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GOVERNMENT OF THE STATE OF ERITREA AND GOVERNMENT OF THE REPUBLIC OF YEMEN (PHASE ONE: TERRITORIAL SOVEREIGNTY AND SCOPE OF THE DISPUTE)[1]

Arbitration Tribunal. 9 *October* 1998

(Sir Robert Jennings, *President*; Judge Schwebel, Dr El-Kosheri, Mr Highet and Judge Higgins, *Members*)[2]

SUMMARY:[3] *The facts:*—The State of Eritrea ("Eritrea") and the Republic of Yemen ("Yemen") were in dispute regarding sovereignty over islands in the Red Sea between their respective coastlines and the delimitation of the maritime boundary between the two States. Following hostilities in 1995, Eritrea and Yemen concluded an Agreement on Principles on 21 May 1996, by which they agreed to renounce force against each other and undertook to "settle their dispute on questions of territorial sovereignty and maritime boundaries peacefully". To that end, they agreed to conclude an agreement on arbitration establishing an arbitration tribunal. The Agreement on Principles provided that:

> . . . concerning questions of territorial sovereignty, the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.

[1] The State of Eritrea was represented by HE Mr Haile Weldensae, Agent, and Professor Lea Brilmayer and Mr Gary Born, Co-Agents. The Republic of Yemen was represented by HE Dr Abdulkarim Al-Eryani, Agent, HE Mr Abdullah Ahmad Ghanim, Mr Hussein Al-Hubaishi, Mr Abdulwahid Al-Zandani and Mr Rodman Bundy, Co-Agents, Professor Ian Brownlie, QC, as counsel.

The map of the Award can be found at pp. 140-1.

[2] For details of the appointment of the President and Members of the Tribunal, see paragraph 4 of the Award. The Tribunal was established *ad hoc* under the terms of the Arbitration Agreement of 3 October 1996 between the two States. The Registrar was Mr P. J. H. Jonkman, Secretary-General of the Permanent Court of Arbitration. The arbitration was held in London but the location of the Tribunal's registry was the International Bureau of the Permanent Court of Arbitration in the Hague.

[3] Prepared by Professor Christopher Greenwood.

Eritrea and Yemen did not agree on which islands were the subject of the dispute. The Agreement on Principles therefore provided that the arbitration tribunal which was to be created should first determine the scope of the dispute and then, in a second phase of the arbitration proceedings, deal with both the dispute over territorial sovereignty and the dispute regarding maritime delimitation.

The Arbitration Agreement was concluded on 3 October 1996 and provided for the creation of a five-member Tribunal, consisting of two arbitrators nominated by each Party and a President appointed by the four arbitrators on the recommendation of the two Parties. Article 2 of the Arbitration Agreement provided that the Tribunal was to "provide rulings in accordance with international law" in two stages; the first stage concerning the dispute regarding territorial sovereignty and the scope of the dispute, the second regarding the delimitation of the maritime boundaries between the Parties.[4] Article 2(2) of the Arbitration Agreement provided that the Tribunal should decide "on the definition of the scope of the dispute on the basis of the respective positions of the two Parties".

Eritrea maintained that the scope of the dispute was to be determined by reference to the respective positions of the Parties as advanced before the Tribunal. Eritrea claimed sovereignty over the Mohabbakahs (principally Sayal Islet, Harbi Islet, Flat Islet and High Islet), the Haycocks (principally South West Haycock, Middle Haycock and North East Haycock), the South West Rocks, the Zuqar-Hanish Group (including the islands of Jabal Zuqar, Greater and Lesser Hanish), all of which were located in the southern Red Sea, and the Zubayr Group and Jabal al-Tayr, which were located further north.[5] Yemen, however, maintained that the critical date for determination of the scope of the dispute was the date of conclusion of the Agreement on Principles and submitted that, at that date, there was no dispute regarding the Zubayr Group or Jabal al-Tayr.

Both Eritrea and Yemen claimed title to the various islands on the basis of historic title and more recent acts which they submitted were manifestations of effective occupation of the islands. It was common ground that, prior to the colonization of Eritrea by Italy at the end of the nineteenth century, sovereignty over both shores of the Red Sea and over the islands had rested with the Ottoman Empire. During the Ottoman period, jurisdiction over the islands had been divided, with those islands off the African coast being subject to the jurisdiction of the Khedive of Egypt, while those off the Arabian coast were subject to the jurisdiction of the Ottoman authorities in the Arabian peninsula.

Eritrea asserted that, during the period of Italian rule in Eritrea, the Italian authorities had patrolled the islands in order to combat piracy and slave trading and had manifested control over the islands in other ways. By Article 16 of the Treaty of Lausanne, 1923,[6] the Ottoman Empire had relinquished any claim which it had once possessed and, according to Eritrea, Article 6 of that treaty did not operate to vest title in Yemen. Eritrea submitted that, by the 1920s, Italy had exercised such a degree of effective control over the

[4] The text of Article 2 is set out in paragraph 7 of the Award.

[5] See map at pp. 140-1 below. The names of some of the islands are not spelt the same way in the map and all of the documents to which the Award refers. The spellings used in the summary are those used in the operative part of the Award.

[6] See p. 49 below.

islands that it had acquired sovereignty. That sovereignty had then passed to Ethiopia when Eritrea became part of Ethiopia after World War Two. Ethiopia had performed numerous administrative and other acts which demonstrated sovereignty over the islands. Eritrea had succeeded to Ethiopia's title when it became independent in the early 1990s. Eritrea also maintained that its title to the islands had been acknowledged, or at least not disputed, by Yemen and pointed to the use of the islands by Eritrean fishermen who were dependent upon the islands for their livelihood.

Yemen advanced a claim based on ancient title which it asserted could be traced back to the sixth century and which reverted to Yemen after the end of Ottoman rule. It also argued that the principle of natural or geographical unity, taken together with evidence of the exercise of acts of jurisdiction and other manifestations of sovereignty, led to the conclusion that the islands were part of Yemen. Yemen relied upon the actual exercise of jurisdiction by Yemeni authorities in the islands and submitted that there were important economic and social links between the islands and the mainland of Yemen.

Both States submitted maps which, each claimed, provided evidence in support of its claim. Yemen, in particular, relied heavily upon cartographic evidence. In addition, both States made reference to the construction and operation of lighthouses in the islands. Although not raised by either State in the initial pleadings, in response to a question from a member of the Tribunal, both States submitted evidence regarding the grant of petroleum concessions by their respective governments and contended that this evidence supported their claims.

Held (unanimously):—(1) The somewhat technical critical date argument advanced by Yemen regarding the determination of the scope of the dispute had to be rejected. Whatever may have been the case at the time the Agreement on Principles was concluded, the Arbitration Agreement departed from the earlier Agreement by providing that the Tribunal should determine the scope of the dispute only after having heard the entire substantive contentions of both Parties on the question of sovereignty. The Arbitration Agreement did not qualify the phrase "the respective positions of the two Parties" and the ordinary meaning of that phrase in its context and in the light of the object and purpose of the Arbitration Agreement was that it was the positions of the Parties as at the date of the Arbitration Agreement, not some earlier date, that was intended. This interpretation was consistent with the way in which the Parties had developed their respective cases. The scope of the dispute thus concerned all the islands to which Eritrea had laid claim (pp. 26-30).

(2) Except in relation to the date at which the scope of the dispute was to be determined, the Parties had not submitted argument regarding the critical date. The Tribunal had therefore examined all the evidence submitted to it, irrespective of the date of the acts to which that evidence related (p. 32).

(3) The function of the Tribunal in the first stage of the proceedings was to render an award "on" territorial sovereignty, not to allocate sovereignty to one or other of the Parties. It was, therefore, within the competence of the Tribunal to find a common or divided sovereignty. Article 2 of the Arbitration Agreement required the Tribunal to 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 notion of an historic title was well established in international law but had two different meanings: that of an ancient title long established by common repute, and that of a title created or consolidated by a process of prescription, acquiescence or long possession. The injunction to have particular regard to historic titles could not have been intended to mean that historic title was to be given some priority it might not otherwise possess. While the Tribunal was not called upon, at this stage of the proceedings, to consider the delimitation of the maritime boundary, it could not accept that the international law governing land territory and the international law governing maritime boundaries bore no juridical relevance to one another. The Tribunal was, therefore, entitled to take account of principles and rules derived from maritime law if they formed part of the international law applicable to title to territory (pp. 34-7).

(4) Yemen's claim to possess an ancient title to the islands which reverted to it upon the end of Ottoman sovereignty in the region could not be accepted. There was no basis for maintaining that a doctrine of reversion of title existed in international law. Even if such a doctrine did exist, it would not be applicable in the present case, because there had been a lack of continuity. To have accepted Yemen's claim would have been tantamount to a rejection of the Ottoman title to full sovereignty over the islands, a sovereignty which, in accordance with the principle of intertemporal law, had been lawful and had carried with it the right to dispose of the territory. That right had been exercised in the Treaty of Lausanne, by which Turkey had renounced her claims in favour of the Allied Powers. While the Treaty of Lausanne had been *res inter alios acta* as far as Yemen was concerned, it had created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties. Moreover, the extent of pre-Ottoman Yemen was far from clear and it would be anachronistic to attempt to attribute to such a tribal, mountainous and Muslim medieval society the modern Western concept of sovereign title, particularly with respect to barren, uninhabited islands (pp. 38-60 and 115-16).

(5) Eritrea's claim to historic title over all the islands was also unfounded. Although Italy had entertained serious territorial ambitions with regard to the islands, the contention that Italy had possessed sovereignty over those islands during the period when it ruled Eritrea was undermined by several factors. First, such claims were incompatible with the status attributed to the islands by Article 16 of the Treaty of Lausanne. Secondly, during the inter-war period, the Italian Government had constantly and consistently given specific assurances to the British Government that Italy fully accepted and recognized the indeterminate legal position of the islands as established by the Treaty. Finally, the provisions of the Italian Peace Treaty, 1947, reaffirmed the legal position created by Article 16 of the Treaty of Lausanne, except that Italy renounced any rights which it might possess under that provision (pp. 37-60 and 116-17).

(6) The evidence of the display of functions of State and governmental authority over the islands was not sufficient to justify upholding either Party's claim to all of the islands in dispute.

(a) The modern international law of the acquisition (or attribution) of territory generally required that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis (p. 69).

(b) While the standard of activity required to establish title might be subject to modification when dealing, as in the present case, with difficult or inhospitable territory, the establishment of territorial sovereignty was no light matter and it might be supposed that there was some absolute minimum requirement for the acquisition of such a right. In contrast to the position in the *Island of Palmas* case,[7] in which the *compromis* had required the arbitrator only to decide the relative strength of two competing claims, in the present case the Arbitration Agreement required that the Tribunal make an award on territorial sovereignty (pp. 117-18).

(c) The factual evidence of *effectivités* presented to the Tribunal was voluminous in quantity but sparse in useful content. In particular, the evidence of the assertion of sovereignty was frequently equivocal and no consistent pattern emerged from the evidence of actual acts of jurisdiction. In addition, many of the acts relied upon by Eritrea were acts of its predecessor, Ethiopia, which were not "peaceful", unless that term might be understood to include acts in prosecution of a civil war (pp. 69-94).

(d) The maps presented by the Parties did not point to any clear conclusion as regards title to the islands after the Ottoman period (pp. 94-100).

(e) The evidence of offshore petroleum contracts entered into by Yemen and by Ethiopia and Eritrea failed to establish or significantly strengthen the claims of either Party to sovereignty but they did 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 (pp. 100-14).

(f) Since the activities relied upon by the Parties did not lead to a clear conclusion, it was appropriate for the Tribunal to consider other factors which might strengthen the basis of decision. In particular, the geographical situation of the islands was relevant. There was some presumption that any islands off the coast of one of the Parties belonged to that Party because of their appurtenance to the coast unless the Party on the opposite coast was able to demonstrate a clearly better title ("the portico doctrine") (pp. 119-22).

(7) Since the legal history did not support either State's claim to sovereignty over all the islands, it was necessary to give separate consideration to each of the different groups of islands.

(a) The islands, islets, rocks and low-tide elevations forming *the Mohabbakahs* were subject to the territorial sovereignty of Eritrea. With the exception of one High Islet, the islands of this group lay within twelve miles of the Eritrean coast. Whatever the history, in the absence of any clear title being shown by Yemen, the fact that these islands lay within Eritrean territorial waters was sufficient for them to be regarded as Eritrean. This approach was confirmed by the principle in Article 6 of the Treaty of Lausanne that islands within the territorial sea of a State were to belong to that State, notwithstanding that the territorial sea then extended only three miles from the coast. Since the Mohabbakahs had always been regarded as one group, High Islet, although

[7] 4 *Ann Dig* 3.

located just outside the Eritrean territorial sea, also belonged to Eritrea (pp. 122-4 and 139).

(b) The islands, islets, rocks and low-tide elevations forming *the Haycocks* were subject to the territorial sovereignty of Eritrea. These islands seem to have fallen under the jurisdiction of the Khedive of Egypt and their proximity to the African coast meant that the portico doctrine suggested that they formed part of Eritrea. In addition, the evidence of the construction and operation of the lighthouse here and the conclusion by Eritrea of petroleum agreements relating to the area around the Haycocks supported the Eritrean claim to sovereignty (pp. 60-9, 124-6 and 139).

(c) *The South West Rocks* were subject to the territorial sovereignty of Eritrea on the basis of historical evidence and proximity to the Eritrean coast (pp. 126 and 139).

(d) The islands, islets, rocks and low-tide elevations of *the Zuqar-Hanish Group* were subject to the territorial sovereignty of Yemen. The appurtenance factor was less significant here as the islands were positioned in the central part of the Red Sea. The legal history did not provide a clear answer. The maps submitted were marginally in Yemen's favour, suggesting a certain widespread repute that these islands belonged to Yemen. Of greater relevance was the evidence of activity in recent times, especially during the decade preceding the conclusion of the Arbitration Agreement. Yemen had constructed and maintained lighthouses in these islands, and had shown evidence of the exercise of sovereignty over the island of Zuqar. The position was less clear cut with regard to Hanish, although even here Yemen had shown evidence of more governmental activity than had Eritrea (pp. 127-34 and 139).

(e) The island of *Jabal al-Tayr* and the islands, islets, rocks and low-tide elevations forming part of *the Zubayr Group* were subject to the territorial sovereignty of Yemen. These islands were a considerable distance from the other islands in dispute and from the coasts of the Parties. The lighthouse history, particularly in recent years, and the petroleum agreements concluded by Yemen together with other relevant factors pointed to the conclusion that, whatever the uncertainties regarding these islands in the past, they were now regarded as part of Yemen (pp. 60-9, 100-14, 134-7 and 139).

(8) Western ideas of territorial sovereignty were strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law. It was also necessary to take account of regional traditions and to render an Award which, in the terms of the Agreement on Principles, would allow the re-establishment and development of trustful and lasting cooperation. The findings of sovereignty were not inimical to, but rather entailed the perpetuation of, the traditional fishing regime in the region. In the exercise of its sovereignty over the islands, Yemen should ensure that the traditional fishing regime, including the free access and enjoyment for fishermen from both Parties, was maintained (pp. 137-9).

(9) The Award should be executed within ninety days (p. 139).

The text of the Award commences on the following page.

AWARD

CONTENTS

CHAPTER I The Setting up of the Arbitration and the Arguments of the Parties

Introduction

1. This Award is rendered pursuant to an Arbitration Agreement dated 3 October 1996 (the "Arbitration Agreement"), between the Government of the State of Eritrea ("Eritrea") and the Government of the Republic of Yemen ("Yemen") (hereinafter "the Parties").

2. The Arbitration Agreement was preceded by an "Agreement on Principles" done at Paris on 21 May 1996, which was signed by Eritrea and Yemen and witnessed by the Governments of the French Republic, the Federal Democratic Republic of Ethiopia, and the Arab

Republic of Egypt. The Parties renounced recourse to force against each other, and undertook to "settle their dispute on questions of territorial sovereignty and of delimitation of maritime boundaries peacefully". They agreed, to that end, to establish an agreement instituting an arbitral tribunal. The Agreement on Principles further provided that

> . . . concerning questions of territorial sovereignty, the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.

3. Concurrently with the Agreement on Principles, the Parties issued a brief Joint Statement, emphasizing their desire to settle the dispute, and "to allow the re-establishment and development of a trustful and lasting cooperation between the two countries", contributing to the stability and peace of the region.

4. In conformity with Article 1.1 of the Arbitration Agreement, Eritrea appointed as arbitrators Judge Stephen M. Schwebel and Judge Rosalyn Higgins, and Yemen appointed Dr Ahmed Sadek El-Kosheri and Mr Keith Highet. By an exchange of letters dated 30 and 31 December 1996, the Parties agreed to recommend the appointment of Professor Sir Robert Y. Jennings as President of the Arbitral Tribunal (hereinafter the "Tribunal"). The four arbitrators met in London on 14 January 1997, and appointed Sir Robert Y. Jennings President of the Tribunal.

5. Having been duly constituted, the Tribunal held its first meeting on 14 January 1997, at Essex Court Chambers, 24 Lincoln's Inn Fields, London WC1, UK. The Tribunal took note of the meeting of the four arbitrators, and ratified and approved the actions authorized and undertaken thereat. Pursuant to Article 7.2 of the Arbitration Agreement, the Tribunal appointed as Registrar Mr P. J. H. Jonkman, Secretary-General of the Permanent Court of Arbitration (the "PCA") at the Hague, and, as Secretary to the Tribunal, Ms Bette E. Shifman, First Secretary of the PCA, and fixed the location of the Tribunal's registry at the International Bureau of the PCA.

6. The Tribunal then held a meeting with Mr Gary Born, Co-Agent of Eritrea, and Mr Rodman Bundy, Co-Agent of Yemen, at which it notified them of the formation of the Tribunal and discussed with them certain practical matters relating to the arbitration proceedings.

7. 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.

8. Pursuant to the timetable set forth in the Arbitration Agreement for the various stages of the arbitration, the Parties submitted their written Memorials concerning territorial sovereignty and the scope of the dispute simultaneously on 1 September 1997 and their Counter-Memorials on 1 December 1997. In accordance with the requirement of Article 7.1 of the Arbitration Agreement that "the Tribunal shall sit in London", the oral proceedings in the first stage of the arbitration were held in London, in the Durbar Conference Room of the Foreign and Commonwealth Office, from 26 January through 6 February 1998, within the time limits for oral proceedings set forth in the Arbitration Agreement. The order of the Parties' presentations was determined by drawing lots, with Eritrea beginning the oral proceedings.

9. At the end of its session of 6 February 1998, the Tribunal, in accordance with Article 8.3 of the Arbitration Agreement, closed the oral phase of the first stage of the arbitration proceedings between Eritrea and Yemen. The closing of the oral proceedings was subject to the undertaking of both Parties to answer in writing, by 23 February 1998, certain questions put to them by the Tribunal at the end of the hearings, including a question concerning the existence of agreements for petroleum exploration and exploitation. It was also subject to the proviso in Article 8.3 of the Arbitration Agreement authorizing the Tribunal to request the Parties' written views on the elucidation of any aspect of the matters before the Tribunal.

10. In its Communication and Order No 3 of 10 May 1998, the Tribunal invoked this provision, requesting the Parties to provide, by 8 June 1998, written observations on the legal considerations raised by their responses to the Tribunal's earlier questions concerning concessions for petroleum exploration and exploitation and, in particular, on how the petroleum agreements and activities authorized by them might be relevant to the award on territorial sovereignty. The Tribunal further invited the Parties to agree to hold a short oral hearing for the elucidation of these issues.

11. Following the exchange of the Parties' written observations, the Tribunal held oral hearings on this matter at the Foreign and Commonwealth Office in London on 6, 7 and 8 July 1998. By agreement of the Parties, Yemen presented its arguments first. In the course of these hearings, the Tribunal posed a series of questions