the former instance, States are generally concerned only with rights and access to natural resources. Part I.A will review the successes and failures of past condominia and will, from those successes and failures, draw lessons relevant to the development of a contemporary condominium model. Part I.B will turn to two water condominia to consider the lessons those experiences offer for crafting a model for future condominia over land.³⁹

For a State to claim a condominium in a territory with another State (or States), each side must admit that the territory belongs to it conjointly with the other State (or States). Whether or not a right is sovereign is a question of more than academic interest. States and their courts must also confront the range of legal issues that arise from interpreting a condominium agreement. For example, in the early twentieth century, French courts struggled to define, at least on a consistent basis, the status of the residents of Andorra, a territory jointly governed by France and Spain.⁴⁰ One court held that Andorrans should be treated as foreigners, while another stated that the “rights of sovereignty which France exercises in Andorra d[id] not permit of the territory being considered as foreign.”⁴¹

condominium over the Caspian Sea); Benjamin K. Sibbett, Note, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 *FORDHAM INT’L L.J.* 1606 (1997–98) (discussing the dispute between Japan and Korea over the Liancourt Rocks in the Sea of Japan). For an in-depth discussion of active maritime disputes in the 1990s, see Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 *AM. J. INT’L L.* 227 (1994).

39. See *infra* Part II.B.

40. See *ANNUAL DIGEST & REPORTS OF INTERNATIONAL LAW CASES: YEARS 1993 & 1994* 56 (H. Lauterpacht ed., 1940). Although today Andorra is an independent nation with a parliamentary democracy, it was governed for more than 700 years (1278 to 1993) as a co-principality by Spain and France.

41. *Id.* Note that, although Andorra is an example of joint administration (which led to the French court’s consideration of citizenship and related issues), it is not an example of a condominium *per se*. The power of administration was not shared by two States; rather, it was held by the leader of a State (France) and an individual (the Bishop of Urgell in Spain). Dietrich Schindler, *Andorra*, in *I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 19, at 164, 164. The Valleys of Andorra had been held in joint sovereignty since 1278, when the French counts of Foix and the Spanish Bishop of Urgell were given joint and equal rights as the outcome of a special arbitration known as a *paréage*. *Id.* (noting also that under the terms of the 1278 *paréage*, the vassals paid an annual tribute to the co-suzerains, who, in turn, nominated a representative (*viguier*) to represent them in the Valleys). In 1589, the French rights passed from the counts of Foix to the King of France and, following the French Revolution, to the French State. *Id.* The rights of the Bishop of Urgell have never been passed to Spain. *Id.* Therefore, the State of France and the Bishop of Urgell maintain an ongoing interest in the sovereign relations of Andorra. *Id.* Indeed, Articles 43 and 44 of the Constitution of Andorra, which was adopted in 1993, recognize that

[i]n accordance with the institutional tradition of Andorra, the Coprínceps are, jointly and indivisibly, the Cap de l’Estat [sic], and they assume its highest repre-

As shown by the Andorran example, a successful condominium must address more than just the underlying issues of shared sovereignty. A roadmap for a condominium must address citizenship, voting rights, executive, legislative, and judicial powers, economic and financial issues, public services, foreign affairs, defense, freedom of movement, and a variety of other considerations.

A. *The Experience of Condominium over Land*

New Hebrides: Colonial Condominium. The best example of a colonial condominium is the condominium agreement that governed the New Hebrides, a chain of islands located in the Pacific Ocean. The New Hebrides were officially discovered by the Spanish explorer Pedro Fernandes de Quiros in 1606.⁴² By the late nineteenth century, both France and Great Britain maintained an active presence on the islands.⁴³ Three centuries after de Quiros discovered the islands, by the Convention of October 20, 1906, the United Kingdom and France established a condominium to administer the New Hebrides.⁴⁴ The islands were governed as a condominium for seventy-four years.⁴⁵

sentation. The Coprínceps, an institution which dates from the Paréatges and their historical evolution, are in their personal and exclusive right, the Bishop of Urgell and the President of the French Republic. Their powers are equal and derive from the present Constitution The Coprínceps are the symbol and guarantee of the permanence and continuity of Andorra as well as of its independence and the maintenance of the spirit of parity in the traditional balanced relation with the neighboring States. They proclaim the consent of the Andorran State to honor its international obligations in accordance with the Constitution. The Coprínceps arbitrate and moderate the functioning of the public authorities and of the institutions, and are regularly informed of the affairs of the State by their own initiative, or that of the Síndic General or the Cap de Govern [sic].

Constitution of the Principality of Andorra arts. 43, 44, available at http://www.andorramania.com/constit_gb.htm.

42. See 22 HISTORICAL SECTION, GR. BRIT. COLONIAL OFFICE, HANDBOOKS PREPARED UNDER THE DIRECTION OF THE HISTORICAL SECTION OF THE FOREIGN OFFICE, NO. 147 7 (1920) [hereinafter HANDBOOKS, NO. 147].

43. See Daniel P. O'Connell, *The Condominium of the New Hebrides*, 43 BRIT. Y.B. INT'L L. 71, 74–75 (1968–69). Among other things, in 1887, the two sides agreed to a convention that established a joint naval commission. Steven Less, *New Hebrides*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 19, at 573, 574. The Commission was staffed by French and British naval officers, who were to maintain order and protect the lives and property of French and British citizens in the New Hebrides. *Id.* at 575. This Convention, however, did not create a condominium over the islands because it merely created a structure to protect national interests in a *terra nullius*. O'Connell, *supra*, at 75. Even after the 1887 Convention was signed, no foreign power was precluded from later taking possession of the islands. *Id.*

44. See O'Connell, *supra* note 43, at 75–76.

45. See Less, *supra* note 43, at 575. Since it was granted its independence in 1980, the country has changed its name to Vanuatu. *Id.*

The principles of the condominium were laid out in the General Instructions to the British and French High Commissioners of August 29, 1907. The Instructions detail the essence of a joint sovereignty agreement:

The desire of the two Governments is to secure the exercise of their paramount rights in the New Hebrides. The two Powers, who were mutually bound not to intervene separately in the New Hebrides, now agree to intervene there together. Instead of remaining mutually exclusive, their paramount rights are combined; the two countries jointly assume jurisdiction in the islands, and thereby provide against the possible appearance of a third Power.⁴⁶

In administering the condominium over the New Hebrides, each government had sovereignty over its own nationals, while the two condominium powers governed the indigenous population jointly.⁴⁷ Essential government services such as tax collection, communications, public health, and public works were provided jointly, and the costs were paid from local revenues and joint contributions.⁴⁸ A Joint Court ran the criminal and civil justice systems.⁴⁹ The Court consisted of one British judge, one French judge, and a neutral third member.⁵⁰ Both languages and currencies were official.⁵¹

Each of the two condominium powers was responsible for all of the expenses of its own administration.⁵² A unified condominium fund, drawn from equal contributions by both States (as well as from local revenues), covered the costs of joint services.⁵³ All tax revenues went directly in the coffers of the joint condominium fund.⁵⁴

The executive command of the condominium consisted of a British Resident Commissioner and a French Resident Commissioner, who

46. General Instructions to the British High Commissioner with Regard to the Application of the Convention of October 20, 1906, *reprinted in* 100 BRITISH AND FOREIGN STATE PAPERS: 1906-1907 519 (Richard W. Brant & Willoughby Maycock eds., 1911).

47. See HANDBOOKS, NO. 147, *supra* note 42, at 16. See generally HUBERT BENOIST, LE CONDOMINIUM DES NOUVELLES-HEBRIDES ET LA SOCIETE MELANESIENNE (A. Pedone ed., 1972); CORET, *supra* note 31; N. POLITIS, LE CONDOMINIUM FRANCO-ANGLAIS DES NOUVELLES-HEBRIDES (A. Pedone ed., 1908).

48. HANDBOOKS, NO. 147, *supra* note 42, at 16.

49. See *id.* at 18-21.

50. *Id.* at 18.

51. Peck & Gregory, *supra* note 36, at 280.

52. Protocol Respecting the New Hebrides Signed at London, August 6, 1914, by Representatives of the British and French Governments art. 5, Gr. Brit.-Fr., July 10, 1922, 1922 U.N.T.S. 278.

53. See *id.*

54. See *id.*

acted in concert on all major decisions.⁵⁵ Any decision affecting the administration of the condominium was to be reached by the executive command.⁵⁶ Officers of both nationalities staffed the administrative departments, and actions by the departments were subject to review by the Resident Commissioners acting jointly.⁵⁷ Condominium agents of both nationalities were deployed on various islands in the chain and were granted joint control over their regions.⁵⁸

From as early as 1906, the police force in the New Hebrides was divided into two separate forces of armed native officers, one British, the other French.⁵⁹ The two forces reported to two National Commandants, each of whom served under his respective Resident Commissioner.⁶⁰ Each force was responsible for policing the actions of its own nationals.⁶¹ The cost of the maintenance of each police force was covered by its own national government, except when the forces acted jointly, in which case, expenses were paid from condominium funds.⁶²

Notable both for its longevity and for its effectiveness in incorporating local traditions, the New Hebrides condominium provides several important lessons regarding colonial condominiumia.⁶³ First, a more distant

55. Peck & Gregory, *supra* note 36, at 280.

56. *See id.*

57. *See id.*

58. *See id.* at 281.

59. O'Connell, *supra* note 43, at 105.

60. *Id.*

61. *See id.* at 106.

62. *See id.*

63. By contrast, certain colonial condominiumia offer no real guidance for future condominiumia because the colonial powers were not interested in governing the territory. For example, in 1939, the United States and Great Britain created a condominium over the Canton and Enderbury Islands in the South Pacific. *See Islands of Canton and Enderbury Agreement*, *supra* note 36. The United States had claimed title over the islands based on the Guano Act of 1856, while Great Britain had incorporated them into the Phoenix Island Group after asserting that the islands were *terra nullius* and, therefore, fair game for conquest. EL-ERIAN, *supra* note 28, at 105. These two tiny atolls were only of interest to the United States as possible landing strips for commercial and military flights. Editorial Comments, 33 AM. J. INT'L L. 519, 526 (1939). Great Britain was interested primarily in the phosphate resources offered by the islands. *See id.* at 525. In 1939, the two States agreed to create a fifty-year condominium over the islands. *See Islands of Canton and Enderbury Agreement*, *supra* note 36. The agreement provided:

I. The Government of the United States and the Government of the United Kingdom, without prejudice to their respective claims to the Canton and Enderbury Islands, agree to a joint control over these islands.

II. The Islands shall, during the period of joint control, be administered by a United States and a British official appointed by their respective Governments.

...

form of administration helps to maintain a sense of order because it allows the local citizens to exercise a greater form of self-governance. Second, joint implementation of laws and tax codes solidifies the relationship with the ruling sovereign powers. Third, when States have a shared interest in the administration of the territory and maintain an active presence in the territory, the equipoise in the relationship between the sovereign powers can be preserved.

Moresnet: Frontier Condominium. Due to ambiguities in the provisions of an 1816 border treaty between the Netherlands and Prussia, Moresnet, a region that lies just a few kilometers from the spot where the borders of Germany, Belgium, and the Netherlands meet, was held in condominium from 1816 until 1919, the year Belgium was granted full sovereignty over the territory.⁶⁴ The condominium became necessary because, in defining the frontier between Prussia and the Netherlands, the 1815 Act of the Congress of Vienna omitted the District of Moresnet.⁶⁵

VI. An airport may be constructed and operated on Canton Island by an American company or companies, satisfactory to the United States Government, which, in return for an agreed fee, shall provide facilities for British aircraft . . .

VII. The joint control . . . shall have a duration of fifty years from this day's date. If no agreement to the contrary is reached before the expiration of that period the joint control shall continue thereafter until such time as it may be modified or terminated by mutual consent of the two Governments.

Id. §§ I-II, VI-VII.

Today, the islands form part of the independent nation of Kiribati. The experience of these islands demonstrates that the underlying agreement that creates the condominium can also delineate particular rights and powers in favor of one sovereign power. In other words, as Section VI of the Agreement demonstrates, sovereignty can be divided and partitioned by one State in favor of another.

64. Schneider, *supra* note 19, at 733. The status of Moresnet was discussed by Belgium's main court of last resort in the case of *Kepp et consorts*. EL-ERIAN, *supra* note 28, at 94 (citing Kepp et consorts, Cour de Cassation [Ct. of Cassation], May 25, 1925, Pasificrie Belge 1925, pt. I, 253-55). On September 16, 1924, the Belgian Court of Compensation for War Damages at Verviers denied claims against Belgium for damages inflicted during World War I on property located in the Commune of La Calamine (the territory formerly known as Moresnet). *Id.* The court of last resort reversed the decision, finding that the territory was Belgian at the time of the attack. *Id.* It further held that Belgian sovereignty did not begin with the Treaty of Versailles, when Germany officially recognized Belgian unilateral sovereignty over the territory, but rather with the Treaty of Vienna in 1815. *Id.* It stated that the Treaty of Versailles simply removed the obstacle of joint sovereignty by rescinding Germany's rights over the territory; however, no new rights of sovereignty were provided by Belgium's acquisition of unilateral sovereignty, even though additional powers might be drawn from the new arrangement (such as the right to police the territory). *Id.* Thus, the Belgian court concluded that Moresnet must be considered "as having been a part of the Netherlands since 1815 and of Belgium since 1830." *Id.* (citation omitted).

65. See Vienna Congress Treaty, June 9, 1815, reprinted in 1 E. HERTSLET, MAP OF EUROPE BY TREATY 208 (1875); see also *Chronique Des Faits Internationaux*, 11 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 68, 71 (1904).

Article 25 provided that "His Majesty the King of Prussia shall also possess in full property and sovereignty, the countries on the left bank of the Rhine included in the frontier."⁶⁶ The District of Moresnet, however, was not contemplated in the language of Article 25.⁶⁷ Prussia and the Netherlands could not come to an agreement on the interpretation of the boundary provision, and both claimed Moresnet.

Despite their disagreement, however, Prussia and the Netherlands agreed to create a condominium over the territory.⁶⁸ Under the terms of the Treaty of Aix-la-Chapelle, the village of Moresnet itself became Dutch, Neu-Moresnet became part of Prussia, and the zinc mine and the village of Kelmis (La Calamine) around the mine became a condominium, with both States exercising joint administration over the area.⁶⁹ In 1830, when Belgium gained its independence from the Netherlands, the land on the Dutch side came under Belgian control, and Belgium took over the position of co-administrator.⁷⁰

The Treaty of Aix-la-Chapelle also set forth the rules for governing the condominium.⁷¹ According to its terms, legislative and executive powers were to be exercised in common by the governments of Prussia and the Netherlands/Belgium.⁷² However, the French Codes of the First Empire, which were the law of Moresnet in 1815, were to remain in force and could not be amended or replaced without agreement by both governments.⁷³ At first, the territory was governed by two royal commissioners, one from each sovereign, but later, Moresnet was granted a greater measure of self-administration when a mayor and municipal

66. Vienna Congress Treaty, *supra* note 65, at 229.

67. *See id.* at 229–31.

68. *See* Treaty of Aix-la-Chapelle, Prussia-Neth., June 26, 1816, *reprinted in part in* CORET, *supra* note 31, at 148 (full treaty on file with author). The reason that the two sides refused to concede to one another was simple: in between the villages of Moresnet and Neu-Moresnet lay a small swatch of territory that included a valuable zinc mine. Both countries were intent on maintaining their rights to this resource.

69. *See id.* Article XXXI explicitly provided for the conditions concerning exploitation of the resources at the mine (La Calamine), thereby binding both parties in their oversight of the zinc mining operations. *Id.* art. XXXI.

70. *See Chronique Des Faits Internationaux, supra* note 65, at 72.

71. Treaty of Aix-la-Chapelle, *supra* note 68. While the treaty included many broad provisions on governance, it also included several strikingly specific provisions, recognizing the need for particularly close attention to detail necessary for successful governance of a condominium. So, for example, Articles IX and XIII provide detailed instructions for construction and passage in the event that either the Government of Prussia or the City of Malmedy decides to complete construction of a planned mountain road that would wind across borders drawn elsewhere in the Treaty. *Id.* arts. IX, XIII, XV, XVI. Furthermore, Article XII specifically allowed Prussian citizens to purchase wood and certain other goods from the condominium territory and to remove those goods without being taxed. *Id.* art. XII.

72. *Id.* art. XXVII.

73. *See* CORET, *supra* note 31, at 148.

council were installed.⁷⁴ The mayor (also the head of State), however, was appointed by the two commissioners.⁷⁵

Even though the zinc mine attracted many workers from the neighboring countries, few issues of citizenship arose as a result of the condominium. Virtually all of the workers who came to Moresnet were either Prussian or Belgian.⁷⁶ In fact, during the condominium, these outside workers made up the majority of Moresnet's population.⁷⁷ The workers who came to Moresnet maintained their original citizenship and were subject to the criminal laws of the country of their citizenship.⁷⁸

Also, since fewer than 500 original residents of Moresnet remained there during the condominium period, issues of citizenship over original inhabitants were minimal.⁷⁹ These residents were joint citizens, and, unlike their neighbors who were Belgian or Prussian nationals, they were not subject to military service in either State.⁸⁰ Each member of the native, "neutral" population, as it was known, could choose his country of allegiance for purposes of determining the body of laws that would apply to him.⁸¹

Police commissioners from both States acted in concert in performing their duties in the territory.⁸² Their duties were complicated by provisions that restricted their ability to act unilaterally in the territory.⁸³ In addition, an agreement, which was reached between the condominium powers in 1853, enabled the two commissioners to ask for the police force of their respective States as necessary.⁸⁴

As a condominium territory, Moresnet offered several benefits to its residents, including low taxes, the absence of import-tariffs from both sovereign powers, and lower prices compared to the prices for similar goods just across the border.⁸⁵ Most services (such as mail) were shared between Belgium and Prussia.⁸⁶ Also, residents who were litigants in a

74. See *id.* at 292.

75. See *id.*

76. See *id.* at 73–75.

77. See *Chronique des Faits Internationaux*, *supra* note 65, at 78.

78. *Id.*

79. *Id.*; see also CORET, *supra* note 31, at 149.

80. Camille Piccioni, *Moresnet*, in 2 *DICTIONNAIRE DIPLOMATIQUE* 165, 165 (M.A.-F. Frangulis ed., 1993).

81. See *Chronique Des Faits Internationaux*, *supra* note 65, at 75–77.

82. See CORET, *supra* note 31, at 293.

83. *Id.*

84. See *id.* at 293.

85. See *Chronique des Faits Internationaux*, *supra* note 65, at 76–77; see also Treaty of Aix-La-Chappelle, *supra* note 68, art. XII.

86. See, CORET *supra* note 31, at 149.

civil judicial action could select the venue for the trial, either the Belgian Tribunal of Verviers or the Prussian Tribunal at Aix-la-Chappelle.⁸⁷

Although the value of the territory shifted in the eyes of its sovereign powers after the zinc resources of the Moresnet mine had been exhausted, their interest in the territory did not disappear altogether. Neither Belgium nor Prussia ever surrendered its original claim to the territory, and, around 1900, Prussia began to take a more aggressive stance toward the territory.⁸⁸ At one point, Prussia was accused of obstructing the administrative process in order to force the issue.⁸⁹

In addition to Prussia's efforts, other countries attempted to disrupt the condominium in Moresnet. In 1914, during World War I, Germany invaded Belgium. Later, in 1915, the Germans annexed Moresnet. Belgium disputed the annexation, however, and was vindicated in 1919 with the Treaty of Versailles, which gave Moresnet to Belgium.⁹⁰ Aside from a brief period during World War II, when Germany re-annexed the territory, Moresnet has remained part of Belgium since 1919.⁹¹

Many lessons can be derived from the Moresnet condominium experience. First, the condominium shows that contiguous States can exercise joint sovereignty over a territory with which they share a common border. This lesson alone stands in stark contrast to the claim that condominium cannot succeed. Second, the citizenship rules of the Moresnet condominium provide useful guidance for any future condominium. Third, the experience illustrates how choice of venue provisions, standards for the application of criminal law, and reliance on the legal code in place at the time of the creation of the condominium can help to create transparency and sustain the condominium.

Schleswig-Holstein: Frontier/Colonial Condominium. The nineteenth century Prussian province of Schleswig-Holstein was made up of the duchies of Schleswig, Holstein, and Lauenburg. For several centuries, the three duchies, which lie on a peninsula between Denmark and Germany, were disputed.⁹² In spite of the competing claims to the territories, Denmark unilaterally ruled the three duchies until its defeat in 1864 at the hands of Austria and Prussia.⁹³ In accordance with the Treaty of

87. See *id.* at 84.

88. See *Chronique Des Faits Internationaux*, *supra* note 65, at 76–77.

89. See *id.*

90. Treaty of Peace with Germany [Treaty of Versailles] art. 27, June 28, 1919, 2 Bevens 43, available at <http://avalon.law.yale.edu/imt/parti.asp>.

91. The territory is now part of the municipality of Kelmis/La Calamine in the Belgian East Cantons.

92. See generally 6 HISTORICAL SECTION, GR. BRIT. COLONIAL OFFICE, HANDBOOKS PREPARED UNDER THE DIRECTION OF THE HISTORICAL SECTION OF THE FOREIGN OFFICE, NO. 35, at 10–73 (1920) [hereinafter HANDBOOKS, No. 35].

93. See generally *id.*

Vienna, Denmark renounced all rights in the duchies in favor of Prussia and Austria.⁹⁴

In 1865, Prussia and Austria entered into an agreement to organize a condominium over the duchies of Schleswig and Holstein.⁹⁵ The exercise of rights over the two duchies was divided to establish a condominium.⁹⁶ This condominium, however, took a different form from the Moresnet condominium. In the case of Schleswig and Holstein, the governments of Prussia and Austria agreed that, although the two duchies would remain in joint sovereignty, each territory would be administered independently. Thus, Austria administered Holstein, and Prussia administered Schleswig.⁹⁷ Following the war between Austria and Prussia in 1866, Austria transferred to Prussia all of her rights over the Duchies of Schleswig-Holstein.⁹⁸

The unilateral administration of the two condominium territories reflects an alternative method of resolving border disputes. Although each State administered only one of the two condominium territories, both maintained sovereignty over the whole of the condominium, limiting the ability of either State to breach the spirit of the agreement. In Schleswig, all inhabitants were citizens of Prussia and subject to the laws of Prussia.⁹⁹ In Holstein, the residents were citizens of Austria and subject to the laws of Austria.¹⁰⁰ Prussia and Austria conferred only on the rare occasions when problems of administration arose.¹⁰¹

Because each State had functional autonomy over the activities in its respective territory, the Schleswig-Holstein model presented unique monitoring difficulties and, therefore, could only succeed between States that trusted one another. The Austro-Prussian condominium over Schleswig-Holstein demonstrates an additional element, which, though not essential, can assist in the maintenance of a condominium: shared

94. See Treaty of Vienna, Austria-Den.-Prussia, art. III, Oct. 30, 1864, *reprinted in* HANDBOOKS, No. 35, *supra* note 92, at 102. Article III of the Treaty provided, "His Majesty the King of Denmark renounces all his rights over the Duchies of Schleswig, Holstein, and Lauenburg in favor of their Majesties the King of Prussia and the Emperor of Austria, engaging to recognize the dispositions which their said Majesties shall make with reference to those Duchies." *Id.*

95. Convention of Gastein, Austria-Prussia, art. I, Aug. 14, 1865, *reprinted in* HANDBOOKS, No. 35, *supra* note 92, at 105 [hereinafter Convention of Gastein]. The duchy of Lauenburg was ceded to Prussia as sole sovereign. Convention of Gastein, *supra*, art. VIII. The administered territories can be considered a hybrid frontier/colonial condominium, since they bordered Prussia, but not Austria.

96. *Id.* art. I.

97. *Id.*

98. Treaty of Prague, Austria-Prussia, art. V, Aug. 23, 1866, *reprinted in* HANDBOOKS, No. 35, *supra* note 92, at 105.

99. Convention of Gastein, *supra* note 95, art. I.

100. *Id.*

101. See *id.*

ideology. In the mid-nineteenth century, Austria and Prussia shared a conservative ideology, exemplified by Prince Klemens von Metternich, which included faith in the monarchical principle and the existing order in Europe. This shared ideology helped the two sides to overcome new political movements in the condominium territories. The success of the condominium, though, was not pinned to the agreement of the sovereign powers on day-to-day administration.

Samoa: Colonial Governance. The case of the tripartite rule of the Samoan Islands from 1889 to 1899 has been referred to as a case of colonial condominium.¹⁰² As with the New Hebrides, the interests involved were colonial, rather than frontier. At the same time, the joint rule of Germany, Great Britain, and the United States over Samoa took the form of a joint protectorate more than that of a condominium.¹⁰³ Whereas a condominium would have vested all three powers with sovereignty over Samoa, the agreement governing the joint administration of Samoa actually stripped all three States of sovereign powers: each power held equal authority in the governance of Samoa, but that authority was less than sovereign authority.¹⁰⁴ All three countries had an interest in using Samoa for shipping and military purposes.¹⁰⁵ Therefore, at the outset, the parties sought a long-term solution to their overlapping claims.¹⁰⁶

In 1879, Germany concluded a treaty with the Samoan king that granted Germany a dominant influence over the islands.¹⁰⁷ Meanwhile, the United States and Great Britain retained their interest in the territory. Tension among the three powers in Samoa had developed early in the nineteenth century, as commercial interests collided.¹⁰⁸ Otto von Bismarck invited representatives of the United States and Great Britain to

102. See Lise Namikas, *Samoa and US Empire*, 10 PEACE REV. 375, 380 (1998). Namikas states,

Historians have generally taken [the position] that all three powers were to have an equal say in Samoa, and have depicted the post-1889 government of Samoa as a tripartite rule, condominium, and tridominium, further implying no difference from Bayard's 1887 plan. These labels, however, do not accurately describe the government set up after the Berlin Conference.

Id.

103. See *infra* Part II.B (providing a discussion of the distinction between condominiums and mandates or protectorates).

104. See Moye, *supra* note 37, at 133–36.

105. See 22 HISTORICAL SECTION, GR. BRIT. COLONIAL OFFICE, HANDBOOKS PREPARED UNDER THE DIRECTION OF THE HISTORICAL SECTION OF THE FOREIGN OFFICE, No. 146, at 21 (1920) [hereinafter HANDBOOKS, No. 146].

106. See Moye, *supra* note 37, at 135.

107. *Id.* at 129–30.

108. *Id.* at 135–37.

Berlin, and the three sides drew up the Samoa Act of June 14, 1889.¹⁰⁹ The Act stipulated that (1) the islands would remain independent and neutral, (2) the citizens and subjects of the three States would have equal rights on the islands, and (3) none of the States would exercise any separate control over the islands or their government.¹¹⁰

The Act entered into by the States created an arbitral tribunal that heard all disputes involving territorial governance and administration.¹¹¹ Any of the three governing States could bring an issue to the arbitral tribunal, which was composed of representatives of all three States.¹¹² A simple majority vote determined the outcome of the dispute.¹¹³

The tri-partite arrangement lasted for ten years, until the three sides were unable to mediate tribal feuds over succession.¹¹⁴ The joint power-sharing arrangement was disbanded and, by the Anglo-German Convention of 1899 and the Tripartite Convention of December 2, 1899, the United States was vested with control over the islands.¹¹⁵

The Samoan experience provides one important clue for condominium where more than two States govern the territory. When two States control a condominium, the power to make a final decision can be handed over to an arbitral or judicial authority. However, when there are more than two States, the power of a decision can be vested in a majority of them, so long as the States involved wield equal power in the governance arrangement.¹¹⁶

Samoa is also an example of a false condominium—a territory labeled a condominium, but not governed as one. Since the arrangement over Samoa did not vest any of the three administering States with sovereignty, this conclusion misses the point. The Samoan administration acted without authority and without representing the interests of any of the three States that, in principle, jointly controlled Samoa. This administrative structure guaranteed a short-lived tenure of joint control. Thus,

109. See HANDBOOKS, No. 146, *supra* note 105, at 21–22; see Final Act of the Conference on the Affairs of Samoa, Gr. Brit.-F.R.G.-U.S., June 14, 1889, 81 B.S.P. 1058 (1889) [hereinafter Conference on the Affairs of Samoa] (containing the text of the Samoa Act).

110. Conference on the Affairs of Samoa, *supra* note 109, art. I.

111. *Id.* art. IV. The three powers defined this mandate broadly, meaning that many non-administrative issues were taken to the tribunal for adjudication.

112. *Id.*

113. *Id.*

114. HANDBOOKS, No. 146, *supra* note 105, at 22.

115. See generally J.B. HENDERSON, JR., AMERICAN DIPLOMATIC QUESTIONS 205–89 (1901).

116. Despite its advantages for swift and efficient decision-making, this procedural device can prove divisive, particularly in a situation where a single neutral party is left to cast the deciding vote on each issue. Thus, even in a condominium of multiple powers, an independent entity should be selected to resolve all disputes that may arise in the administration of the condominium. See I OPPENHEIM, *supra* note 4, at 243.

while the Samoan case presents a strong condemnation of trusteeship governance, many of the difficulties of the Samoan experience relate directly to the uncertainty regarding sovereignty and authority for governing the territory.¹¹⁷

Trieste: Hybrid Condominium. Some condominiums do not conform strictly to the frontier-colonial divide. Perhaps the best-known condominium was the arrangement to govern Trieste after World War II.¹¹⁸ The Free Territory of Trieste was created by the Italian Peace Treaty in the aftermath of World War II. Trieste was to be governed as a condominium with the international community having joint sovereignty over it.

After World War II, Trieste and its environs were claimed by Yugoslavia, mainly because the population surrounding the city of Trieste was predominantly Slovenian (even though the population of the city of Trieste itself was largely Italian).¹¹⁹ The Western powers opposed the Yugoslav claim.¹²⁰ Ultimately, Yugoslavia capitulated, and the Allied powers drafted a treaty, the Italian Peace Treaty, which established a new State, the Free Territory of Trieste.¹²¹

The Italian Peace Treaty provided that, pending the assumption of power by a Governor for Trieste, the Free Territory would be administered by the "Allied military commands within their respective zones."¹²² The northern part of the territory (Zone A), which included the city of

117. See *infra* Part II.B.2 (offering a more complete discussion of trusteeship agreements).

118. Treaty of Peace with Italy, Feb. 10, 1947, 61 Stat. 1245, 49 U.N.T.S. 3.

119. GEOFFREY COX, *THE RACE FOR TRIESTE* 254-55 (1977).

120. *Id.* at 226. For two months in the spring of 1947, the Allied forces squared off against the Yugoslav army. See *id.* at 247-57. As Cox observed, Trieste was "the last battleground in the Mediterranean of World War II, and the first battleground of the Cold War." *Id.* at 256-57.

121. *Id.* at 256-63. The primary precedent in international law for the Trieste arrangement was the treatment of Danzig after World War I. The Treaty of Versailles created the Free City of Danzig as a separate State. See Treaty of Versailles, *supra* note 90, arts. 100-08. Danzig was "placed under the protection of the League of Nations," which was represented in Danzig by a High Commissioner. *Id.* arts. 102-03. The Constitution of Danzig, establishing the political organization of the Free State, was protected by the League as well. *Id.* art. 103.

Trieste and Danzig must be distinguished from Tangier, which was the hybrid protectorate established in 1923 and modified in 1928 and 1945. The critical difference between Tangier and the other two international arrangements concerns the outstanding claims on the territories. Whereas in the latter cases sovereignty was in abeyance, in the case of Tangier, the Sultan of Morocco never renounced his sovereign rights in Tangier. Otto Steiner, *Tangier*, in IV *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 19, at 760, 761. Indeed, the Convention Regarding the Organization of the Statute of the Tangier Zone expressly recognized the "sovereign rights of His Majesty the Sultan." Convention Regarding the Organization of the Statute of the Tangier Zone art. 25, Dec. 18, 1923, 28 L.N.T.S. 542.

122. ECON. COOPERATION ADMIN., *EUROPEAN RECOVERY PROGRAM: TRIESTE COUNTRY STUDY* 12 (1949). The Free Territory included the city of Trieste and the coastal zone of Istria, running from Duino along the Gulf of Trieste to Cittanova. See BOGDAN C. NOVAK, *TRIESTE 1941-1954: THE ETHNIC, POLITICAL, AND IDEOLOGICAL STRUGGLE* 246 (1970).

Trieste, was under joint British-American administration, whereas the southern zone (Zone B) was under Yugoslav administration.¹²³ The Treaty presumed full cooperation between all powers involved, particularly between Yugoslavia and Italy.¹²⁴ The U.N. Security Council guaranteed the independence and territorial integrity of Trieste.¹²⁵

As soon as the Treaty went into force, however, the Yugoslavs immediately incorporated their portion of the Free Territory into Yugoslavia.¹²⁶ In response to the actions taken by Yugoslavia, on March 20, 1948, the United States, France, and the United Kingdom formally recommended that the Treaty be revised to return the Free Territory to Italy.¹²⁷ Pending revision of the Treaty, the Free Territory continued to be administered in two parts, one incorporated into the body of Yugoslavia, the other administered jointly by the Allied Command of the United States, the United Kingdom, and Italy (the Allied Command).¹²⁸ Thus, the relevant condominium experience in Trieste occurred not over the whole territory, but rather over the Italian portion of the Free Territory (Zone A) during the period before the whole territory was returned to Italy.¹²⁹

Zone A was divided into three hierarchical levels of local administration: the zone, the province, and the commune.¹³⁰ Authorities at each level oversaw "the departments of public health, public utilities, agriculture and fisheries, and civil transport."¹³¹ Even though three layers of authority existed, the guiding principle in this structure was that only local (commune) authorities could regulate certain sectors of the terri-

123. See Cox, *supra* note 119, at 256.

124. ECON. COOPERATION ADMIN., *supra* note 122, at 12. Ultimately, the signatories hoped to create the institutions that would allow Trieste to become free and independent over time. NOVAK, *supra* note 122, at 270.

125. Cox, *supra* note 119, at 263.

126. ECON. COOPERATION ADMIN., *supra* note 122, at 12.

127. See *id.* at 12-13.

128. See DONATO MARTUCCI, TRIESTE IS NO JOKING MATTER: AN ITALIAN VIEWPOINT (1953).

129. Indeed, in some ways, Trieste is another example of an historical misnomer—a territory described as a condominium, but not governed under the basic principles of joint sovereignty inherent in condominiums. It is worth noting that the Zone A condominium was created among parties that essentially held the same interests at heart and, as in the case of Sudan, one party (Italy) held sway over the other condominium participant (an Anglo-American coalition on behalf of the Allied Powers). See *infra* notes 152-156 and accompanying text (discussing the Sudanese case). Unlike Sudan, though, where the relationship was defined by England's disproportionate power over Egypt, the imbalance in Zone A was more the result of Italy's closer attachment to, and interest in, the governance of Trieste relative to that of the Anglo-American coalition.

130. See NOVAK, *supra* note 122, at 292.

131. *Id.*

tory.¹³² As in the New Hebrides, this arrangement proved successful not only as a management device, but also in creating a sense of local ownership over the governance process.

With its independence and territorial integrity guaranteed, the Free Territory did not have any military or paramilitary units, only a police force.¹³³ The Allied Command controlled all military actions within Zone A, leaving no opportunities for the opposition forces within and around the Zone to mount an armed resistance.¹³⁴ The police force was composed of Zone A residents of both Italian and Slovenian ethnicity.¹³⁵

With regard to the economy of Trieste, in accordance with the Italian Peace Treaty, a general financial agreement was reached on March 9, 1948, between the Allied Military Government and the Italian Government (the Financial Agreement).¹³⁶ Under the Financial Agreement, Italy agreed to provide the basic internal currency requirements of Zone A.¹³⁷ In addition, Trieste was included in the Italian customs regime and its foreign exchange zone.¹³⁸ In return, Italy supplied foreign exchange to Trieste.¹³⁹ Many of the staple goods, such as food, fuel, and medical supplies, were supplied to Trieste by the United States.¹⁴⁰ Domestic production was limited, and Zone A relied on external assistance to maintain its economy.¹⁴¹ The Financial Agreement reinforced Italian

132. *Id.* at 291. The command structure of the territory reflected the intricacies of governance by multiple authorities. The Allied Command appointed a zone president, who headed the zone administration. *Id.* The president was assisted by a vice-president, who was also selected by the Allied Command, and by a zone administrative board composed of nine members. *Id.* Of the nine members on the board, four were appointed by the zone president and five by the provincial council, which, in turn, was elected by the residents of Zone A. *Id.* This system assured that the States administering the condominium would exercise some control over the administrative board, but ultimate power would be vested in Zone A residents, who elected the majority of the board members.

The leading positions at the provincial level were more closely controlled by the sovereign States. On their behalf, "the zone president appointed the president of the province, as well as the provincial council. The provincial authorities were responsible for the administration of welfare services and for the maintenance of roads . . ." *Id.* at 293. The zone, provincial, and communal authorities—including the zone president and the administrative board—reported to the Trieste Department of the Interior. ECON. COOPERATION ADMIN., SURVEY OF THE ECONOMY OF TRIESTE: YEARS 1938 AND 1948, at 64 (1949). The Allied Command appointed the heads of the six communes directly. NOVAK, *supra* note 122, at 293. They were called *sindaco* (mayor). *Id.* The mayor was assisted by a communal board, which was, in turn, appointed by the zone president. *Id.*

133. *See* NOVAK, *supra* note 122, at 272.

134. *See id.*

135. *See* JACQUES LEPRETTE, LE STATUT INTERNATIONAL DE TRIESTE 112 (1949).

136. ECON. COOPERATION ADMIN., *supra* note 122, at 10.

137. *Id.*

138. *Id.*

139. *Id.*

140. NOVAK, *supra* note 122, at 284.

141. *See id.*

control over Trieste's economy and slowed the development of an independent economy.¹⁴²

The Trieste experience is notable for some of the practical lessons that it can teach us about the process of building a condominium. With respect to the governing structure and layers of authority, Trieste successfully implemented a system by which more local control could be exercised at the lower levels. The sovereign powers administering the territory could protect their rights and interests at the macro level, while officials selected locally could control the day-to-day functions of the government. However, if anything, the Trieste arrangement did not devolve enough authority to the lower levels. That said, though, one potential problem with the devolution of power in that manner is that a dominant ethnic group can seize control of the administration. In Trieste, the Italian majority took advantage of its dominant position over the Slovenian minority.¹⁴³

On voting rights, open publication of voter rolls creates additional transparency. The process of determining eligible voters, while often contentious, is also one of the most important steps in building a sense of local ownership. In Trieste, the Allied Command held municipal elections only after it had implemented its own administrative structure.¹⁴⁴ Thereafter, the director general of the Free Territory issued an order calling for the creation of voter rolls.¹⁴⁵ After much debate, the Order defined eligible voters as

142. Over time, through agreements signed in April and October of 1948, Italy gradually gained further control over the economy of Zone A. By the end of September 1948, Zone A had become a part of the Italian economy, controlled directly by Rome. *Id.* at 286. Yugoslavia lodged formal complaints against each of the agreements that ceded greater authority over Zone A to Italy. *See, e.g.*, Memorandum from the Ministry of Foreign Affairs of Yugoslavia to the President of the Security Council, U.N. Doc. S/1054/CORR.1 (Nov. 2, 1948). In fact, from the beginning, Italy had been ensured a dominant position in Zone A when it was allowed to maintain control over Italian state and parastatal property in Zone A during the condominium period. NOVAK, *supra* note 122, at 287. With a foothold in the Trieste territorial zone, Italy was able to expand the ambit of its authority.

143. At the outset, the Anglo-American coalition ran the Department of Education. NOVAK, *supra* note 122, at 298. The first head of the Department was a U.S. national; his successor was English. *Id.* Each was supported by two advisors with equal status, one a Slovenian, the other Italian. *Id.* However, when the British head of the Department of Education stepped down from his post, he was replaced by the Italian advisor, who immediately stopped consulting with the Slovenian advisor and soon abolished the Slovenian advisor's position altogether. *Id.* As a model for future condominiums, this system was a complete failure. As soon as the neutral officials stepped away from the educational process, the Italian official imposed his will and thus the will of the Italian majority over the Slovenian minority. *See id.*

144. *Id.* at 301. The voting list system and the resulting proportional representation scheme mirrored the Italian political model.

145. *Id.* The date of the election was selected directly by the Allied Command, but the election was organized by the zone president. *Id.* at 301–02. Even though the President was appointed by the Allied Command, he maintained a relative degree of independence.

all male and female persons—to whom the right of voting is hereby expressly extended—who on 15 September 1947 were Italian citizens and have reached or will reach the age of 21 within December 31, 1948 and are lawfully inscribed in the Register of the Permanent Population of one of the Communes of the Zone.¹⁴⁶

Each commune prepared its electoral rolls under the supervision of the zone president.¹⁴⁷

On citizenship, citizens should be provided the right to become citizens of the local authority, even if their ethnicity, as in the case of the Slovenian minority, might not directly lead to citizenship.¹⁴⁸ Trieste addressed issues of citizenship, but, since the Free Territory was initially created as a future independent State (rather than as a long-term condominium), its dictates on citizenship are most useful simply as an example of the contours of the citizenship considerations at stake in a condominium setting.¹⁴⁹

146. Order No. 345: Provisions Concerning the Compilation of Electoral Rolls art. II, in I ALLIED MILITARY-GOVERNMENT: BRITISH—UNITED STATES ZONE FREE TERRITORY OF TRIESTE, ANALYTICAL INDEX TO OFFICIAL GAZETTE 383 [583] [hereinafter Order No. 345]. “Each person on the electoral rolls had the right to vote and the right to be elected.” NOVAK, *supra* note 122, at 303. One point of particular acrimony was the base date of residence in the Trieste region. When the date was shifted from 1940 (as it had been in earlier drafts) to 1947, all Italian refugees who had settled in Trieste during or after the war were granted the right to vote. *Id.* at 304. These additional voters influenced the outcome of the elections in favor of Italy and to the detriment of Yugoslavia and the Slovenian population in Trieste. See Memorandum from the Ministry of Foreign Affairs of Yugoslavia to the President of the Security Council, *supra* note 142.

147. NOVAK, *supra* note 122, at 302. Fascists who had held the highest positions in the party of state administration were excluded from the voting process. *Id.* In addition, anyone who had lost or who stood to lose his Italian citizenship was removed from the electoral rolls. *Id.*

148. Issues of citizenship are particularly complex in the context of condominiums. In some cases, citizens of a condominium territory are granted the opportunity to select between (or among) the governing States. In some cases of dual sovereignty, citizens are automatically considered citizens of both States and are subject to the benefits and costs of dual sovereignty. In all cases, however, citizens of condominium territories are not entitled to take on the citizenship of States that are not governing the territory, unless the citizen in question has an independent basis for claiming that citizenship.

149. See Treaty of Peace with Italy, *supra* note 118, art. 19. Article 19 of the permanent statute creating the Free Territory defined the rights of citizenship in the following manner: “Italian citizens who were domiciled on June 10, 1940,” in the area comprised within the boundaries of the Free Territory, “and their children born after that date, shall . . . become citizens [of the Free Territory] with full civil and political rights . . . Upon becoming citizens [of the Free Territory], . . . they shall lose their Italian citizenship.” *Id.*

When the Free Territory was divided into two zones, the provisions on citizenship were altered. Those who had possessed Slovenian nationality, but who remained in the territory of Zone A generally, became citizens of Italy after 1954. *Id.* art. 20. In the interim, many remained citizens of Yugoslavia, although, as described above, citizenship was defined more

The Trieste condominium experience also suggests several lessons on what to avoid in establishing a condominium. In several different arenas, the Allied Powers allowed Italy to exercise dominant control over decision-making authority, and the Italians abused that power. This lesson appears again in the Sudanese experience, in which the British dominance of the condominium meant that there was no check on its rule. In Trieste, the decision to make Italian the *de facto* official language, the selection of an Italian to succeed an Englishman and a U.S. national as the head of the Department of Education, and the selection of Italian currency and customs regulations all led to a dominant role for the Italians over the Slovenian minority.¹⁵⁰ The Italians took advantage of their position, and, in turn, the governing Allied partners did not place sufficient checks on the Italian power. The system that favored Italian control on these issues had its benefits, however, particularly in terms of convenience and clarity. Given the short-term interests at the heart of the Trieste arrangement, these benefits may actually have outweighed the costs. However, in a longer-term condominium, the balance would shift significantly. As a reminder, it is this precise constraint—a short-term vision to joint sovereignty as a solution—that has in fact led to the failure of past condominiums.¹⁵¹

Sudan: Hybrid Condominium. Like the condominium in Trieste, the condominium in Sudan combined a distant sovereign with a contiguous sovereign to govern jointly. The United Kingdom and Egypt jointly controlled Sudan from 1898 to 1955.¹⁵² However, unlike in Trieste, in Sudan, the contiguous power (Egypt) did not exercise dominant control over the territory.¹⁵³ Even though both the British and Egyptian flags flew over Sudan, the administrative and military commands were controlled entirely by the British.¹⁵⁴ In fact, the first three governors of the Sudan were

broadly, allowing Italian refugees who had settled in Trieste during and after the war to become citizens of the Free Territory. *Id.*

150. See LEPRETTE, *supra* note 135, at 138.

151. The Schleswig-Holstein condominium serves as an example of a condominium created—and governed—with a short-term solution in mind. The condominium only lasted from 1864 until 1866 and served simply as a placeholder until a shift of power allowed Prussia to assert complete autonomy over the territory. See CORET, *supra* note 31, at 189–93 (noting also that the Treaty of Prague of August 23, 1865, marked the official passage of full sovereignty over the duchies of Schleswig and Holstein to Prussia and noting January 12, 1867, as the date on which they were officially incorporated by Prussia).

152. See P.M. HOLT & M.W. DALY, *THE HISTORY OF THE SUDAN: FROM THE COMING OF ISLAM TO THE PRESENT DAY* 118 (1979). The British crafted the hybrid condominium arrangement in lieu of direct annexation because Britain's own claim to Sudan was based on Egyptian claims to the territory, claims that Britain co-opted as its own by pointing out its dominant position in Egypt. See *id.* at 117–18.

153. *Id.* at 118.

154. *Id.* Lord Cromer, Britain's consul-general in Egypt at the time of the formation of the condominium, was instructed to inform the Egyptian leadership that "[h]er Majesty's Gov-

British nationals who combined their duties in Sudan with their roles as *sirdar* (commander-in-chief) of the British-run Egyptian army.¹⁵⁵ Thus, whereas Sudan was, in theory, jointly administered by Egypt and the United Kingdom, the British occupied the meaningful positions in the administration and, therefore, exercised authority over decision-making in the territory. Ultimately, because it failed to give true meaning to the notion of joint sovereignty inherent in condominiums, the Sudanese condominium has been accused of fostering the sectarian politics that have divided Sudan since independence and of creating economic hegemonies that doomed Sudan to economic hardships far worse than virtually any other British colonial possession in Africa.¹⁵⁶

The primary lesson to be drawn from the Sudanese condominium is that the legal nature of a condominium can be obscured when one State wields a disproportionate amount of power in the arrangement. Furthermore, even where neither of the governing powers is subordinate to the other (as Egypt was to the United Kingdom), administration of the condominium should be divided so that one State is not left in *de facto* absolute control of the territorial governance.

B. Water Condominia

Although most condominium arrangements concern pieces of land, a condominium may also grant joint sovereignty over a body of water.¹⁵⁷ In

ernment consider that they have a predominant voice in all matters connected with the Sudan, and that they expect that any advice which they may think fit to tender to the Egyptian Government with respect to Sudan affairs will be followed." MEKKI ABBAS, *THE SUDAN QUESTION: THE DISPUTE OVER THE ANGLO-EGYPTIAN CONDOMINIUM 1884-1951*, at 46 (Margery Perham ed., 1952) (quoting The Marquis of Salisbury to Lord Cromer, Aug. 2, 1898, F.O. 78/4955). The British government based its right to control the condominium on the "substantial military and financial co-operation which has recently been offered by Her Majesty's Government to the Government of the Khedive." *Id.*

155. See ARTHUR WHITE, *THE EXPANSION OF EGYPT UNDER ANGLO-EGYPTIAN CONDOMINIUM* 424 (1899); PETER WOODWARD, *CONDOMINIUM AND SUDANESE NATIONALISM* 2 (1979).

156. See M.W. DALY, *IMPERIAL SUDAN: THE ANGLO-EGYPTIAN CONDOMINIUM* 396-97 (1991).

157. Unlike condominiums over land, water condominiums generally involve only frontier claims, in which neighboring States dispute a body of water that abuts on the land of each State. For example, Austria, Germany, and Switzerland are currently engaged in debate over the status of Lake Constance, which lies on the frontier of all three States. See Joachim Blatter, *Lessons from Lake Constance: Ideas, Institutions, and Advocacy Coalitions*, in *REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION* 89 (Joachim Blatter & Helen Ingram eds., 2001). The Austrians claim that the three riparian States possess a condominium over a part of the waters forming the boundary up to a zone near the shore (the *Obersee*). See *id.* By contrast, Switzerland and Germany argue that the waters should be divided among the three States according to the proportional amount of shoreline. See *id.* The conception of a condominium over Lake Constance is not a new one. Indeed, the Lake was the subject of condominium discussion, negotiation, and at times even

terms of joint sovereignty arrangements for enclosed or semi-enclosed areas of water, there are two major cases of condominium.¹⁵⁸

Dutch-Prussian Frontier Stream. In 1816, Prussia and the Netherlands signed an agreement vesting ownership of frontier waterways jointly in the two States.¹⁵⁹ According to the agreement, all waterways running between the two countries were to be governed jointly, with equal rights to use and appropriate resources.¹⁶⁰ However, not long after the agreement went into effect, the legal question of whether one of the contracting States could take unilateral action that would affect the course of a jointly owned stream arose.¹⁶¹ Answering this question, the Supreme Administrative Court for Germany ruled that the States had created a condominium-type arrangement and that, as a result, both States exercised joint jurisdiction over frontier waterways with the further result that the jurisdiction of each State was limited by that of the other.¹⁶² Thus, neither State could legislate unilaterally over the

treatment in the late nineteenth and early twentieth centuries. See CORET, *supra* note 31, at 145–46. Lake Titicaca in South America has likewise been the subject of dispute between two neighboring States, in this case Peru and Bolivia. Over the years, condominium has similarly been proposed as a solution to that dispute. See, e.g., LUIS DE ITURRALDE CHINEL, *EL LAGO TITICACA Y LA TEORIA DEL CONDOMINIO* (1959).

158. Another example of a water condominium is Baie du Figuiet. By a “Declaration” in 1879, the Baie du Figuiet became a condominium of France and Spain. Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. intervening), 1992 I.C.J. 351, 600 (Sept. 11). However, condominium status did not lead to a change in the status of the waters or in the activities of either State.

159. See Treaty of Aix-la-Chapelle, *supra* note 68.

160. See *id.* Article 27 of the Treaty of Aix-la-Chapelle stated:

Unless otherwise stipulated, wherever brooks, streams or rivers are boundaries, they will be common to both States . . . There shall be no changes in the flow of the rivers, nor in the banks, and no concession or right to draw water shall be granted without the participation and consent of both governments; the same principles will apply to ditches, channels, paths, canals, hedges, or any other object used as a limit, [this is to say,] sovereignty over these objects shall be shared by the two Powers.

. . .

[Fishing] [c]atch[es] will also be common and will continue to be sold at public auction for the benefit of both States.

Id. art. 27.

161. ANNUAL DIGEST & REPORTS OF PUBLIC INTERNATIONAL LAW CASES: YEARS 1931 & 1932, at 50 (H. Lauterpacht ed., 1938).

162. In this case, the appellant ran a mill at a stream that ran along the boundary of Germany and Holland. *Id.* He drew water from the stream to run the mill; he returned any unused water to the stream. *Id.* The miller applied for registration of these water rights in the Water Register, in accordance with the German Water Act. *Id.* The District Committee that reviewed these applications, however, denied it on the grounds that, under the Frontier Agreement of 1816, frontier streams were owned jointly by Prussia and Holland. *Id.* The miller appealed. *Id.*

stream.¹⁶³ As a consequence, Prussia was not free to enter into an agreement with another State that involved “frontier streams that were subject to the joint jurisdiction of Prussia and the Netherlands.”¹⁶⁴

The Frontier Stream experience provides two important lessons for framers of condominiums—whether over water or land. The first is that a State’s judicial body can objectively decide issues of central importance to the maintenance of the condominium. In the context of this particular condominium, the dispute taken to the Prussian court was the essential issue of condominium governance. The court issued a decision that upheld the underlying principles at the expense of Prussia. The second lesson of the Frontier Stream condominium relates to the ability of States to share resources. Prussia and the Netherlands shared rights to the boundary stream and, even though a boundary stream can be administered more easily than a condominium over a contiguous territory, the positive experience in sharing resources indicates that States, like people, are capable of exercising joint ownership.

Gulf of Fonseca. The second and most important precedent for water condominiums is the landmark International Court of Justice (ICJ) decision on the status of the Gulf of Fonseca.¹⁶⁵ The Gulf of Fonseca lies off the Pacific coast of El Salvador, Honduras, and Nicaragua. The Gulf of Fonseca condominium is of particular interest because it was created not by express agreement among the concerned parties, but rather by judicial decision.¹⁶⁶ The dispute between Honduras and El Salvador, which led to the ICJ case, had three elements: (1) a dispute over the land boundary between the two States; (2) a dispute over the legal situation of the islands in the Gulf of Fonseca;¹⁶⁷ and (3) a dispute over the legal status of maritime spaces and resources within and outside the Gulf.¹⁶⁸ The ICJ

163. *Id.*

164. *Id.*

165. *See* Land, Island and Maritime Frontier Dispute (El Salv. v. Hond.: Nicar. intervening), 1992 I.C.J. 351 (Sept. 11). The case is better known for a different reason, namely as the first case in which a third party intervenor was allowed to participate in the proceedings. *See id.* at 609. Nicaragua was permitted to intervene in the dispute, but only with respect to the status of the waters of the Gulf of Fonseca. *Id.* at 360. This decision led to a lengthy discourse by the ICJ on the applicability of its findings to Nicaragua, the third party. The ICJ held that the terms under which intervention was granted were such that Nicaragua could not become a party to the proceedings. *Id.* Accordingly, the binding force of the judgment for the parties did not extend to Nicaragua as intervenor. *Id.* at 609.

166. *Id.* at 598.

167. *Id.* at 579. The ICJ reviewed claims to disputed islands in the Gulf and awarded the Isla del Tigre to Honduras and the islands of Meanguera and Meanguerita to El Salvador. *Id.* at 569–70.

168. *Id.* at 380.

decision was complex and fact specific.¹⁶⁹ Only the third dispute is of interest here.

In its decision, the ICJ held that the Gulf of Fonseca should be held in condominium, concluding that the Gulf had long been treated as a unified entity that should remain undivided.¹⁷⁰ In reaching its decision, the ICJ relied primarily on a 1917 ruling by the Central American Court of Justice (CACJ), which held that the Gulf should be held in condominium.¹⁷¹ Although the ICJ concluded that the waters could be divided upon agreement by all three parties, it otherwise respected the terms of the 1917 decision, which stated that the three countries possessed joint rights within the Gulf.¹⁷²

The 1917 decision arose from a 1914 dispute between El Salvador and Nicaragua over a treaty signed by Nicaragua with the United States (the Bryan-Chamorro Treaty).¹⁷³ There, the CACJ held that

[B]y the concession of a naval base in the Gulf of Fonseca, the Bryan-Chamorro Treaty . . . violates [El Salvador's] coownership in the said Gulf . . . [t]hat the Government of Nicaragua is under the obligation—availing itself of all possible means provided by international law—to reestablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty . . .¹⁷⁴

The 1917 decision left one major question open, inasmuch as it found that the Gulf was co-owned except “as to the littoral (coastal) marine league [of three miles] which is the exclusive property of each.”¹⁷⁵

169. See Freddy Cuevas, *Presidents Agree to Honor Decision Ending Long Border Dispute*, ASSOCIATED PRESS, Sept. 11, 1992. Presiding Judge Jose Sette-Camara of Brazil stated that “[i]t was the most complicated case the Court [had] ever handled.” *Id.*

170. See *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 601.

171. See *Republic of El Salvador v. Republic of Nicaragua*, Central American Court of Justice, Mar. 9, 1917, translated in 11 AM J. INT’L L. 674 (1917) [hereinafter *Republic of El Salvador v. Republic of Nicaragua*]. As a general rule, “gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial.” See 1 OPPENHEIM, *supra* note 4, at 716. Such bodies of water are considered to be part of the open sea. *Id.*

172. See *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 351. During the colonial period, the Gulf had belonged only to Spain. *Id.* at 558. Initially, the area that now comprises El Salvador, Honduras, and Nicaragua remained as a single State, and the Gulf survived intact even after the dissolution of the Spanish colonial empire. *Id.* at 589. Eventually, three States emerged. They continued to share the Gulf of Fonseca without major conflict until 1914 when Nicaragua provoked litigation with El Salvador by signing the Bryan-Chamorro Treaty with the United States. *Id.* at 590.

173. See *Republic of El Salvador v. Republic of Nicaragua*, *supra* note 171. The Treaty was signed on August 5, 1914. It provided for a U.S. naval base in Nicaragua’s portion of the Gulf of Fonseca. *Id.*

174. *Id.* at 730.

175. *Id.* at 716. The parties had agreed—and the Central American Court of Justice (CACJ) accepted—the principle that each State possessed a “littoral marine league” (a three-

The CACJ qualified the Gulf as an “historic bay,” meaning that the waters were “territorial waters” under the shared and undivided ownership of the three countries.¹⁷⁶ Specifically, the CACJ held that “[o]ne coparcener cannot lawfully alter, or deliver into the hands of an outsider, or even share with [an outsider], the use and enjoyment of the thing held in common”¹⁷⁷ However, as to the three-mile zone off the coastline of each riparian State, each State exercised exclusive jurisdiction.¹⁷⁸

The resulting ambiguity served as the basis for Nicaragua’s claims to exclusive control over one-third of the Gulf.¹⁷⁹ Relying on the 1917 decision, the ICJ ruled that the waters of the Gulf are not international; rather, they are a closed condominium of the three countries, with each country given the right to an exclusive three-mile coastal strip, subject to rights of innocent passage.¹⁸⁰ The ICJ agreed with the CACJ and reasoned that the Gulf constituted historical waters, limiting the rights of each State with respect to the others.¹⁸¹ The ICJ further concluded that the Gulf waters were subject to joint sovereignty of the three coastal States.¹⁸² The decision created a community of interests among the States that was to be respected by each so as to allow the other co-sovereigns to enjoy the resources and rights of the Gulf equally.¹⁸³

The Gulf of Fonseca decision demonstrates several basic, but important, principles that can help to shape the reemergence of condominium as a solution to boundary disputes. First, and perhaps most obvious, the ICJ decision in the Gulf of Fonseca case demonstrates that condominium can be a legitimate tool for the resolution of territorial disputes. Second, condominium is a device that can be used to resolve disputes among

mile zone contiguous to its coastline), which was the exclusive domain of each State. *Id.* The CACJ also recognized an additional zone of nine nautical miles as a secondary zone of authority, granting rights of inspection and police power for fiscal and national security purposes. *Id.* at 715. Finally, the CACJ noted that merchant vessels of third States enjoyed a right of *uso innocente* in the nonlittoral waters of the Gulf, which is to say the waters outside the three-mile exclusive jurisdiction zone reserved to each State. *See id.* at 715.

176. *Id.* at 704–05.

177. *Id.* at 712.

178. *See id.* at 716.

179. *See* Land, Island and Maritime Frontier Dispute (El Salv. v. Hond.: Nicar. intervening), 1992 I.C.J. 351, 589–90 (Sept. 11).

180. *See id.* at 616. In a vigorous dissent, Judge Oda of Japan argued that the concept of a “pluri-State” bay has no legal basis. *Id.* at 733 (separate opinion of Judge Oda). He argued that the waters of the Gulf of Fonseca consisted of a sum of the territorial seas of each State. *Id.*

181. *Id.* at 598–601.

182. *See id.* at 601.

183. *Id.* at 602–03. The Court further held that the closing line of the Gulf, which is used to determine the legal status of the waters outside the Gulf, constituted the baseline of the territorial sea. *Id.* at 617. Thus, all three joint sovereigns that have rights inside the closing line also possess rights outside that line to the territorial sea, continental shelf, and exclusive economic zone. *See id.* at 608.

several States and not only when the dispute involves two States. Third, States can abide by the rules of a condominium, even when significant interests are at stake. So, whereas one might argue that the relevance of the Frontier Stream case is limited by the small stakes in play there, the Gulf of Fonseca dispute involved significant rights to resources, including fish and minerals. Thus, the success to date of the three condominium partners in governing the Gulf of Fonseca condominium indicates that sovereign States can share valuable resources without protracted conflict or a tragedy-of-the-commons-type depletion of resources.

II. CONDOMINIUM DISTINGUISHED

Much of the criticism of condominium is in fact misplaced, born of confusion between condominium and other forms of joint sovereignty in international law.¹⁸⁴ Part II will therefore explain distinctions between condominium and these other joint sovereignty arrangements.

A. *Coimperium*

A condominium and a coimperium denote an arrangement composed of two elements: (1) a formal association of two or more subjects of international law (generally, States) and (2) a joint exercise of authority within a particular territory.¹⁸⁵ The two concepts are distinctive not for their form, but for their purpose. A condominium exists when two or more States exercise joint sovereignty over a territory that belongs to the administering States, whereas a coimperium exists when they exercise joint sovereignty over a third party's territory.¹⁸⁶ Thus, by its nature, a coimperium is designed as a caretaker regime, whereas, in principle at least, a condominium is intended to serve the interests of the administering powers themselves. One of the primary reasons why the concept of a condominium has been discarded is that the governing principles of

184. See, e.g., 1 PAUL FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 684 (1922) (noting that international law includes cases of co-ownership over territory and that such cases—known as condominium or coimperium—arise where two sovereigns exercise their indivisible power over the same territory); Milan Sahovic & William W. Bishop, *The Authority of the State: Its Range with Respect to Persons and Place*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 311, 317 (Max Sorensen ed., 1968) (stating that “some territories . . . have been subject to a division of authority between two or more states The most frequent form of this kind of divided authority over the same territory is termed ‘condominium’ or ‘coimperium.’”); Schneider, *supra* note 19, at 734.

185. CORET, *supra* note 31, at 73.

186. See *id.* at 72 (defining a coimperium as “a regime in which a partial international community exercises certain *competences* [(powers)] over a portion of the territory of a third state”).

many past condominium regimes more closely resembled the features one might expect of a coimperium, in which States do not exercise the same level of consideration and judgment that they do over their own sovereign territory. This state of affairs leads to short-term decisions, rather than to sustainable ones, and it ultimately dooms the arrangement to failure. It explains why a coimperium will not work as well as condominium, and it also explains why some past condominiums—treated as a coimperium—have failed.¹⁸⁷

Under both arrangements, the component parts are most often defined by treaty, and the partners are bound by the contractual rights established in the treaty. In a coimperium, however, the partners do not exercise full sovereign rights over the territory in question.¹⁸⁸ Their role in the territory is akin to that of a caretaker, whereby the administering States are charged with administering the territory on behalf of others. By this definition, after World War II, the administration of Germany by the allied powers constituted a coimperium. Although Germany had lost the war and had surrendered unconditionally, it had not abandoned its status as a subject of international law. Consequently, the Allied Powers were occupying foreign territory and lacked full sovereign power over it. The laws applied in postwar Germany were designed to maintain order and rebuild the German State. These are features of a coimperium. By contrast, had Germany been governed as a condominium, consideration would have been given to incorporating the laws of the administering powers to apply to German citizens. Similarly, German nationals would have been stripped of their citizenship and would have been compelled to become citizens of one or more of the States exercising sovereignty.

B. Mandates, Trusts, Non-Self-Governing Territories, and Protectorates

Condominia must also be distinguished from the four primary territorial arrangements established in the wake of the two world wars and as a consequence of the dismantling of colonial empires: mandates, trust territories, non-self-governing territories, and protectorates.¹⁸⁹ Each of

187. For example, the Anglo-Egyptian condominium over Sudan—which had other problems discussed earlier—also suffered from treatment by the governing powers that lacked long-term considerations in part because both governing powers behaved merely as caretakers. *See id.* at 300.

188. *See* Arrigo Cavaglieri, *Regles Generales du Droit de la Paix*, 26 RECUEIL DES COURS 315, 388–89 (1929).

189. Mandates and protectorates emerged following World War I, while trusteeships and non-self-governing territories were devices created after World War II, in conjunction with the formation of the United Nations. For a more thorough discussion of this topic, including the role of international territorial administrations (ITA), see Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 601–03 (2001) (noting that an ITA can take two approaches to a governance problem by

these arrangements has been confused, at one time or another, with condominium.¹⁹⁰ Yet, all four are fundamentally different in nature from condominium.¹⁹¹ Unlike condominium, mandates, trusteeships, and non-self-governing territories were established for the explicit purpose of allowing the territories to work toward independence. In addition, with very few exceptions, none of these arrangements involved joint action and in none of the cases did that joint action involve shared sovereignty. Only protectorates conferred rights that might be inherent to sovereign powers, and those rights were ceded through negotiated solutions. Finally, all four of these arrangements were intended as interim solutions to the quandary of resolving the impediments of colonialism. Therefore, unlike condominium, these territorial devices were not intended to lead to any long-term, power-sharing agreement.

1. Mandates

After World War I, the newly formed League of Nations was charged with devising a solution to the complex postwar territorial issues that had fueled the war and threatened to undermine the postwar order.¹⁹² The

either directly substituting international organizations for local actors or by changing the “structural features of local governance to remove the problem that led to the need for the ITA” and further observing that many suggest that mandates are precursors to an ITA whereas trusteeships are more of an alternative).

190. See, e.g., Schneider, *supra* note 19, at 734.

191. In general, the rights of all dependent territories include the right to “freely dispose of . . . natural wealth and resources . . . [the] right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.” Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement>. In itself, this explicit reference to the exercise of sovereignty distinguishes these post-colonial arrangements from the joint sovereignty doctrine that drives condominium.

192. See F.B. Francis Sayre, *Legal Problems Arising From the U.N. Trusteeship System*, 42 AM. J. INT’L L. 263, 263 (1948). Mandates (and protectorates) were the product of rushed solutions to the unanticipated problems resulting from the decisive allied victory in 1918. The dissolution of the Turkish Empire, as well as of the Austria-Hungary dual monarchy, the dismantling of Germany, and the re-mapping of Europe at the Paris Peace Conference of 1918 not only created political tension, but also posed a legal dilemma: what country would be the sovereign of the re-mapped territories during the period from their cession from their prewar State until the final settlements had been prepared? Many writers tried to solve the legal problems by resorting to the formula of condominium, asserting that the territories were under the condominium of the Allied and Associated powers. EL-ERIAN, *supra* note 28, at 79. Five interpretations were suggested: (1) title in the Principal Allied and Associated Powers; (2) title in the League of Nations; (3) title in the Mandatory Powers; (4) title in the Inhabitants of the Mandated Territories; and (5) joint title in the League of Nations and the Mandated Power. *Id.*

Although it might appear that mandates created under the first, third, or fifth interpretations would conform with condominium principles, a number of national courts distinguished all of the mandates from condominium, noting the novel status of mandate territories in international law. See *Rex v. Christian* 1924 (1) SA 101 (A) at 109–13 (S. Afr.). The *Rex* court noted that

League of Nations devised two solutions to protect territories with uncertain or disputed sovereignty: mandates and protectorates.¹⁹³ Mandates were created in order to administer and develop territories that were characterized as “not yet able to stand by themselves under the strenuous conditions of the modern world.”¹⁹⁴

Mandates divested all of the administering powers of sovereignty in the territory.¹⁹⁵ This arrangement, where no State commands sovereign

there was no cession of the German possessions to the Principal Powers The animus essential to a legal cession was not present on either side The intention of the signatories seems to have been to place them [the territories] under a basis new to international law and regulated primarily by Article 22 [of the Treaty of Versailles and the Covenant of the League of Nations].

Id.; see also *Frost v. Stevenson* (1937) 58 C.L.R. 528, 550–52 (Austl.). The *Frost* court, in a case that raised a question regarding the extent of the British Commonwealth’s legislative powers in the mandated territory of New Guinea, ruled that

[t]he grant of mandates introduced a new principle into international law The position of a mandatory in relation to a mandated territory must be regarded as *sui generis*. The Treaty of Peace, read as a whole, avoids cession of territory to the mandatory, and, in the absence of definite evidence to the contrary, it must . . . be taken that New Guinea has not become part of the Dominions of the Crown.

Id.

193. See J.L. Brierly, *Trusts and Mandates*, 10 BRIT. Y.B. INT’L L. 217, 219 (1929). Brierly stated,

Anglo-Saxon law has two different regimes for property, viz., ownership and trust; International law has two different regimes for government, viz., sovereignty (under whatever reserves we like to make as to the meaning of the term) and mandate. Mandated territories have ceased to be under the sovereignty of the state which formerly governed them; they have passed into the regime of mandate. It is idle to attempt to force the mandate, which is a social institution, into the individualistic concept of sovereignty, as it is to force the trust into a scheme based only on private property.

Id.

194. League of Nations Covenant art. 22. The mandate system was established under Article 22 of the League of Nations Covenant, but the rights and obligations of the mandatory powers were outlined in specific mandates for each territory. *See id.*

195. The terms of each mandate varied according to the specific circumstances of each territory, but there were certain obligations for the administering country included in each of the mandates. First, the administering country was obliged to act with a view toward the well-being and development of the territory’s inhabitants, explicitly forbidding the economic exploitation of the territory or its population. Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513, 525 (2002). In addition, and, perhaps most importantly, the administration of the mandate was to be supervised by the League of Nations. *Id.* at 524. Issues of nationality, diplomatic protection, and the practical issues of administration were largely left up to the mandatory power. *See id.* at 526–27. Nevertheless, the League Council made certain recommendations regarding administrative issues. *See* League of Nations Covenant art. 22.

authority, leads to a void in power.¹⁹⁶ As Sir Arnold McNair noted in the ICJ's Advisory Opinion on the status of South-West Africa,

The Mandates System is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. Sovereignty in a mandated territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent state, sovereignty will revive and vest in the state.¹⁹⁷

As McNair pointed out, the mandate system challenged prevailing notions of sovereignty. However, the mandates did not force multiple States to share sovereignty over a territory. Instead, they allowed an outside body (the League of Nations) to identify an administering authority, which, in turn, governed the territory.¹⁹⁸ Many of the territories that Professor Schneider's definition of condominium in *Encyclopedia of Public International Law* identifies as problematic condominiumia¹⁹⁹ were in fact mandates, with problems stemming not from joint sovereignty, but rather from the different form of sharing inherent to this mandate structure.

The mandate system operated for less than twenty years, and the mandate agreements led to a *de facto* state of affairs in which the territo-

196. Note that at the time of the creation of the mandate system, an alternative existed: to vest sovereignty in multiple States and allow them to govern. That system, of course, would have been a condominium-type arrangement, governed under the auspices of an international organization.

197. International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 150 (July 11) (separate opinion of Judge McNair). For additional information on the South-West Africa Mandate, see *SOUTHWEST AFRICA UNDER MANDATE* (Robert Love Braum ed., 1976).

198. See League of Nations Covenant art. 22. One example of the difficulty of governing mandate territory was the experience of Memel, a port city that had been the subject of a long-standing dispute between Germany and Lithuania. Memel lies on the Baltic Sea at the mouth of the Niemen River and has a mixed population composed primarily of German and Lithuanian nationals. See *CORET*, *supra* note 31, at 196. Article 99 of the Treaty of Versailles severed Memel and the surrounding district from Germany. See *Treaty of Versailles*, *supra* note 90, art. 99; *CORET*, *supra* note 31, at 196. Memel was placed under a French administration that governed under a League of Nations mandate. See *CORET*, *supra* note 31, at 196.

The governance of Memel was a failure. France, England, Italy, and Japan were given governing authority over the territory by Article 99 of the Treaty of Versailles. See *CORET*, *supra* note 31, at 196. Disagreement over governance and the status of the territory led to an uprising by a group of Lithuanian partisans in January 1923. See *id.* The partisans succeeded in establishing a revolutionary government. See *id.* The insurgency led the governing States to take urgent action to find a permanent solution for the small territory. See *id.* On February 16, 1923, the four governing States agreed to transfer sovereignty over the territory to Lithuania. Lithuanian sovereignty over Memel was formally recognized on May 8, 1924, when Great Britain, France, Italy, Japan, and the United States signed a convention that had been agreed to in the spring of 1923 by their representatives. See *id.*

199. See Schneider, *supra* note 19, at 734.

ries were administered as colonies while the system was in place. After the League of Nations fell apart, the mandate system could no longer exist. However, the system evolved under the supervision of the United Nations, and the mandate system was ultimately subsumed into the trusteeship system.

2. The United Nations Trusteeship System

The United Nations Trusteeship system, now defunct, incorporated the territories of the mandate system under the League of Nations; however, it allowed for closer supervision of the administering States.²⁰⁰ The system was created to continue, and sometimes to initiate, the administration of territories that were not entirely self-governing.²⁰¹ The central goal of the trusteeship system was for the people of the territories to follow a “progressive development towards self-government.”²⁰² While most trusteeships were governed by only one State, trusteeships have most often been confused with condominiums where multiple States administered the trusteeship during its period of pre-independence incubation.²⁰³ Today, all of the trust territories under the trusteeship system have achieved self-government in accordance with the objective articulated in Article 76(b) of the U.N. Charter.²⁰⁴

200. U.N. Charter arts. 75–91.

201. *Id.* arts. 75, 77. In line with the wide-ranging goals of the trusteeship system, administering States were given only a blueprint for the arrangement to be developed with the trustee territory, in the form of a trusteeship agreement. The trusteeship agreements for the eleven former mandates were very similar to the agreements under the mandate system. Each trusteeship agreement defined the territory, designated the administering authority, and outlined the obligations of that authority. *See id.* arts. 79, 81.

202. Dietrich Rauschnig, *United Nations Trusteeship System*, in IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 19, at 1193, 1194. The objectives of the trusteeship system were enumerated in greater detail than the objectives for the mandate system had been. The trusteeship’s objectives included: the promotion of the well-being and the interests of the inhabitants of the territories; the promotion of political, economic, social, and educational advancement within the territories; and the achievement of self-government. U.N. Charter art. 76.

203. Several different systems were adopted for administering the trusteeships. For example, in Nauru, Great Britain, Australia, and New Zealand jointly administered the territory. *See* CHARMIAN E. TOUSSAINT, *THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS* 79–80 (George Keeton & George Schwarzenberger eds., 1956). In practice, Australia acted as the primary administrator for the territory in the name of all three States. *Id.* at 85. Two of the countries, Australia and New Zealand, “did little to conceal their desire to annex the mandate territory of Nauru because of its valuable phosphate deposits.” Anghie, *supra* note 195, at 563.

By contrast, New Guinea, which is located in the same region as Nauru, was administered solely by Australia. TOUSSAINT, *supra*, at 99 n.6. The trust agreement for New Guinea contained a clause that allowed the administering country to treat the territory as an “integral part of Australia,” so long as this did not delay the development of self-government. *Id.* at 108.

204. James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT’L L. 85, 89 (1998). Article 76(b) states:

3. Non-Self-Governing Territories

After 1945, the international community became more concerned with the welfare of dependent territories that had not attained independence and with the condition of their inhabitants. As a result, all territories that had not yet attained full self-government were given special status under Chapter XI of the U.N. Charter;²⁰⁵ this status created specific obligations for the administering authorities.²⁰⁶

Although non-self-governing territories, unlike trusteeships, are not administered under a detailed framework, the goal of the system is the same, namely the achievement of self-government.²⁰⁷ Self-government is achieved only after the expression of the free will of the people of the

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article I of the present Charter, shall be: . . . (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement . . .

U.N. Charter art. 76(b).

In most cases, "the progress to self-government or independence was consensual. It occurred with the agreement of the State responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that State and local leaders." Crawford, *supra*, at 89.

205. U.N. Charter art. 73. The main difference between territories placed under the trusteeship system and non-self-governing territories is that trusteeships were subject to specific requirements and procedures, while non-self-governing territories were not subject to those strictures. See LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 406-07 (2d ed. 1949). Article 73 of the U.N. Charter provides the guidelines for the administration of non-self-governing territories. The responsibilities that flow from Article 73 of the Charter belong to "[m]embers of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government . . ." U.N. Charter art. 73.

206. GOODRICH & HAMBRO, *supra* note 205, at 408-09. This system was adopted after a compromise within the United Nations between those countries that wanted the trusteeship system extended to all colonial territories, and those resisting that type of arrangement. The compromise led to the adoption of Chapter XI of the U.N. Charter and acknowledged the responsibility of the United Nations in ensuring the eventual independence of the territories under the system. It also guaranteed that Member States administering dependent territories would "recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories." U.N. Charter art. 73. It was written to protect the interests of territories not able to speak for themselves in international forums by ensuring that a member of the United Nations entrusted with their welfare would be responsible for their well-being. Thus, the underlying philosophy was to avoid leaving dependent territories defenseless and voiceless in a world that had not yet accorded them independent status. For example, Article 73(d) provides that administering powers have the responsibility "to promote constructive measures of development" in the territories under their administration. *Id.* art. 73(d).

207. Compare U.N. Charter art. 73(b), with *id.* art. 76(b).

territory and cannot be based solely on historic claims to the territory.²⁰⁸ Although non-self-governing territories occasionally relied on multiple administering powers, the motives and operational rules of non-self-governing territories distinguish them from condominiums.

4. Protectorates

An international protectorate is a legal relationship between a protecting State and a protected State; the legal basis for the relationship arises from a treaty signed between the parties involved.²⁰⁹ The treaty proclaims that the protecting party will defend the protected State (or its interests) against aggression.²¹⁰ There are many differences between a protectorate and the three arrangements described immediately above. Most importantly, a protectorate is itself a State.²¹¹ This distinguishes protectorates not only from mandates, trusts, and non-self governing

208. However, the United Nations has never interpreted the practical requirements for, or limits to, an Article 73 administering power. Therefore, it is unclear what measures would be sufficient to meet the minimum standards required of an administering power.

The question of what is sufficient is more than a purely academic issue. For example, ongoing negotiations over the status of the Western Sahara focus not only on the rights of Morocco to assert its authority as an administering power, but also—assuming Morocco to be the administering power—on the obligations imposed on Morocco under Article 73. Questions, such as whether Morocco, consistent with its obligations under Article 73, can enter into oil concession agreements with private oil companies, and, if so, whether Morocco can use the proceeds of such agreements, have arisen. See Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694 (1976) (arguing that the historic claims that have been made to the Western Sahara have stalled the achievement of self-government by the peoples of that territory).

209. See Gerhard Hoffman, *Protectorates*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 19, at 1153, 1154. There are different types of protectorates. In a complete protectorate, the protector State can act on behalf of the protected State with regard to foreign relations. *Id.* In a restricted protectorate, the protected State can make its own decisions regarding foreign relations, subject to the approval of the protector State. *Id.*

Protectorates were most common during the time of imperial expansion and colonialism. *Id.* During that period, the great powers had protectorate relationships with strategic countries. *Id.* One example of a contemporary international arrangement that resembles a protectorate is the relationship between France and Monaco. See *id.* The treaty between these two States has been in place since 1918. *Id.* Monaco, although sovereign and independent, has signed “particular conventions with France.” Constitution De La Principaute art. 1 (Monaco). French is the national language, *id.* art. 8, and, until France and Monaco adopted the Euro as their official currency, the Monegasque franc had the same value as the French franc. Dietrich Schindler, *Monaco*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 19, at 444, 444. There has been a French-Monegasque customs union since 1865. *Id.* According to the treaty on the status of Monaco, signed in Paris on July 17, 1918, Monaco must “exercise its rights of sovereignty in complete conformity with the political, military, naval and economic interests of France.” Treaty Establishing the Relations of France with the Principality of Monaco, Fr.-Monaco, July 17, 1918, 981 U.N.T.S. 364.

210. See Hoffman, *supra* note 209, at 1154.

211. *Id.* at 1153.

territories, but also from condominiums, which are never independent States themselves.

Regardless of the type of protectorate in question, the protected State is still a State within the international sphere, and it is subject to international law.²¹² Notably, “the protected State is still entitled to exercise territorial jurisdiction over its own territory. Its citizens are neither subject to the legal order of the protecting State nor nationals of this State.”²¹³ Protectorates only last as long as the treaty relationship between the two parties is in force, and they are never considered a part of the protecting State. Today, protectorates are not as important as they were during colonial times, but, as with so many of the terms described here, the territories that are, or have been, protectorates are sometimes confused with condominiums.

Although all four of these arrangements are quite distinct from the joint sovereignty notion that is central to condominium, the terms are used interchangeably, as if a condominium was closely related to a mandate or a trust territory. In fact, other than the shared experience as a solution to territorial complexities and a resort to relations with outside powers, the condominium is an entirely different breed of animal. The terms are confounded out of an indifference to the nuances of the lexicon and not out of any uncertainty in the terms themselves.

C. Other International Territorial Arrangements

The concept of condominium also must be distinguished from two special cases that involve two very different situations: military power sharing and the Antarctic regime. Military power sharing lacks many of the basic features of condominium governance, such as joint administration and a range of practical considerations, including citizenship, voting rights, and governing laws. For example, the power-sharing arrangement between the United Kingdom and the United States over the San Juan Islands, which is described as a condominium, lacked the basic features of condominium governance.²¹⁴ For twelve years, from 1860 until 1872, British and U.S. forces exercised joint sovereignty over the San Juan Islands,²¹⁵ which are located off the northwestern coast of the continental United States. While this arrangement was intended to create a condominium-type, power-sharing procedure, joint custody was restricted to

212. *Id.* at 1156.

213. *Id.*

214. See HUNTER MILLER, *SAN JUAN ARCHIPELAGO: STUDY OF THE JOINT OCCUPATION OF SAN JUAN ISLAND 171* (1943).

215. *Id.* at 9.

military control.²¹⁶ In all other affairs, British and U.S. authorities did not govern the territory jointly. Thus, the Anglo-American arrangement in the San Juan Islands was merely an instance of military occupation.²¹⁷

One final international arrangement for joint sovereignty merits mention: the Antarctic regime. It was established by the Antarctic Treaty (the Treaty), which entered into force in 1961.²¹⁸ The Treaty is a unique tool designed to resolve the particular issues involved in the claims to Antarctica. The Treaty forbids national claims to Antarctica.²¹⁹ It does not attempt to solve the claims to territorial sovereignty over the continent, but instead creates a global commons and serves as a framework agreement governing the use of mineral and other resources of Antarctica.²²⁰ The limited scope of the Treaty has evolved into a system that covers most of the potential activities in Antarctica. Indeed, the Antarctic regime demonstrates that successful cooperation among States can be achieved and maintained in spite of ongoing legal disputes. That said, because of the unique issues at play in Antarctica, it cannot be used as a model for other territorial disputes.²²¹ Moreover, whereas cooperation in Antarctica has proceeded “with little outward sign of dissension,” it is less clear how the system will handle increasing pressures to develop Antarctica’s resources and protect its environment.²²²

216. See *id.* at 171–72 (noting that “joint occupation is exclusively military, and that civil officers of neither power can exercise any jurisdiction or authority whatsoever there . . . [The British and U.S. forces] have no power to govern any of the inhabitants of the disputed territory”).

217. Nonetheless, the San Juan Islands should be distinguished from other instances of military occupation, such as Allied occupation of postwar Germany, which was not in any way congruent with the notions of joint sovereignty that define a condominium.

218. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

219. See *id.* art. 4. The Antarctic Treaty states,

No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Id.

220. See *Envtl. Def. Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

221. In particular, Antarctica’s physical location and near year-round inaccessibility have fostered cooperation, rather than competition, among States in exploiting the potential of the territory. See, e.g., MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 231–32 (4th ed. 2003).

222. F.M. AUBURN, ANTARCTIC LAW AND POLITICS 1 (1982); see also Christopher C. Joyner, *The Antarctic Minerals Negotiating Process*, 81 AM. J. INT’L L. 888 (1987).

III. ON PROPERTY AND SOVEREIGNTY²²³

Property and sovereignty have long been treated as distinct entities under the law. As Morris Cohen pointed out in his seminal lecture on property and sovereignty in 1927, “[p]roperty and sovereignty . . . belong to entirely different branches of the law. Sovereignty is a concept of political or public law and property belongs to civil or private law.”²²⁴ Nevertheless, the experience of common property regimes involving purely private actors can inform contemporary state practice with respect to the possible use of condominium by sovereigns to resolve territorial disputes. While sovereignty and property involve different types of actors, they also derive from similar theoretical underpinnings.²²⁵ Some have wondered whether the study of condominium would benefit from a comparison to common property regimes in domestic law.²²⁶ Part III demonstrates that such a comparison sheds light on the possibilities available to States that share full sovereign rights over territory (even disputed territory).

With respect to sovereignty, the transformation of political community in the sixteenth and seventeenth centuries produced the vocabulary of the modern territorial State. Loyalties to the sovereign State supplanted allegiance to an “immediate feudal superior” and “customary religious obedience to the Church under the Pope.”²²⁷ For more than three centuries, the primacy of sovereignty in state behavior remained constant. However, recently, States have been more willing to release their grip on the primacy of sovereignty in the international arena.²²⁸

223. This Part explicitly considers how lessons from the context of private property and individuals can be carried over to the world of sovereignty and States. As such, the title of this Part reflects both homage and reconsideration of the lecture and article of the same title more than seventy years ago. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

224. *Id.* at 8.

225. It is important to remember, after all, that when Cohen gave his lecture in 1927, sovereignty was considered the defining characteristic of state behavior.

226. See, e.g., O’Connell, *supra* note 43, at 79–80.

227. MARTIN WIGHT, *POWER POLITICS* (1946), reprinted in “LOOKING FORWARD” PAMPHLETS, no. 8, at 8 (Royal Institute of International Affairs ed., 1946). Jean Bodin, the late-sixteenth century French political theorist, is regarded as the father of the concept of sovereignty. Bodin argued that sovereign power amounted to coercive power, and such power was to be wielded at the expense of others. As Bodin explained, sovereign power could not be shared because if the sovereign “holds of another, he is not sovereign.” JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 36 (M.J. Tooley trans., Basil Blackwell 1955). Bodin’s views were shared by John Adams, who described dual sovereignty as “the height of political absurdity.” GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 351 (1972).

228. See Andrew Linklater, *Citizenship and Sovereignty in the Post-Westphalian State*, reprinted in *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 113, 113 (Daniele Archibugi, David Held & Martin Kohler eds., 1998) (“As the present century draws to a close, the subnational revolt, the internationalization of decision-making, and

On the other hand, private property is typically defined in lay terms as the relationship between people and things.²²⁹ Property theorists, by contrast, recognize that property actually defines the more complex relationships among people with respect to things. Importantly, both laypeople and theorists tend to agree that property rights vest people with at least one fundamental right: the right to exclude.²³⁰ Thus, notions of private property, however defined, start from the premise that individuals have some form of exclusive control over their property, even if they can exclude only some—but not all—people.

Like people, States cast their concepts of property in the exclusionary mold: my territorial rights allow me to exclude you while conducting whatever business I choose. Also, like people, States are constrained by some restrictions on their activities, particularly when their internal actions harm others. However, as a baseline, property rights in a territory vest a State with certain powers, including, at a minimum, the right to exclude.

Common property regimes regulate the rights of all of the parties to the property interest in question. Whether in common law or civil law, these regimes govern the right of owners to use, exclude, and regulate the ways in which ownership can be exercised, ceded, or abused. Perhaps then, joint sovereignty arrangements are analogous to common property regimes.²³¹

Under a condominium, two or more States exercise exclusive control over a territory. They maintain and exercise their right to exclude others, much as members of a common property regime may hold exclusionary rights with respect to non-members, even as they share rights with one another.²³² As with any common property regime, the paramount

emergent transnational loyalties in Western Europe reveal that the processes that created and sustained sovereign states in this region are being reversed.”). One example of a common property regime in the context of joint sovereignty is Antarctica, discussed *supra*, which is governed as a global commons. The Antarctic regime establishes the viability of common property-type solutions for disputes over sovereignty. Note, however, that the Antarctic regime establishes a global commons, thereby eroding the traditional notions of exclusive control. Nonetheless, the joint sovereignty arrangement in Antarctica is unique, and, even in the global commons framework, signatory States possess certain rights to exclude non-signatories. The Antarctic Treaty has evolved into a system that covers most of the potential activities in Antarctica, where issues of property and of governance are tied together in the absence of other exogenous factors.

229. See Thomas Gray, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69 (J. Roland Pennock & John W. Chapman eds., 1980) (discussing these perspectives).

230. See *id.* at 59, 81.

231. Indeed, Lassa Oppenheim himself recognized this possibility when he defined a condominium as a “piece of territory consisting of land or water . . . under the joint tenancy of two or more States, these several States exercising sovereignty conjointly over it, and over the individuals living thereon.” 1 OPPENHEIM, *supra* note 4, at 453.

232. See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS 59 (1990).

concerns for States as actors are over exploitation of resources and free riding by partners in the common property.²³³ Moreover, the distinction between property and sovereignty—between the ownership of land and the right to govern—has become so ingrained in legal discourse that we often forget that the distinction dissolves in cases in which notions of land ownership and of government are closely related.²³⁴

For relevant lessons in the private property realm, the work of political scientist Elinor Ostrom is particularly instructive. Ostrom investigated a number of common property regimes over what she described as common pool resources (CPRs).²³⁵ In conducting her analysis, Ostrom relied on four long-enduring, self-organized, and self-governed CPRs. The four cases explored successful common property regimes “in which (1) appropriators have devised, applied, and monitored their own rules to control the use of their CPRs and (2) the resource systems, as well as the institutions, have survived for long periods of time.”²³⁶ The four cases were chosen because they shared several important characteristics: (1) small populations; (2) similar demands and needs within each community; and (3) a well-ingrained custom, which had endured for centuries (and, in at least one case, more than a millennium).²³⁷ In addition, all four CPR settings faced the challenge of “uncertain and complex environments.”²³⁸ More importantly, these four regimes offer insight into successful structures for sharing and indeed cultivating jointly held resources.

Ostrom’s inquiry suggests a number of features of common property regimes that might prove instructive for the analogous relationship in the

233. This is a common argument that dates back to Garrett Hardin’s 1968 pioneering article. See Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243 (1968). Hardin illustrates the tragic consequences of the commons by looking at herding on pastures “open to all.” *Id.* at 1244.

234. See Stuart Banner, *The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750–1850*, 41 *AM. J. LEG. HIST.* 61 (1997); see also I. FREDERICK POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 527–28, 586–97 (2d ed. 1968); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 *U. PA. L. REV.* 691, 707–10 (1983). See generally Cohen, *supra* note 223. Indeed, on some occasions, the commons provides for institutions of self-government when there is a vacuum of power.

235. See OSTROM, *supra* note 232, at 58.

236. *Id.* The four regimes Ostrom examined were: (1) a Swiss village (Törbel) with a common property regime over cow grazing and timber; (2) three Japanese villages (Hirano, Nagaike, and Yamanoka) with similar common property regimes over grazing and timber; (3) three towns in Spain (Valencia, Morica/Orihuela, and Alicante) with variations on common irrigation systems (*huertas*); and (4) several *zanjera* irrigation communities in the Philippines. See *id.* at 61–88. Ostrom’s detailed study of the common property regimes in four small communities provides an additional theoretical construct for crafting condominiums to resolve complex, contemporary disputes.

237. See *id.* at 88–91.

238. *Id.* at 88.

international public law sphere. Specifically, Ostrom has identified eight design principles illustrated by the four long-enduring CPRs.²³⁹ These principles are: (1) clearly defined boundaries; (2) congruence between the rules for appropriation and local conditions; (3) collective-choice arrangements; (4) monitoring systems; (5) graduated sanctions; (6) conflict-resolution mechanisms; (7) minimal recognition of rights to organize; and (8) multi-tiered, nested enterprises.²⁴⁰

The eighth design principle—nested enterprises—merits closer discussion as a means of understanding how the common property regimes among small, homogeneous communities described by Ostrom can become a framework for joint sovereignty arrangements among States. Ostrom finds that “all of the more complex, enduring CPRs . . . [organize] appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities . . . in multiple layers of nested enterprises.”²⁴¹ The CPRs are constructed on levels that may in turn be nested in local, regional, and national governmental jurisdictions.²⁴² For example, in the case of the Filipino irrigation canals, the problems facing irrigators at the level of a tertiary canal are different from the problems facing a larger group sharing a secondary canal. Those, in turn, are different from the problems involved in the management of the main diversion works that affect the entire system. Establishing rules at one level, without rules at the other levels, will produce an incomplete system that will not endure over the long run.²⁴³

Like common property regimes over common pool resources, condominiums over shared territory must take account of local conditions, regulate the behavior of interested actors, and enforce sanctions against wrongdoers who violate agreements governing the use of the territory. Unlike the common property regimes, condominiums must deal with both public and private actors (rather than only private actors) and must contend with regulation of not only the shared resources, but also many other aspects of life in the jointly governed territory. Thus, the lessons to be drawn from Ostrom’s work in the private property context offer a starting point for the construction of shared sovereignty arrangements.

239. See *id.* at 90 (outlining the eight principles in a detailed table).

240. *Id.* at 90.

241. *Id.* at 101.

242. See *id.* at 102.

243. *Id.*

IV. A FLOOR PLAN OF THE MODEL CONDOMINIUM

This Part describes principles for a model condominium drawn from Ostrom's work on common pool resources combined with lessons derived from past condominiums. As the condominiums over the Dutch-Prussian Frontier Stream and over the Gulf of Fonseca demonstrate, States are capable of sharing resources just like private actors. Ostrom's common property regimes offer a set of design principles that can be shaped to apply to condominium arrangements. In the analogous world of joint sovereignty among States, the guiding principles allow practitioners to take a more rigorous approach in developing an arrangement that can endure the challenges of common property regimes in a state of mistrust and heightened tension. Meanwhile, the lessons of past experience identified in Part I of this Article offer specific instructions for elements of any condominium.

Each of Ostrom's eight factors for common pool resources might also be considered an indispensable element of any condominium arrangement.²⁴⁴ The basic features that would allow a complex common property regime to function include clear rules of engagement, principled bases for those rules, mechanisms for enforcement of those rules, and respect by citizens of the rules and the consequences of any breach. The Moresnet condominium highlights the importance of transparency of lawmaking for condominiums. Because residents of condominium territories often will be skeptical of one—or more—of the condominium partners, transparent processes—both for the drafting and implementation of laws—allow skepticism to be overcome by demonstrating openness and fairness in all aspects of government function and power. Dating back to the first recorded condominium in the thirteenth century B.C., the Hittite condominium incorporated rights of supervision by each partner in the condominium.

As the New Hebrides condominium demonstrated, joint implementation of governing laws strengthens the incentive to jointly monitor and enforce those laws. Clear and robust laws also reduce opportunities for disputes over implementation. If the framers of a condominium understand the underlying common property principles in the territory in which a condominium is being created and so create rules to harness those principles, rather than to counteract them, the condominium will

244. To recall, those eight factors include (1) clearly defined boundaries; (2) congruence between the rules for appropriation and local conditions; (3) collective-choice arrangements; (4) monitoring systems; (5) graduated sanctions; (6) conflict-resolution mechanisms; (7) minimal recognition of rights to organize; and (8) multi-tiered, nested enterprises. *See id.*

be more likely to succeed in providing a long-term, stable resolution to the territorial dispute.²⁴⁵

With respect to the governing structure and layers of authority, Trieste successfully implemented a system in which more local control could be exercised at the lower levels. The sovereign powers administering the territory could protect their rights and interests at the macro level, while officials selected locally could control the day-to-day functions of the government. As the Trieste experience demonstrates, however, such devolution of authority must be carefully monitored so that competing groups are not placed in positions of dominance over one another. Such conditions lend themselves to misuse of power and threaten the viability of the condominium. As the shortcomings of the Trieste condominium amply expose, a condominium that ignores the multiple layers of its territory and society cannot succeed over the long term.

The experiences in Trieste and Sudan also demonstrate that condominium can only succeed where the condominium partners are co-equals in authority, with equal rights and obligations. To place one party in control at the expense of the other undermines the legitimacy of the condominium and threatens its viability as a long-term solution.

The Schleswig-Holstein condominium shows that shared ideology can be essential. There, the shared ideology of the Austrians and Prussians allowed the partners to overcome some of the hurdles they faced. Not all condominium partners will share ideology (indeed, the opposite will often be true), but when they do, the condominium will have a greater chance of success.

As in common property regimes, in condominiums, outside parties—whether States, international organizations, or non-governmental organizations—must create an incentive structure to ensure that parties maintain their commitment to the arrangement. If each State is made to believe that it stands to lose the entire region and that the condominium is the only guarantee that it will have of control over the disputed territory, there is a chance that both sides will consider joint sovereignty. For monitoring purposes, condominium arrangements generally should include an additional layer of nesting—the supranational level—from which multilateral or other non-governmental bodies may be called upon to resolve disputes among the condominium sovereigns. Outside participation in collective dispute resolution can prove effective, as demonstrated by models adopted as far back as the Hittite condominium.

245. Of course, one problem with this analysis is that the framers of the condominium are the negotiating parties, and those parties are more concerned with self-interest and bargaining leverage than they are in accommodating the local population. Otherwise the parties would simply allow the residents to determine their status by referendum. However, the interests of the condominium powers themselves are best served by a durable resolution.

While in some cases the judicial bodies of one of the condominium partners can provide impartial decision-making (as in the Dutch-Prussian Frontier Stream), on balance, condominiums are most likely to succeed with a tiered judicial process that includes internal and external voices.

Ideally, condominiums will be propelled by some type of an action-forcing event. Action-forcing events occur when outside actors impose conditions on negotiating parties that press them to make concessions in order to reach a compromise.²⁴⁶ In the context of negotiations over a proposed condominium, an action-forcing event exists when there is a threat of action that will be taken if the parties do not (i) appear at the table, (ii) negotiate in good faith, and (iii) participate in the condominium arrangement as agreed. Moreover, if a viable, neutral third party can be identified, the two sides might be able to use the condominium as a building block for more amicable relations on a broader range of issues.

Condominium can be a viable, long-term solution to existing boundary disputes. As past experiences indicate, shared sovereignty can succeed if such an arrangement is carefully crafted to take account of the specific features of the territory and people being governed. The framework drawn from long-standing common property regimes over potentially scarce resources provides the structure that can be used in crafting the specific solution to an existing boundary dispute. Rather than carving up a disputed territory by drawing lines, condominium allows States to collaborate and build a community of shared rights and responsibilities. This, in turn, might offer long-term stability with reduced incentives for local residents, the condominium powers, or outside third parties to exacerbate tensions or to in any other way attempt to redraw the boundary lines.

V. CONCLUSION

Boundary disputes have long been sources of tension between States and a root of war, but they threaten international peace and security more today than ever before.²⁴⁷ The time has come to return to condominium

246. MICHAEL WATKINS & SUSAN ROSEGRANT, *BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS* 123 (2001).

247. Nearly a century ago, one of Britain's leading imperialists, Lord Curzon, then a former Viceroy of India and later the British Foreign Secretary, identified the threat of boundary disputes, describing them as "the razor's edge on which hang suspended the modern issues of war or peace, of life or death to nations." Lord Curzon of Kedleston, *Address at the Romanes Lecture of 1907*, <http://www-ibru.dur.ac.uk/docs/curzon1.html> (last visited Mar. 20, 2008). In that same lecture, Lord Curzon noted the dearth of legal scholarship on boundaries, stating:

as a solution to certain intractable boundary disputes. The power of sovereignty as the dominant force in global relations has diminished substantially. Boundary disputes that involve territories, rather than mere line drawing, remain at the forefront of some of the world's most charged conflicts.²⁴⁸ And condominium, so often discarded from the discourse on potential solutions, has often been little more than a scapegoat for failures independent of the difficulties posed by joint sovereignty. In many cases, the failure of the condominium has resulted from the fact that it has largely been adopted as a solution when all else has failed. In other cases, the failed arrangements were not condominiums at all, while in still other cases, failures stemmed from lack of proper planning and foresight to identify critical problems and real, negotiated solutions to those problems. Nothing in the nature of a condominium preordains its failure as a device for dispute resolution among States.

Negotiated solutions offer the best hope for enduring resolutions to boundary disputes. Long-term solutions are virtually impossible to obtain when one side must cede its rights to a territory it views as part of its *own* territory. By contrast, a solution that allows all of the parties to the dispute to maintain their rights would allow for a meaningful settlement that may prove durable over time.

This Article represents an initial effort to rekindle the flickering flame of condominium. The next step in the process would be to elaborate on the specifications for a model condominium, where a condominium could be established not only to resolve an ongoing boundary dispute, but also to test the mechanisms for successful condominium governance.

Future research could explore the framework for a model condominium in greater detail, focusing on the experience in the New Hebrides and proposing a condominium solution to a specific ongoing boundary

You may ransack the catalogues of libraries, you may search the indexes of celebrated historical works, you may study the writings of scholars, [yet] you will find the subject [of frontiers] almost wholly ignored. Its formula are hidden in the arcane of diplomatic chancelleries; its documents are embedded in vast and forbidding collections of treaties, its incidents and what I may describe as its incomparable drama are the possession of a few silent men, who may be found in the clubs of London, Paris or Berlin, when they are not engaged in tracing lines upon the unknown frontiers of the earth.

Id.

248. Indeed, the exogenous forces that influence the success or failure of condominiums have changed since the period in which the condominium was widely used as a solution to boundary disputes. These new forces present new opportunities to turn to condominium for a durable solution to boundary disputes. Just as the development of nuclear capabilities altered the nature of the Cold War, so too must the proliferation of nuclear weapons lead us to transform our perspectives on international dispute resolution.

dispute—for example, the dispute between Russia and Japan over the Kurile Islands to the north of the Japanese island of Hokkaido.²⁴⁹ As in the common pool resources context, condominiums would be most successful over territories with small populations with shared demands and needs that will unify the population in service to meeting those shared demands and needs.

At a minimum, the history of condominium arrangements reveals that supposedly indivisible territorial rights can be reformulated to create a joint exercise of territorial sovereignty. Recent developments in state practice suggest that sovereignty can be divided and shared among States or between States and international organizations.

In spite of the close relationship between the condominium itself and the territory where it is imposed, condominiums have generally been built from the top down. By establishing the connection between local conceptions of joint or common ownership and the framework for their governance by joint sovereignty, it may be possible to construct a territorial condominium the same way real estate developers build the better known form of condominium from the ground up. Taking account of the local framework would also vest the local residents with greater ownership in the condominium; thus, locals might participate more actively in the condominium instead of viewing it as a fiction to resolve more powerful States' political and economic pretensions. More importantly, in past efforts to design a condominium, the negotiating powers have not taken account of local conceptions of common property. How do the residents of the territory conceive of shared rights to land or other resources? Does the condominium align with local custom or contravene it? These are some of the theoretical questions that underpin the more pressing practical concerns that preoccupy decision-makers who are charged with creating a condominium.

249. The dispute over the Kurile Islands offers the most promising opportunity to craft a durable condominium solution. First, a condominium over the Kuriles will resolve the ongoing dispute over the islands in a way that will allow both Russia and Japan to draw the benefits they have long sought—for Japan, sovereignty over the islands, and, for Russia, a continued presence and the rights that flow from that presence. The dispute has lasted since World War II and has been the top bilateral foreign policy issue between the Russian and Japanese governments since the early 1990s. At the same time, because the Kuriles do not present the obvious problems of frontier condominiums and because the passions and tension involved in the dispute do not rise to the level of other contemporary boundary disputes, the Kuriles offer an ideal opportunity to create a model for future condominium development in other, more troubled regions of the world. Moreover, the experience of Russia and Japan as condominium partners over Sakhalin Island, directly to the north of the Kurile Islands, suggests a shared willingness by both States to use condominium as a solution to territorial disputes. See CORET, *supra* note 31, at 163–65.