The Government of the State of Eritrea and the Government of the Republic of Yemen Award of the Arbitral Tribunal in the First Stage of the Proceedings

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INTERNATIONAL DECISIONS

EDITED BY BERNARD H. OXMAN

Territorial sovereignty of islands and other maritime features—sovereignty of low tide elevations—presumptions with respect to sovereignty—critical date—treaty interpretation


Award of the Arbitral Tribunal in the First Stage of the Proceedings.
(Territorial Sovereignty and Scope of the Dispute).

The Controversy

In an “Agreement on Principles” of May 21, 1996, Eritrea and Yemen agreed to renounce the use of force against each other and to “settle their dispute on questions of territorial sovereignty and of delimitation of maritime boundaries peacefully.” The Arbitration Agreement of October 3, 1996, implemented a two-stage process contemplated in the Agreement on Principles. In the first stage, the Tribunal was to “decide territorial sovereignty [over the disputed islands in the Red Sea] in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.” In the second stage, the Tribunal was to issue “an award delimiting maritime boundaries... 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 Tribunal was composed of Judges Stephen M. Schwebel and Rosalyn Higgins, appointed by Eritrea, Dr. Ahmed S. El-Kosheri and Mr. Keith Highet, appointed by Yemen, and Sir Robert Y. Jennings, presiding. On October 9, 1998, it rendered the first award on territorial sovereignty over the islands, islets, rocks and low-tide elevations in controversy.

That 142-page text is an extremely thorough and important award. It is also a frustrating document for two reasons. First, because it was apparently written by many hands such that its components and theories are not always internally consistent. And second, the bulk of the award which reviews and discusses the parties’ submissions is dismissive of their evidence, which the Tribunal characterized, in a moment of refreshing candor, as “voluminous in quantity but... sparse in useful content.” (The Tribunal generously speculated that the paucity of hard evidence may have been due to the fact that the disputed islands are “uniformly unattractive, waterless, and habitable only with great difficulty” and during the decades preceding the arbitration the governments of both states

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1 Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Eritrea/Yemen (Oct. 9, 1998), located at (visited Sept. 14, 1999) <http://www.pca-cpa.org/ER-YEAwardTOC.htm> [hereinafter Award].
2 Id., para. 7.
3 Id.
4 Id., para. 239.
5 Id., para. 99.
had been preoccupied by civil wars.\(^6\) The conclusions in Chapter X (paragraphs 440 to 526) move in a direction apparently unintended by the parties and almost stand as an independent award. As the written and oral submissions have not been released and there are no dissenting opinions to provide a window to the cameral deliberations, scholars will not be able to look behind the award to understand how the Tribunal worked with and refashioned the materials the parties submitted.

The parties acknowledged (and the Tribunal accepted) that the Ottoman Empire had title to the islands. (The criteria by which the Osmanlis secured and maintained title are not specified; presumably they were neither by succession nor effective occupation.) Eritrea claimed territorial sovereignty over all the islands by virtue of Italian sovereignty, which, it argued, was acquired by effective occupation sometime after Turkish renunciation. Italian title was transferred to Ethiopia and, upon its accession to independence in 1993, Eritrea succeeded to it. Yemen, for its part, based its claim on “original, historic or traditional Yemeni title,”\(^7\) from the sixth-century. Under this theory, Yemen’s title was recognized during its integration into the Ottoman Empire and “reverted” to Yemen upon the demise of the Ottoman Empire. Eritrea and Yemen also adduced evidence of more recent demonstrations of sovereignty, up to the period immediately preceding the arbitration, including, at the request of the Tribunal, petroleum exploration agreements and activities.

As Eritrea had contended that the scope of the dispute included the northern islands of Jabal al-Tayr and the Zubayr group and Yemen disagreed, Article 2(2) of the Arbitration Agreement requested the Tribunal to resolve this issue. The Tribunal took note of the possible discrepancy between the Agreement on Principles and the Arbitration Agreement (in which case the latter would prevail), but, for this issue, it relied on the final sentence of Article 2(2) of the Arbitration Agreement: “The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.”\(^8\) Reasoning that the parties’ positions as of the time of the Arbitration Agreement “should form the basis for the determination by the Tribunal of the scope of the dispute . . .,”\(^9\) the Tribunal held that all the islands came within the scope of the dispute.\(^10\) This was, one may note, a curiously passive posture with respect to the matter in dispute. The competence assigned to the Tribunal to make the decision was surrendered to the broadest submission of one of the parties, for, in the nature of the situation, the other party will always have to defend against it, if only on a special or conditional basis.

In response to Yemen’s invocation of the doctrine of \textit{uti possidetis}, the Tribunal wavered, doubting the law, but giving some effect to Ottoman allocations of jurisdiction. The factual predicate for the application of \textit{uti possidetis} was a clear sense of where the administrative boundaries of the Ottoman Empire were located, which was the question at bar.\(^11\) Yet while skirting “the question whether this doctrine of \textit{uti possidetis}, at that time thought of as being essentially one applicable to Latin America, could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War,”\(^12\) the Tribunal seemed to apply a type of \textit{uti possidetis} when it found that “even when the whole region was under Ottoman rule it was assumed that the powers of jurisdiction and administration over the islands should be divided between the two opposite coasts.”\(^13\)

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\(^{6}\) Id., para. 92.

\(^{7}\) Id., para. 31.

\(^{8}\) Id., para. 7.

\(^{9}\) Id., para. 88.

\(^{10}\) See id., para. 90.

\(^{11}\) See id., para. 97.

\(^{12}\) Id., para. 99.

\(^{13}\) Id., para. 99. See also id., paras. 126, 142.
The Tribunal was rather defensive with respect to information it had solicited concerning petroleum agreements and explorations undertaken under the auspices of the respective parties. Yemen contended that it was not relevant in the first phase of the arbitration and expressed concern that the information was being used to "prefigur[e] . . . a median line." Yet as a general matter, it stated that it could not "accept the proposition that the international law governing land territory and the international law governing maritime boundaries are not only different but also discrete, and bear no juridical relevance to each other." Still, the Tribunal insisted that there could not be any question of drawing any maritime boundary line based on equitable principles in the arbitration's first stage.

The Tribunal rejected Yemen's argument for a reversion of title on the basis of law and facts. Yemen had not established that the doctrine was part of international law, nor had it persuaded the Tribunal that the historic bitad el Yemen had exercised territorial control over coastal areas and perforce over the islands. In any event, because the Ottoman Empire would have had title to the islands and the Treaty of Lausanne could have validly alienated that title, the chain of title necessary for a reversion would have been interrupted. In a shadowy application of a type of uti possidetis, the Tribunal did take account of the exercise of "jurisdiction" which could constitute "historic fact." The allocation of administrative powers over the Red Sea islands during the Osmanli period was an historic fact that should be given "a certain legal weight.

Sovereign title includes the capacity to alienate. Hence the successor to the Ottoman Empire was able to alienate the islands as it did in the Treaty of Lausanne's Article 16, which provides:

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 recognized by the said Treaty, the future of those territories and islands being settled or to be settled by the parties concerned . . .

In the view of the Tribunal, all the contested islands were covered by Article 16, despite "intermittent acceptance that [some] were under the jurisdiction of Italy" and had "erga omnes effect." As to Yemen's contention that the Lausanne Treaty was res inter alios acta, the Tribunal said:

[1]his special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect erga omnes. If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of res inter alios acta, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of res inter alios acta is without legal import.

Yemen's protests could have no effect on this alienation, as Yemen did not have title.

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14 Id., para. 110.
15 Id., para. 109.
16 Id., para. 112.
17 See id., para. 113.
18 See id., para. 125.
19 Id., para. 126.
20 Id., para. 142.
22 Id., para. 162.
23 Id., para. 153.
24 See id., para. 152.
At the core of the Tribunal's award is a reading of Article 16 of the Lausanne Treaty:

In 1923, Turkey renounced title to those islands over which it had sovereignty until then. They did not become *res nullius*—that is to say, open to acquisitive prescription—by any state, including any of the High Contracting Parties (including Italy). Nor did they automatically revert (insofar as they had ever belonged) to the Imam [Yemen]. Sovereign title over them remained indeterminate *pro tempore.*

In the Tribunal's view, its interpretation was confirmed by the 1927 "Rome Conversations," which produced a signed record and by the 1938 Anglo-Italian Agreement and Protocol, especially Article 4 of Annex III, which had the effect of depriving Italian actions of legal and title-generating force in the contested islands. Arguably, such actions would have otherwise signified or constituted effective occupation.

This negative analysis of Article 16 does not answer the question of who is the territorial sovereign of the contested islands, but rather who was not the territorial sovereign and therefore who could not pass title to a putative successor. The analysis is also oddly incomplete. The Tribunal does not explain when and why Article 16's suspensive force ceased, such that the Tribunal and the two parties before it could determine sovereignty only by reference to alleged *effectivités* of Eritrea and Yemen and without the participation of all the "parties concerned." This class included states whose ships traverse the Red Sea and parties to the Lighthouse Convention, and also could include France, the United Kingdom, Ethiopia, Russia, Israel and the United States. Moreover, if the class, "parties concerned," is this large, the relevance of many of the bilateral judicial and arbitral precedents is called into question.

The Tribunal concluded that Italy could not make a claim that it had title to the contested islands. In this regard, it is curious that the Tribunal interprets Article 23 of the 1947 Peace Treaty with Italy as not merely relinquishing its rights to participate as a "concerned party" in the disposition of the islands under Article 16 of the Treaty of Lausanne, but also as a renunciation of claims Italy might have made with respect to the islands themselves. If Turkey had tile until 1923, whereupon Article 16 deprived Italian *effectivités* of legal effect, what substantive Italian title was being renounced? In the view of the Tribunal, the indeterminate status of the islands was further confirmed by a 1949 UN Working Paper in connection with the preparation of the draft Eritrean Constitution.

With respect to important lighthouses on some of the contested islands, the Tribunal held that "[b]y the outbreak of the Second World War it may be said that the maintenance of the lights is seen as a non-sovereign act and there is agreement that the underlying title to the islands concerned was left in abeyance." In this regard, various Ethiopian activities were immaterial as to sovereignty. Yet because "by the early 1970s Yemen was regarded [by the British Government] as the leading 'party concerned' for purposes of Article 16 of the Treaty of Lausanne, at least so far as Abu Ali and Jabal al-Tayr were concerned," the fact

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*Id., para. 165.*  
*See id., paras. 169–74.*  
*See id., para. 181.*  
*See id., para. 178.*  
*See id., para. 186.*  
*See id., para. 195.*  
*See id., para. 196.*  
*Id., para. 197.*  
*See id., paras. 200–38.*  
*Id., para. 221.*  
*See id., para. 227.*  
*Id., para. 229.*
that Yemen relit the lighthouse in 1987 was an act not "without significance by virtue of Article 16 of the Treaty of Lausanne." As a legal matter:

the erection and maintenance of lights, outside of any treaty arrangements and for the indefinite future, had certain implications. The acceptance of Yemen's offer did not constitute recognition of Yemen sovereignty over islands. But it did accept the reality that Yemen was best placed, and was willing, to take on the role of providing and managing lights in that part of the Red Sea; and that when the time came finally to determine the status of those islands Yemen would certainly be a "party concerned."

Despite the fact that the Tribunal's theory was based on a reading of Article 16 that deprived manifestations of sovereignty of acquisitive force, almost one-third of its opinion assesses the quality of the parties' factual evidence of alleged "effectivités." The Tribunal found that legislative and constitutional acts by both parties lacked specific reference to the islands by name. Similarly, the Tribunal found that "the activities of the Parties in relation to the regulation of fishing allows no clear legal conclusion to be drawn." With respect to activities relating to the water, the Tribunal did not find that Ethiopian naval patrols were directed at fishing regulation, but concluded that "there was somewhat greater Yemeni activity than Ethiopian/Eritrean activity in the granting of permission relating to the Islands in the period stated." Eritrea produced no evidence of publication, by itself or by Ethiopia, of general information concerning pilotage or maritime safety. In contrast, Yemen published six such notices between 1987 and 1991. The Tribunal stated that the notices, "while not dispositive of the title, nevertheless suppose a presence and knowledge of location." While the Tribunal seemed to discount the significance of lighthouse maintenance in these circumstances, it took note of the emplacement of markers. The Tribunal declined to infer manifestations of sovereignty from search and rescue operations because they are a generalized duty incumbent on any person or vessel under the law of the sea.

The Tribunal only found sparse and inconsistent evidence of the maintenance of naval and Coast Guard patrols in the waters around the islands on behalf of both parties. But from 1983 through 1991, it found "widespread surveillance and military reconnaissance activities in the waters around the islands" by the Ethiopian Navy. During this same period, Yemen conducted very few similar activities in the area and did not protest the Ethiopian presence. No permanent garrison or military post was established on the islands until after the dispute's outbreak in 1995.

The Tribunal did not ascribe legal significance to private fishing activities without evidence of state licensing and enforcement. State activity was the critical factor. Similarly, the maintenance of shrines and holy places was not deemed critical evidence,
unless it was a governmental activity. But intentions with respect to governmental investment activity were, apparently, allowed some probative weight. Curiously, the Tribunal did not view the regulation of electronic equipment on the islands in the course of military activities as an exercise of sovereign authority, but appeared to allow more weight to a recent scientific expedition authorized by Yemen. Overflights of uninhabited islands were not evidence of effectiveness.

The parties had differed on the probative value of the many maps that were adduced. In general, Eritrea contended that the map evidence was contradictory and unreliable, while Yemen argued that it was important evidence of general opinion, of the attitudes of the parties and of acquiescence. The Tribunal held that Yemeni map evidence was "superior in scope and volume," but apparently not decisive. It concluded its discussion with the rather Delphic observation that, "[t]he evidence is, as in all cases of maps, to be handled with great delicacy."

As mentioned, after the Tribunal had closed the oral proceedings, it asked for written observations on petroleum exploration and exploitation activities. The Tribunal reconvened almost six months later for three days of oral argument on the matter. While the Tribunal concluded that the offshore petroleum contracts entered into by the parties failed to establish, or significantly strengthen, either of their claims to sovereignty over the islands, "[t]hose contracts however lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the parties." Nevertheless, the implementation of the petroleum contracts involved state activities to which the Tribunal did allow legal significance.

The Tribunal’s Conclusions

In drawing its conclusions, the Tribunal held that neither party was able to establish historic title to the islands, islets and rocks and that the relatively recent history of use and possession would prove decisive. Yet, applying the test of "continuous and peaceful display of the functions of State within a given region," as established in Island of Palmas, or even accepting a test of "very little in the way of actual exercise of sovereign rights," the Tribunal was not certain that either party had demonstrated title.

The Tribunal apparently avoided an award of non liquet by reaching for criteria that the Arbitration Agreement had not authorized:

In these circumstances where for all the reasons just described the activities relied upon by the parties, though many, sometimes speak with an uncertain voice, it is surely right
for the Tribunal to consider whether there are in the instant case other factors which might help to resolve some of these uncertainties.69

The Tribunal acknowledged that its departure was quite radical:

[I]n order to make decisions on territorial sovereignty, the Tribunal has hardly surprisingly found no alternative but to depart from the terms in which both Parties have pleaded their cases, namely by each of them presenting a claim to every one of the islands involved in the case. The legal history simply does not support either such claim. . . . The Tribunal has accordingly had to reach a conclusion which neither Party was willing to contemplate, namely that the islands might have to be divided; not indeed by the Tribunal but by the weight of the evidence and argument presented by the Parties, which does not fall evenly over the whole of the islands but leads to different results for certain sub-groups and for certain islands.70

Indeed, the departure from the compromis was even further than the preceding quotation suggests. The assignment of what the Tribunal styled the various “sub-units” of islands was actually effected simply by a presumption of proximity.71 Thus the Mohabbakah Islands were assigned to Eritrea because:

[i]t is sufficient for the Tribunal to note that all the Mohabbakahs, other than the High Islet, lie within twelve miles of the Eritrean coast. Whatever the history, in the absence of any clear title to them being shown by Yemen, the Mohabbakahs must for that reason today be regarded as Eritrean.72

High Islet, slightly more than 12 nautical miles from the territorial sea baseline, was included in this assignment for the rather tautological reason that it was part of the same group “sharing the same legal destiny.”73 But the effort by Eritrea to “leapfrog” seaward to include other islands beyond the 12-mile territorial sea was blocked by the Tribunal, because the more seaward islands do not benefit from the same neo-presumption of propinquity:

There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state, unless there is a fully-established case to the contrary (as, for example, in the case of the Channel Islands). But there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue.74

Yet the Tribunal awarded the three small Haycock Islands which lie beyond Eritrea’s territorial sea to Eritrea because:

the geographical arguments of proximity to the Eritrean coast remain persuasive and accord with the general opinion that islands off a coast will belong to the coastal state, unless another, superior title can be established. Yemen has failed, in this case, to establish any such superior claim.75

A party seeking to defeat the presumption of proximity is, apparently, obliged to submit “a fully-established case to the contrary,”76 while all that is needed to defeat the proximity argument beyond the territorial sea is another relatively “superior title.”77 Not only could Yemen not marshal a superior claim to overcome proximity, but, in fact, Eritrea’s petroleum activity extended to the Haycock Islands while Yemen’s did not. Further, Eritrean activity was, for the most part, not protested by Yemen.

69 Id., para. 457.
70 Id., para. 466.
71 See id., paras. 460–65.
72 Id., para. 472.
73 Id., para. 475.
74 Id., para. 474.
75 Id., para. 480.
76 Id., para. 474.
77 Id., para. 480.
The South West Rocks were also awarded to Eritrea, ostensibly because they "were, at various times, considered to form the easternmost limit of African-coast jurisdiction" and because of Italian "assertions of jurisdiction over all of the proposed sites." Curiously, the Tribunal did not inquire as to whether the rocks in question were susceptible to appropriation, nor did it explain why assertions of jurisdiction that could not trump Article 16 in any other areas should suddenly acquire a decisive legal valence, or why \textit{uti possidetis}, whose legal applicability was not accepted, should have legal effect here.

The propinquity presumption or "appurtenance factor" could not avail the Tribunal with respect to the Hanish Islands and Zuqar, which are in the center of the Red Sea and would be divided by a coastal median line. In the Tribunal's opinion, neither party could make an historical claim to these islands. Hence "the Tribunal has looked at events in the last decade or so before the Agreement of Arbitration for additional materials and factors which might complete the picture of both Parties' cases and enable the Tribunal to make a firm decision about these two islands and their satellite rocks and islets." These additional materials and factors included the construction and maintenance of lighthouses, which, though generally regarded as "neutral for the purpose of the acquisition of territorial sovereignty, . . . are cogent evidence of some form of Yemen presence in all these islands." As for naval patrols, the Tribunal found much that was ambiguous and unexplained on both sides, such that there was "no compelling case here for either Party." Nor did the petroleum agreements concluded by each state provide conclusive evidence of title, as they seemed to ignore the islands, which were—given their geological nature—of little interest to the oil companies. Thus, the Tribunal was faced with the quandary of deciding when its record was based on evidence insufficient to sustain either side's claims:

As neither Party has in the opinion of the Tribunal made a convincing case to these islands on the basis of an ancient title in the case of Yemen, or, of a succession title in the case of Eritrea, the Tribunal's decision on sovereignty must be based to an important extent upon what seems to have been the position in Zuqar and Hanish and their adjoining islets and rocks in the last decade or so leading up to the present arbitration. Anything approaching what might be called a settlement, or the continuous display of governmental authority and presence, of the kind found in some of the classical cases even for inhospitable territory, is hardly to be expected.

Hence the Tribunal looked to effectivités. Yemen had submitted some forty-eight alleged Yemeni "happenings or incidents in respect of 'the islands,' between 1989 and mid-1991." On the basis of this list, the Tribunal held that the island of Zuqar was under the sovereignty of Yemen. Unfortunately, the Tribunal does not specify what those incidents were, nor how they compared with whatever "happenings or incidents" Eritrea may have adduced, so the student of the award is unable to appraise the Tribunal's judgment in this regard.

With respect to Hanish, the Tribunal acknowledged that Eritrea's claim was well-established and that the island was "of great importance to that very newly-independent country." But it concluded that Yemen had more to show by way of presence and display of authority, an assessment that was fortified by "the evidence that these islands fell under..."
the jurisdiction of the Arabian coast during the Ottoman Empire, and that there was later a persistent expectation reflected in the British Foreign Office ... that these islands would ultimately return to Arab rule."\(^8\)

With respect to Jabal al-Tayr and the Zubayr group, the Tribunal noted the sparseness of evidence adduced by each side, as well as the islands’ proximity to the Yemeni coastal islands and their location well eastward of a coastal median line. While the Tribunal indicated ambivalence with respect to the sovereignty consequences of maintaining a lighthouse, it found that Yemen's actions in this regard and the response of international maritime users was a factor of some significance, as “[r]epute is also an important ingredient for the consolidation of title.”\(^9\) Hence, these islands were subject to the territorial sovereignty of Yemen.\(^9\) The Tribunal concluded its award by admonishing the parties to exercise their sovereignty in ways compatible with the traditional fishing regime in the region.\(^9\)

APPRAISAL

It would be impossible, in the space allowed a case note, to comment on all the Tribunal's innovations and initiatives in the award at the first stage of these proceedings. The following comments focus on the more striking features.

Jurisdictional Innovations

Consent of Concerned Parties: The Tribunal's construction of Article 16 of the Lausanne Convention is the basis for the rejection of Eritrea's central argument. But if that provision suspended resolution of the question of sovereignty disputes over the islands, such that Italian actions did not constitute effectivité, when did Article 16 become caducus? If Article 16 is still in force, then the concurrence of all concerned parties (whoever they may be) is required for the settlement of the issue of sovereignty over the Red Sea islands or, alternatively, is required for the submission of the question to a third party. However, the parties to the Lausanne Treaty did not concur in the compromis, and it is not certain that all other concerned parties were consulted or even notified. Thus, the Tribunal's construction of Article 16 raises questions about the integrity of the Tribunal's own jurisdiction. This problem might have been obviated if the parties had elected to place the dispute before the International Court of Justice (ICJ), which has limited competence to deal with the procedural challenge of essential third parties.

Arbitral Review: The selection of two sitting judges of the ICJ also has jurisdictional implications. If the validity of the award were challenged in the first or second stage, it would be reasonable to assume that the ICJ would be called upon to resolve the claims of nullity, as occurred in *Guinea-Bissau v. Senegal*.\(^3\) But two of the judges, as quondam arbitrators in the case, would have to recuse themselves as did Judge Bedjaoui in the aforementioned case. These costs suggest that the utility and propriety of ICJ judges sitting as arbitrators in public international disputes should be reconsidered.\(^4\)

Procedural Innovations

Sequencing of Issues: For reasons that are not known, the parties elected to conduct the arbitration in two separate phases: territorial sovereignty and maritime boundaries. Yemen

\(^8\) Id., para. 508.
\(^9\) Id., para. 516.
\(^9\) See id., para. 524.
\(^9\) See id., para. 526.
seemed particularly anxious to insulate each stage from the other and was concerned that
the shadow of the second stage might fall on the first. In a late phase of the procedure,
Yemen expressed concern “that the Tribunal might be tempted to ‘prefigure’ (a nicely
chosen expression) an eventual stage two maritime solution as an element of its thinking
about stage one.” The Tribunal allowed that “there can be no question of even
‘prefiguring,’ much less drawing, any maritime boundary line, whether median or indeed
a line based on equitable principles, in this first stage of the arbitration.” Yet it stated that
it was unable “to accept the proposition that the international law governing land territory
and the international law governing maritime boundaries are not only different but also
discrete, and bear no juridical relevance to each other.” In fact, the islands on either side
of the median line were essentially awarded to the proximate littoral state.

Deciding as to Scope: As noted, the Tribunal determined the scope of the dispute by
referring to the positions of the parties. When parties cannot agree on scope, the option
of referring the matter to a tribunal facilitates the arbitration agreement’s conclusion. When
a tribunal decides scope, as it must in its final award, the party that pressed for the narrower
scope has no choice but to develop a defensive argument against its adversary’s broader
claims, lest it find at the end that it has lost on the scope issue and effectively defaulted on
some of the broader arguments. If the tribunal, instead of making an explicit decision,
simply refers to the pleadings, the party that had pressed for the broader scope will always
prevail. The long-term consequence may be that disagreements about scope will prevent
controversies from being submitted to tribunals, making it more difficult to conclude an
arbitration agreement. Arbitrators, especially in early phases, often prefer to present
interlocutory decisions as if they were the result of party agreement. In the present case, the
Tribunal appeared quite pleased to present its scope decision as one in which Eritrea
prevailed. The formula it used to couch its decision may not facilitate future agreements on
compromises.

Hydrocarbon Location in Territorial and Maritime Boundary Disputes: After closure of oral
argument in the ill-fated Guinea-Bissau/Senegal maritime boundary arbitration, the
Tribunal asked the parties to submit all the information at their disposal on the location of
hydrocarbon deposits in the contested area. Because “equitable principles,” the term that
designates the modern law of maritime boundary delimitation, has moved increasingly to
objective geographic, rather than more subjective equitable factors, the belated request for
this information was puzzling. In Eritrea/Yemen, too, a request for “the existence of
agreements for petroleum exploration and exploitation” was made late in the proceeding
and was followed by a short oral hearing dedicated only to this issue. In the award, the
Tribunal explained that it sought the information because some of the petroleum
agreements, especially those made by Yemen, “appeared to be drawn to extend to some sort
of coastal median line.” The relevance of this request for determining sovereignty over
contested islands is not immediately apparent.

Critical Date: The Tribunal’s award contributes to the decay of the doctrine of critical date.
According to the award, neither party had argued “critical date” in the sense, to quote Lord
McNair, of “a date after which the Court should not admit evidence of the activities of the

95 Award, supra note 1, para. 108.
96 Id., para. 113.
97 Id., para. 112.
98 See id., paras. 88–90.
99 Guinea Bissau v. Senegal, supra note 93.
100 Affaire de la délimitation de la frontière entre la Guinée-Bissau et le Senegal, 20 R.I.A.A. 121, 128, para. 17
(July 31, 1989).
101 Award, supra note 1, para. 10.
102 See id., para. 11.
103 Id., para. 110.
The Tribunal decided to allow all submitted evidence, ostensibly based on McNair’s award. A rigorous application of the doctrine as expressed by Judge Huber could well have precluded decision because the Tribunal was obliged, given the paucity of credible historical evidence, to rely on recent events, many of which occurred after the title to the disputed territories was in conflict. The Tribunal relied on the fact that the parties had not invoked the critical date theory and that Lord McNair in the Argentine-Chile Frontier case had admitted all the evidence submitted to it “irrespective of the date of the acts to which such evidence relates.” In fact, Lord McNair articulated a multi-referential doctrine of critical date because “the critical date is not necessarily the same for all purposes.”

Judge Huber’s notion of the critical date in the Island of Palmas case was based on a sound policy—a cut-off date for the admissibility of evidence precludes any incentive to “create” facts which are thereupon adduced in support of a title claim. Unfortunately, the doctrine underwent a rigid scholasticization at the hands of Sir Gerald Fitzmaurice in the course of his pleading in Minquiers and Ecrehos, which has made subsequent tribunals reluctant to use it. But the policy that underpins the doctrine is sound; its erosion will hardly contribute to the international policy of minimization of conflicts. While the position the Tribunal took in this case is quite understandable, it is to be regretted that language which might have distinguished the general applicability of the doctrine from the facts of the instant case was not crafted.

**Substantive Innovations**

**Avoiding Non Liquet by Innovative Presumptions:** The Tribunal was faced with an extraordinarily difficult task in the first phase of this case. International law has classically determined disputes about territorial sovereignty either by succession to title or by effective occupation. The essential principles were authoritatively expressed in 1928 by Max Huber in the Island of Palmas case:

> Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory . . . a jus in re once lawfully acquired shall prevail over de facto possession however well established . . . .

These apparently simple principles could not be easily applied to the instant case. In the Tribunal’s view, the links of succession were severed by operation of Article 16 of the Lausanne Convention. A group of major powers had secured by that article Turkey’s renunciation of title but the Convention parties had agreed to maintain the indeterminate status of the islands by suspending the operation of the normal legal consequences of whatever effectivités might have transpired. In the Tribunal’s view, this treaty was not only law-making and binding erga omnes, but virtually “constitutional,” because inconsistent action could not force an amendment since it would have no legal significance. Therefore, the Tribunal was forced into the anomalous position of having to treat effective acts, such as

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104 Argentine-Chile Frontier Case, 16 R.I.A.A. 109, 111, 166 (1966) (McNair, Kirwan & Papworth arbs.).
105 See award, supra note 1, para. 95.
106 Supra note 104.
108 Id.
109 Supra note 66.
111 Island of Palmas, supra note 66, at 839–40.
Italy's, not as demonstrations of sovereignty or its consolidation, but as exercises of "jurisdiction." In essence, "effective acts" were not to be treated as effective acts. As for the parties to the arbitration, neither was apparently able to adduce evidence that would establish title by effective occupation, even when the Tribunal took notice of the uninhabitability of the islands and reduced the level of required effective presence to the virtual vanishing point. Yet, the Arbitration Agreement, unlike its counterparts in the Island of Palmas case and Minquiers and Ecrehos cases, did not empower the Tribunal to award territory to the litigant who demonstrated a marginally better claim. Short of issuing a *non liquet*, the Tribunal had to create some new law, if it wished to issue an award.¹²

The technique it used—the establishment of presumptions of different degrees of rebuttability—has long been employed by common law courts when they wish to create new law, yet to conceal the innovation, as if it were, in Sir Henry Maine's memorable phrase, "being gradually secreted in the interstices of procedure."¹³ However packaged, this award contains highly innovative prescriptions with regard to territorial acquisition.

First, the Tribunal prescribed a strong presumption in favor of a state's sovereignty over maritime formations in its territorial sea by virtue of propinquity alone. That presumption, *qua* presumption, is not new. But, as crafted by the Tribunal, it is now virtually a *presumptio juris et de jure*, for it can be defeated only if there is a "fully-established case to the contrary."¹⁴ That is virtually impossible to establish with respect to uninhabited islands. In the Tribunal's view, the compelling force of that presumption diminishes the further one moves from the coast. With respect to islands that are closer to one state than another but are outside the territorial sea, a presumption in favor of the most proximate coastal state's title operates, but it can be defeated by a relatively stronger claim of another state ("another, superior title"),¹⁵ a considerably less demanding test than a "fully established case to the contrary."¹⁶

Reducing the Effective Occupation Requirement: The Tribunal also distinguished prior authoritative holdings with respect to uninhabited territory. The Island of Palmas,¹⁷ Clipperton Island,¹⁸ and Eastern Greenland¹⁹ cases established a contextually appropriate level of effective occupation, based on criteria of relative accessibility and habitability. Because Clipperton Island, in particular, was far from major maritime routes and was virtually uninhabitable, the standard was set close to the vanishing point. In the instant case, the Tribunal believed that there was so little evidence of actual or persistent activities on the islands by each side and their putative predecessors-in-title that the Tribunal ultimately had to render a decision on a different criterion than that contemplated in the Arbitration Agreement. Title would not have been established by either Eritrea or Yemen under the criteria of Palmas and Clipperton, because the Red Sea islands, though arguably uninhabitable (a concept which is essentially relative and subjective), were at the very center of major navigation routes. Indeed, with a ship passing every twelve hours *en route* to or from the Suez Canal during the decade of greatest Italian activity, Italian construction on the islands would not only have been known, it would have been notorious. Thus the inaccessibility factor used in the Clipperton Island case would have been reduced and the requisite level of manifestation of sovereignty increased.

¹² It is interesting to note that neither party claimed that this unconcealed departure from the terms of the submission constituted an excess of jurisdiction.

¹³ *SIR HENRY MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1891).

¹⁴ *Id.*, para. 474.

¹⁵ *Id.*, para. 480.

¹⁶ *Id.*, para. 474.

¹⁷ *Island of Palmas, supra* note 66.

¹⁸ Sovereignty over Clipperton Island (France v. Mexico) Award, Jan. 28, 1931, 26 AJIL 390 (1932).

¹⁹ Legal Status of Eastern Greenland (Denmark v. Norway) PCJ (ser. A/B) No. 53, at 22 (Apr. 5).
Territorializing Low-tide Elevations: The Tribunal, in its dispositif, assigned to the territorial sovereignty of Eritrea "the islands, islet [sic], rocks, and low-tide elevations forming the Haycock Islands,"120 and assigned to Yemen "the islands, islet [sic], rocks, and low-tide elevations of the Zuqar-Hanish group,"121 and to Yemen "the island of Jabal al-Tayr, and the islands, islets, rocks and low-tide elevations forming the Zubayr group."122 While the assignment of the Mohabbakah Islands' low-tide elevations to Eritrea is consistent with lex lata, in that they fall within the 12-nautical-mile territorial sea, the low-tide elevations in the other three assignments are all beyond the territorial sea. This may be the first instance in which an authoritative decision has characterized low-tide elevations beyond the territorial sea as territory, in effect assimilating them to islands. Yet, there is no discussion of the matter in the award.

Given the cumulative depth of experience of the members of the Tribunal, one assumes that the holding's implications were not missed by its architects. This commentator would assume that the intention was that formations in the territorial sea and the Exclusive Economic Zone (EEZ) should pertain, presumptively, to the proximate coastal state, subject to a better claim of another state. The policy that may underpin this holding, akin to Lord Asquith's speculation de lege ferenda in Abu Dhabi, about the preferred regime for the continental shelf, is that these low-tide elevations should be subject to the jurisdiction and control of some state and that it will, on balance, be less mischievous if that state is the one in whose EEZ the particular formation is found. If these formations are to be endowed with their own EEZ and continental shelf, however, they could have a significant effect on maritime boundary delimitation, especially vers le large, unless Article 121(3) of the Law of the Sea Convention is applied strictly.124 As mentioned earlier, the Tribunal rejected the technique of "leapfrogging," thus restraining some national lunges for jurisdiction over the ocean.

The Relative Value of Effectivités: The Tribunal catalogues many different forms of effectivities and indicates the circumstances under which they may be probative of title. However, no comparative appraisals of the relative value of different forms of effectivities are vouchsafed. Thus, there is no way of reconstructing the actual reasons for the decision. In this respect, this award bears some similarity to the Clipperton Island cases,125 in which the formal reasons and facts do not always parse in the dispositif. Are we encountering here, as in some other areas of the law, decisions that are made according to an "operational code," whose policies and provisions are not reflected in the express language of the decision?127

Uti Possidetis: If the Tribunal was extremely precise in its historical and legal-historical narratives, it seemed quite uncomfortable, and even maladroit, in handling the major doctrines in this genre. For example, the incipient globalization of Latin America's doctrine of uti possidetis, which has been thoughtfully critiqued in this Journal,128 suffers a rather odd treatment in the award. The Tribunal questioned whether the doctrine could properly be used "to interpret a juridical question arising in the Middle East shortly after the close of the

120 Id., para. 527(ii) (emphasis added).
121 Id., para. 527(iv).
122 Id., para. 527(v).
125 Sovereignty Over Clipperton Island (Mex. v. Fr.), 2 R.I.A.A. 1105 (1931).
126 Eastern Greenland, supra note 67.
First World War.\textsuperscript{19} Whatever one's views of the general utility of \textit{uti possidetis} as a doctrine giving preference to one type of evidence while raising barriers to adducing another, the doctrine is inherently retrospective. The question of whether it existed at the time a particular territorial regime was established in Africa or the Arabian peninsula is not relevant to its current application. The critical question, which the Tribunal appeared reluctant to address, is whether the policies \textit{uti possidetis} expressed currently enjoy regional or general international support, and if not, whether they should.

Decolonization and Territorial Stability: A similar diffidence is found in the discussion of "reversion." Yemen's claim with respect to reversion, though central to its position and presumably argued at length, is presented summarily: Yemen's "ancient title predated the several occupations by the Ottoman Empire . . . and reverted to modern Yemen after the collapse of the Ottoman Empire at the end of the First World War."\textsuperscript{20} It is not an implausible legal argument. A corollary of decolonization, one of the major political events in the post-war period, is that the territorial rights of the victim of colonization that existed at the moment of colonization "revert" or "spring back," as it were, at the moment of decolonization. It would have been a relatively simple doctrine to apply in Western Sahara,\textsuperscript{13} but, like any retroactive legal doctrine, it also contains the potential for great mischief. Reversion may displace acquired rights established \textit{jure gentium} in the colonial interim, and increase the grave potential for likely disruption and aggravation of conflict which accompanies the termination of any relationship or regime.\textsuperscript{132} Yet simply ignoring it may drain an act of decolonization of political meaning. On the facts, the Tribunal found that Yemen failed to establish that it had territorial sovereignty over the islands prior to Ottoman occupation. On the law, the Tribunal remarked laconically that "it has not been established in these proceedings to the satisfaction of the Tribunal that the doctrine of reversion is part of international law."\textsuperscript{133} Perhaps one can discern, in those few words, a cautious and conservative approach to decolonization's effect on the stability of territorial sovereignty in international law.

The Persistence of Eurocentrism: In an obiter, the Tribunal criticized the Eurocentric approach to title acquisition manifested by implication in Western Sahara. Ultimately the Tribunal fell into some of the same confusions that plagued the ICJ in that Opinion. The Tribunal stated:

There can be no doubt that the concept of historic title has special resonance in situations that may exist even in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area. A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters.\textsuperscript{134}

Nomads, by definition, move continuously through an ecology that is unable to sustain permanent habitation. The critical political factor therefore becomes perforce the link between ruler and subjects, rather than ruler and territory. The Tribunal was generous in finding international servitudes\textsuperscript{135} and in insisting on the protection of traditional fishing rights,\textsuperscript{136} yet it persisted in demanding the extension of "socio-political power over the geographic area" to secure title.

\textsuperscript{19} Award, \textit{supra} note 1, para. 99.
\textsuperscript{20} Id., para. 116.
\textsuperscript{132} Id., para. 123.
\textsuperscript{133} Id., para. 126.
\textsuperscript{134} Id., para. 526.
There is no cogent reason for not applying a more sensitive socio-ecological test to "uninhabited islands which are not claimed to be falling within the limits of historic waters." If islands, like arid land-based areas, cannot support permanent habitation, but can support seasonal inhabitants who owe political fealty to a ruler, that should constitute an effectivité as surely as would periodic visits by nomads to an oasis where they water by customary right, indeed, as would the infrequent visits by a French ship to Clipperton Island.

The award compounds this confusion some two hundred paragraphs later when it states:

[I]t is not clear from the evidence, in spite of occasional references to "families" staying on the Islands, whether any family life is in fact present on the Islands. Inasmuch as the use of the islands is necessarily seasonal, this would seem to be a priori inconsistent with family life in the sense of family units migrating to a location where normal community activities continue, as for example with nomadic herdsmen. Should not seasonal and ecologically-dictated movement of people to waterless islands, have the same title-generative potential that it would have in arid and semi-arid mainland areas? In this regard, international jurisprudence remains captive to deeply held political-cultural notions, unable to recognize and give due effect to forms of political organization that have evolved in ecologies different from those of Europe.

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European Convention on Human Rights—right to free elections applicable to European Parliament elections—states' responsibility for human rights violations within the supra-national organization framework

DENISE MATTHEWS v. THE UNITED KINGDOM, Application No. 24833/94.
European Court of Human Rights, February 18, 1999.

The case originated in a complaint to the European Commission on Human Rights (the "Commission") brought by a British citizen residing in Gibraltar. It concerned her exclusion from participating in the 1994 elections to the European Parliament (the "Parliament" or "EP"). She invoked Article 3 of the First Additional Protocol to the European Convention on Human Rights (the "Protocol"), which guarantees individuals the right to free and regular legislative elections. The European Court of Human Rights (the "Court") judgment held that this provision may apply to elections to supra-national representative bodies. It also found that the United Kingdom must ensure that its obligation under the framework of the European Community did not violate the European Convention on Human Rights (the "Convention").

Gibraltar is a dependent territory; the United Kingdom is responsible for its international relations. Its legislature is empowered only to make law concerning clearly defined domestic matters. For all other matters, the British Parliament is competent. In addition, the British Parliament holds the ultimate power to legislate for Gibraltar. By virtue of a February 25,