

IV. PERMANENT COURT OF ARBITRATION

(c) Case Analysis

Eritrea – Yemen Arbitration

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Abstract: On 9 October 1998, an Arbitral Tribunal handed down its Award regarding the first stage of an arbitration between Eritrea and Yemen. The Award determined, firstly, the scope of the dispute between the parties and, secondly, the sovereignty of small islands, islets, rocks and low-tide elevations sprinkling in the Red Sea between the respective coast lines of the two states. Whilst closely examining concepts raised by the parties such as historic title, the Tribunal was ultimately swayed by factors of geographical appurtenance, recent demonstrations of governmental authority and functions of state, and, to a lesser extent, the area's legal history. The Award contributes to the body of law on territorial sovereignty and to an understanding of the role of arbitration in the peaceful resolution of disputes.

1. BACKGROUND TO THE ARBITRATION

In late 1995, tensions flared between the African State of Eritrea (Eritrea) and the Republic of Yemen (Yemen) on the Arabian peninsula – tensions which culminated in military confrontation and occupation of a number of islands in the waters between the two states.¹ At the centre of the dispute was a disagreement as to the territoriality of smatterings of small islands, islets, rocks and low-tide elevations ('Red Sea islands') sprinkling the southernmost area of the Red Sea between the coastlines of the two states. The two states, each on different continents, face one another across the waters of the Red Sea – the relatively narrow arm of water separating the north-eastern coast of Africa and southwest Asia's Arabian coast.

The islands closest to the mainland are only six to twelve nautical miles from the Eritrean coast. However, none of the islands is inhabited on any permanent

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1. Eritrea-Yemen Arbitration (Eritrea v. Yemen), Phase I: Territorial Sovereignty and Scope of Dispute of 9 October 1998, Permanent Court of Arbitration, see <http://www.pca-cpa.org/ER-YEAwardTOC.htm>, at 17 September 1999. (Copy on file with author), para. 74. [Hereinafter 'Award'].

basis with, for the most part, the terrain of the islands being barren and not conducive to human habitation. Nevertheless, many of the islands have a history of being and continue to be visited by fishermen from both party states.

On 21 May 1996, the two states formally articulated their desire to re-establish peaceful relations and executed an Agreement on Principles.² Under the agreement, the parties renounced the use of force against each other and agreed to settle the dispute peacefully through arbitration and the establishment of an Arbitral Tribunal ('the Tribunal').³ Five months later, on 3 October 1996 and pursuant to the Agreement on Principles, the parties executed an Arbitration Agreement ('Arbitration Agreement') which established the procedures for the arbitration process (such as the appointment of the arbitrators) and set out the issues to be determined. The first meeting of the arbitrators took place on 14 January 1997 and, on 9 October 1998, the Tribunal delivered an Award pursuant to the Arbitration Agreement.

2. THE TASK OF THE TRIBUNAL

Article 2 of the Arbitration Agreement provides that:

1. The Tribunal is requested to provide rulings in accordance with international law, in two stages.
2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.
3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.

The Arbitration Agreement therefore requests the Tribunal to provide rulings in two stages, each dealing with different issues.⁴ The two-stage approach to the resolution of the issues between the parties was first mooted in the earlier Agreement on Principles.⁵ However, the Agreement on Principles divided the is-

2. Agreement on Principles of 21 May 1996, <http://www.pca-cpa.org/ER-Yeagreeprinc.htm>, at 30 October 1999 (Copy on file with author), preamble. [Hereinafter 'Agreement on Principles'].

3. Art. 1 Agreement on Principles.

4. Arbitration Agreement of 3 October 1996, <http://www.pca-cpa.org/ER-YEagree.htm>, at 30 October 1999 (Copy on file with author), Art. 2(1). [Hereinafter 'Arbitration Agreement'].

5. Art. 1(1.2) Agreement on Principles.

sues differently between each stage. Under the Agreement on Principles, the first stage of the arbitration process was only to define the scope of the dispute between Eritrea and Yemen.⁶ The second stage of the arbitration would then rule on territorial sovereignty of the Red Sea islands as well as delimit their maritime boundaries.⁷ Acknowledging an inconsistency between the two agreements, the Tribunal confirmed the prevalence of the latter Arbitration Agreement (pursuant to Article 15(2) of the Arbitration Agreement).⁸

This Article is concerned with the Tribunal's Award of 9 October 1998 which rules on the first stage of the arbitration and, thus, the following issues will be dealt with:

- 1) the definition of the scope of the dispute; and
- 2) the territorial sovereignty of the islands.

3. THE SCOPE OF THE DISPUTE

Unable to agree between themselves on the scope of their dispute and unwilling to let this issue prevent conclusion of the Agreement on Principles or the Arbitration Agreement,⁹ the parties, unusually,¹⁰ decided that the definition of the scope of their dispute should be determined by the Tribunal. Specifically, the parties had been unable to decide which in particular of the Red Sea islands was to be the subject of an Award by the Tribunal. Generally, in providing its rulings, the Tribunal is required by the Arbitration Agreement to do so in accordance with international law.¹¹ In deciding on the definition of the scope of the dispute between the parties, the Arbitration Agreement¹² also requires the Tribunal to decide "on the basis of the respective positions of the two Parties."

Eritrea wished the Tribunal to determine all claims between Eritrea and Yemen concerning any of the Red Sea islands. Yemen wished certain islands within the Red Sea islands, namely the northern islands of Jabal Al-Tayr, Jabal Zubayr and the latter's surrounding islands, to be excluded from the Tribunal's

6. *Id.*

7. *Id.*

8. Art 15 (2) states as follows: "In the event of any inconsistency between the Agreement on Principles and this Arbitration Agreement implementing the procedural aspects of that Agreement on Principles, this Arbitration Agreement shall control. Except with respect to such inconsistency, the Agreement on Principles shall continue in force."

9. Award, para. 74.

10. N.S. Marques Antunes, *The Eritrea-Yemen Arbitration: First Stage – The Law of Title to Territory Re-averred*, 48 *International and Comparative Law Quarterly* 362, at 363-364 (1999) states the conceding to the Tribunal of the definition of the scope of the dispute to be "probably the most striking feature of the Arbitration Agreement."

11. Art. 2(1) Arbitration Agreement.

12. Art. 2(2) Arbitration Agreement.

rulings. Yemen argued that, because both the Arbitration Agreement and the Agreement on Principles required the Tribunal to define the scope of the parties' dispute in terms of the "respective positions" of parties,¹³ the scope of the dispute must be judged as at the date of the execution of the Agreement on Principles. When the Agreement on Principles was executed, on 21 May 1996, Yemen argued¹⁴ that it was the understanding of the parties that the northern islands described above were not within the scope of the dispute (and, indeed, were not in dispute at all). It was only subsequently, when the parties filed their respective memorials on 1 September 1997, that Eritrea raised issues concerning the northern islands. Yemen thus argued that the respective positions of the parties *limited* their dispute to the Red Sea islands other than the northern islands.

The Tribunal, however, did not agree with Yemen that the date of the Agreement on Principles *determined* the parties' respective positions. First, the Tribunal looked at the changes made by the Arbitration Agreement to the issues to be determined at the first stage of the arbitration. Under the earlier Agreement on Principles, the scope of the dispute only was to be determined at the first stage with the issues of territorial sovereignty and delimitation of maritime boundaries to be determined by the second stage of the arbitration. The Arbitration Agreement however, moved the determination of territorial sovereignty to the first stage. The Tribunal was of the view that the Arbitration Agreement had included the determination of territorial sovereignty with the definition of the dispute's scope to ensure that the question of scope would be determined in light of all arguments on sovereignty as they were presented. This made the earlier date of the Agreement on Principles less likely to be the 'critical date'. Secondly, the Tribunal found that the lack of any qualification of the term "the respective positions of the two parties" meant that the term was to be given its ordinary meaning and thus be interpreted as the respective position of the two parties as at the date of the Arbitration Agreement and not at some, other unspecified date.¹⁵ Further, the Tribunal noted that Yemen had fully argued the issue of sovereignty in relation to the northern islands. Thus, the Tribunal found that it was to award on the sovereignty of all of the Red Sea islands in relation to which the parties had presented conflicting claims throughout the proceedings. These included claims regarding the northern islands.

13. *Id.*

14. Award, para. 76.

15. Award, para. 88.

4. TERRITORIAL SOVEREIGNTY OF THE ISLANDS

4.1. Regional background

Both parties referred extensively to their historical backgrounds in their respective claims with both parties arguing an historic title to the Red Sea islands. This included reference to a period of shared history. From the mid-1800s until 1918, the entire region including the geographical areas of both states and the Red Sea islands was part of the Ottoman Empire and its successor state, the modern state of Turkey. The collapse of the Ottoman Empire and the defeat of Turkey in World War I led in 1923 to the Treaty of Lausanne in which Turkey renounced “all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present treaty and the islands other than those over which her sovereignty is recognised by the said Treaty.”¹⁶ After Ottoman rule, for some of the period between the First and Second World Wars, the coastal areas, including the Red Sea coast, of the Yemen region were under local tribal rule with the remaining Yemen area being ruled predominantly by the Imam of Yemen. In 1926 the coastal areas also came under Imamic rule. The current state of the Republic of Yemen was declared on 22 May 1990 following a period of civil war between 1962 and 1970. Prior to the rule of the Ottoman Empire, the state of Yemen traces its existence back to medieval times. Eritrea, between World War I and World War II, was a territorial possession of Italy. As a result of Italy’s defeat in World War II, Italy renounced all right and title to Eritrea. Eritrea became a province of Ethiopia in the period following World War II before, in 1993, gaining independence after a period of civil war.

The Red Sea islands also came under the sovereignty of the Ottoman Empire during its reign. In the period between the two world wars, some of the Red Sea islands were occupied by Britain whilst others were the subject of Italian colonial interest. The 1923 Treaty of Lausanne, *inter alia*, included a renunciation by Turkey of title to “the islands other than those over which her sovereignty is recognised by the said Treaty” with “the future of those [...] islands being settled or to be settled by the parties concerned.”¹⁷

4.2. The role of the Tribunal

In laying claim to the Red Sea islands, both parties primarily argued their possession of an ‘historic title’. The concept of historic title is expressly referenced in the Arbitration Agreement as a basis upon which, “in particular”, the Tribunal

16. Art. 16, 1923 Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, 28 LNTS 11 (1924).

17. *Id.*

is to decide territorial sovereignty.¹⁸ The Tribunal acknowledged this reference but was of the opinion that this special mention should not be interpreted as a requirement to accord the concept of historic title any extraordinary priority. Instead the Tribunal regarded the reference to historic title as an act of “abundant caution” which reminded the Tribunal of the existence of a form of title that is not dependent upon use and possession.¹⁹

4.3. The arguments of the parties

Eritrea’s claim to an historic title over the islands was argued to have originally derived from Italy. Italy, Eritrea argued, gained title to the Red Sea islands as a result of its colonial activities in the region between World War I and World War II. It was further argued that this title was transferred to Ethiopia²⁰ as part of Italy’s territorial dispositions after its defeat in the Second World War and then to Eritrea upon the gaining of its independence from Ethiopia.²¹

Yemen relied on a different concept of historic title to argue possession of an ‘ancient title’ to the islands deriving from the existence of Yemeni society in the middle ages. By reference to a proposed doctrine of reversion, Yemen further argued that this title had not been broken by the intervening Ottoman rule that existed in the region from the mid-1800s through to the early 1900s. Upon the end of the Ottoman rule, Yemen argued that title to the Red Sea islands then ‘reverted’ to Yemen sovereignty.

In support of their respective claims, both parties argued their claim to historic title to be supported by, firstly, each state having displayed the functions of state and governmental authority on the subject islands in a sufficiently significant manner as to evidence title. Both parties further cited the legal history of the islands as supporting their respective claims to sovereignty. Both of these factors were subsequently relied upon to a significant degree by the Tribunal in reaching its decision. In relation to both issues, both states led evidence concerning their consenting to or actually undertaking the erection or maintenance of lighthouses on a number of the Red Sea islands as well as governmental consent to various petroleum agreements concerning areas around some of the islands. Finally, both parties also argued that their respective claims of historic title were supported by the physical unity of the islands. This unity was argued by both sides to bind the islands to both their respective mainlands. Although the establishment of a historic title does not require actual possession, both parties also produced much evidence as to their respective use and possession of the islands including the previously mentioned lighthouse activities and petroleum

18. Art. 2 Arbitration Agreement.

19. Award, para. 107.

20. Award, para. 448.

21. Award, para. 115.

agreements, state naval patrols of the waters surrounding the islands, official visits to the islands, and the granting of licences concerning or other controlling of activities undertaken in respect of the islands. Both parties also produced substantial evidence concerning historical maps (some dating from the 18th century) and the indications given by those maps as to the ownership of the islands.

4.4. The Tribunal's findings on the arguments of the parties

4.4.1. Failure to establish historic title

The Tribunal examined each party's arguments and the large volume of supporting evidence produced and found that:

- 1) neither party possessed historic title to any of the Red Sea islands; and
- 2) contrary to each party's pleadings, it was inappropriate to determine the sovereignty of the islands as a whole.

Firstly, the Tribunal recognised the establishment of sovereignty through historic title to be an accepted principle of international law capable of establishing a right to possession regardless of actual possession being held or use being established.²² The Tribunal further acknowledged the concept of historic title to have a number of different meanings in international law. Yemen's argument, in the opinion of the Tribunal, was primarily based on a meaning of historic title described as "ancient title" being "a title that has so long been established by common repute that this common knowledge is itself a sufficient title."²³ Eritrea's argument, in the opinion of the Tribunal, referred to a historic title created or consolidated "by a process of prescription, or acquiescence or by possession so long continued as to have become accepted by the law as a title."²⁴ Yemen had, in the view of the Tribunal, also argued this other kind of historic title but only to confirm its primary claim of an "ancient title" to the Red Sea islands.

Whilst both parties had argued their respective possession of an historic title to the Red Sea islands, it was the final view of the Tribunal that neither party had succeeded in their arguments. Firstly, in relation to Yemen's arguments, the Tribunal doubted whether the doctrine of reversion (which Yemen argued had caused its ancient title to revert at the end of Ottoman rule) is an accepted or valid principle of international law.²⁵ The Tribunal was concerned that Yemen had been able to cite little support for the doctrine and was itself unaware of any basis for the doctrine's existence in general international law.²⁶ However, it is

22. Award, para. 107.

23. Award, para. 106.

24. *Id.*

25. Award, paras. 125, 443.

26. Award, para. 443.

noted that previous suggestion and consideration of the existence of reversionary territorial rights has been observed.²⁷ These rights have been described as “less than sovereignty and dependent upon the circumstances of each case.”²⁸ In light of this previous consideration, the view has been expressed that it may have been open to the Tribunal to consider in more detail this aspect of the Yemeni argument.²⁹ More generally, the doctrine of reversion, as argued in this case, has been viewed as being related to a power to attribute political meaning to acts of decolonisation.³⁰ Consequently, it was mooted as not legally implausible for the territorial rights of a colonised state to ‘revert’ or ‘spring back’ when colonisation ceases.³¹ From this viewpoint, it was suggested that the Tribunal’s attitude to the doctrine of reversion may perhaps reflect “a cautious and conservative approach” to the effect of decolonisation on the stability of territorial sovereignty in international law.³² However the dangers of retrospectivity inherent in applying such doctrines were also noted.³³

However, rather than dismissing the doctrine of reversion out of hand, the Tribunal went on to consider its application in this case. In the opinion of the Tribunal any doctrine of reversion, as well as the notion of historic title, requires some degree of continuity of title.³⁴ In the present case, continuity of Yemen rule had been broken by the intervention of decades of Ottoman rule. As the Ottoman Empire had achieved sovereignty through means which were legitimate under the international law of the day, acceptance of the Yemen argument of reversion would, in the view of the Tribunal, be to reject the lawfulness of the Ottoman sovereignty and therefore conflict with the principle of intertemporal law. Finally, the Tribunal also doubted whether Yemen had originally possessed, prior to the Ottoman Empire, a title over the subject islands that was capable of ‘reverting’. In the eyes of the Tribunal, it was questionable, firstly, whether the ‘sway’ of the then head of medieval Yemen, the Imam, physically extended to the subject islands. The Tribunal therefore saw no application for a doctrine of reversion in this case should such a doctrine exist. The Tribunal also questioned the appropriateness of attributing western concepts of sovereignty to a medieval Islamic society such as would have existed in the Yemen area.³⁵ It has been noted that the place and relevance of territorial rights besides those known in traditional international law to the determination of territorial sovereignty has

27. Marques Antunes, *see supra* note 10, at 368-369.

28. *Id.*, at 369.

29. *Id.*

30. W.M. Reisman, *International Decisions – The Government of the State of Eritrea and the Government of the Republic of Yemen*, 93 *American Journal of International Law* 368, at 681 (1999).

31. *Id.*

32. *Id.*

33. *Id.*

34. Award, paras. 125, 443.

35. Award, paras. 143, 446.

been considered in other contexts.³⁶ However, it has also been noted that the interpretation of international law by reference to local and regional legal traditions should be considered “very cautiously and restrictively” for its potential to create inconsistencies in international law.³⁷

In relation to Eritrea, the Tribunal found that it had also failed to establish historic title to any of the subject islands on the basis that Italy had had no title to the Red Sea islands and thus was incapable of passing any title to Ethiopia which was able to be acquired by Eritrea. In reaching this decision, the Tribunal carefully considered the provisions of the Treaty of Lausanne and, particularly, Article 16. Article 16, in part, states as follows:

Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of those territories and islands being settled or to be settled by the parties concerned.³⁸

In the Tribunal’s view, Article 16 constituted a renunciation by Turkey of its title to those islands over which, until the Treaty, it had had sovereignty. The Tribunal further interpreted Article 16 as stating that the title over such islands was to remain “indeterminate pro tempore.”³⁹ Further, it was the opinion of the Tribunal that, under Article 16, those islands did not become *res nullius* and thus were not open to “acquisitive prescription” by any state.⁴⁰ In keeping with this interpretation of Article 16, the Tribunal recognised that the Italian Government had, in the period between World War I and World War II, “constantly and consistently” expressed assurances that it recognised the indeterminate status of the islands as established by the Treaty of Lausanne.⁴¹ The Tribunal thus saw the Treaty of Lausanne to be a “formidable obstacle”⁴² to Italian sovereignty. Following the Treaty of Lausanne, the Tribunal interpreted the 1947 Treaty of Peace, which obliged Italy to renounce “any rights and interests” under the Treaty of Lausanne,⁴³ as extending to “a renunciation of any claims Italy might have made and any legal instruments she might have asserted regarding the islands.”⁴⁴ The Tribunal, whilst recognising Italy’s territorial interest in the region of the Red Sea islands, did not consider these activities to have been sufficient to

36. For example, Marques Antunes, *supra* note 10, at 369-370, refers to a consideration of immemorial feudal title by the International Court of Justice in the *Minquiers and Ecrehos* case and legal ties of allegiance and other non-Western concepts relating to land in the *Western Sahara Advisory Opinion*.

37. Marques Antunes, *supra* note 10, at 385-386.

38. Quoted in Award, para. 157.

39. Award, para. 165.

40. *Id.*

41. Award, para. 448.

42. Award, para. 168.

43. Art. 43, 1947 Paris Treaty of Peace With Italy, 49 UNTS 3 (1950).

44. Award, para. 196.

constitute sovereignty over the islands thereby preventing any consolidation of title to Italy in relation to the disputed islands.

4.4.2. Sovereignty cannot be determined over the islands as a whole

The Tribunal was also of the opinion that it could not consider the sovereignty of the islands in the way set out in the parties' pleadings.⁴⁵ Specifically, the Tribunal found the evidence to indicate that the islands were divided into sub-groups. Further, this evidence had the potential to lead to different results for different sub-groups. Consequently it was the view of the Tribunal that the question of sovereignty must be considered separately in relation to each sub-group.⁴⁶ As stated by the Tribunal, both parties' pleadings presented a claim to every one of the Red Sea islands. However, much of the evidence presented by the parties could be identified as concerning particular islands or groups of islands.⁴⁷ In particular, the evidence as to the legal history of the islands indicated different histories for different islands.⁴⁸ This legal history therefore was inconsistent with the islands being considered collectively⁴⁹. Specifically, no common legal history had been presented for all of the islands. Moreover, each party had argued its respective claim in a way that supported the division of the islands into sub-groups.⁵⁰ Further, the Tribunal stated that, because the islands properly fell into sub-groups and different evidence applied to different sub-groups, it had also to be accepted that different decisions regarding sovereignty could be made in relation to different sub-groups. The Tribunal also noted that the consideration of sovereignty by sub-group could result in title to the islands being divided between the two states.

The sub-groups identified by the Tribunal⁵¹ were as follows:

- 1) the Mohabbakahs;
- 2) the Haycocks;
- 3) the Zuqar-Hanish Group; and
- 4) northern islands consisting of Jabal al-Tayr and a group of islands of which Jabal Zubayr is the largest.

The Tribunal was of the opinion that the legal histories of the Mohabbakahs, the Haycocks and the Zuqar-Hanish group distinguished them as separate sub-

45. Award, para. 466.

46. Award, paras. 459, 466.

47. Award, para. 466.

48. Award, paras. 459, 466.

49. Award, paras. 466.

50. Award, para. 465.

51. *Id.*

groups. The northern island, being relatively isolated, were unified into a distinct group by their geographic location.

4.5. Bases of the Tribunal's award on sovereignty

4.5.1. Appurtenance

As a result of the inconclusiveness of the evidence adduced by the parties as to historical title, the Tribunal considered it appropriate to consider factors other than those considered by the parties. In relation to the consideration of other factors, the Tribunal considered the geographical situation of the islands to be particularly relevant in terms of the appurtenance or proximity of certain islands to the coastline of a particular party.⁵² The Tribunal indicated a presumption that, in the situation of opposing coastlines, islands are under the sovereignty of their nearest coastal state unless the opposing coastal state can clearly demonstrate superior title.⁵³ When considering particular islands, the Tribunal also paid heed to a presumption that an island lying within a state's territorial sea is under the same sovereignty of the nearby mainland.⁵⁴ Elsewhere in its Award, the Tribunal cited a doctrine known in the nineteenth century as the 'Portico doctrine' which attributed coastal state sovereignty to off-shore features "within the attraction of the mainland."⁵⁵ The Tribunal was of the view that this presumption was supported by the legal histories of the subject islands which included, at times, administration of the islands being divided between the two coasts.⁵⁶

Relevant to the Tribunal's consideration of the proximity principle was certain issues raised by each party concerning the physical unity of the islands. The Tribunal noted⁵⁷ that Eritrea had argued that the baseline of its territorial sea extended from those islands which were within 12 miles of its coastline. By so extending the baseline of its territorial sea, the Tribunal noted that Eritrea had further claimed islands within the next twelve miles and so on, 'leapfrogging'⁵⁸ to include all of the islands within its territorial sea. The Tribunal agreed that there is a presumption that islands within a state's territorial sea, as measured from the state's coastline, are within the sovereignty of the coastal state. However, this presumption does not extend outside the coastal belt of territorial sea.⁵⁹ The Tribunal also considered Yemen's argument that the entire island chain was subject to the principle of natural or geophysical unity thereby causing the dis-

52. Award, para. 458.

53. *Id.*

54. The Tribunal's consideration of this principle took place in the context of its consideration of the sovereignty of the Mohabbakahs and is set out at para. 471 of the Award.

55. Award, para. 463, quoting D. O'Connell, *The International Law of the Sea* 185 (1982).

56. Award, para. 458.

57. Award, para. 473.

58. *Id.*

59. Award, para. 474.

play of governmental authority on one island to extend to all other islands in the group.⁶⁰ The theory of natural or physical unity was acknowledged by the Tribunal as relevant to extending an established title to a proximate or contiguous area which is part of the same unity.⁶¹ Yemen had argued, for example, title to certain islands, the Mohabbakahs, on the basis of their unity with another group of islands. However, the Tribunal recognized a principle of natural or physical unity but noted that the principle is not an absolute one capable of establishing sovereignty in its own right. Instead the principle can only raise a presumption as to the extent and scope of a title⁶² which must be coupled with other factors such as proximity, contiguity, or continuity in order to found title.⁶³ The comment has been made that the practical effect of the Tribunal's findings has been to greatly strengthen this presumption in the case of uninhabited islands located within a territorial sea.⁶⁴ The Tribunal states that rebuttal requires a "fully established case to the contrary"⁶⁵ which, in the case of uninhabited islands may be very difficult to formulate.⁶⁶ However the strength of the presumption decreases outside the territorial sea.⁶⁷ The Tribunal did not accept the Yemen argument in this case and noted that whilst the principle of natural and physical unity may function to extend the juridical effect of a display of governmental function on one island to some other islands, the principle also causes consideration to be given in this case as to whether the unity being argued in this case originated from the Yemeni or Eritrean coastline.⁶⁸ However, whilst rejecting Yemen's argument as to the use of the principle, the Tribunal then went on to apply the principle of natural or physical unity to include individual islands into a particular sub-group (for example, High Islet into the Mohabbakahs).

4.5.2. *Demonstrations of functions of state and governmental authority*

In addition to appurtenance, the Tribunal also placed substantial reliance upon demonstrations of functions of state and governmental authority (or "effectivités"⁶⁹) when determining the sovereignty of the islands. Having rejected the existence of any historic title, these displays were relied upon as an indicia of

60. Award, para. 463.

61. Discussed by the Tribunal in para. 460 of the Award.

62. Award, para. 461.

63. Consider Award, para. 462.

64. See Reisman, *supra* note 30, at 679.

65. Award, para. 474.

66. See Reisman, *supra* note 30, at 678-679, who also expresses the opinion that it was necessary for the Tribunal to be "highly innovative" and create new law. This was because the classic bases for determining territorial sovereignty were not applicable to the circumstances of this case and the effect of Article 16 of the Treaty of Lausanne was to suspend the usual legal consequences of effectivités as demonstrations of sovereignty.

67. Award, para. 474. Discussed at *id.*

68. Award, para. 463.

69. Award, para. 239.

sovereignty in their own right. The Tribunal noted that the “principles, rules and practices of international law”⁷⁰ regarding territorial sovereignty recognise that possession can be shown to have gradually consolidated into a title through the use, presence or display of state or governmental authority.⁷¹ In this case both parties had argued a ground to sovereignty, being historic title, that did not rely on actual use or possession. However, in order to confirm their respective claims to historic title, both parties’ had additionally introduced evidence of the display of functions of state and governmental authority leading to a consolidation of title and thus anticipated such evidence as a potential basis for determining sovereignty.⁷²

The evidence adduced by each party to establish displays of functions of state and governmental authority was substantial in volume and included, as classified by the Tribunal:⁷³

- 1) assertions of intention to claim the islands including public claims of sovereignty;
- 2) legislative acts regulating activities on the islands;
- 3) activities relating to the waters of the islands including the licensing of activities in the waters off the islands, regulation of fishing and fishing vessel and arrests, licensing of tourist operations, granting of permission to cruise waters or land on islands, publication of notices to mariners or pilotage instructions, search and rescue operations, naval and coast guard patrols, environmental protection;
- 4) activities on the islands including landing parties, establishment of military posts, construction and maintenance of facilities, licensing land activities, exercise of criminal or civil jurisdiction regarding happenings on the islands, construction or maintenance of lighthouses, granting of oil concessions, habitation, inspection tours; and
- 5) other general activities including overflight.

The above evidence included particularly detailed arguments presented by both parties in relation to the history of petroleum agreements and the construction and maintenance of lighthouses.

Each party adduced evidence to establish its own possession and use as well as a denial of sovereignty by the other, for example, where the other party had not protested the use or possession.

Having rejected the existence of any historic title, the Tribunal relied upon displays of functions of state and governmental authority as indicia of sover-

70. Art. 2(2), Arbitration Agreement states that the Tribunal is to decide territorial sovereignty in accordance with the “principles, rules and practices of international law applicable to the matter”.

71. Award, para. 450.

72. *Id.*

73. See Award, paras. 240 *et seq.*

eignty in their own right. However, from the large body of evidence presented, the Tribunal was only able to conclude that a “chequered and frequently changing”⁷⁴ situation had existed in relation to the islands⁷⁵ and that the events and actions relied upon spoke with “an uncertain voice.”⁷⁶ Consequently, the Tribunal decided that only relatively recent history of use and possession was relevant to determining territorial sovereignty in this case. In finally determining sovereignty, the Tribunal therefore limited itself to events and actions which had occurred during the decade preceding the arbitration. Further, the inconclusive nature of the evidence as to state and governmental authority justified the Tribunal’s consideration of other factors such as geographical appurtenance (discussed above).⁷⁷ Thus, whilst the issue of state and governmental authority was an important factor in the Tribunal’s decision-making processes, the issue was only one factor taken into account by the Tribunal.⁷⁸

4.5.3. *Legal history*

Another important factor in the Tribunal’s deliberations, was the effect of the legal history of the Red Sea islands and the parties. In reaching its decision, the Tribunal considered the islands’ legal history both as a factor relevant to determining sovereignty as well as a justification for the formation of sub-groups of islands in relation to each of which the Tribunal considered sovereignty separately. In this case, the Tribunal found it particularly necessary to consider the provisions of the 1923 Treaty of Lausanne by which Turkey divested itself of its territories after World War I.⁷⁹ The Tribunal also gave careful consideration to each party’s evidence on legal history. The legal history cited was expressed through various treaties and other legal instruments, diplomatic statements both by the states themselves as well as other states, each party’s reaction to acts of possession by the other and the attitudes of other states. Of the treaties discussed, the most significant was the 1923 Treaty of Lausanne by which Turkey, following its defeat in World War I, renounced “all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty”⁸⁰ including those territories in the region of the Red Sea islands. Other types of material cited as indicating sovereignty over the islands included

74. Award, para. 456.

75. *Id.*

76. Award, para. 457.

77. *Id.*

78. The comment has been made that, in basing its decision on effectivités, greater explanation by the Tribunal of the relative probative value of the different types of effectivités it considered may have been useful. See Reisman, *supra* note 30, at 673, 680.

79. The Tribunal’s findings as to the interpretation of the effect of the Treaty of Lausanne and particularly Art. 16 of the Treaty are set out in 4.4.1. above.

80. Art. 16 Treaty of Lausanne.

state constitutions, diplomatic memoranda and requests by other states to undertake activities on any of the islands.

In the context of legal history, the award also included a discussion of the principle of *uti possidetis* and the concept of a 'critical date'. Firstly, the Tribunal presumed the principle of *uti possidetis* to underly the Yemeni argument of a presumption that the post-Ottoman Empire boundaries of the states of Eritrea and Yemen should correspond to the boundaries of the "administrative units" constituting that empire.⁸¹ The relevance of the Tribunal's consideration of the universality of the principle's application at the salient periods of legal history (and its finding that the principle was limited to Latin America) has been questioned. The view has been expressed that such considerations are irrelevant with the doctrine to being "inherently retrospective"⁸² while another view considered that a "less strict approach" could have been taken by the Tribunal.⁸³ Further, the case may have presented an unexplored opportunity to explore the current standing of the doctrine.⁸⁴ Nevertheless it is noted that the Tribunal's main grounds for rejecting the *uti possidetis* argument concerned the absence of clear pre-defined boundaries to which to apply the principle and the provisions of the Treaty of Lausanne.⁸⁵

The Tribunal also considered but rejected the usefulness of applying a "critical date" when interpreting the material submitted by each party.⁸⁶ This decision has been criticised for contributing to the decay of the critical date concept.⁸⁷ However it must be noted that the Tribunal's decision was based on the fact that neither party had presented an argument of critical date.⁸⁸

4.6. The Tribunal's findings on the sovereignty of the islands

4.6.1. *The Mohabbakahs*

The first sub-group identified by the Tribunal, the Mohabbakahs, consists of a number of rocky islets. The sub-group was identified on the basis of its shared legal history. It was in relation to this sub-group that the Tribunal particularly considered it should have regard to the geographical factor of appurtenance. Three of the islets are located six to twelve nautical miles of the Eritrean mainland whilst the fourth islet is less than one nautical mile outside the 12-mile limit. The Tribunal therefore unanimously awarded sovereignty of the Mohab-

81. Award, para. 96.

82. Reisman, *supra* note 30, at 681.

83. Marques Antunes, *supra* note 10, at 370.

84. Reisman, *supra* note 30, at 680.

85. See Award, paras. 97–99.

86. Award, para. 95.

87. Reisman, *supra* note 30, at 678.

88. Award, para. 95.

bakahs to Eritrea on the basis of proximity or appurtenance to the Eritrean coast. In relation to High Islet, the Tribunal considered it to have natural and physical unity with the other islets within the group and therefore to also be appurtenant to the Eritrean coast.

4.6.2. *The Haycocks*

The second sub-group, the Haycocks, consist of three small islands which the Tribunal saw as having a distinct, shared legal history deriving from their administration from the African coast during the Ottoman rule. In addition, the Tribunal noted that, in 1930, the Italian Government constructed a lighthouse on one of the islands. The Tribunal also identified as significant British acknowledgement of Italian jurisdiction over the same islands both in relation to the placing of the Italian lighthouse and an earlier lighthouse proposed by the British. Ultimately, however, the Tribunal relied on the islands' geographical proximity to the Eritrean coast to find the islands to be subject to the territorial sovereignty of Eritrea. The Tribunal also noted the Eritrean claim of sovereignty to be supported by displays of governmental authority in the form of petroleum agreements entered into by the Eritrean government in relation to the areas of the Haycocks (and the Mohabbakahs). These agreements were not protested by Yemen. Other petroleum agreements entered by Yemen did not extend as far as the Haycocks.

4.6.3. *The Zuqar-Hanish Group*

The Tribunal found the issue of sovereignty the most difficult in relation to this third sub-group of islands. Due to differences in the recent legal history of certain islands, the Tribunal further divided this sub-group into two smaller groups – the Zuqar group of islands and the Hanish group. As a result, the Tribunal was also prepared to consider a possible division of sovereignty within the group.

Ultimately, the Tribunal based its decision upon evidence as to displays of governmental and state authority. In relation to sovereignty, the appurtenance factor was found to be unhelpful due to the location of the islands mid-way between the parties' respective coastlines.⁸⁹ The island's legal history also provided the Tribunal with no clear indication of sovereignty.⁹⁰ It had been argued that when the Ottoman Empire divided administration of the islands between the African and Arabian coasts, it had not included these islands in its grant of jurisdiction of some of the Red Sea islands to Egypt. This was argued to indicate Yemeni sovereignty. Whilst agreeing that such an event would constitute "an impressive historical precedent, the Tribunal was, however, unable to rely upon

89. Award, para. 486.

90. Award, paras. 487, 491.

this argument due to the lack of evidential certainty and the intervention of the Treaty of Lausanne. Evidence of negotiations between Britain and Yemen in the early 1900s as to the return of certain islands to Yemen was found by the Tribunal to be too uncertain to be capable of being relied upon decisively.⁹¹

The Tribunal therefore turned to instances of governmental and state authority over the particular islands. Because there had been no continuous display of governmental authority and presence, the Tribunal focused its decision on examining recent displays of governmental authority (namely those which had taken place in the decade preceding the Arbitration Agreement) on the basis that both Yemen and Ethiopia had formulated claims to both islands by the late 1980s at the latest.⁹² Particular consideration was given to the parties' arguments of governmental authority regarding lighthouses, naval patrols and petroleum agreements.⁹³ The Tribunal accepted the construction of maintenance of four lighthouses by Yemen prior to 1992 as cogent evidence of a Yemen presence on all of the islands in this subgroup.⁹⁴ In contrast, the evidence presented by both sides as to naval patrols, although on balance favouring Eritrea, was considered ambiguous and of insufficient weight. In particular, it was noted that many of the patrols concerned the high seas with there being little evidence of activity on or near the relevant islands. Yemen's lack of protest against Eritrean patrols was also accorded some significance. As regards the entering of petroleum agreements, those cited were found to not really concern these particular islands and thus were found to do little to resolve the territorial issue.⁹⁵

On balance, the Tribunal was of the opinion that recent events pointed to a clear dominance of Yemeni actions in relation to the island of Zuqar. Yemen had alleged 48 happenings in relation to the subject islands, a significant proportion of which took place in relation to Zuqar. Eritrea, by contrast, was unable to demonstrate significant activity in relation to Zuqar.⁹⁶ The Tribunal therefore saw the island of Zuqar as clearly under the sovereignty of Yemen.⁹⁷ The Tribunal also noted that the happenings cited by Yemen were not limited to the central islands within this group.

In relation to Hanish, the Tribunal found the issue of territorial sovereignty to be less clear. The Eritrean claim established some strong indicators of sovereignty both through displays of governmental authority and public assertions of title by Eritrea. For example, Ethiopia had refused to agree to a Yemeni aerial survey of the surrounding islands in 1973 and had publicly responded with a claim to some of the islands. Ethiopia had also, in 1976, arrested Yemeni fish-

91. Award, para. 488.

92. Award, para. 503.

93. Award, para. 492.

94. *Id.*

95. Award, para. 497.

96. Award, para. 504.

97. *Id.*

ermen on Greater Hanish and answered a subsequent Yemen protest to the Security Council with an assertion of jurisdiction. In 1980 Ethiopia had issued a radio transmitting licence to a Dutch company in relation to a station to be located on Greater Hanish island. However, other factors argued as establishing title were found to be insufficiently established. For example, Eritrea had placed some weight on its assisting in the installation of an oil company's beacons on a number of the islands. However, the Tribunal was of the opinion that the evidence was unclear as to whether the installations actually took place.

Nevertheless, Yemen was found to have established a greater presence and greater displays of authority in relation to the Hanish group of islands. The Tribunal particularly noted Yemen's 'recent'⁹⁸ authorisation, firstly, of an amphibious scientific research expedition to Greater Hanish and, secondly, the establishment of an air landing site on one of the islands by an oil company with the permission of the Yemen government. This evidence was strengthened by the establishment of frequent scheduled flights to the island. The Tribunal also noted the 1995 licensing by Yemen of a Yemen-German joint venture to undertake a tourist resort project. The Zuqar-Hanish group of islands was therefore found to be Yemen territory.⁹⁹

4.6.4. *Northern Islands (including Jabal Al-Tayr and the Zubayr Group of Islands)*

The islands composing this last group are relatively isolated. The Tribunal considered that the geographic location of these islands unified them as a separate group. The islands are not proximate to the coastline of either party (but are slightly closer to islands found to be of Yemeni sovereignty and are well eastward of a median line).

The Tribunal based its determination of sovereignty on an examination of the exercise of functions of state and governmental authority. This issue was not easily resolved due to there being found to be little evidence to indicate actual or persistent activities being undertaken by either party in relation to the islands or the waters surrounding them.¹⁰⁰ As with the Zuqar-Hanish group, the Tribunal focused on very recent activities in making its decision. In particular, three main activities were examined: the construction and maintenance of lighthouses; the entering of petroleum agreements; and the legal history of the islands. Overall these activities were found to favour Yemeni sovereignty with territorial sovereignty being awarded accordingly.

98. Award, para. 334.

99. A view has been expressed that the reasons for vesting sovereignty in Yemen over the smaller islands of the Hanish group are not clear from the Award. It has been forwarded that contiguity of these islands and islets to Hanish and Zuqar together with an absence of contradicting effectivities could be validly argued. See Marques Antunes, *supra* note 10, at 381.

100. Award, para. 523.

First, in relation to lighthouses, the Tribunal saw the events of an international conference in 1989 in London on the management of lighthouses as a crucial indicator of Yemeni sovereignty. Yemen attended the conference as an observer upon the request of the British Government. At the conference Yemen offered to take responsibility for managing and operating certain lighthouses situated on islands within this group. The Tribunal viewed the conference's acceptance of this offer as expressing a confidence and expectation by the member governments of the conference in a continued Yemeni presence on the lighthouse islands at least for the foreseeable future¹⁰¹. In relation to petroleum agreements in the area, the Tribunal was particularly swayed by whether the agreement encompassed any of the islands within the group or their territorial seas. Yemen had entered two petroleum agreements, in 1973 and 1985, which definitely encompassed the Zubayr group of islands. The 1973 agreement also possibly encompassed the territorial sea of Jabal al-Tayr. The 1985 agreement definitely included Jabal al-Tayr's territorial sea and physically brushed the actual island. Neither agreement was protested by Ethiopia (although it was noted that Ethiopia was involved in a civil war at the time of the 1985 agreement). Further, neither Ethiopia nor Eritrea had entered any petroleum agreements that encompassed any islands within the group. After the execution of the Arbitration Agreement, Eritrea had entered one agreement extending in the direction of the islands. The entering of this agreement was protested by Yemen. The tribunal grouped these islands as warranting separate consideration due to their geographic location.

In the view of the Tribunal, the legal history of the islands within this group was mixed and varied to the extent that their sovereignty was still indeterminate as at 1989 as per the situation under the 1923 Treaty of Lausanne. However, by 1995, matters had clarified somewhat and the Tribunal considered that any dispute of Yemen's claim to these islands at that time would not have been admitted to this Tribunal.

Sovereignty was therefore awarded to Yemen in respect of this group of islands. However, the Tribunal recognised the exercise of traditional fishing rights by Eritrean fishermen in and around the group of islands and included a requirement in its award upon Yemen to ensure the perpetuation of the traditional fishing regime as well as free access and enjoyment for both Eritrean and Yemeni fishermen.¹⁰² The Tribunal's competence to make a determination on these fishing rights is not detailed by the Tribunal.¹⁰³ However, it has been suggested that the fishing regime may be viewed as a restriction upon Yemeni sovereignty

101. Award, para. 516.

102. Award, para. 526.

103. Marques Antunes, *supra* note 10, at 383.

and therefore is part of that sovereignty.¹⁰⁴ A declaration concerning the fishing regime is therefore implicit within the Tribunal's sovereignty.¹⁰⁵

5. CONCLUSIONS

With a clear determination of both the scope of the dispute between the parties and the sovereignty of all of the Red Sea islands, the award provided a definite basis for the second stage of the arbitration between the parties, the delimitation of the islands' maritime boundaries, which was determined on 17 December 1999. In clarifying sovereignty the Tribunal traversed a labyrinth of legal concepts and historic evidence including particularly the many facets of the concept of historic title. However, at the end of the day, it was the principle of geographical appurtenance which was found to hold the most sway with secondary resort being made to an examination of very recent displays of Governmental authority and functions of state. Further, the decision arguably adds to the presumptions of sovereignty in situations of appurtenance or proximity particularly in the case of uninhabited islands located within a territorial sea. The decision also touches upon other matters such as the existence, or otherwise of a doctrine of reversion, and the role of the concept of intertemporal law. The result aside, the first stage of this arbitration demonstrated a powerful commitment by both parties to averting an escalation of territorial tensions and the role of arbitration in the peaceful resolution of disputes and the maintenance of peaceful relations between states.

104. *Id.*, at 384.

105. *Id.*