

## TITLE, CONTROL, AND CLOSURE? THE EXPERIENCE OF THE ERITREA–ETHIOPIA BOUNDARY COMMISSION

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**Abstract** This article examines the establishment and work of the Eritrea–Ethiopia Boundary Commission with regard to its decision of 13 April 2002 concerning the delimitation of the border between Eritrea and Ethiopia and subsequent events. Apart from an examination of the substantive decision of the Commission in the light of the law relating to territory, the article will discuss certain unusual features of the process, including mandating the Commission both to delimit and demarcate the boundary and the involvement of third parties. The delimitation decision is significant in a number of ways, including its views as to the applicable law, treaty interpretation and the subsequent conduct of the parties in relation to title. The long-running and difficult process of demarcation is noted, together with the important role played by the UN and other international actors.

The experience of the Eritrea–Ethiopia Boundary Commission is proving instructive both with regards to the illumination of the relevant principles concerning delimitation and demarcation and with regard to the methodology of the peaceful settlement of boundary disputes. Its establishment marked an attempt to resolve a violent territorial conflict and its continued existence has underscored the continuing tensions between the parties. The fundamental questions raised may be divided into substantive legal problems, covering, for example, treaty interpretation and the treatment of subsequent conduct by the parties, which may be seen in the context of other important judgments on territorial disputes in recent decades,<sup>1</sup> and broader strategic matters concerning the combined mandate of delimitation and demarcation determination and the interleaving of legal and political processes with the involvement of the United Nations.

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<sup>1</sup> See, eg, the *Eritrea–Yemen Arbitration Awards of 1998 (Territorial Sovereignty and Scope of the Dispute)* and 1999 (*Maritime Delimitation*) (2005) Permanent Court of Arbitration Award Series; *Frontier Dispute (Benin/Niger)* [2005] ICJ Rep 90; *Sovereignty over Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [2002] ICJ Rep 303; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Rep 40; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* [1992] ICJ Rep 351; *Frontier Dispute (Burkina Faso/Mali)* [1986] ICJ Rep 554.

I. THE BASIC FACTUAL BACKGROUND AND THE ESTABLISHMENT  
OF THE COMMISSION

Ethiopia has long been a member of the international community as an independent State, save for a period following its conquest and annexation by Italy in 1935. Large parts of Eritrea had been subject to Ottoman and Egyptian authority prior to the 1880s, to be succeeded by increasing Italian attempts to establish control. In 1889, the Treaty of Ucciali provided for a boundary between Ethiopia and the Italian possessions in Eritrea. The Italian colony of Eritrea was formally proclaimed on 1 January 1890. In 1900, 1902 and 1908, Ethiopia and Italy signed treaties which established the entire boundary between the Colony of Eritrea and the Empire of Ethiopia. None of the boundaries thus agreed was demarcated and, as the Commission was to conclude, 'each of these boundaries was, to varying degrees, not fully delimited'.<sup>2</sup>

In 1935, Italy invaded and annexed Ethiopia. The Italians were expelled by British forces in 1941 from both Ethiopia and Eritrea. The Emperor of Ethiopia regained control of his country the following year, while Eritrea remained under British control until 1952. Following failure to agree on the disposition of Eritrea, the issue was passed to the United Nations, which in General Assembly Resolution 390A (V), 1950, declared that Eritrea would constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown. The treaties of 1900, 1902 and 1908 were declared null and void by Ethiopia on 11 September 1952 and the federal status of Eritrea was abolished two months later. Following continual upheavals and changes of government in Ethiopia, Eritrea became independent on 27 April 1993. In May 1998, hostilities broke out between Eritrea and Ethiopia. Following the Framework Agreement and the Modalities for its Implementation of July 1999 and the Agreement on Cessation of Hostilities of June 2000, both of which were endorsed by the Organization of African Unity (OAU) (now the African Union (AU)) and the United Nations, the Agreement of 12 December 2000 (the December Agreement) was signed in Algiers by the two States, providing for the permanent termination of hostilities.<sup>3</sup>

The December Agreement provided for the creation of a 'neutral Boundary Commission' in The Hague.<sup>4</sup> This Commission was, and remains, composed

<sup>2</sup> Eritrea–Ethiopia Boundary Commission Award, para 2.7.

<sup>3</sup> *ibid* paras 2.8–2.13. See also the reports of the International Crisis Group dated 24 September 2003 and 22 December 2005; and B Simma and D Khan, 'Peaceful Settlement of Boundary Disputes under the Auspices of the Organization of African Unity and the United Nations: The Case of the Frontier Dispute Between Eritrea and Ethiopia' in N Ando et al (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer, The Hague, 2002) 1179.

<sup>4</sup> To consist of five members, two of whom were to be appointed by each party by way of written notice to the UN Secretary-General within 45 days of the date of the Agreement and none of whom were to be nationals or permanent residents of the party making the appointment. The president of the Commission was to be selected by the party-appointed commissioners, see Art 4 (2), (3), (4), and (5). Within the time-limits provided for in the Agreement, Eritrea appointed as

of a former President of the International Court of Justice, a former Judge of the International Court, a former ad hoc Judge of the International Court, a former President of the Inter-American Commission on Human Rights and a former Legal Adviser to the UK Foreign and Commonwealth Office. Considerable judicial, arbitral and scholarly experience is thus reflected in the composition of the Commission.<sup>5</sup>

There are several critical points that distinguish the Commission from other boundary court or tribunal processes. First, the Commission was asked both to delimit and demarcate the boundary in question. This had the apparent advantage that the demarcation process could proceed on the basis of considerable knowledge gained in the delimitation phase, which should have speeded up the process. Secondly, and unusually for an arbitration, the process was institutionally underpinned by benefiting from the overt support of the United Nations and the OAU/AU. This is reflected in the preamble to the December Agreement and in the fact that this agreement was ‘witnessed’ by Algeria, the UN, the OAU/AU, the European Union and the US.<sup>6</sup> Thirdly, the degree of post-delimitation award practice that has taken place has enabled a number of clarifications to be made and has embedded the Commission in the process of implementation. This is unusual in that usually the court or tribunal producing a boundary decision ceases its involvement once the decision has been made. The advantage is that in an implementation process of some complexity and controversy, the parties are able to obtain authoritative guidance. The disadvantage is that it may place the awarding body in a rather vulnerable position between the contending parties.

Fourthly, the December Agreement imposed stringent time constraints upon the process. In particular, the Commission was to commence its work not more than 15 days after its constitution and was to ‘endeavour to make its decision concerning delimitation of the border within six months of its first meeting’.<sup>7</sup> Although the Commission was given the power to extend this deadline, the tight schedule may well have had an impact upon the ability of the parties to produce the necessary materials and to formulate the arguments required in such a complex case, particularly so soon after a violent and disruptive conflict.

Commissioners Mr Jan Paulsson and Judge Stephen Schwebel and Ethiopia appointed HE Prince Bola Adesumbo Ajibola and Sir Arthur Watts. Professor Sir Elihu Lauterpacht was selected as President of the Commission. The appointment of Mr Jan Paulsson was challenged by Ethiopia. An Interim Rule of Procedure was adopted on 5 April 2001 allowing for challenges to a member of the Commission to be decided by the remaining Commissioners and if this was not possible, by the UN Secretary-General. In the event the matter was remitted to the UN Secretary-General but before this was decided, Mr Paulsson resigned, it being understood that the resignation did not imply an acceptance of the validity of the alleged grounds of challenge. In accordance with Art 4 (6) of the December Agreement, Eritrea appointed Professor W Michael Reisman to fill the vacancy. Eritrea–Ethiopia Boundary Commission Award, paras 1.3–1.14.

<sup>5</sup> The UN Cartographer (Dr Hiroshi Murakami) was appointed to serve as Secretary to the Commission.

<sup>6</sup> See below, p 792.

<sup>7</sup> Art 4(12).

The parties agreed from the start that ‘the delimitation and demarcation determinations of the Commission shall be final and binding’ and that ‘[e]ach party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party’.<sup>8</sup> The final decision on delimitation was to be transmitted to the parties and to the Secretaries General of the OAU and the UN for publication and the UN was asked to ‘facilitate resolutions of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory’.<sup>9</sup>

The Commission met in The Hague on 25 March 2001 and on the following day conducted a meeting with the representative of the parties, at which a Registrar was appointed and the schedule of work tentatively agreed.<sup>10</sup> On 20 June 2001 Rules of Procedure were adopted by the Commission, based, as required by Article 4(11) of the Agreement, on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. The unanimous delimitation decision was rendered on 13 April 2002.

## II. SUBSTANTIVE LEGAL ISSUES

### A. The Applicable Law

Article 4(1) of the December Agreement provided that:

the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res.16 (1) of the OAU Summit in Cairo in 1964, and in this regard, they shall be determined on the basis of pertinent colonial treaties and applicable international law.

Article 4(2) provided that a neutral Boundary Commission be established ‘with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law’. The Commission was ‘not to have the power to make decisions *ex aequo et bono*’.

This applicable law requirement mirrored that laid down, for example, for the International Court in the *Botswana/Namibia* case,<sup>11</sup> where Article 1 of the Special Agreement between the parties provided that that Court was asked ‘to determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and

<sup>8</sup> Art 4(15).

<sup>9</sup> Art 4(13) and (16).

<sup>10</sup> According to which the parties would simultaneously file written Memorials on 30 June 2001 and Counter-Memorials on 22 September 2001. The Memorials were filed within the time limits and the Counter-Memorials on 30 September 2001. The Commission decided, after consultation with the parties, to authorise an exchange of Replies and these were filed on 29 Oct 2001. Oral hearings were held at the Peace Palace in The Hague from 10 to 21 December 2001. Eritrea–Ethiopia Boundary Commission Award, paras 1.10–1.11.

<sup>11</sup> *Kasikilil Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, 1058.

Botswana around Kasikili/Sedudu Island and the legal status of the island'. The Court noted that the law applicable in the case had its source 'first of all in the 1890 treaty'.<sup>12</sup> The Court also discussed the nature of the additional source of law, defined as 'the rules and principles of international law', as meaning something beyond the general rules of international treaty interpretation, which would apply in any event due to the reference to the relevant treaty. The Court concluded that such reference authorized it to apply the rules and principles of international law independently of the treaty, including in the circumstances of the case, arguments as to prescription advanced by Namibia.<sup>13</sup>

The Commission expressly relied upon the views of the Court in *Botswana/Namibia*, noting that the Court accepted the possibility that 'an attribution of territory following from its interpretation of the relevant boundary treaty could be varied by operation of the customary international law rules relating to prescription'.<sup>14</sup> The Commission concluded, therefore, that the reference in the December Agreement to applicable international law could not be limited to the law relating to the interpretation of treaties. Accordingly, the Ethiopian contention that the boundary should be delimited exclusively on the basis of the three colonial treaties as interpreted in accordance with the rules of international law governing treaty interpretation could not be accepted. The Commission considered that: 'it is required also to apply those rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of conduct of the parties'.<sup>15</sup>

This is surely correct. Any other interpretation would have left redundant the additional phrase agreed by the parties in the applicable law provision in Article 4(1) of the Agreement ('and applicable international law'), something clearly contrary to the intention of the parties. Like the International Court, the Commission concluded that the terms of the applicable law requirement meant that the relevant treaties had to be examined first, and only then would recourse be made to the rules of general international law in order to see if the provisions of the treaties needed to be modified. This is an implicit recognition of the fact that the terms of a boundary treaty alone could not always be determinative of a territorial delimitation, thus permitting recourse to extraterritorial practice where necessary, but only where necessary.

Article 4(1) of the December Agreement also made reference to 'the principle of respect for the borders existing at independence as stated in Resolution AHG/Res.16 (1) of the OAU Summit in Cairo in 1964'. This is not unusual in African boundary disputes,<sup>16</sup> and while no State contradicts this

<sup>12</sup> *ibid* 1059.

<sup>13</sup> *ibid* 1102–3.

<sup>14</sup> Eritrea–Ethiopia Boundary Commission Award, para 3.14.

<sup>15</sup> *ibid* para 3.15.

<sup>16</sup> See, eg, *Botswana/Namibia* (n 11) 1059–60 and *Benin/Niger* (n 1) para 23.

principle, so that arguments focus on issues such as the interpretation of boundary treaties and the relevance of *effectivités*, it is of use in assisting in the determination of the critical date, that is the date at which the rights of the parties may be seen as crystallized.<sup>17</sup> This is usually the date of independence of the parties concerned and if they are not essentially the same,<sup>18</sup> the later date of independence of the States in question will be taken.<sup>19</sup> Of course, this is dependent upon the circumstances, so that the critical date may be later than the date of independence, where a subsequent pertinent treaty<sup>20</sup> or award<sup>21</sup> or other relevant materials have appeared.<sup>22</sup> Similarly, the critical date may be earlier than the date of independence, where no subsequent events have occurred so as to alter the legal position so established.<sup>23</sup>

The Commission drew the legal consequence of the establishment of the critical date or date at which the borders are to be determined as follows: 'Developments subsequent to that date are not to be taken into account save in so far as they can be seen as a continuance or confirmation of a line of conduct already clearly established, or take the form of express agreements between them'.<sup>24</sup> However, although the Commission laid down the critical date in clear terms, it also went on to hold that with regard to the area between the Setit and the Mareb, 'the boundary . . . had crystallised and was binding on the Parties' as at 1935.<sup>25</sup> The meaning of this appears to have been something less than the Commission's description of the consequences of the critical date itself since 'developments since that date' in question could 'affect' the conclusion reached, presumably without constituting an 'express agreement'.<sup>26</sup> This will be noted below.<sup>27</sup> Accordingly, the Commission appears to posit the notion of a critical date crystallizing rights which could only be subsequently altered by express agreement and dates by which certain rights may be seen as having become established but which could be modified by subsequent developments which may amount to less than an express agreement. The difference is not entirely clear. However, the concept of a critical date may be seen as a presumptive device requiring convincing evidence for

<sup>17</sup> See, eg, LFE Goldie, 'The Critical Date' (1963) 12 ICLQ 1251; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice (1951–4): Points of Substance, Part II' (1995–56) 32 British Ybk of Intl L 20. See also MN Shaw, 'The Heritage of States: The Principle of *Utī Possidetis Juris* Today' (1996) 67 British Ybk of Intl L 75, 130.

<sup>18</sup> As, for example, in the *Benin/Niger* case (n 1) paras 20 and 46.

<sup>19</sup> The Eritrea–Ethiopia Boundary Commission Award, para 3.36. The date taken was thus the date of the independence of Eritrea, 27 April 1993.

<sup>20</sup> See, eg, *Beagle Channel* 21 Rep Intl Arbitral Awards 55, 82–3.

<sup>21</sup> See, eg, the *El Salvador/Honduras* (n 1) 401.

<sup>22</sup> *ibid* 56 et seq.

<sup>23</sup> Eritrea–Ethiopia Boundary Commission Award, paras 5.90–5.91.

<sup>24</sup> *ibid* para 3.36. Note that this approach was reaffirmed a few months later by the International Court in the *Indonesia/Malaysia* case (n 1) para 135. See also *Argentina/Chile* (1969) 38 International Law Reports 10, 79–80.

<sup>25</sup> *ibid* para 5.90 and see also below, pp 767 and 780.

<sup>26</sup> *ibid*.

<sup>27</sup> p 780.

the modification of crystallized rights, the relativity of which being dependent upon the strength of the established rights between the relevant parties.

### *B. Treaty Interpretation*

The role of treaties in the establishment of boundaries is paramount. Boundary treaties, where they exist, comprise a root of title in themselves and constitute a special kind of treaty in that they establish an objective territorial regime valid *erga omnes*.<sup>28</sup> Such a regime will not only create rights binding also upon third States, but will exist outside of the particular boundary treaty and thus will continue even if the treaty in question itself ceases to apply.<sup>29</sup> The reason for this exceptional approach is to be found in the need for the stability of boundaries.<sup>30</sup> Accordingly, where there is a relevant boundary agreement, this will constitute not only the relevant starting point but also the presumptive source and determination of the line in any dispute. It is for this reason that boundary disputes focus to a large extent upon the meaning of the provisions of any pertinent agreement or agreements.

Since the parties requested the Commission to delimit the boundary between them on the basis of the ‘pertinent colonial treaties (1900, 1902, and 1908) and applicable international law’, and since the parties agreed that the three treaties in question covered the whole of the boundary between them, the meaning of those treaties naturally became ‘a central feature’ of the dispute.<sup>31</sup> The Commission proceeded, therefore, to its initial and primary task on the basis that ‘it will apply the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.<sup>32</sup> This details the essential elements contained in Article 31 of the Vienna Convention on the Law of Treaties 1969, which has been held by the International Court in a number of cases to constitute a reflection of customary international law.<sup>33</sup> The Commission, however, rather than simply reiterating this, went further in emphasizing that these elements were a means of guiding the interpreter in establishing what the parties actually intended, or their ‘common will’.<sup>34</sup> To put it another way, the text of the treaties read in the light of their object and purpose, context and negotiating history, and the subsequent course of conduct of the parties were to be seen as ‘tools for determining “the common will” of the parties’.<sup>35</sup>

<sup>28</sup> See *Eritrea/Yemen* (n 1) para 153.

<sup>29</sup> See *Libya/Chad* (n 1) 6, 37.

<sup>30</sup> *ibid* and *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, 34.

<sup>31</sup> *Eritrea–Ethiopia Boundary Commission Award*, para 3.3.

<sup>32</sup> *ibid* para 3.4.

<sup>33</sup> See, eg, the *Libya/Chad* case (n 1) 21–22; *Botswana/Namibia* case (n 11) 1059; and *Indonesia/Malaysia* (n 1) para 37.

<sup>34</sup> *Eritrea–Ethiopia Boundary Commission Award*, para 3.4, quoting the 1966 *Argentina/Chile Frontier* case (n 24) 10, 89.

<sup>35</sup> *ibid* para 5.16.



*1. The doctrine of contemporaneity*

The Commission accepted that in interpreting the treaties in question, it should apply the doctrine of ‘contemporaneity’. This was understood to mean that ‘a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded’. Further, it was noted that this involved giving expressions used in the treaties (including names), the meaning that they would have possessed at that time.<sup>36</sup> The Commission stated the general principles as follows: ‘The determination of the meaning and effect of a geographical name used in a treaty, whether of a place or of a river, depends upon the contemporary understanding of the location to which that name related at the time of the treaty.’<sup>37</sup> This approach was indeed reflected later in 2002 by the International Court in *Cameroon v Nigeria*, where it was emphasized that in seeking to determine the location of the mouth of the River Ebeji under the terms of the relevant international agreement, ‘the Court must seek to ascertain the intention of the parties at the time’.<sup>38</sup>

The problem arose particularly in relation to rivers in the Eritrea–Ethiopia situation. In this regard the Commission emphasized that:

What matters most is the identification of what the parties intended in referring to a watercourse as a feature in the landscape, rather than its name. If the name used is incorrect, then it is the parties’ intentions with respect to the reality on the ground rather than the name which is decisive.<sup>39</sup>

In seeking to elucidate the intentions of the parties, the Commission declared that ‘the principal evidence is what they said in the treaty’.<sup>40</sup>

However, the Commission made reference to the role of modern knowledge in the process of determining the intention of the parties. It noted that the map annexed to the 1900 treaty concerning the Central Sector ‘may be followed so long as it is not shown to be so at variance with modern knowledge as to render it valueless as an indicator of what the parties could have intended on the ground’.<sup>41</sup>

*2. Treaty interpretation issues arising from the 1902 treaty (the Western Sector)*

The 1902 treaty dealt with the Western Sector of the boundary from the tripoint with Sudan and thence eastwards. From the tripoint (termed Point 1 in

<sup>36</sup> *ibid* para 3.5.

<sup>37</sup> *ibid* para 5.17.

<sup>38</sup> *Cameroon v Nigeria* (n 1) para 59.

<sup>39</sup> Eritrea–Ethiopia Boundary Commission Award, para 4.14.

<sup>40</sup> *ibid* para 4.33.

<sup>41</sup> *ibid* para 4.36. Judge Higgins put this approach as follows: ‘our task is to decide what general idea the parties had in mind, and then to make reality of that general idea through the use of contemporary knowledge’, *Botswana/Namibia* (n 11) 1114.





the Commission's decision) to the junction of the rivers Setit and Maiteb (Point 3), there was no dispute between the parties. Nor was there a dispute with regard to the end of this sector of the boundary, ending at the confluence of the Mareb and Mai Ambessa (Point 9). However, there was a considerable difference between the parties concerning the intervening area (including the plain and village of Badme, the site of fighting between the parties as from May 1998,<sup>42</sup> and later to figure in post-decision implementation problems). Ethiopia claimed essentially a straight line going north-east, linking Points 3 and 9; Eritrea claimed a line in the form of a 'v' shape that dipped south-east following the river Setit<sup>43</sup> and then moved north-east in a straight line to Point 9.<sup>44</sup>

Article 1 of the treaty provided that, from Point 3, the boundary was to follow the course of the river Maiteb 'so as to leave Mount Ala Tacura to Eritrea, and joins the Mareb at its junction with the Mai Ambessa' (Point 9). It was also provided that 'the line from the junction of the Setit and Maiteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that the Canama tribe belong to Eritrea'. No such delimitation occurred.<sup>45</sup>

The dispute therefore focused upon two elements: first, the identity and course of the river 'Maiteb' with regard to which contemporary maps differed; and secondly, the question of the location of the Canama tribe. In seeking to interpret the treaty with regard to the identification of the Maiteb, the Commission had recourse to the two reports made by the Italian negotiator (Major Ciccodicola). There was apparently no record of the negotiations from the Ethiopian side. These two reports, the first being made immediately after the signature of the treaty and the second some five weeks later, referred to a map termed the Mai Daro map, which the Commission concluded was 'clearly the map that was actually used in the discussions' and indeed was accepted as the only map that the negotiators had before them.<sup>46</sup> The Commission emphasized that: 'A map that is known to have been used in negotiations may have a special importance'.<sup>47</sup>

The Commission relied on this map as part of the negotiating materials and decided that there were four reasons why the Maiteb (termed the Meeteb in the map but accepted by the Commission as the same river) could not have been

<sup>42</sup> See, eg, Eritrea/Ethiopia Claims Commission, Partial Award, *Ius Ad Bellum*, Ethiopia's Claims 1–8, 19 Dec 2005; and C Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17 *Eur J of Intl L* 699.

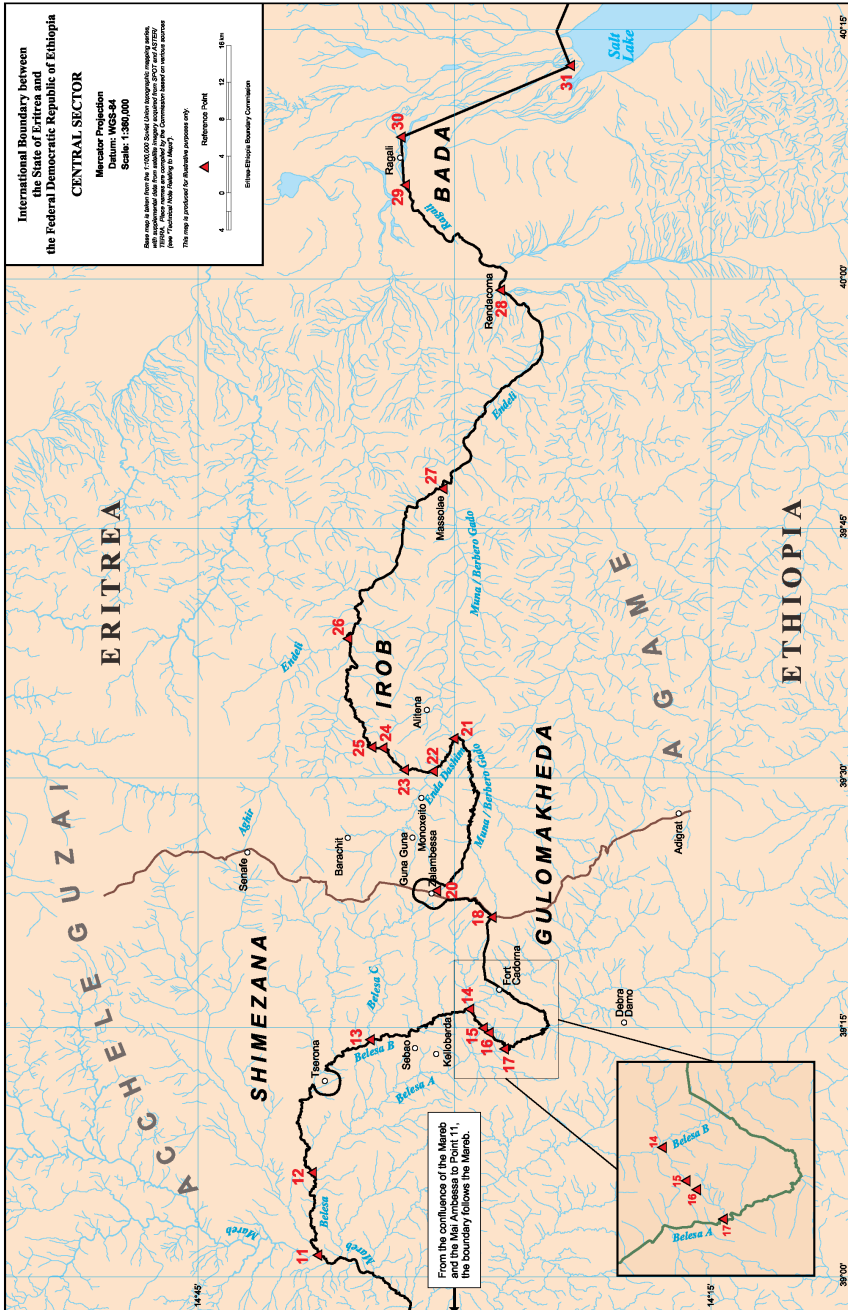
<sup>43</sup> The Commission noted that Eritrea made differing submissions as to the end point of this part of the line, before deciding in its final submissions upon locations termed Points 7A and 7B, Eritrea-Ethiopia Boundary Commission Award, para 5.15.

<sup>44</sup> See accompanying map 1.

<sup>45</sup> Eritrea–Ethiopia Boundary Commission Award, para 5.1–5.15.

<sup>46</sup> *ibid*, paras 5.20 and 5.24, unlike other maps, *ibid*.

<sup>47</sup> *ibid* para 3.21. See further below, p 777 as to the role of maps generally.



Map 2

where Ethiopia claimed it was (Point 3, termed by the Commission the 'western Maiteb'). These ranged from the direction and length of the Meeteb when contrasted with the Maiteb as claimed by Ethiopia, to the difference in angle by which the boundary was seen to arrive at the agreed end point (Point 9). This was seen as confirmed by the 1894 de Chaurand map, which was expressly stated to have been the basis for the 1900 treaty map and 'must have been familiar to the negotiators'.<sup>48</sup> The Commission also concluded that it could not 'identify any evidence of events in the years following 1902 to suggest that the parties' actual intention to select the Meeteb of the Mai Daro map was changed to the western Maiteb'.<sup>49</sup> Despite this examination, the Commission accepted that the identification of the Maiteb of the treaty with the Meeteb in the Mai Daro and de Chaurand maps could not by itself resolve the question.<sup>50</sup> This required the Commission to turn to the other distinguishing element in establishing the boundary in this sector, which was the provision that the line be so delimited so as to include the Cunama tribe in Eritrea. The Commission analysed this as part of the 'object and purpose' of the treaty and therefore as part of the tools for ascertaining the 'common will' of the parties.

The provision regarding the Cunama tribe indicated to the Commission that the line described in the treaty was not completely defined, so that a portion of it remained to be delimited and that the object of this delimitation was 'precisely to ensure that the Cunama tribe belonged to Eritrea'. This was understood to be a reference to 'at least the bulk of the Cunama tribal area, if not the whole of it' and would have required a two-stage operation. First, the ascertainment of the relevant facts concerning the domain of the Cunama and secondly, the construction of a line to reflect these facts and so to place the Cunama in Eritrea.<sup>51</sup> Such a delimitation did not take place. The negotiating materials available to the Commission (only from the Italian side since it appeared that none existed from the Ethiopian side) demonstrated clearly that the Cunama were to be placed within the boundaries of Eritrea.<sup>52</sup>

The Commission turned to a consideration of developments subsequent to the treaty in order to ascertain the relevant subsequent practice of the parties. The material that the Commission identified, certainly in the immediate post-treaty years and thence to the early 1930s, convinced the Commission that the Cunama inhabited the region to the east and south of Ethiopia's claim line (and therefore outside of it).<sup>53</sup> In particular, the Commission noted the Comando del Corpe di Stato Maggiore map of 1904, which showed the boundary moving down the Setit south-east to the river Tomsa (Point 6) and then turn-

<sup>48</sup> *ibid* para 5.26.

<sup>50</sup> *ibid* para 5.27.

<sup>52</sup> *ibid* paras 5.37–5.41.

<sup>53</sup> See, for example, the letter of Martini, the Governor of Eritrea, of 3 Aug 1902, para 5.46; the Prinetti map of 10 Dec 1902, para 5.48; and the Pollara report of 17 May 1904, para 5.52. See generally paras 5.44–5.81.

<sup>49</sup> *ibid* para 5.43.

<sup>51</sup> *ibid* para 5.34.

ing sharply north-east in an unbroken straight line to Point 9. The Commission pointed out that this line, with the exception of an Italian map of 1905 and an Ethiopian map of 1923, had ‘constantly been adhered to on the maps produced by both Eritrea and Ethiopia’.<sup>54</sup> This element of consistent practice was to prove critical.

The Commission concluded that although Article 1 of the 1902 treaty referred to a river called the Maiteb, the explicit object and purpose of the treaty, namely the assignment to Eritrea of the Cunama tribe ‘clearly indicates the intention and “common will” of the parties that the boundary river should not be the western Maiteb’. The Commission indicated that the evidence, although inexact, indicated that the territory of the Cunama extended far to the east and south-east of the Ethiopian claim line; that the negotiators had sufficient knowledge to identify the general limits on the sole map which the evidence indicated was before them during their discussion; that this map was the Mai Daro map; and that this map showed that the river called Meeteb was not the western Maiteb, which could not have been intended to be the starting point of the straight-line boundary to Point 9 as used by Ethiopia.<sup>55</sup> The Commission considered that the river Meeteb of the Mai Daro map was really the Sittona, which flowed into the Setit from the north-east at Point 4, so that the Maiteb as used in the 1902 treaty was the present-day Sittona.<sup>56</sup> It was held that although three early Italian maps and one Ethiopian map of 1923 showed the Ethiopian claim line, ‘all the other relevant maps show the Eritrean claim line’, which followed the Setit to the Tomsa at Point 6 and then followed a straight line to Point 9. The Commission emphasized that there was no record of any timely Ethiopian objection to these maps and that there was a consistent record of Ethiopian maps showing the same boundary, and concluded that these maps ‘amount to subsequent conduct or practice of the parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line’.<sup>57</sup> The Commission also noted that ‘the line so consistently shown on these maps’ evidences the acceptance by the parties of that line as the eastern limit of Cunama territory transferred to Eritrea by the 1902 treaty. The Commission held that as at 1935, immediately prior to the Italian invasion, the boundary between the Setit and the Mareb had crystallized and was binding on the parties along the line from Point 6 to Point 9.<sup>58</sup> The point to be noted at this stage is not that the Commission revised the clear provisions of a boundary treaty in the light of subsequent practice, but that in a situation where the treaty was itself unclear, the practice of the parties in question would become determinative as to what they understood the ambiguous provisions of that agreement to be.

<sup>54</sup> *ibid* para 5.56.

<sup>56</sup> *ibid* para 5.85.

<sup>58</sup> *ibid* para 5.89–5.90. See below p 780 as to post-crystallization practice.

<sup>55</sup> *ibid* para 5.83.

<sup>57</sup> *ibid* para 5.88.

### 3. Treaty interpretation issues arising from the 1900 treaty (the Central Sector): the role of annexed maps

The treaty of 1900 delimited the Central Sector, running from the eastern point reached by the 1902 treaty (Point 9) to the area of the Salt Lake. In fact, the boundary between Point 9 to Point 12 was uncontested by the parties, as was the line between Massolae (Point 27) and Rendacoma (Point 28). Article 1 of the Treaty (after modification of the line from the west to Point 9) provided that the boundary ran along ‘the line from the Mareb [effectively from its junction with Mai Ambessa]—Belesa—Muna, traced on the map annexed’.<sup>59</sup> This terse phrase, as the Commission wryly noted

fell short of a desirably detailed description, particularly in the light of the uncertain knowledge at the time concerning the topography of the area and the names to be given to geographical features. Rivers, in particular, were frequently given different names along different stretches of their courses.<sup>60</sup>

However, and unlike the other sectors of the Eritrean–Ethiopian boundary, the treaty had a map annexed to it. This, thus, was of ‘critical importance’ for the determination of the boundary.

Whatever the role of maps generally with regard to territorial disputes,<sup>61</sup> it has long been clear that where a map has been formally attached or annexed to a boundary treaty, that map attains a significance equal to the text of the treaty. The International Court declared in the *Burkina Faso/Mali* case that where maps fall into the category of ‘physical expressions of the will of the state or states concerned’, such as the case of maps ‘annexed to an official text of which they form an integral part’, then such maps may acquire legal force in the context of establishment of territorial rights.<sup>62</sup> As the Commission noted, maps

made authoritative by, for example, being annexed to a treaty as a definitive illustration of a boundary delimited by the treaty, are in a special category since they ‘fall into the category of physical expressions of the will of the state or states concerned’. The Treaty map annexed to the 1900 Treaty is such a map.<sup>63</sup>

The fact, therefore, that Article 1 of the treaty added to the sparse textual description of the boundary in this sector the phrase ‘traced on the map annexed’, meant as the Commission emphasized, that ‘the map contained the Parties’ agreed delineation of the boundary that they intended to adopt’. Accordingly, the Commission applied the same rules and principles of interpretation of words used in the Treaty to the map.<sup>64</sup>

<sup>59</sup> *ibid* paras 4.2–4.4. See accompanying map 2.

<sup>60</sup> *ibid* para 4.8.

<sup>61</sup> See below, p 777.

<sup>62</sup> *Burkina Faso/Mali* (n 1) 554, 582.

<sup>63</sup> Eritrea–Ethiopia Boundary Commission Award, para 3.18. Footnote reference to the *Burkina Faso/Mali* case omitted.

<sup>64</sup> *ibid* para 4.8.

The parties differed as to the proper course of the Belesa river from the agreed Point 12. At that point, two rivers merged to form or join the Belesa. Eritrea argued that the river joining from the south was the boundary river intended; Ethiopia argued that the river flowing in from the east was the correct river. The Commission held that the Eritrean claim could not be reconciled with the treaty map boundary since on the map the name ‘T Belesa’ was written as covering both the main stretch of the river and its eastward extension (termed by the Commission Belesa B), thus demonstrating what the parties to the treaty had intended by the word ‘Belesa’. Similarly, the Eritrean claim would not have given any role to the tributary that joins Belesa B from the east at Point 13 (termed Belesa C by the Commission), which the treaty map had clearly used as part of the boundary.<sup>65</sup>

The parties also disagreed as to the identity of the river Muna, referred to in Article 1 of the treaty.<sup>66</sup> Ethiopia proposed that, in view of the inconsistencies contained in the map, the river termed Muna on the map was in reality the Endeli and the river depicted in the position of what is called the Muna was another river, the Berbero Gado. Ethiopia also pointed to confusion after 1900 over the location of the river designation ‘Muna’, in particular in relation to the Endeli and Berbero Gado.<sup>67</sup> Eritrea argued that the river identified on the map as ‘T Mai Muna’, with its headwaters south of Barachit, constituted the boundary and that there was a river with that name in that place so that this river was the boundary.<sup>68</sup> The district of Irob was thus in dispute between the parties. Faced with this, the Commission emphasized that the key issue concerning the problem of names in the area in question was to determine what the parties intended ‘of which the principal evidence is what they said in the Treaty and, more particularly, illustrated in the Treaty map’. The Commission held that it was clear that the parties had agreed to a treaty which referred to the Muna and that the treaty map showed a boundary line following a river, designated as the Muna, flowing from south of Barachit and running generally east-south-east towards the Salt Lake. This, therefore, had to be taken to represent what the parties intended, especially as the existence of the river Muna in the area in question was known to the parties and indeed had been referred to in the armistice arrangement of March 1896 and the peace treaty of later that year.<sup>69</sup> Had the parties intended the boundary to follow the course of the Endeli, a river known at the time of the treaty, they would have said so.<sup>70</sup> It was common practice, noted the Commission, for different stretches of a waterway to bear different names, so that the use of ‘T Mai

<sup>65</sup> *ibid* paras 4.16–4.21.

<sup>66</sup> This river was known by different names at different points until it reached, or became known at some point as, the Endeli and Ragali rivers. The Endeli, however, commenced from further north, but was not shown on the treaty map until its lower reaches, which is called the Muna on the map. This then flows into the Ragali and thence to the Salt Lake.

<sup>67</sup> *ibid* paras 4.27–4.29.

<sup>69</sup> *ibid* para 4.35.

<sup>68</sup> *ibid* para 4.31.

<sup>70</sup> *ibid* para 4.33.



Muna' to designate the whole waterway (and thus the stretches of the Muna, Endeli and Ragali) was merely a matter of 'simplification and convenience acceptable to the Parties'.<sup>71</sup> The Commission concluded by noting the fact the map was to be followed: 'so long as it is not shown to be at variance with modern knowledge as to render it valueless as an indicator of what the Parties could have intended on the ground'. It was also important not to attribute 'far-reaching consequences to relatively minor discrepancies'.<sup>72</sup>

The parties also disputed the location of the eastern terminal point of the 1900 treaty boundary. In dealing with this, the Commission raised two issues. First, the Commission considered the work of the 1904 Commission which had been charged with examining part of the boundary covered by the 1900 treaty. The 1904 Commission concluded that its own mission terminated at Massolae,<sup>73</sup> something that the Commission noted was not based on either Article 1 of the treaty or the treaty map. While it was accepted that the work of the 1904 Commission could constitute evidence as to the intentions of the parties with regard to Article 1, it was emphasized that this was essentially an Italian commission with an Ethiopian observer who did not sign the final report and without agreed terms of reference. It could not, therefore, be seen as expressing the shared views of the parties.<sup>74</sup> The Commission thus underlined the importance, while considering the relevant practice of the parties concerning the interpretation of a treaty, of taking account of all the pertinent circumstances and, accordingly, not over-emphasizing material emanating from, and with the authority of, one side alone, particularly, one may add, where the other party was involved and failed to accept or approve it.

Secondly, the Commission had to deal with the situation that the river Muna (known as the Ragali at this stretch) did not flow clearly into the Salt Lake. The river reached a point to the north of the Lake and then split into 'a filigree network of small channels and streams, with no readily identifiable single and regular river bed'.<sup>75</sup> This was reflected in the fact that on the map the previous continuous blue line marking the river became a dotted blue line in the final part of the river system.<sup>76</sup> It was thus not possible to define the boundary simply in terms of the river at this point. Faced with this, the Commission decided that from Point 29 the boundary in the delta would be based upon straight lines linking Points 29, 30 and 31, the latter point being on

<sup>71</sup> *ibid* para 4.34. See also *ibid* para 4.44.

<sup>72</sup> *ibid* para 4.36. As an example of this approach, the Commission, in dealing with the overland link between the Belesa and the Muna, held with respect to the Ethiopian claim as to the river boundary that it was 'unable to read the Treaty as establishing a boundary so at variance with the Treaty map as to involve a longer and less direct overland sector than that which the map shows', *ibid* para 4.41.

<sup>73</sup> Eritrea argued that the eastern terminal point was at Massolae, *ibid* para 4.45.

<sup>74</sup> *ibid* para 4.48 and Appendix A, paras A1 and A2.

<sup>75</sup> *ibid* para 4.52.

<sup>76</sup> *ibid*. The Commission noted that while this was unexplained on the treaty map, on the underlying de Chaurand map, the legend stated that a dotted blue line signified an uncertain river course.

the shores of the Salt Lake.<sup>77</sup> This is consistent with prior jurisprudence. In the *Burkina Faso/Mali* case, for example, the Chamber of the International Court drew a straight line across the Pool of Soum ‘in the absence of any precise indication in the texts of the position of the frontier line’.<sup>78</sup>

#### *4. Treaty interpretation issues arising from the 1908 treaty (the Eastern Sector): the role of geometric delimitation*

Article 1 of the 1908 treaty delimited the boundary from the ‘most easterly point of the frontier established . . . by the Treaty of 10th July 1900’ to the ‘frontier of the French possessions of Somalia’. This provision determined that from the former point ‘the boundary continues south-east, parallel to and at a distance of 60 kilometres from the coast’. As the Commission noted, this established a geometric method of delimitation.<sup>79</sup> The treaty also provided for a demarcation as soon as possible, adapting the agreed frontier line ‘to the nature and variation of the terrain’,<sup>80</sup> and for the parties to establish ‘the respective dependence of the tribes bordering the frontier on the basis of their traditional and usual residence’.<sup>81</sup> Article IV provided that the two governments undertook ‘to recognise reciprocally the ancient rights and prerogatives of the tribes bordering the frontier without regard to their political dependence’. The Commission understood this as reinforcing the primacy of the geometric method of delimitation and as establishing that: ‘Prior *effectivités*, which might have been adduced to determine the location of the boundary, are recognised prospectively only as the basis for transboundary rights, but are not to play a role in the calculation as to where the boundary is located’.<sup>82</sup>

This approach of the Commission to the provision of a geometric method of delimitation constitutes a valuable discussion of both methodology and substance with regard to the geometric basis of boundary delimitation. It did not mean, as Eritrea argued, that all the Commission had to do was to apply the delimitation to a map of the area. The Commission determined that what had been provided was ‘a formula, the application of which required a series of subsidiary decisions on other critical matters, eg the meaning to be attributed to the word “coast” in Article 1, and the point at which the boundary was to commence’. It was a process ‘of both delimitation and demarcation’.<sup>83</sup> However, departures from the geometric method in the demarcation process would only be permissible to take account of the ‘nature and variation of the terrain’. The Commission emphasized that the effect of Articles II and IV of

<sup>77</sup> But see later as to post-decision practice, p 789.

<sup>78</sup> *Burkina Faso/Mali* (n 1) 554, 633. The question of subsequent practice is dealt with below, p 776.

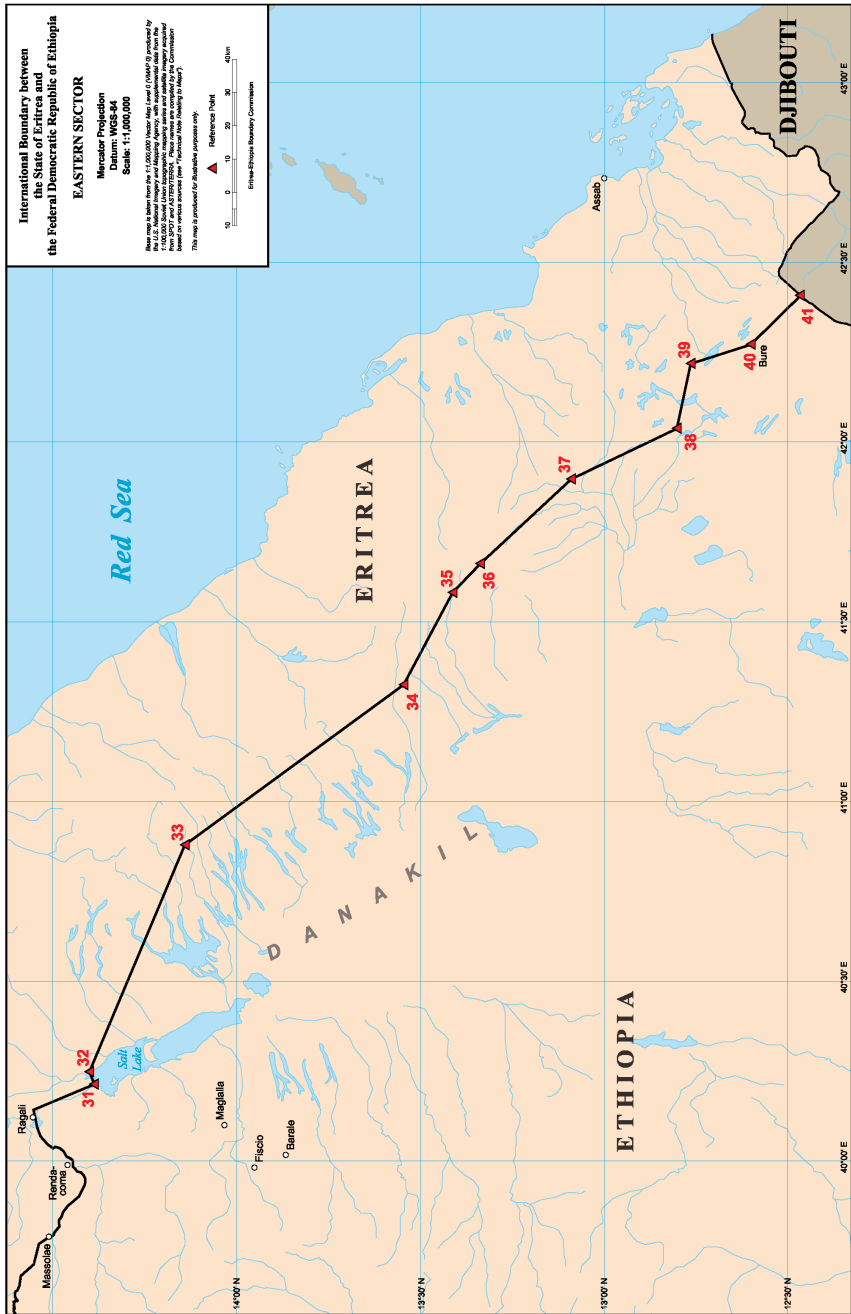
<sup>79</sup> Eritrea–Ethiopia Boundary Commission Award, para 6.2. See accompanying map 3.

<sup>80</sup> Art II. This in fact never happened.

<sup>81</sup> Art III.

<sup>82</sup> Eritrea–Ethiopia Boundary Commission Award, para 6.5.

<sup>83</sup> *ibid* para 6.14.



Map 3

the Treaty was that the position, rights and prerogatives of the tribes in the boundary area were of relevance not in establishing a delimitation line, but only after that line had been determined. Accordingly, the geometric methodology required by the treaty excluded any consideration of pre-1908 *effectivités* 'with adjustments to the geometric line to be made only to take account of the nature and variation of the terrain'.<sup>84</sup>

The Commission held that the starting point of the 1908 boundary line, being the most easterly point of the 1900 treaty, was Point 31, the point at which the river Muna reached the Salt Lake via straight lines.<sup>85</sup> The end point was stated to be 'the point, 60 km. from the coast, where the boundary line meets the frontier of Djibouti'. The Commission took the view that the exact location of this end point (Point 41) was a matter to be addressed in the demarcation phase, 'taking account of the nature and variation of the terrain as well as the precision made possible by large-scale survey maps'.<sup>86</sup> The parties agreed that the definition of 'coast' referred to 'the line adhering to the continent itself, and not any coastlines of islands'.<sup>87</sup>

The parties differed as to how to manifest the geometric method.<sup>88</sup> The Commission concluded that both the methods proposed by the parties, which produced congruent or nearly congruent results in many sectors of the proposed boundary, imported a measure of subjective choice, even though they purported to be objective.<sup>89</sup> The Commission proposed instead the taking of a satellite image of the coastline of Eritrea in the area covered by the 1908 boundary and the transposition of this inland to a distance of 60 kilometres. This would be accompanied by the drawing of a straight line from the Eritrean–Djibouti boundary at the point at which it meets the coast to the point in the north-west on the coast opposite the eastern terminus of the 1900 treaty, which would produce a line describing the general direction of the coast in this sector. In order to determine the appropriate point on the coast at the eastern terminus of the 1900 treaty, an arc with a radius of 60 kilometres would be drawn from Point 31. The drawing of two lines, each 60 kilometres long would then be projected perpendicularly from each end of this line and this would constitute the points inland upon which the satellite image of the coast may be set. This would produce a line, every point of which would be exactly 60 kilometres inland from the nearest point on the coast. Each sinuosity of the coast would be reproduced exactly on this inland line and each would be precisely 60 kilometres inland from the corresponding sinuosity on the coast.<sup>90</sup>

<sup>84</sup> *ibid* para 6.17. See also para 6.24.

<sup>85</sup> See above, p 770.

<sup>86</sup> *ibid* para 6.16.

<sup>87</sup> *ibid* para 6.19. Eritrea had argued at one point that 'coast' included islands, *ibid*.

<sup>88</sup> Eritrea proposed the application of the arcs of circles method in order to produce a simplified representation of the coast which would then be moved inland for the prescribed 60 kilometres. Ethiopia suggest the creation of a construct of the coast at the coastline which would then be moved inland 60 kilometres and then readjusted to take account of certain problems inherent in the method itself and then further readjusted in order to adapt it to the nature and variation of the ground, *ibid* para 6.20.

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* para 6.21.

However, the Commission noted that this replication of the coast on the inland 60 kilometre line ‘does not produce a manageable boundary’ and pointed out that the parties had indicated to it that such adjustments in the boundary as would be necessary to render it manageable and rational should be made. Accordingly, the Commission designated nine points to assist in this project.<sup>91</sup> The delimitation line thus produced, with one exception arising out of post-1908 *effectivités*,<sup>92</sup> would ‘serve as the basis for the demarcation, leaving open the possibility at that stage of “adapting it to the nature and variation of the terrain”, as contemplated in Article II of that Treaty’.<sup>93</sup>

### *C. The Conduct of the Parties*

#### *1. Resort to pre-treaty materials*

The Arbitral Tribunal in the *Argentina/Chile Frontier* case noted that the process of interpretation, which focuses on seeking the ‘common will’ of the parties, may be aided by recourse to preparatory documents or subsequent action of the parties.<sup>94</sup> The Commission took into account a number of pre-treaty materials in seeking to ascertain the meaning of particular treaty provisions, both materials used in the negotiating process leading to the adoption of the particular treaty provision in question and earlier relevant materials that were not part of the negotiation process. The fact that circumstances might dictate when pre-treaty materials could be pertinent was emphasized by the Commission when it decided not to look at the conduct of the parties prior to the conclusion of the 1908 treaty. This was because ‘the terms of the treaty make it clear that the parties intended that the effect of such activities should not be taken into account’.<sup>95</sup> There was no such provision in the 1900 and 1902 treaties. Further, the Commission noted that the fact that the 1896 armistice between Italy and Ethiopia provided that until a peace treaty was signed the border between the parties would be maintained at the ‘Mareb, Belesa and Muna, which is the border of the Agame and Okologezay’ and that in Article IV of the peace treaty later that year the parties agreed to observe the *status quo ante*, did not mean that the 1900 treaty had to be interpreted as having as its object and purpose the maintenance of the division between Acchele Guzai and Agame.<sup>96</sup> The Commission also observed that diplomatic exchanges of a decade before the conclusion of the 1900 treaty were not part of the negotiations for it.<sup>97</sup>

<sup>91</sup> *ibid* para 6.22.

<sup>92</sup> See below, p 782.

<sup>93</sup> *ibid* para 6.34.

<sup>94</sup> *Argentina/Chile* (n 24) 10, 89 (the *Palena* case). See also Art 31 of the Vienna Convention on the Law of Treaties 1969.

<sup>95</sup> Eritrea–Ethiopia Boundary Commission Award, para 6.24.

<sup>96</sup> *ibid* para 4.56.

<sup>97</sup> *ibid* para 4.58.

*i. The de Chaurand map of 1894*

This map was discussed in the context both of the 1900 treaty (concerning the Central Sector) and the 1902 treaty (concerning the Western Sector). In the former case, a map was annexed to the treaty.<sup>98</sup> This treaty map stated that it was based upon de Chaurand's map of the relevant area and the Commission noted that: 'it is apparent that the Treaty map was in fact a tracing or other direct copy of the relevant part of the de Chaurand map, omitting certain features so as to give prominence to the features most relevant to the 1900 Treaty line'. The Commission thus concluded that: 'Depictions on de Chaurand's map are therefore directly relevant to an understanding of the Treaty map'.<sup>99</sup>

The Commission had recourse to the de Chaurand map in interpreting the treaty map with regard to the omission from the latter of the Tserona river as shown on the former. It was concluded that this omission was deliberate in establishing that the Belesa river continued eastwards and not southwards. Accordingly, Eritrea's argument that the eastwards branch of the river (termed by the Commission Belesa B) was meant to depict the Tserona, so that the southwards branch (Belesa A) was intended to be the Belesa boundary, was dismissed.<sup>100</sup> The Commission also used the de Chaurand map, which termed stretches of the Muna river as the 'Maj Mena', the Endeli and the Ragali, whereas the treaty map simply referred to the Muna, as emphasizing that different names may reflect different stretches for the same watercourse. The importance of this was that although the different names of the watercourse must have been known to the parties, the fact that the treaty map referred only to the Muna underlined that this was intended as the boundary as stated in the text of the treaty and constituted 'a cartographic simplification for the purposes of the boundary treaty'.<sup>101</sup> The de Chaurand map was further used by the Commission to explain the meaning of a dotted blue line marking the final stages of the river system leading to the Salt Lake, following on from a continuous blue line. While the treaty map of 1900 had no explanation of this change, what the Commission termed 'the underlying de Chaurand map' explained in the legend that a dotted blue line meant an uncertain river system.<sup>102</sup>

<sup>98</sup> See above, p 768.

<sup>99</sup> Eritrea–Ethiopia Boundary Commission Award, para 4.9.

<sup>100</sup> *ibid* paras 4.17–4.22.

<sup>101</sup> *ibid* paras 4.34 and 4.44.

<sup>102</sup> *ibid* para 4.52. The Commission also referred to the de Chaurand map in the context of its consideration of the 1902 treaty concerning the Western Sector. The Commission attributed great importance to the Mai Daro map, see above, p 764 and the following subsection. It was also stated that: 'The significance and evidentiary weight of the Mai Daro map is confirmed by its similarity with the de Chaurand map of 1894', *ibid* para 5.26.

*ii. The Ciccodicola reports and the Mai Daro map*

In seeking to determine what was meant by the reference in Article 1(ii) of the 1902 treaty to the Maiteb, the Commission paid particular attention to the two reports of Major Ciccodicola, dated 16 May 1902 and 28 June 1902, both close to the date of the treaty, which was 15 May 1902. Ciccodicola was the Italian negotiator. No record of the negotiations from Ethiopia's negotiator, Emperor Menelik, apparently existed. Ciccodicola's two reports referred specifically to a map termed by the Commission the Mai Daro map. The Commission attached importance to the Mai Daro map since it was clear from Ciccodicola's reports that this map was the only one before the negotiators. Accordingly, it displaced other maps that had placed the Maiteb at Point 3.<sup>103</sup> The Commission also resorted to the Ciccodicola reports in the context of establishing the object of the treaty as ensuring that the Cunama tribe and villages became part of Eritrea.<sup>104</sup>

*2. Subsequent conduct of the parties*

The subsequent conduct of the parties may be relevant in a number of ways: first, as a method of determining the true interpretation of the relevant boundary instrument in the sense of the 'common will' of the parties;<sup>105</sup> secondly, as a method of resolving an uncertain disposition or situation, for example, whether a particular area did or did not fall within colonial territory for the purposes of determining the *uti possidetis* line;<sup>106</sup> or thirdly, as a method of modifying a boundary treaty itself in certain circumstances.

*i. The role and scope of relevant conduct*

The Commission has provided a careful analysis of subsequent practice of some significance. It was emphasized that the function of such practice goes beyond the interpretation of treaties, as such,<sup>107</sup> and may affect the legal relations between the parties. It was noted that:

the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning.<sup>108</sup>

The interposition of the phrase 'so clear' needs to be particularly noted in this context as some have criticized the Commission's decision as upsetting the

<sup>103</sup> *ibid* paras 5.19–5.24. See also above, p 764.

<sup>104</sup> *ibid* paras 5.38–5.40.

<sup>105</sup> See Art 31 (3) of the Vienna Convention on the Law of Treaties 1969 and the *Argentina/Chile* case (n 24) 10, 89.

<sup>106</sup> See, eg, the *El Salvador/Honduras (Nicaragua Intervening)* (n 1) 351, 401, 558 et seq.

<sup>107</sup> As to which, see *Botswana/Namibia* (n 11) 1076.

<sup>108</sup> Eritrea–Ethiopia Boundary Commission Award, paras 3.6 and 3.8, citing the *Case Concerning the Payment of Various Serbian Loans Issued in France* PCIJ Rep Series A, Nos 20/21, pp 5, 38; and the *Namibia* case [1971] ICJ Rep 22.



balance between title and conduct.<sup>109</sup> Perhaps some further elucidation may have been of assistance. However, what is at issue here is the question of proof, both the onus and the standard of proof. A treaty title is determinative, subject to evidence to the contrary, so that the party alleging a modification of a clear treaty line must prove that the two (or more) parties directly involved have indeed by their conduct agreed to such modification. Clearly, the presumption will always be that a clear treaty provision stands. It will take undisputed evidence to displace this and such evidence must focus upon the behaviour of the relevant parties. Too facile an acceptance of conduct revision would undermine the necessary primacy of boundary treaties, while to ignore the clear intention of the parties could import instability and harm. On the other hand, of course, the degree of subsequent conduct required to produce a determination in the face of an ambiguous treaty provision would necessarily be of a different order.

Subsequent conduct may be defined or discussed in terms of a number of different contexts and concepts, including, for example, recognition, estoppel, preclusion, acquiescence or implied agreement, where the essential elements were identical.<sup>110</sup> The Commission also noted, citing the *Taba* case,<sup>111</sup> that: ‘a clear treaty provision may be varied by the conduct of the Parties’.<sup>112</sup> The Commission identified three relevant categories of the conduct of the parties: maps, *effectivités* and diplomatic and other similar exchanges and records constituting assertions of sovereignty or acquiescence in or opposition to such assertions by the other party.<sup>113</sup>

## *ii. Maps*

The Commission, ‘aware of the caution with which international tribunals view maps’,<sup>114</sup> held that ‘where a map is made part of a treaty, then it shares

<sup>109</sup> See, eg, M Kohen, ‘La Relation Titres/Effectivités dans le Contentieux Territorial à la Lumière de la Jurisprudence Récente’ (2004) 108 *Revue Générale de Droit International Public* 567. See also *ibid*, ‘The Decision on the Delimitation of the Eritrea/Ethiopia Boundary of 13 April 2002’ in Kohen (ed), *Liber Amicorum Lucius Caflisch* (Martinus Nijhoff, Leiden, 2007) 767.

<sup>110</sup> The Commission noted that: ‘in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule—whether or treaty or customary origin; the knowledge, actual or reasonably to be inferred of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first. Likewise, these concepts apply to the attitude of a party to its own conduct: it cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct’, *ibid* para 3.9. This passage ends with a footnote reference to the *Nuclear Tests* cases [1974] ICJ Reps 253 and 267–8.

<sup>111</sup> *Taba* (1989) 80 *International Law Reports* 226.

<sup>112</sup> Eritrea–Ethiopia Boundary Commission Award, para 3.10. cf Kohen (n 109) 566. Linking the issue to the question of the applicable law, the Commission considered that: ‘it is required also to apply those rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of conduct of the parties’, *ibid* para 3.15.

<sup>113</sup> *ibid* para 3.16.

<sup>114</sup> *ibid* para 3.18.

the legal quality of the treaty and is binding on the parties'. This was the case with the map annexed to the 1900 treaty, deemed of 'critical importance' for determining the boundary<sup>115</sup> and 'which needs to be scrutinised with the greatest care, since the detail it contains can greatly assist in giving specific meaning to an otherwise insufficiently detailed verbal description'.<sup>116</sup>

The Commission summarized the legal importance of maps in a series of important propositions. It declared that:

The effect of a map that is not part of a treaty will vary according to its provenance, its scale and cartographic quality, its consistency with other maps, the use made of it by the parties, the degree of publicity accorded to it and the extent to which, if at all, it was adopted or acquiesced in by the parties adversely affected by it, or the extent to which it is contrary to the interests of the party that produced it.<sup>117</sup>

A map known to have been used in negotiations 'may have a special importance',<sup>118</sup> an approach that the Commission indeed adopted with regard to the Mai Daro map.<sup>119</sup> A map emanating from third parties (depending on the circumstances), or one on so small a scale that its import is speculative, 'is unlikely to have great legal or evidentiary value', although where the third-party map was one so closely bearing upon its interests that, to the extent that it might be erroneous, 'it might reasonably have been expected that the state affected would have brought the error to the attention of the state which made the map and would have sought its rectification'. Further, a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed boundary area to be identifiable and generally available and 'acted upon, or not reacted to' by the adversely affected party, 'can be expected to have significant legal consequences'.<sup>120</sup>

The Commission emphasized that in such cases it was not the maps alone which could produce legally significant effects, but rather the maps in association with other circumstances, being the basis, for example, of acquiescence and thus of great legal significance.<sup>121</sup> Where the map evidence is not uniform or consistent, it would be treated as ambiguous,<sup>122</sup> unless one map or maps possessed a clearly greater weight.<sup>123</sup>

The Commission addressed the question of the 'signature' of a map, that is, its general shape, silhouette, contour or outline, as distinct from its particular details, with justifiable caution, noting that such signature may not be of suffi-

<sup>115</sup> *ibid* para 4.8.

<sup>116</sup> *ibid* para 3.20 and see above, p 768.

<sup>117</sup> *ibid* para 3.21. See also *Burkina Faso/Mali* (n 1) 554, 582 and *Eritrea/Yemen* (n 1) 1, 94 et seq.

<sup>118</sup> Eritrea–Ethiopia Boundary Commission Award, para 3.21.

<sup>119</sup> See above, p 764.

<sup>120</sup> *ibid*.

<sup>121</sup> *ibid* para 3.22.

<sup>122</sup> *ibid* paras 4.67, 4.82–4.83, 4.90 and 6.33.

<sup>123</sup> As in the case of the Mai Daro map, *ibid* para 5.20 et seq.

cient specificity or clarity to allow for transposition to larger-scale maps. However, it was felt that if such signature, or general shape, was sufficiently clear and specific and distinctive, and was depicted as such in a consistent or near-consistent manner, the Commission ‘must attribute to such a general shape the appropriate legal consequences’.<sup>124</sup> In this context, the Commission found that, apart from three early Italian maps and one Ethiopian map of 1923, with regard to the 1902 treaty covering the Western Sector, ‘all the other relevant maps show the Eritrean claim line in accordance with the what has, in the present proceedings, come to be called the “classical” or “traditional” signature characterised by a straight line’ from Point 6 to Point 9. There was no record of any timely Ethiopian objection to these maps and there was a consistent record of Ethiopian maps showing the same boundary. Accordingly, the Commission concluded that these maps ‘amount to subsequent conduct or practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line’.<sup>125</sup> Further, the Commission noted that ‘the line so consistently shown on these maps’ could serve to evidence the acceptance by the parties of that line as the eastern limit of Cunama territory, transferred to Eritrea by the 1902 treaty.<sup>126</sup>

The Commission distinguished between establishing a boundary using such a signature and confirming an established boundary by such means, and between using a signature in a confirmatory way and using it negatively to demonstrate that a boundary does not exist elsewhere. Map evidence may also need to be considered separately in relation to different parts of the boundary.<sup>127</sup>

### *iii. Effectivités*

Defined as ‘activity on the ground tending to show the exercise of sovereign authority by the party engaging in that activity’,<sup>128</sup> the Commission provided

<sup>124</sup> *ibid* para 3.24.

<sup>125</sup> *ibid* para 5.88. See also Appendix A, para A33 et seq and above, p 767.

<sup>126</sup> *ibid* para 5.89.

<sup>127</sup> *ibid* para 3.25. The Commission also clarified the meaning of the various disclaimer terms that appear on maps that show that the map itself is not taken by the party preparing it (whether a State or the United Nations, for example) as authoritative. It was held that such disclaimers do not automatically deprive a map of all evidential value since the map ‘still stands as an indication that, at the time and place the map was made, a cartographer took a particular view of the features appearing on the map’. The disclaimer simply means that legal recognition has not been accorded by the body making the map to the titles or boundaries shown. Nor can a disclaimer relieve a State adversely affected of the need to protest, depending upon the character of the map and the significance of the feature shown. The map would stand as a statement of geographical fact ‘especially where the state adversely affected has itself produced and disseminated it, even against its own interest’. Disclaimers may affect the weight to be attributed to the map, but do not exclude its admissibility, *ibid* para 3.28.

<sup>128</sup> *ibid* para 3.16. Private activity was not relevant, see the Observations of the Boundary Commission dated 21 Mar 2003, para 17, see below, p 788. See also *Botswana/Namibia* (n 11) 1045, 1105 and *Indonesia/Malaysia* (n 1) para 140.

an accurate and cogent summary of the current law.<sup>129</sup> Examples of *effectivités* submitted by the parties include the establishment of telephone and telegraph facilities, the holding of elections and the Eritrean independence referendum, the conduct of a census, the maintenance of local records of such matters as births and deaths, the payment of taxes and financial tributes, the issue of trading licenses, the establishment of a customs office, the administration of fuel supplies, the structure of local administration, the regulation of religious and social institutions, the stationing of military and police posts and the conduct of military and police patrols, the regulation of land use, provincial administration, the administration of educational facilities, public health administration, steps for the eradication of malaria, the grant of a mineral concession, various local acts carried out by the British Military Administration during the period from 1941 to 1952 and the appointment and payment of local officials.<sup>130</sup>

In the Western Sector, covered by the 1902 treaty, the Commission considered a range of developments subsequent to the treaty and until the early 1930s when it was concluded that the situation had largely crystallized. Such subsequent practice consisted of maps, official documentation and administrative measures.<sup>131</sup> Relying primarily upon a significant consistency of maps, both Italian and Ethiopian, the Commission concluded that by 1935 the boundary between the Setit and the Mareb had crystallized and was binding on the parties along the line from Point 6 to Point 9.<sup>132</sup> The Commission examined the major events after 1935 and until the independence of Eritrea and took the view that the 'boundary of 1935 remained the boundary of today'.<sup>133</sup> The Commission declared that it had given 'careful consideration' to Ethiopian evidence of its activities in the area west of Eritrea's claim line (which includes the present-day village of Badme). It was specifically noted that no evidence of such activities appeared in the Ethiopian Memorial and that it was introduced only in the Ethiopian Counter-Memorial and not added to or developed in the Ethiopian Reply,<sup>134</sup> the necessary implication being no doubt that the Commission could only consider such evidence as was placed before it.

The Commission noted that the area of claimed Ethiopian administrative activity comprised, at the most, one-fifth of the disputed area and did not

<sup>129</sup> The Commission declared that: 'the actions of a state pursued *à titre de souverain* can play a role, either as assertive of that state's position or, expressly or impliedly, contradictory of the conduct of the opposing state. Such actions may comprise legislative, administrative or judicial assertions of authority over the disputed area. There is no set standard of duration and intensity of such activity. Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on and the extent of any contradictory conduct (including protests) of the opposing state. It is also important to bear in mind that conduct does not by itself produce an absolute and indefeasible title, but only a title relative to that of the competing state. The conduct of one party must be measured against that of the other. Eventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty', *ibid* para 3.29.

<sup>130</sup> *ibid* paras 4.65, 4.74, 4.80, 4.88, 5.92–5.95, and 6.25–6.32.

<sup>131</sup> *ibid* paras 5.44–5.90.

<sup>133</sup> *ibid* para 5.91.

<sup>132</sup> *ibid* para 5.90.

<sup>134</sup> *ibid* para 5.92.

extend in any significant way towards the Eritrean claim line. In addition, the dates of Ethiopian conduct related to only a small part of the period since 1902 and essentially dated from 1951 (apart from references to sporadic friction in 1929–1932 at Acqua Morchiti). The Commission concluded that it did not find in the elements itemized by Ethiopia ‘evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallised as of 1935’.<sup>135</sup>

In the Central Sector, the Commission found in general that the evidence of *effectivités* was mixed and that no departure from the 1900 treaty boundary line was justified apart from in two places. The Commission held itself satisfied, in a statement that may be criticized as rather too cryptic, that: ‘the evidence of Eritrean activity is sufficient, in terms of administrative range, quantity, area and period, to justify treating the Acran region as part of Eritrea.’<sup>136</sup> With regard to the town of Zalambessa, which had not existed in 1900, the Commission took note of the establishment of a customs post, agreed by both parties to be 2 kilometres north of the town<sup>137</sup> and held that the location of such a post on one side of the town strongly suggested that the boundary was on the same side of the town ‘since to have a population centre *between* a boundary and a border customs post would be unusual’. Ethiopia has also submitted evidence showing that the customs authorities of Eritrea regularly had dealings with the nearby Ethiopian customs post in such a way as to accept Zalambessa as part of Ethiopia. In addition, in an exchange in 1996, Eritrea had referred to an Ethiopian request to allow a survey team into its territory as being incidental to the task of ‘rechecking border delineating points in Zalambessa area (Tigray region)’. Accordingly, the Commission adjusted the 1900 boundary line so as to place Zalambessa in Ethiopian territory.<sup>138</sup> The basic reason for this appeared to have been the ‘considerable number of significant administrative activities by Ethiopian authorities’, there coupled with Eritrean acknowledgment that the town fell within Ethiopia.

In the part of the Central Sector between the Muna/Berbero Grado river and the upper reaches of the Endeli (termed the Endeli projection by the Commission), the Commission concluded that, although Ethiopia had presented the stronger evidence of administrative activity, the impact of Eritrean activity was stronger in the northern and western fringes of the Endeli projection and that Ethiopia had not established its effective sovereignty to the required degree over those areas. Accordingly, the Commission held that the

<sup>135</sup> *ibid* paras 5.93–5.95.

<sup>136</sup> *ibid* para 4.71. It is to be noted that this region is not specifically marked on the maps accompanying the award. See below p 782 as to the Ethiopian admission concerning Tserona and Fort Cardona.

<sup>137</sup> The Commission felt that there were probably two customs posts, one belonging to each party located close to each other, *ibid* para 4.75.

<sup>138</sup> *ibid* paras 4.75 and 4.78. Emphasis in original. See also below, p 785.

treaty line should be varied so as to place only the more southerly and easterly parts of the Endeli projection in Ethiopia.<sup>139</sup>

In the Eastern Sector, covered by the 1908 treaty, the Commission noted that the *effectivités* adduced for the period since the treaty

essentially reinforced the geometric line, in the sense that activities conducted by Ethiopia and Italy (or Eritrea, after the latter's independence), *à titre de souverain*, did not take place anywhere that would have required an adjustment of the boundary determined by the geometric method.<sup>140</sup>

The evidence that was provided appeared to show that each party had undertaken activities on its own side of the geometric line.<sup>141</sup>

However, a special situation was deemed to have arisen with regard to Bure, located on the Ethiopian side of the 60 kilometre line. Eritrea produced evidence of an express agreement between the parties, with corresponding performance which appears to have placed the border at Bure. The agreement was signed by both parties on 7 November 1994, incorporating a report of 12 July 1994. Part of the report noted that the main checkpoints along the Addis-Assab corridor included 'Bure Ethiopian border' and 'Bure Eritrean border'. This was reinforced by an internal Eritrean memorandum of 30 April 1994 (copied to the Ethiopian Embassy in Asmara) that referred to Ethiopian trucks 'entering Eritrea through the checkpoints both in Zalambessa and Burre'.<sup>142</sup> The Commission thus concluded that both parties had agreed that their common border was placed at Bure and accordingly held that the boundary 'passes equidistantly the checkpoints of the two parties'.<sup>143</sup>

#### *iv. Diplomatic and other similar exchanges*

The Commission interestingly included diplomatic and other similar exchanges 'constituting assertions of sovereignty, or acquiescence in or opposition to such assertions, by the other party' as a third category of subsequent conduct, thus differentiating these from *effectivités*.<sup>144</sup> This category was held to include 'assertions or admissions made in the course of the proceedings before a tribunal'.<sup>145</sup> The Commission referred here in particular to Ethiopian statements in its Reply, noting that 'Fort Cadorna . . . and Tserona' were 'mostly . . . undisputed Eritrean places'. The Commission interpreted this statement, made formally in a written pleading, as an 'admission of which the Commission must take full account'. Accordingly, the 1900 treaty line was adjusted so as to include Fort Cadorna and Tserona in Eritrean territory.<sup>146</sup>

<sup>139</sup> *ibid* paras 4.84–4.85.

<sup>140</sup> *ibid* para 6.25.

<sup>141</sup> *ibid* paras 6.25–6.29.

<sup>142</sup> *ibid* para 6.30. See also above, p 781 with regard to Zalambessa.

<sup>143</sup> *ibid* para 6.31.

<sup>144</sup> *ibid* para 3.16. See, eg, paras 4.66, 4.75 and 4.81.

<sup>145</sup> *ibid* para 3.30.

<sup>146</sup> *ibid* paras 4.69–4.71.

In the Western Sector, the Commission considered a range of diplomatic correspondence and activities, which led it to conclude that by 1935 the boundary had crystallized with respect to the line between Point 6 and Point 9.<sup>147</sup> With regard to the Central Sector, the Commission noted that the parties had accepted that Zalambessa formed part of Ethiopia,<sup>148</sup> while in the Eastern Sector the Commission held that the parties had accepted that their border lay at Bure.<sup>149</sup>

*v. Conclusion as to title and subsequent conduct*

The Chamber of the International Court declared in its seminal statement as to the relationship of title and *effectivités* in the *Burkina Faso/Mali* case that where the *effectivités* in question correspond to the legal title, the former serve simply to confirm the latter and that where the act does not correspond to the law, so that one State is exercising sovereign authority in the territory of another State holding title, preference is to be given to the latter. Where the *effectivités* do not coexist with any legal title, then the former must be taken into account, while *effectivités* will, however, play an essential role in interpreting title where the latter is in the circumstances ambiguous.<sup>150</sup> This is clear: title, usually established by treaty, is paramount and constitutes the relevant delimitation. However, this does not mean that an ambiguous provision cannot be settled through the subsequent practice of the parties, nor that the parties themselves may not subsequently decide to modify that provision.

The delimitation decision by the Eritrea–Ethiopia Commission dealt with these issues in a considered fashion. In most of the situations it examined, it concluded that either the *effectivités* in question were ambiguous or insufficient to modify title. Where the title was unclear or undetermined, particularly with regard to the part of the Western Sector dealt with by the 1902 treaty (from Point 6 to Point 9), the Commission decided that the conduct of the parties up to the date of the crystallization of title by 1935 (the date of the Italian invasion of Abyssinia) led to the conclusion that a straight line from Point 6 to Point 9 had been accepted by the parties and that the post-crystallization practice was insufficient to alter this.

<sup>147</sup> *ibid* paras 5.46–5.81 and see also above, p 767.

<sup>148</sup> *ibid* para 4.75 and above, p 781.

<sup>149</sup> *ibid* para 6.30 and above, p 782. Not specifically characterized by the Commission, but accepted as an example of the modification of an earlier treaty boundary point by subsequent practice, was the location of the western tripoint between Eritrea, Ethiopia and Sudan. Stated in Art I (ii) of the 1902 treaty to lie at ‘the junction of the Khor Um Hagar with the Setit’, the Commission held that this was modified to ‘the bend of the Setit immediately opposite the mouth of the Khor Rhoayan’ by the operation of the Sudan–Eritrea agreements of 22 November 1901, 18 February 1903 (the relevant part being referred to as the Talbot/Martinelli demarcation), and 1 Feb 1916 and the Ethiopian acceptance of the Talbot/Martinelli demarcation by an Exchange of Notes of 18 July 1972. As this was not challenged by the parties and as no monument marking the tripoint was found, the Commission adopted its description in the delimitation decision as the first boundary point on the demarcation line, see Commission’s Comments on its Statement of 27 Nov 2006, para 1, see below, p \*\*.

<sup>150</sup> *Burkina Faso/Mali* (n 1) 554, 586–7. See also the *El Salvador/Honduras (Nicaragua Intervening)* case (n 1) 398 and *Cameroon v Nigeria* (n 1) paras 68–70.



However, the Commission did accept that the legal title as laid down in the appropriate treaty could be modified where the parties had, impliedly or explicitly, so agreed. The Commission found this with regard to Zalambessa, Fort Cadorna and Bure. In each case, the Commission concluded that the parties had accepted by their subsequent conduct a change in the treaty line. This was a possibility that the International Court supported a few months later in *Cameroon v Nigeria*. In that decision, the Court, while noting that it was not able to modify the course of a boundary established by a delimitation agreement, concluded that in the Sapeo area the parties had accepted that this area lay within Nigerian territory contrary to the text of the agreement.<sup>151</sup> The Court declared, during the course of an examination of the situation around Lake Chad, that the fact that one State might acquiesce in the establishment of a change in treaty title could not be ‘wholly precluded as a possibility in law’.<sup>152</sup> This confirmed the view expressed by the Court in the *El Salvador/Honduras* case that the established boundaries of the States concerned could be varied between them by agreement and that ‘some forms of activity, or inactivity, might amount to acquiescence in a boundary other than that of 1821 [established by virtue of *uti possidetis*]’.<sup>153</sup>

The decision of the Commission therefore reinforces the view that *effectivités* operate most decisively where there is some doubt or ambiguity as to the line of the particular boundary treaty and that a modification in the valid treaty line by the parties is possible, but that clear evidence of acceptance by the parties is required.

### III. DEMARCATION

#### A. At the Delimitation Stage

While delimitation is the determination of the boundary line, by treaty or otherwise, and its expression in written terms, demarcation is the physical demonstration of the delimitation on the ground by means of boundary posts and the like. It is a distinction that has been accepted by international tribunals as well as writers.<sup>154</sup> The December Agreement gave the Commission the mandate to demarcate the colonial treaty border based on the pertinent colonial treaties and applicable international law, but no power to decide *ex aequo et bono*.<sup>155</sup> The Commission was to proceed to an ‘expeditious demarcation’<sup>156</sup> and the demarcation decision, like the delimitation decision was to be

<sup>151</sup> *Cameroon v Nigeria* (n 1) para 144.

<sup>152</sup> *ibid* para 68.

<sup>153</sup> *El Salvador/Honduras* (n 1) 351, 408–9.

<sup>154</sup> See, eg, the *Argentine/Chile* award of 1966 (n 24). See also I Brownlie, *African Boundaries* (Hurst, London, 1979) 4; M Shaw, *Title to Territory in Africa* (OUP, Oxford, 1986) 260; and SB Jones, *Boundary-Making* (Columbia University Press, New York, 1945) 190–203.

<sup>155</sup> Art 4 (2).

<sup>156</sup> Art 4 (13).

‘final and binding’.<sup>157</sup> The demarcation was designed to follow upon, and thus be separate from, the delimitation decision.<sup>158</sup>

The Commission in its *dispositif* noted with regard to Tserona that the boundary would be so drawn as to leave that town and its environs to Eritrea. Accordingly, the boundary would run around that town ‘at a distance of approximately one kilometre from its current outer edge, in a manner to be determined more precisely during the demarcation’.<sup>159</sup> Similarly, in order to leave Zalambessa and its environs to Ethiopia, the *dispositif* provided that the boundary would pass around the town at a distance of approximately one kilometre from its ‘current outer edge’ until the boundary rejoins the treaty line at approximately Point 20. However, ‘the current outer edge’ of this town would be determined ‘more precisely’ during the demarcation phase.<sup>160</sup> With regard to the use of small-scale maps in the decision, the Commission stated that a definitive map of the whole boundary on a scale of 1:25,000 would be produced on a sector-by-sector basis as each sector was finally demarcated and the exact coordinates of the locations of the boundary markers were determined.<sup>161</sup>

It is also interesting to note that the Commission held that the question of the location of the Eastern Sector boundary with its geometric criterion was one of both delimitation and demarcation,<sup>162</sup> so that the line of delimitation decided by the Commission (apart from Bure, accepted by the parties to lie on the border) would ‘serve as the basis for the demarcation, leaving open the possibility at that stage of “adapting it to the nature and variation of the terrain”, as contemplated in Article II of that Treaty [of 1908]’.<sup>163</sup> The Commission also noted that the exact location of the point at which the boundary meets the frontier of Djibouti was a matter for specification in the demarcation phase.<sup>164</sup>

<sup>157</sup> Art 4 (15).

<sup>158</sup> See Eritrea–Ethiopia Boundary Commission Award, para 3.37 and Art 4(13) of the December Agreement.

<sup>159</sup> Eritrea–Ethiopia Boundary Commission Award, para 8.1 B (iv).

<sup>160</sup> *ibid* para 8.1 B (vi). In its Comments attached to its Statement of 27 November 2006 establishing the demarcation line, paras 9–13, the Commission noted that in demarcating the line around Tserona and Zalambessa, it had taken into account the views of the parties, the nature of the environs and the extent of manifest impracticability in parts of the area, see further as to the Statement, below, p 791.

<sup>161</sup> The Commission produced a table of coordinates in its decision, but noted that such coordinates had been computed to the nearest one tenth of a minute, corresponding to approximately 0.18 kilometres on the ground. The reason for this was because of the ‘limited availability at the present stage of information on the maps available to the Commission’. Accordingly, all coordinates would be ‘recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information’, Eritrea–Ethiopia Boundary Commission Award, para 8.3. See para 11 of the Commission’s Observations of 21 March 2003, noting that such recalculation was to be simply for ensuring the accuracy of the locations listed in the decision and was to be a technical exercise not involving any substantial alteration in the boundary, S/2003/257/Add. 1). See below, p 788.

<sup>162</sup> *ibid* para 6.14.

<sup>163</sup> *ibid* para 6.34.

<sup>164</sup> *ibid* para 6.16. The Commission also held that the determination of a permanent line in

*B. After the Delimitation Award: Demarcation and Implementation Problems*

The situation following the rendering of the delimitation award by the Boundary Commission on 13 April 2002 has generated substantial practice, much of it of great interest with regard to the differences between the delimitation and demarcation processes. It also reveals graphically the problems faced by a tribunal with a jurisdiction continuing beyond the delimitation decision where the parties fail signally to cooperate as required. As such it may conceivably mark the end of an interesting experiment.

As of the date of writing, the President of the Commission has issued 22 reports on the work of the Commission,<sup>165</sup> while the Commission has itself made a number of subsequent binding decisions and the Security Council has adopted a number of resolutions on the dispute. In particular, the subsequent practice of the Commission has led to a number of important statements as to, for example, the delimitation decision, the scope and nature of demarcation, the question of interpretation and the responsibility of the parties both generally and particularly with regard to the period between delimitation and demarcation. Ultimately at its meeting in November 2006, the Commission, faced with the lack of necessary cooperation by the parties 'extending over more than four years', decided to act unilaterally with regard to the demarcation line.<sup>166</sup>

The Commission's delimitation decision was circulated by the UN Secretary-General,<sup>167</sup> and the demarcation process was commenced soon after the decision, but had to be suspended due to the Government of Ethiopia's prohibition of further work in its territory on 27 April 2002.<sup>168</sup> The Commission emphasized that the responsibility for the demarcation rested with it under Articles 4(2) and (14) of the December Agreement and Article 30(2) of the Rules of Procedure.<sup>169</sup> On 13 May 2002, the Commission received a document from Ethiopia entitled 'Request for Interpretation, Correction and Consultation'. This was sent to Eritrea for comments and these

boundary rivers would be deferred to the demarcation phase in the light of the wishes of both the parties. However, the Commission did note that: 'The boundary in rivers should be determined by reference to the location of the main channel; and this should be identified during the dry season' in view of the parties' agreement, *ibid* paras 7.2–7.3. This was confirmed in the Comments to the Commission's Statement of 27 November 2006, *ibid* paras 26–7. The Commission also declared in a manner reflecting the approach of the Tribunal in the *Eritrea–Yemen (Territorial Sovereignty)* award (n 1) para 526, that: 'Regard should be paid to the customary right of the local people to have access to the river', *ibid* paras 7.2–7.3.

<sup>165</sup> The first was dated 29 May 2001, S/2001/608 Annex I and the 22nd covers the period up to 20 December 2006, S/2007/33, Annex II.

<sup>166</sup> Commission Statement dated 27 November 2006, reproduced as an Enclosure to the Secretary-General's Special Report on Ethiopia and Eritrea to the Security Council dated 15 December 2006, S/2006/992, p 9ff.

<sup>167</sup> S/2002/423. See also the fifth report of the Commission, S/2002/744 Annex, para 2.

<sup>168</sup> *ibid* para 4.

<sup>169</sup> *ibid* para 12.

were provided on 14 June that year. Ethiopia raised a series of concerns. The Commission emphasized in its Decision, that the facility accorded to the parties in Article 28(1) of the Rules of Procedure to request the Commission to give an interpretation of the Decision could ‘only be invoked where the meaning of some specific statement in the Decision is unclear and requires clarification in order that the Decision should be properly applied’.<sup>170</sup> The Commission declared the request inadmissible, noting that no uncertainty in the Decision could be identified that could be resolved by interpretation at the present stage nor any case made out for revision.<sup>171</sup>

The Commission drafted and subsequently promulgated on 8 July 2002 binding Demarcation Directions, which included the statement that: ‘The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties’.<sup>172</sup> These Directions were amended in November 2002 and March and July 2003 and a set of Demarcation Instructions issued on 21 March 2003 and 22 August 2003.<sup>173</sup> In the Demarcation Directions, it was stated that the general purpose of the demarcation was to set on the ground pillars identifying the course of the line decided in the delimitation decision and to determine more precisely the delimitation line at Tserona and Zalambessa and in the Eastern Sector. The demarcation process was to be carried out by or under the responsibility of the Commission.<sup>174</sup>

On 17 July 2002, and following upon a request from Eritrea, the Commission issued an Order (pursuant to Articles 20 and 27(1) of the Rules of Procedure) holding that any Ethiopian government-sponsored resettlement of Ethiopian nationals in Dembe Mengul<sup>175</sup> after 13 April should not have taken place and requiring the return to Ethiopian territory of such persons and requiring both parties to ensure that no further population resettlement across the delimitation line established by its Decision should take place.<sup>176</sup> The Commission confirmed its competence to make this Order and determined that its jurisdiction and powers ‘extend to its taking cognisance of, and where

<sup>170</sup> In particular, the Commission noted that: ‘The concept of interpretation does not open up the possibility of appeal against a decision or the reopening of matters clearly settled by a decision’, see Decision Regarding the ‘Request for Interpretation, Correction and Consultation’ Submitted by the Federal Democratic Republic of Ethiopia on 13 May 2002, 24 June 2002, para 16. The Commission emphasized that re-argument of the case was not permitted and this was consistent with international judicial practice as to the limits of interpretation, citing the *Chorzow Factory* case, PCIJ, Series A, No 13, p 21; and the *Arbitration on the Delimitation of the Continental Shelf (France–UK)*, *Interpretive Decision of 14 March 1978* 54 International Law Reports, 161.

<sup>171</sup> Decision of 24 June 2002, *ibid* paras 17–18.

<sup>172</sup> Para 14 A.

<sup>173</sup> See Sixteenth Report of the Commission, S/2005/142 Annex I, Enclosures 1 and 2.

<sup>174</sup> *ibid*. Enclosure 2, II, 1 and 2.

<sup>175</sup> Eritrean territory under the Delimitation Decision.

<sup>176</sup> Sixth Report of the Commission, S/2002/977 Annex I, paras 7 and 10. Eritrea’s request for interim measures was refused, *ibid*.

necessary making appropriate decisions on, any matter it finds necessary for the performance of its mandate to delimit and demarcate the boundary'.<sup>177</sup>

The Eighth Report of the Commission, dated 21 February 2003, contained an important statement as to its competence faced with Ethiopian comments that 'the boundary should be varied so as to take better account of human and physical geography'. The Commission emphasized that it had not been given the power to vary the boundary delimited in the April Decision. It had not been given the power to decide *ex aequo et bono* nor had it been given the power to vary the boundary in the process of demarcation for the purpose of meeting local human needs. In the absence of such authority, the hands of the Commission are in large measure tied.<sup>178</sup>

The Commission issued 'Observations' on 21 March 2003,<sup>179</sup> declaring that there was no authority for it to add to or subtract from the terms of the colonial treaties or to include within the applicable international law elements of flexibility which it does not already contain. In analysing the role of demarcation, it was emphasized that there was no settled rule of customary international law to the effect that boundary demarcators not so expressly empowered possess the power of latitude or flexibility in the process of demarcation.<sup>180</sup> The Commission also addressed the question of subsequent conduct, emphasizing that in considering this in reaching its decision, it relied on the evidence placed before it by the parties during the written and oral pleadings. However, it could not accept additional evidence of such conduct at the post-decision phase since this would mean that the Commission's decision was not 'final' as required in the December Agreement. It was concluded clearly that there was 'no further room for the introduction by the Parties of additional new evidence

<sup>177</sup> Eritrea–Ethiopia Boundary Commission, Determinations, 7 Nov 2002, p 2. See also S/2002/1245 and the Seventh Report of the Commission, S/2002/1393 Annex I. On 14 August that year, the Security Council adopted resolution 1430 calling on the parties to refrain from unilateral troop or population movements, including the establishment of any new settlement in areas near the border, until demarcation and orderly transfer of territorial control had been accomplished in accordance with Art 4 (16) of the December Agreement.

<sup>178</sup> The Commission concluded that 'In the absence of agreement, however, the Commission's ability to ameliorate—on its own initiative—any problems that might arise is limited to minor clarifications justified principally by the enlargement of the scale of the maps with which it is working', S/2003/257 Annex I, para 4.

<sup>179</sup> This was done explicitly with the aim of 'avoiding certain misunderstandings regarding the content and effect of the Commission's Delimitation Decision . . . and regarding its tasks during the demarcation process' and in the light of 'the unusual features of the present situation, in which the Boundary Commission is required to continue its work by demarcating the boundary but without provision for formal pleadings by the Parties or full oral hearings', para 1.

<sup>180</sup> Para 7. The Commission stated that: 'a demarcator must demarcate the boundary as it has been laid down in the delimitation instrument, but with a limited margin of appreciation enabling it to take account of any flexibility in the terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable', para 8. The Commission accepted that in certain matters—Tserona, Zalambessa, Bure, the Eastern Sector as a whole, rivers, the recalculation of coordinates and the need to produce a final and definitive map—further work was required, *ibid* para 10.

of their conduct, or for the Commission to seek out such evidence'.<sup>181</sup> The Commission drew particular attention to its conclusions in the Western Sector, adding that the maps submitted by Ethiopia were inconsistent as to the location of Badme village (claimed by Ethiopia but held to lie within Eritrea on the basis of the straight-line boundary drawn by the Commission from Point 6 to Point 9) and that such Ethiopian evidence as was provided concerning governmental activity was insufficient to convince the Commission to depart from the line that had crystallized by 1935.<sup>182</sup>

The Commission noted, however, that in the light of 'further work done in the exercise of its demarcation function', it had identified two areas in the Central Sector where the line as delimited in its decision would be 'manifestly impracticable', namely certain plateau lands in the vicinity of Point 18 and the area of the delta-like formation where the Ragali river flows into the Salt Lake. Demarcation instructions to the parties were to be issued at a later date.<sup>183</sup> The Commission emphasized that: 'It is accepted as a matter of international law that it is the *dispositif* which is operative and binding, and which prevails if there is any discrepancy between it and the body of a tribunal's award'.<sup>184</sup>

The process, however, became delayed as Ethiopia was prepared to give the necessary security assurances for demarcation activities only with regard to the Eastern Sector and Mareb river section of the boundary and, in particular, informed the UN Secretary-General of its decision not to allow demarcation in Badme and Irob. In a letter dated 19 September 2003, the Prime Minister of Ethiopia criticized the Commission's decision with regard to Badme and parts of the Central Sector as 'totally illegal, unjust and irresponsible'.<sup>185</sup> The President of the Commission responded in a letter of 7 October to the UN Secretary-General, in which the view taken by the Commission with regard to Badme was reaffirmed as flowing from the correct interpretation of the relevant treaty. In particular, it was noted that the Commission was convinced that pertinent State practice consisting primarily of a series of maps, including those published by Ethiopia, 'showed the parties' agreement upon an interpretation of the relevant treaty, which placed the boundary prescribed by that treaty in the location determined by the Commission'.<sup>186</sup> The 'paucity of evidence produced by the parties in relation specifically to Badme', referred

<sup>181</sup> Para 13.

<sup>182</sup> Para 17.

<sup>183</sup> Para 20. In addition, it was felt that insufficient information concerning the precise location of Fort Cadorna had been provided (para 23), and that some clarification was required with regard to the area immediately to the south-east of Zalambessa in view of a discrepancy between the Commission's reasoning (para 4.42) on the one hand and the summary of the Treaty boundary (para 4.59 (6) and (7)) and the *dispositif* as shown on Map 11 on the other.

<sup>184</sup> Para 24. The Commission also stated that from the aerial photo survey that it was only recently permitted to conduct, it appeared that map evidence submitted by both parties with regard to the placement of Point 20 was inaccurate. Appropriate instructions were to be issued to the demarcation team, para 25.

<sup>185</sup> Eleventh Report of the Commission, S/2003/1186 Annex I, paras 4 and 10.

<sup>186</sup> *ibid* Appendix I, para 8.

to in the Observations of 21 March 2003, was repeated.<sup>187</sup> The President's letter also noted that:<sup>188</sup>

Where villages have sprung up or spread in recent times, and in so doing transgress boundaries previously established by older treaties, it is fully consistent with international law for the treaty-based boundary to be maintained and for the resolution of any consequential human problems to be left for the parties to resolve by agreement . . . that result is precisely what the International Court of Justice decided, in comparable circumstances, in its recent judgment in the *Cameroon v Nigeria* case.<sup>189</sup>

Ethiopia subsequently took the position that no work could be carried out in the Western and Central Sectors until the Eastern Sector had been completely demarcated and only if that State approved the Commission's method of demarcation. Eritrea maintained that no demarcation could be carried out until it was absolutely clear that demarcation would take place in the other parts in accordance with the delimitation decision.<sup>190</sup> The Commission concluded that Ethiopia was expressing its dissatisfaction with the delimitation decision in the form of procedural impediments to the demarcation process.<sup>191</sup>

On 25 November 2004, the Ethiopian Prime Minister submitted a five-point peace proposal, point 3 of which noted that 'Ethiopia accepts, in principle, the Ethiopia–Eritrea Boundary Commission decision' and point 5 of which called for a dialogue to start immediately 'with the view to implementing the Ethiopia–Eritrea Boundary Commission's decision in a manner consistent with the promotion of sustainable peace and brotherly ties between the two peoples'.<sup>192</sup> However, attempts to restart the demarcation process failed and the two parties reiterated their positions referred to in the President's letter of 7 October 2003.<sup>193</sup>

<sup>187</sup> *ibid* Appendix I, para 9.

<sup>188</sup> *ibid*, para 10. Further, Art 4 (16) of the December Agreement specifically stated that 'the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory'.

<sup>189</sup> In fact in the *Cameroon* case, decided some six months after the Eritrea–Ethiopia decision, the Court stated clearly that: 'it has no power to modify a delimited boundary line, even in a case where a village previously situated on one side of the boundary has spread beyond it. It is instead up to the parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population', *Cameroon v Nigeria* (n 1) para 123. See also para 107.

<sup>190</sup> Eleventh Report of the Commission, S/2003/1186, Appendix 1.

<sup>191</sup> *ibid* para 20.

<sup>192</sup> Fifteenth Report of the Commission, S/2004/973/Add. 1, Appendix.

<sup>193</sup> Sixteenth Report of the Commission, S/2005/142 Annex I, paras 4–6. The Commission underlined that the boundary as delimited in its decision 'constituted the final and legally binding line of the boundary', subject only to the qualifications made in the decision as to the drawing of the line around the 'current outer edge' of the towns of Tserona and Zalambessa. Conduct inconsistent with the boundary line was stated to be 'unlawful', *ibid* para 33. What remained to be done was the physical demarcation of the line 'on the ground by the placing of visible markers at appropriate locations', *ibid* para 15 and see above.



Faced with continuing non-cooperation by the parties, the Commission decided at its meeting on 20 November 2006<sup>194</sup> to complete the work of demarcation by itself. Declaring that the interpretation of the December Agreement which had established the Commission as an international institution had to be approached in the same way that international institutions construed their constitutional instruments, that is by way of the concept of institutional ‘effectiveness’, the Commission concluded that it was able ‘to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have had in mind’.<sup>195</sup> The objective was declared to be the conclusion of the border dispute at the earliest possible date.<sup>196</sup> Although the first-choice method of demarcation remained the actual fixing of boundary pillars on the ground, this was only possible with the full cooperation of both the States concerned. Accordingly, the Commission decided that the most practical way of advancing its mandate was to provide the parties with a list of boundary points identified by the Commission by means of modern techniques of image processing and terrain modelling in conjunction with aerial photography. This list of boundary points would represent the locations at which, if the Commission were so enabled by the parties, it would construct permanent pillars. This list, accompanied by 45 maps illustrating the boundary points, was attached to the Commission Statement.<sup>197</sup>

The Commission proposed that the parties consider their positions and seek to reach agreement on the placement of pillars over a twelve-month period, terminating at the end of November 2007. If by that date the parties have not reached the necessary agreement and proceeded significantly to implement it, or have not requested and enabled the Commission to resume its activity, the Commission declared that the boundary will automatically stand as demarcated by the points listed and the mandate of the Commission fulfilled. Until such time as the boundary is finally demarcated, the Delimitation Decision of 13 April 2002 will continue ‘as the only valid legal description of the boundary’.<sup>198</sup> In so acting, the Commission referred to the practice of the Iraq–Kuwait Boundary Demarcation Commission in establishing coordinates and of maritime delimitations.<sup>199</sup>

<sup>194</sup> Attended by the witnesses to the Algiers Agreement (UN Secretary-General, the EU, USA and Algeria). The parties themselves refused to attend.

<sup>195</sup> Commission Statement dated 27 November 2006, S/2006/992, Enclosure, para 17.

<sup>196</sup> *ibid* para 18.

<sup>197</sup> *ibid* paras 20–1.

<sup>198</sup> *ibid* para 22. This position was reaffirmed by the Commission in its Press Release of 12 September 2007. The Commission also concluded that no further progress could be made towards the emplacement of pillars at this stage. On 25 September 2007 the Ethiopian Foreign Ministry issued a press statement saying that Eritrea was in material breach of the Algiers Agreements and that Ethiopia was entitled to consider its legal and peaceful options including terminating the Agreements or suspending their operation in whole or in part. While this cannot affect the validity of the boundary decision of the Commission, Ethiopia’s possible action would clearly affect the peaceful settlement of the disputes as a whole.

<sup>199</sup> *ibid* paras 23–6.

## IV. THE INTERNATIONAL CONTEXT

As noted at the start of this article, the Commission was established by the December Agreement, which followed the Framework Agreement and the Modalities for its Implementation of July 1999 and the Agreement on Cessation of Hostilities of June 2000, both of which were endorsed by the Organization of African Unity (as it then was) and the United Nations.<sup>200</sup> In addition, the December Agreement was witnessed by Algeria, the UN, the OAU/AU, the European Union and the US. This constitutes an important factor with regard to implementation of increasing importance. The UN Security Council has offered its encouragement for the whole process since it reaffirmed its ‘strong support’ for the Agreement on the Cessation of Hostilities and for the December Agreement as well as expressing its satisfaction that ‘a final legal settlement of the border issues’ was about to be reached in accordance with the agreements of 2000 and emphasizing ‘the importance of ensuring expeditious implementation of the upcoming decision by the Boundary Commission’ as well as ‘its resolve to support the parties in the implementation of the decision by the Boundary Commission’.<sup>201</sup> Upon the rendering of the Commission’s decision, the Security Council issued a presidential statement on 16 April 2002 welcoming that decision and commending the ‘commitment of Ethiopia and Eritrea to accept the decision of the Commission as final and binding’.<sup>202</sup>

In Resolution 1430, adopted on 14 August 2002, the Council decided to adjust the mandate of the United Nations Mission in Ethiopia and Eritrea (UNMEE) ‘in order to assist the Boundary Commission in the expeditious and orderly implementation of the Delimitation Decision’ and called upon the parties ‘to cooperate fully and promptly with the Boundary Commission, including by implementing without conditions its binding Demarcation Directions’. The commitment of the Council to the 2000 agreements and the delimitation decision ‘embraced by the parties as final and binding’ in accordance with these agreements was reaffirmed in Resolutions 1434 (2002) and 1507 (2003). The latter called specifically upon Ethiopia and Eritrea to cooperate with the Commission to enable it to fulfil its mandate to demarcate expeditiously the boundary.

The Security Council expressed its concern about ‘Ethiopia’s ongoing rejection of significant parts of the Boundary Commission’s decision, and its current lack of cooperation with the Boundary Commission’ in Resolution 1560 (2004). The Council also stressed that Ethiopia and Eritrea had the

<sup>200</sup> See the preamble to the December Agreement.

<sup>201</sup> Resolution 1398, paras 2, 5, and 9, adopted on 15 March 2002. The UN Mission in Ethiopia and Eritrea (UNMEE) was established in by Resolutions 1312 and 1320 (2000). A Temporary Security Zone was later established, see the Secretary General’s report of 12 January 2001, S/2001/45.

<sup>202</sup> SC/7362. See also the Presidential Statements of 17 July 2003, S/PRST/2003/10; 4 May 2004, SC/8085 and 4 Oct 2005, S/PRST/2005/47.

primary responsibility for the implementation of the December Agreement ‘and the decision of the Eritrea–Ethiopia Boundary Commission’, called upon the parties to cooperate fully and promptly with the Commission and urged Ethiopia to reaffirm unequivocally its acceptance of the Commission’s decision and take the necessary steps to enable the Commission to demarcate the border without further delay.<sup>203</sup> The Council further demanded that ‘Ethiopia accept fully and without further delay the final and binding decision of the Eritrea–Ethiopia Boundary Commission and take immediately concrete steps to enable, without preconditions, the Commission to demarcate the border completely and promptly’ in Resolution 1640 (2005).<sup>204</sup>

On 22 February 2006 the witnesses to the 2000 agreements (Algeria, the UN, the OAU/AU, the European Union and the US) issued a statement in which they recalled that ‘both Ethiopia and Eritrea had committed themselves to accepting the delimitation and demarcation determinations of the Eritrea–Ethiopia Boundary Commission as final and binding’ and called upon them to cooperate with the Commission ‘to implement its decisions without delay’ and to that end to meet with the Commission.<sup>205</sup> Two days later, the President of the Security Council issued a statement recalling that both parties had agreed to accept the delimitation and demarcation decisions of the Boundary Commission as final and binding and called for cooperation with the Commission to implement its decisions without further delay.<sup>206</sup>

Faced with a further deterioration in the security situation during 2006, the Security Council in Resolution 1741 (2007) repeated its call for Ethiopia to accept ‘fully and without delay the final and binding decision of the Eritrea–Ethiopia Boundary Commission and take immediately concrete steps to enable, without preconditions, the Commission to demarcate the border completely and promptly’ and for Eritrea to ‘immediately withdraw its troops and equipment from the Temporary Security Zone’.<sup>207</sup>

## V. CONCLUSION

The following general comments may be made in conclusion:

<sup>203</sup> See also Resolution 1586 (2005). Eritrea was called upon to cooperate with the UN Secretary General’s Special Envoy for Ethiopia and Eritrea. Eritrea also banned the overflight of UNMEE helicopters and restricted the movement of UNMEE patrols. A presidential statement of the Council on 3 March 2006 called for these restrictions to be lifted.

<sup>204</sup> See also Security Council Resolution 1661 (2006) which demanded that the parties comply fully with Resolution 1640 (2005) and extended for one month the mandate of UNMEE.

<sup>205</sup> Twentieth Report of the Commission, S/2006/140 Annex II, para 2.

<sup>206</sup> *ibid* para 3 and S/PRST/2006/10. See also the reports of the UN Secretary General, eg S/2002/205; S/2003/665/Add.1; S/2003/858; S/2003/1186; S/2006/1 and S/2006/140.

<sup>207</sup> Adopted on 30 January 2007. The parties were also called upon to cooperate fully with the Commission and to refrain from any threat or use of force against each other. UNMEE’s mandate was extended for a further six months and its personnel reduced. See also S/2007/33 and Security Council Resolutions 1681 (2006) and 1710 (2006).

1. As to the process itself, one is struck by the speed with which the Commission was obliged to produce its delimitation decision, particularly as the violent and wide-ranging conflict had only recently been concluded. The hostile environment re-emerged after the Commission's delimitation decision as Ethiopia sought first to reject and then to modify it, while Eritrea pressurized UNMEE and then placed its own forces within the Temporary Security Zone in an effort to ensure the decision was carried out. Perhaps the provision of a longer period within which the Commission and the parties could work with regard to the delimitation issue might have enabled the latter to argue the case in a way that may have precluded later expressions of surprise at the outcome and to have appreciated the strong points in each other's cases. It might also have enabled the UN to seek politically to mitigate the tensions in the area with rather more success.

2. One critical issue raised is whether delimitation and demarcation should be placed in the hands of the same judicial or arbitral body. The advantages of doing this include the knowledge and expertise developed by the particular tribunal (where appropriately technically assisted), the fact that this should speed up the process of boundary settlement and the capacity and competence of the tribunal in dealing with matters as they arise during the often-complex process from establishment of the legal boundary to the final placement of boundary markers on the ground. The disadvantage is that it may encourage ongoing efforts by the unsuccessful party to use the demarcation process in an effort to pressure the tribunal in question to modify its boundary delimitation decision. The experience of the Eritrea–Ethiopia Boundary Commission demonstrates precisely this. The danger is that a lesser tribunal may be tempted to give way to heavy pressure by one side to such an extent that the process of delimitation itself may be undermined and its finality constantly challenged. In this sense, the danger implicit in a procedure necessitating continuing interventions by the delimitation tribunal is that material may be produced which could be interpreted by one party or another as in some way inconsistent with the terms of the delimitation award.

Apart from the fact that the parties themselves may agree to boundary changes, attempts to convince the tribunal itself to do this would blur the critical distinction between delimitation and demarcation and likely result in the elongation of the delimitation process in practice since the latter phase would be seen as simply a sort of appeal or revision mechanism. This would inevitably maximize the dangers in what is always a sensitive situation of a radical deterioration in the relations between the parties. The best way forward, it appears, is to ensure that the two stages of delimitation and demarcation are kept firmly separate and allocated to two separate bodies.

3. It seems clear that the December Agreement was focused upon resolving the violent conflict which had only recently ceased. It recognized the importance

of establishing a clear boundary recognized by the parties and by the international community, but perhaps devoted less attention to the process of demarcation than it might have done. In particular, it might have proved of some benefit to have given the Commission the power to modify the delimitation line where specific local conditions could be seen to require this, an approach which is not unusual in the demarcation process and which may prove helpful provided that it is accepted that the delimitation decision reached on the basis of law is final and not subject to change, other than by the parties acting together. There is a profound difference between a delimitation made on the basis of the applicable law and a demarcation reached by applying the delimitation line in accord with any relevant local geographical factors. However, although the Commission emphasized that it could not modify the delimitation line, it was accepted that ‘a limited margin of appreciation’ did exist where there was any flexibility in the terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process and with regard to the avoidance of establishing a boundary which is manifestly impracticable. This narrow margin could have been widened by the terms of the December Agreement, but without such authority it could not be assumed.

4. With regard to its continuing competence, the Commission determined that its jurisdiction and powers extended to making decisions on ‘any matter it finds necessary for the performance of its mandate to delimit and demarcate the boundary’.<sup>208</sup> This was stated with regard to Ethiopia’s attempted settlement of its nationals on Eritrea’s side of the delimitation line, but it marks an important principle with regard to any tribunal with an ongoing mandate. So long as this does not result in a change in the delimitation award, this is acceptable and in this case certainly helped to maintain the integrity of the decision itself.

5. The careful evaluation of the relationship between title and conduct in the Commission’s approach is particularly instructive. Despite criticisms to the contrary,<sup>209</sup> the Commission was meticulous in distinguishing the hierarchy and operative roles of treaty title and the conduct of the parties. The *Burkina Faso/Mali* paradigm has not been overturned but rather elucidated. A treaty title is the delimitation line unless the contrary is proved and the standard of proof has to be high. A clear title by treaty provision may only be modified by the subsequent practice of the parties where this is unmistakably intended and is a question of evidence. The Commission emphasized that this could only happen where the effect of the subsequent conduct is ‘so clear’ that a treaty provision may be varied.<sup>210</sup> Even here, the Commission made the point that conduct could only provide or suggest a title relative to the competing State so

<sup>208</sup> Eritrea–Ethiopia Boundary Commission, Determinations (7 Nov 2002) 2.

<sup>209</sup> See, eg, Kohen, who argues that the Commission virtually placed title and State conduct on the same level (n 109) 595.

<sup>210</sup> Award, para 3.8.

that the conduct of one party must be measured against that of the other.<sup>211</sup> Where the parties had expressly or by their mutual conduct clearly accepted a variation of a treaty title in a particular area, this would mark the common will of the parties in question and would be accepted.<sup>212</sup> Thus, although a title by treaty constitutes the core of any delimitation, it may not necessarily constitute the end-point of any delimitation. Of course, where the treaty provision in question is ambiguous, then the degree of effective control or conduct required to be demonstrated in order to secure title would be correspondingly less than in the case of conduct modifying a clear delimitation provision and would itself be relative to the particular circumstances including the claims of the parties.

6. The establishment of the unilateral demarcation line by the Commission in its Statement of 27 November 2006, albeit subject to the views of the parties until November 2007, is unusual. It has the advantage of seeking to encourage the parties to cooperate in order to resolve the matter, but the disadvantage of producing a decision which may be ignored. Nevertheless, the precedential value of such an approach may be of value in seeking to ensure that in future disputes the parties proceed normally through the demarcation process, aware that as a last resort the demarcation authority may be prepared to determine the line itself.

7. The close and institutionalized involvement in the settlement of volatile boundary disputes by significant international players, particularly the United Nations, which was asked in the December Agreement to ‘facilitate resolutions of problems which may arise due to the transfer of territorial control’,<sup>213</sup> is likely to prove an important precedent. Although to date such involvement in the Eritrea–Ethiopia dispute has demonstrated impotence rather than success, in the longer term that may not necessarily remain so and the resolution of many boundary disputes could be given additional legitimacy and weight by such international underpinning, as well as ensuring a level of resource allocation to enable the boundary delimitation and demarcation processes to be completed and ensured. However, it is important to realize that any such international involvement implies responsibility for implementation.

Although at the time of writing, it cannot be said that the mission of the Eritrea–Ethiopia Boundary Commission has been completed as envisaged, it is certainly conceivable that political circumstances may change so as to enable the final and successful completion of the Commission’s mandate. At that point, no doubt the value of the Commission’s work taken overall may be appreciated. In the meantime, there are lessons to be learned.

<sup>211</sup> *ibid* para 3.29.

<sup>212</sup> See above, p 784.

<sup>213</sup> See above, p 758.