225 YEARS TO THE JAY TREATY: INTERSTATE ARBITRATION BETWEEN PROGRESS AND STAGNATION

Tamar Meshel†

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I. INTRODUCTION

For Americans, John Jay was a founding father, a co-author of the Federalist Papers, the first Chief Justice of the United States, and the second governor of the State of New York after independence from Great Britain. Jay is also known to Americans and most international law scholars for negotiating the Jay Treaty with Great Britain in 1794.[1] Among other notable achievements, including facilitating agreement between the two formerly warring parties to resolve their territorial and other disputes peacefully, the Jay Treaty marked the "modern era" of interstate arbitration.[2]

†Assistant Professor, University of Alberta Faculty of Law.

1 Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

2 M.C.W. Pinto, *The Prospects for International Arbitration: Inter-State Disputes*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 63, 66 (A.H.A. Soons ed., 1990) [hereinafter Pinto, *Inter-State Disputes*]. In its contemporary form, international arbitration has been defined as "a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties

In the 225 years since the Jay Treaty, interstate arbitration has been successfully employed by the United States and other countries to resolve a wide range of disputes and prevent their violent escalation. These include disputes concerning sea vessels,[3] environmental pollution,[4] diplomatic crises,[5] territorial boundaries,[6] and freshwater disputes,[7] to name a few.

Despite arbitration's proven effectiveness[8] in this wide range of interstate disputes, it has not been a panacea for resolving every conflict.[9] While the same is true for all dispute resolution mechanisms

applying neutral judicial procedures that provide the parties an opportunity to be heard." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 64-65 (2d ed. 2009).

3 *E.g.*, United Nations, Alabama claims of the United States of America against Great Britain, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, Reports of International Arbitral Awards, VOLUME XXIX, 125-134, http://legal.un.org/riaa/volumes/riaa_XXIX.pdf; OFFICE OF THE HISTORIAN, DECISION OF THE ARBITRATOR, MR. T. M. C. ASSER, MEMBER OF THE STATE COUNCIL OF THE NETHERLANDS, RENDERED AT THE HAGUE, NOVEMBER 29, 1902, IN THE INTERNATIONAL ARBITRATION BETWEEN THE UNITED STATES OF AMERICA, PARTY CLAIMANT, AND RUSSIA, PARTY DEFENDANT, RELATIVE TO THE VESSELS "CAPE HORN PIGEON," "JAMES HAMILTON LEWIS," "C. H. WHITE," AND "KATE AND ANNA" (1902), https://history.state.gov/historicaldocuments/frus1902app1/comp10; United Nations, Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, Award of 30 April 1990, Reports of International Arbitral Awards VOLUME XX, 215-284, http://legal.un.org/riaa/volumes/riaa_XX.pdf.

4 *E.g.*, United Nations, Trail smelter case (United States, Canada), Reports of International Arbitral Awards, VOLUME III, 1905-82, at 1938, 1941, http://legal.un.org/docs/?path=../riaa/cases/vol_III/1905-1982.pdf&lang=O.

5 *E.g.*, The Iran-United States Claims Tribunal, which was created to resolve the crisis between the Islamic Republic of Iran and the United States of America arising out of the November 1979 hostage crisis at the United States Embassy in Tehran, and the subsequent freezing of Iranian assets by the United States of America. IRAN-UNITED STATES CLAIMS TRIBUNAL, http://www.iusct.net/ (last visited Sept. 5, 2019).

6 *E.g.*, United Nations, The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan), Reports of International Arbitral Awards, VOLUME XVII, 1-576 (1968), http://legal.un.org/docs/?path=../riaa/cases/vol_XVII/1-576.pdf&lang=E.

7 Lake Lanoux Arbitration (France v. Spain), 12 R.I.A.A. 281 (Arbitral Trib. 1957); In the Matter of the Indus Waters Kishenganga Arbitration (Pakistan v. India), PK-IN 82842 (Perm. Ct. Arb. 2013).

8 "Effectiveness" in this context refers to states' compliance with the arbitral award.

9 In addition to the unsuccessfully resolved disputes examined in this article, interstate arbitration has also failed, for instance, to resolve the Helmand River

operating in the international sphere, occasional failures in the use of arbitration have led some in the United States, as well as elsewhere, to doubt its efficacy in relation to interstate disputes involving political,[10] rather than legal, issues.[11] These doubts appear to be partially rooted in a perception of interstate arbitration as an essentially legal process, suitable only for the resolution of legal questions through the application of legal principles,[12] and frequently equated with judicial

dispute between Iran and Afghanistan. Helmand River Case (Afghanistan v. Persia) (Arbitral Awards of Aug. 19, 1872 and April 10, 1905).

10 "Political disputes" are generally viewed as "'disputes of such a nature as to arouse national political passions, irrespective of whether they are capable or not of settlement in conformity with international law,'" whereas "legal disputes" are generally viewed as "'inter-state controversies in which the parties are divided on an issue of international law.'" P.H. Kooijmans, *International Arbitration in Historical Perspective: Past and Present*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS, *supra* note 2, at 23, 27-28 (internal citations omitted).

11 *E.g.*, Karl-Heinz Böckstiegel, *The Effectiveness of Inter-State Arbitration in Political Turmoil*, 10 J. INT'L ARB. 43, 47-49 (1993); Carla S. Copeland, *The Use of Arbitration to Settle Territorial Disputes*, 67 FORDHAM L. REV. 3073, 3074, 3098, 3107 (1999); Dean Rusk, *The Role and Problems of Arbitration with Respect to Political Disputes*, *in* RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 15-20 (Thomas E. Carbonneau ed., 1984); Richard B. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, *in* RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION, *supra* note 11, at 3-14; PETER WALLENSTEEN, UNDERSTANDING CONFLICT RESOLUTION 111 (2015).

12 *E.g.*, D.W. BOWETT, CONTEMPORARY DEVELOPMENTS IN LEGAL TECHNIQUES IN THE SETTLEMENT OF DISPUTES 178 (1983); ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS 432 (7th ed. 2012); J.G. Merrills, *International Boundary Disputes in Theory and in Practice: Precedents Established*, *in* PEACEFUL RESOLUTION OF MAJOR INTERNATIONAL DISPUTES 95, 101-02 (Julie Dahlitz ed., 1999); STUDY GRP. OF THE DAVID DAVIES MEM'L INST. OF INT'L STUDIES, INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 20, 59-60 (1972) [hereinafter STUDY GROUP]; DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE 265 (2001); A.L.W. Munkman, *Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes*, 46 BRIT. Y.B. INT'L L. 1, 12 (1972-73); JACOB BERCOVITCH & JUDITH FRETTER, REGIONAL GUIDE TO INTERNATIONAL CONFLICT AND MANAGEMENT FROM 1945 TO 2003, 14 (2004); Böckstiegel, *supra* note 11, at 43-44, 47, 49; HO-WON JEONG, PEACE AND CONFLICT STUDIES: AN INTRODUCTION 176 (2000); Christine Gray & Benedict Kingsbury, *Inter-State Arbitration Since 1945: Overview and Evaluation*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 55 (Mark W. Janis ed., 1992). Nonetheless, others have argued that arbitration is appropriate for the resolution of disputes concerning "vital interests" if it is applied properly. *See, e.g.*, GERALD RABOW, PEACE THROUGH AGREEMENT: REPLACING WAR WITH NON-VIOLENT DISPUTE-RESOLUTION METHODS 122 (1990); James D. Fry, *Arbitrating Arms Control Disputes*, 44 STAN. J. INT'L L. 359, 419 (2008).

settlement by a permanent international court.[13] This view of interstate arbitration is often contrasted with diplomatic or non-legal mechanisms such as negotiation, conciliation, and mediation, which are generally non-binding, not restricted by legal rules and principles, and perceived as more appropriate for the resolution of complex interstate disputes.[14] The preference for such diplomatic mechanisms in this context is thus a by-product of states' reluctance to submit political or other sensitive issues to what they perceive to be binding external adjudication based on legal principles.[15]

However, this judicialized conception of arbitration flies in the face of both its original nature and the complexity of most interstate disputes. In fact, arbitration as originally conceived and used under the Jay Treaty was intended to serve as an *alternative* to judicial settlement. The contemporary emphasis on the application of strict legal principles to the resolution of interstate disputes by arbitration, rather than on their effective settlement,[16] is therefore antithetical to this "true nature"[17] of arbitration. The complexity of most interstate disputes also calls into question a narrow, judicialized conception of arbitration. Such disputes frequently involve both legal and political

13 Edward McWhinney, *The International Court as Constitutional Court and the Blurring of the Arbitral/Judicial Processes*, 6 LEIDEN J. INT'L L. 279, 283 (1993); M.C.W. Pinto, *Structure, Process, Outcome: Thoughts on the Essence of International Arbitration*, 6 LEIDEN J. INT'L L. 241, 241-42 (1993) [hereinafter Pinto, *Essence of International Arbitration*].

14 Munkman, *supra* note 12, at 5; JUNWU PAN, TOWARD A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA'S TERRITORIAL AND BOUNDARY DISPUTES 50 (2009).

15 RABOW, *supra* note 12, at 122; McWhinney, *supra* note 13, at 280; PAN, *supra* note 14, at 2, 30. One resource indicates that only in 6% of territorial disputes in the Western Hemisphere between 1816-1992 involved attempts of resolution by binding third-party settlement. *See* Paul R. Hensel, *Territory: Theory and Evidence on Geography and Conflict, in* WHAT DO WE KNOW ABOUT WAR? (John A. Vasquez ed., 2000). Another resource indicates that out of 165 interstate territorial disputes involving 1,140 rounds of negotiations between 1945-2000, seventy-eight of those disputes were eventually settled by negotiations and eighteen were settled by arbitration or adjudication. *See* Paul K. Huth, Sarah E. Croco & Benjamin J. Appel, *Bringing Law to the Table: Legal Claims, Focal Points, and the Settlement of Territorial Disputes Since 1945*, 57 AM. J. POL. SCI. 90, 96. Yet another resource indicates that in 91.5% of 343 interstate disputes between 1945-2003, the parties resorted to mediation or negotiation, while in only 0.6% of those disputes did the parties resort to arbitration. *See* BERCOVITCH & FRETTER, *supra* note 12, at 29.

16 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 60.

17 M.C.W. Pinto, *Structure, Process, Outcome: Thoughts on the 'Essence' of International Arbitration*, *in* THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 43, 44 (Sam Muller & Wim Mijs eds., 1994) [hereinafter Pinto, *Essence of International Arbitration* (1994)].

issues[18] that are strongly intertwined, and thus require a mechanism capable of addressing both aspects effectively. With increased interaction between states comes the ever-growing potential for complex interstate conflicts that require peaceful resolution, and therefore, careful consideration must be given to all available dispute resolution mechanisms and particularly to those that have proven effective for centuries, such as arbitration.[19]

The goal of the present article is thus to challenge the contemporary judicialized conception of interstate arbitration[20] and to call for a return to its "traditional quality"[21] and purpose of resolving issues "not suitable for judicial settlement,"[22] as reflected in the Jay Treaty. To this end, this article analyzes key legal and political aspects of successful[23] interstate territorial arbitrations[24] as well as interstate

18 JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 7-8 (1999); Malcolm N. Shaw, *Peaceful Resolution of 'Political Disputes:' The Desirable Parameters of ICJ Jurisdiction*, *in* PEACEFUL RESOLUTION OF MAJOR INTERNATIONAL DISPUTES 49-50, 52, 62 (Julie Dahlitz ed., 1999); FRANCISCO ORREGO VICUÑA, INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION 101 (2004); Sam Muller & Wim Mijs, *The Flame Rekindled*, 6 LEIDEN J. INT'L L. 203, 210 (1993).

19 It has been suggested that arriving "at a commonly held perception of [the] essentials" of interstate arbitration is a "pre-requisite to formulating rules which all States might be invited to accept." *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 91-99; Pinto, *Essence of International Arbitration*, *supra* note 13, at 263-64.

20 *See also* Tamar Meshel, *Interstate Arbitration: Awakening the 'Sleeping Beauty of the Peace Palace,'* OPINIO JURIS (Aug. 8, 2014), http://opiniojuris.org/2014/08/18/emerging-voices-interstate-arbitration-awakening-sleeping-beauty-peace-palace/.

21 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 85-86.

22 Gray & Kingsbury, *supra* note 12, at 55. *See also* Fry, *supra* note 12, at 419; Jacques Werner, *Interstate Political Arbitration: What Lies Next?*, 9 J. INT'L ARB. 69, 419 (1992).

23 The "success" of these arbitrations is assessed on the basis of the willingness of the parties to implement the arbitral award.

24 This category of interstate disputes was selected for two reasons. First, territorial disputes tend to be particularly complex, as they involve both fundamental legal issues, such as acquisition of title, and significant extra-legal issues, such as national identity or economic stability. WALLENSTEEN, *supra* note 11, at 111. Second, since interstate territorial disputes often lead to armed conflict or war, the persistence of these disputes constitutes one the greatest dangers to the maintenance of international peace and security. Todd L. Allee & Paul K. Huth, *The Pursuit of Legal Settlements to Territorial Disputes*, 23 CONFLICT MGMT. & PEACE SCI. 285 (2006); Srecko Vidmar, *Compulsory Inter-State Arbitration of Territorial Disputes*, 31 DENV. J. INT'L L. & POL'Y 87, 98 (2002-2003).

territorial arbitrations that failed to resolve the parties' dispute.[25] This article argues that the contemporary judicialized conception of interstate arbitration serves as a possible explanation of the contradictory outcomes in these cases, all of which involved problems that "a legalistic arbitration award *simplicta* cannot resolve."[26] Additionally, this article strives to illustrate how interstate arbitration can be applied to territorial and other interstate disputes as a *sui generis* hybrid mechanism that provides binding, reasoned, and effective resolution of both legal and political issues.[27] This traditional hybrid nature is reflected in two interrelated dimensions of interstate arbitration that guide the comparative analysis undertaken in the article: the legal dimension and the political dimension.

The legal dimension of interstate arbitration allows state parties to submit legal questions to an arbitral tribunal and to present arguments grounded in law. It guarantees procedural safeguards such as the arbitrators' consideration of all arguments raised by the parties and their provision of reasons for their decisions, and it allows the tribunal to apply law, including equitable principles,[28] in its decision making. This legal dimension accords the arbitral award its legally binding nature. While in this dimension the arbitrators' function is akin to that of judges, they should avoid a "formalistic"[29] approach to the interpretation and application of the law that is rigid, literal, and legalistic.

25 Due to the limited scope of this analysis, it does not seek to establish any causal relationship between the way the arbitral process was understood and applied in these cases and the ultimate success or failure of the arbitrations. Rather, it aims to identify similarities and differences between the successful and unsuccessful arbitrations in order to identify potential patterns of effective arbitral practice.

26 GBENGA ODUNTAN, INTERNATIONAL LAW AND BOUNDARY DISPUTES IN AFRICA 201 (Routledge, 2015).

27 Munkman, *supra* note 12, at 2; RABOW, *supra* note 12, at 127.

28 Decisions in equity are generally considered to be part of the law and therefore distinct from decisions *ex aequo et bono. See* Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 628 (2007).; Manfred Lachs, *Equity in Arbitration and in Judicial Settlement Disputes*, 6 J. INT'L L. 323, 325 (1993) [hereinafter Lachs, *Equity in Arbitration*] ("Equity aims at proper application of law in a particular case in order to avoid decisions that are a reflection of abstract principles detached from the circumstances that a court or arbitration tribunal may face.").

29 Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-81 (1986) ("Legal formalism" is commonly defined as "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative." In the context of interstate arbitration, this paper argues that while law may be relevant to the resolution of a dispute, legal formalism that leads to narrow, conservative, and restrained decisions should be avoided.).

Rather, this role of the arbitrator as judge is to be carried out with flexibility and in accordance with the specific circumstances of the dispute in question.

The political dimension of interstate arbitration allows state parties to submit politically sensitive questions to an arbitral tribunal and to advance extra-legal arguments based on political, historical, and economic considerations, or local and traditional customs. It also allows the tribunal to decide such questions *ex aequo et bono*,[30] or in accordance with what is reasonable and effective in the circumstances of the case. In this political dimension, the arbitrators act as diplomats of sorts, who look beyond the law and consider both extra-legal factors and the realities on the ground in order to devise a compromise and avoid a winner-takes-all outcome. This role of the arbitrator as diplomat is intended to avoid the restrictive preoccupation with strict legal rules where these rules are inapplicable to the dispute or incapable of providing a comprehensive and practical resolution.

It is the combination of these two dimensions that produces the traditional *sui generis* hybrid nature of interstate arbitration and that has largely been disregarded in its contemporary judicialized form. The current practice of interstate arbitration instead focuses almost exclusively on the legal dimension of the arbitral process, with state parties submitting mostly legal issues to arbitration and arbitrators exercising their role narrowly by applying strict legal principles to resolve such issues. The political dimension of the process, and with it the arbitrators' role as quasi-diplomats, seems to have been largely abandoned. While the dual role of the arbitrator as judge-diplomat may seem overly demanding and omniscient, arbitrators would be able to exercise this role successfully if state parties are truly committed to the traditional arbitral process, and if both the parties and the arbitrators understand and use it appropriately. If arbitrators were given the opportunity and subsequently chose to act pursuant to the traditional hybrid arbitral process advanced in this article, they would be more

30 *Approaches to Solving Territorial Conflicts: Sources, Situations, Scenarios, and Suggestions*, CARTER CENTER, at vi (2010) [hereinafter THE CARTER CENTER], https://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/solving_territorial_conflicts.pdf; Manfred Lachs, *Arbitration and International Adjudication*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS, *supra* note 2, at 41; Loretta Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States Go To Arbitration Rather Than Adjudication*, 5 L. & PRAC. INT'L CTS. & TRIBS. 133, 151 (2006); J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 95 (Cambridge University Press 2017) [hereinafter MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT].

likely to devise effective and comprehensive solutions to complex interstate disputes.[31]

This article will first provide a brief introduction to interstate arbitration and illustrate how its contemporary judicialized conception is antithetical to its original nature and purpose. Section II will then analyze and compare four interstate territorial arbitrations: (1) the 1977 Beagle Channel Arbitration between Chile and Argentina, (2) the 1988 Taba Arbitration between Israel and Egypt, (3) the 1998 Red Sea Islands Arbitration between Eritrea and Yemen, and (4) the 2002 Eritrea-Ethiopia Boundary Arbitration.[32] The goal of this comparative case study is to evaluate the extent to which the respective state parties' and arbitral tribunals' understanding, or lack thereof, of interstate arbitration may have impacted the outcomes of the disputes. Section III will offer conclusions by highlighting lessons from the case studies intended to reinforce the true nature of interstate arbitration.

Considering the wide range of mechanisms available for the settlement of interstate disputes, this article does not purport that other means should not be used prior to, or in conjunction with, arbitration.[33] It also does not posit that arbitration necessarily constitutes the optimal mechanism for the resolution of every interstate dispute; or, even in cases where it may be the optimal mechanism, that its success does not ultimately depend, as any other interstate dispute resolution method does, both on the political will and responsible behavior of governments[34] and on a recognition by those governments that making

31 Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. (2005); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 901 (2005).

32 These cases were selected on the basis of the following criteria: (1) they were all interstate disputes; (2) they all involved a territorial dispute, either concerning land or boundaries, giving rise to both legal and political, historical, strategic, economic, or other important issues; and (3) they all involved some form of armed conflict or military confrontation between the parties (to the author's knowledge, these are also the most notable interstate territorial arbitrations that have taken place since WWII, other than the 1968 *Rann of Kutch* Arbitration between India and Pakistan, and the 1999 Brčko Arbitration between the Federation of Bosnia and Herzegovina and Republika Srpska (Brčko). A detailed discussion of these arbitrations is beyond the scope of this article). *See also* Robert G. Volterra, *The Rann of Kutch Arbitration*, in ARBITRATING FOR PEACE: HOW ARBITRATION MADE A DIFFERENCE 79 (Ulf Franke et al. eds., 2016); R. Jade Harry, *The Brčko Arbitration*, *in* ARBITRATING FOR PEACE: HOW ARBITRATION MADE A DIFFERENCE, *supra* note 32, at 179.

33 Michael E. Schneider, *Combining Arbitration with Conciliation*, 1 TRANSNAT'L DISP. MGMT. 1 (2004).

34 Hans Corell, *The Feasibility of Implementing the Hague/ St. Petersburg Centennial Recommendations Under the UN System*, *in* PEACEFUL RESOLUTION OF

peace is preferable to waging war.[35] Finally, this article sets out to counter what it views as a misperception and misuse of the interstate arbitral process, and aims to revive its traditional nature and original purpose. This account is largely internal to interstate arbitration itself, its history, and practice. It therefore does not purport to account for all possible factors, such as those external to the dispute resolution process, that may impact its success or failure. This account is also not presented as the only legitimate view of arbitration as an interstate dispute resolution mechanism or of the respective roles of law and politics in its application.

II. INTRODUCTION TO INTERSTATE ARBITRATION

States have a wide choice of mechanisms for resolving their disputes. None of these, however, is without its drawbacks. Unlike non-binding diplomatic dispute resolution mechanisms, adjudication by a permanent international court does not allow states to maintain their perceptions of the facts and the law, control the terms of any settlement agreement,[36] or focus on non-legal disputed issues that are normally outside the scope of judicial review.[37] Moreover, states may prefer to resolve disputes on the basis of "political wisdom," expediency, and "the lessons of political or administrative experience," rather than on the basis of law.[38] Such resolution is also more likely to produce a compromise[39] that is both less risky and unpredictable to the parties, as well as more durable and stable.[40]

Diplomatic dispute settlement, however, may also compromise states' interests by causing unnecessary delay or failure to obtain an

MAJOR INTERNATIONAL DISPUTES, *supra* note 12, at 31, 33; William G. Hopkinson, *Overcoming Diplomatic Inertia and Constraint in the Resolution of Major Conflict*, *in* PEACEFUL RESOLUTION OF MAJOR INTERNATIONAL DISPUTES, *supra* note 12, at 77, 80.

35 W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics* 6 TUL. J. INT'L. & COMP. L. 5, 22 (1998) [hereinafter Reisman, *Stopping Wars and Making Peace*].

36 *See* STUDY GROUP, *supra* note 12, at 38; Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution,* 32 U. PA. J. INT'L L. 6 (2010); PAN, *supra* note 14, at 53-54.

37 THE CARTER CENTER, *supra* note 30, at vi, vii; PAN, *supra* note 14, at 54.

38 Shaw, *supra* note 18, at 51.

39 PAN, *supra* note 14, at 54.

40 THE CARTER CENTER, *supra* note 30, at 17, 71.

effective resolution.[41] "Decades of political discourse"[42] may prolong disputes and lead to deadlock, further conflict or conflict escalation, and potentially hinder the development of interstate relations that may ultimately be more beneficial to states than a favorable outcome in a particular dispute.[43] Diplomatic dispute resolution mechanisms may also prove unsuccessful where the parties are "enduring rivals," the dispute has experienced negotiation stalemate,[44] and where commitment problems exist that make it difficult for either party to bind itself to an agreement.[45] These mechanisms have also proven less effective in overcoming the "critical barriers" that prevent successful resolution of territorial claims,[46] such as the absence of agreed-upon principles that may lead to a solution as well as the parties' reluctance to make concessions.[47]

In light of the limitations of both diplomatic dispute resolution mechanisms and adjudication by a permanent international court, a viable alternative that is capable of providing a binding, efficient, flexible, and effective resolution to both the legal and non-legal issues arising in territorial and other complex interstate disputes is warranted. Arbitration constitutes such an alternative, however its *sui generis* nature has been "largely ignored"[48] in its contemporary judicialized model.[49] This misperception of arbitration not only runs counter to the complex political-legal nature of most interstate disputes, but also belies the original purpose and "true nature" of interstate arbitration itself.[50]

41 *See* STUDY GROUP, *supra* note 12, at 39; PAN, *supra* note 14, at 6.

42 Aman Mahray McHugh, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L.J. 209, 239 (2005).

43 One resource indicates that in most interstate disputes between 1945-2003 in which mediation was applied, and in almost half of such disputes in which negotiation was applied, these methods failed to resolve the dispute. *See* BERCOVITCH & FRETTER, *supra* note 12, at 29. Another resource shows that binding conflict management techniques are two to four times more likely to end a territorial claim than nonbinding mediation or bilateral negotiations. S*ee* Stephen E. Gent & Megan Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting Into a Bind*, 72 J. POL. 366, 367 (2010). *See also* STUDY GROUP, *supra* note 12, at 39; THE CARTER CENTER, *supra* note 30, at v; Huth, Croco & Appel, *supra* note 15, at 92.

44 Huth, Croco & Appel, *supra* note 15, at 100.

45 Vanessa Ann Lefler, *Bargaining for peace? Strategic Forum Selection in Interstate Conflict Management*, 2-404 (U. of Iowa, Iowa Res. Online, July 2012).

46 Gent & Shannon, *supra* note 43, at 378.

47 RABOW, *supra* note 12, at 122-23.

48 Allee & Huth, *supra* note 24, at 286.

49 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 85, 94-95.

50 Pinto, *Essence of International Arbitration*, *supra* note 13, at 244.

A. The Origins and Purpose of Interstate Arbitration[51]

The use of arbitration to resolve disputes between state-like entities has been documented since the times of ancient Greece and China, when arbitration was distinguished from determinations by judges because an arbitrator may consider the equity of the case, whereas a judge is bound by the letter of the law.[52] Such "equity" included "every thing [sic], which it is more proper to do than to omit, even beyond what is required by the express rules of justice."[53] Arbitration was used, for instance, as early as 600 B.C. to resolve disputes between Athens and Mytilene and between Athens and Megara.[54] Moreover, "compromissory clauses" providing for dispute resolution by arbitration were included in interstate treaties as far back as 418 B.C., at which time a treaty of peace between Sparta and Argos was concluded.[55] Arbitration was used in those times to resolve a wide variety of issues ranging from frontiers to breaches of peace by armed attack,[56] but rather than involving "the strict application of law and judicial methods" it featured "an element of compromise."[57] This use of interstate arbitration continued during the Middle Ages, mostly between the city-states of Italy, between Italian princes and communities, and between Swiss cantons,[58] "offering the singular spectacle of conciliation and peace advancing between populations of the most warlike character."[59] Arbitration was often resorted to during this time not only to prevent wars but also to end them by reconciling the parties and re-establishing peace[60] in accordance with the rules of law and "in the most useful and suitable way."[61]

As mentioned, the 1794 Jay Treaty between Great Britain and the United States was designed to resolve various disputes between the

51 *See also* Tamar Meshel, *The Croatia v. Slovenia Arbitration: The Silver Lining*, 16 L. & PRAC. OF INT'L. CTS. & TRIBS. 288 (2017).

52 Chittharanjan F. Amerasinghe, *International Arbitration: A Judicial Function?*, *in* CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF BUDISLAV VUKAS 677 (Rüdiger Wolfrum, Maja Sersic, & Trpimir M. Sosic eds., 2015).

53 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 65.

54 Amerasinghe, *supra* note 52, at 678.

55 JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 157-58 (Stanford University Press, 1929).

56 *Id.* at 158.

57 Amerasinghe, *supra* note 52, at 678.

58 *Id.* at 679.

59 RALSTON, *supra* note 55, at 176.

60 *Id.* at 181.

61 *Id.* at 180.

two countries that threatened to deteriorate into war.[62] With respect to three such disputes that were not settled within the provisions of the Treaty itself, it provided for resolution by mixed arbitral commissions, i.e., commissions that were to combine legal proceedings and diplomatic negotiations in a quasi-diplomatic arbitral process,[63] and retained many of the original features of arbitration. Indeed, the commissioners "were supposed to blend juridical with diplomatic considerations to produce what was in effect a negotiated settlement."[64] Accordingly, in one of these disputes where the parties were silent on how the arbitration commission was to decide, the commission based its decision largely on equity and did not engage in much detail with the applicable international law of the time.[65] The remaining two disputes, moreover, were explicitly to be decided according to "justice, equity and the law of nations."[66]

The successful settlements achieved by some of the arbitral commissions under the Jay Treaty have largely been credited to their "spirit of negotiation and compromise"[67] and to the arbitrators acting as negotiators rather than judges.[68] Moreover, the success of these arbitrations, among others,[69] resulted in a steady increase in the number of interstate arbitration agreements during the nineteenth century.[70] These often instructed the arbitrators to decide "according to justice" or "according to principles of justice and equity,"[71] thereby emphasizing the quasi-diplomatic, rather than purely legal, nature of arbitration. Similarly, at a Conference of the Association for the Reform and Codification of the Law of Nations[72] in 1873 it was unanimously agreed that arbitration was to be regarded "as a means essentially just and

62 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 66.

63 Charles H. Brower II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 266, 270-71 (2008) (discussing the encouragement of high-level consensus-seeking due to the commission being solely composed of the parties' nationals); KAJ HOBÉR, ESSAYS ON INTERNATIONAL ARBITRATION 3-4 (2006).

64 Amerasinghe, *supra* note 52, at 681.

65 HOBÉR, *supra* note 63, at 4, 8.

66 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 85.

67 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 241, 257.

68 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 68.

69 *See id.* (discussing examples of successful settlements achieved under the Jay Treaty).

70 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 69-70.

71 *See id.* at 85. *See also* Office of Legal Affair, Codification Division, *Handbook on the Peaceful Settlement of Disputes Between States*, 62 n.146 (1992).

72 The name of which was changed to the International Law Association in 1895.

reasonable, and even obligatory on all nations, of terminating international differences which cannot be settled by negotiation."[73] At a later seating of the Conference, while defining one of the objects of the Association as "the question of International Law," it was repeated that "the principal object, nevertheless, [was] to be Arbitration as a means of settlement of all differences between nations,"[74] whether legal or extra-legal.

However, this rise in prominence of interstate arbitration became greatly influenced by the European legal tradition in the twentieth century and as a result gradually evolved into a search for "orderly" dispute settlement through the application of law and institutionalized arbitration.[75] Thus began the judicialization process of interstate arbitration, whereby international agreements require that arbitral decisions be based solely on international law,[76] and settlements incorporating "diplomatic adjustment" be viewed as fundamentally flawed.[77] The view that only such judicial arbitration based on international law is "arbitration properly so called" quickly followed and has become the conventional wisdom.[78]

This contemporary conception of interstate arbitration, while perhaps introducing procedural order and predictability into its practice, also deterred many states from using it in complex interstate disputes that were not necessarily amenable to resolution based solely on legal principles.[79] In addition, the strong political dimension of most interstate disputes led to a period of decline in the use of this judicialized version of interstate arbitration in the 1930s. As the rules governing arbitration grew in comprehensiveness, completeness, and legal precision, so did recourse to arbitration for the resolution of politically

73 SANDI E. COOPER, ARBITRATION: TWO VIEWS: THE RECENT PROGRESS OF INTERNATIONAL ARBITRATION BY HENRY RICHARD AND ESSAI SUR L'ORGANISATION DE L'ARBITRAGE INTERNATIONAL BY BARON EDOUARD DESCAMPS 2 (Garland ed. 1972).

74 *Id.*

75 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 69-70.

76 Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 68 (1998) (discussing the judicialization process of interstate arbitration, whereby international agreements require that arbitral decisions be based solely on international law).

77 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 258.

78 *See id.* at 258 (noting that, however, there were exceptions to this view, such as the 1957 *European Convention for the Peaceful Settlement of Disputes*, 320 UNTS 243, which provided that "non-legal" disputes should be submitted to arbitration. Still, the Convention was signed by only 14 states and 8 of these did not accept this particular provision.).

79 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 74, 87.

sensitive interstate disputes decline.[80] In most cases where arbitration continued to be used, the issues submitted for resolution remained largely legal, and arbitrators tended to decide them by strictly applying international law, thereby perpetuating the judicialized form of interstate arbitration.[81]

Interstate arbitration thus gradually transitioned from a mechanism that emphasized the *settlement* of a dispute to an essentially judicial mechanism that emphasized the *application of law* to the dispute.[82] As a result, it has come to be treated by states with "wariness and circumspection,"[83] excluding from its purview any dispute which cannot be decided strictly on the basis of law.[84] As the distinction between arbitration and adjudication by a permanent international court continues to fade into a "distinction without a difference,"[85] so too fades the prospect of states being willing to arbitrate more complex and politically sensitive disputes.[86]

B. The True Nature of Interstate Arbitration

Traditionally, the true nature of interstate arbitration lies in its ability to provide a "genuine alternative method of dispute settlement"[87] based on both law and politics. This perception of arbitration places it midway between adjudication by a permanent international court and non-binding mechanisms on the spectrum of interstate dispute resolution processes. Unlike diplomatic mechanisms such as negotiation and mediation, arbitration can provide a state party with legitimate "political cover"[88] and protection from negative public perception by allowing it to use the arbitral tribunal as a "scapegoat,"[89] and thereby diffuse difficult political situations.[90] As governments are

80 *See id.* at 70, 87-88.

81 HOBÉR, *supra* note 63, at 55.

82 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 258 (emphasis in original).

83 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 88.

84 Hazel Fox, *Arbitration*, *in* THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES 168, 168 (Evan Luard ed., 1970).

85 MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 83, 288; VICUÑA, *supra* note 18, at 271, 285.

86 CLAPHAM, *supra* note 12, at 432.

87 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 86-87; McHugh, *supra* note 42, at 239.

88 Allee & Huth, *supra* note 24, at 300-01; Gent & Shannon, *supra* note 43, at 369.

89 Lachs, *supra* note 30, at 40; Malintoppi, *supra* note 30, at 133.

90 Corell, *supra* note 34, at 34.

often reluctant to agree to negotiated settlements or make voluntary concessions due to domestic political constraints,[91] arbitration can be used to justify such concessions domestically,[92] as well as to legitimize the successful state's claim in the eyes of the international community.[93] In this way, arbitration can be used strategically to achieve an outcome that cannot be obtained through negotiation,[94] and can play an important role in facilitating a long-term settlement by providing a binding and neutral decision.[95] Arbitration is therefore particularly useful where a fundamental lack of trust between the parties influences their behavior or claims.[96] In such circumstances, the parties may not be able to negotiate in good faith because of mutual distrust, and a diplomatic, yet binding, resolution provided by a neutral third party may supply the missing element of objectivity and impartiality, resulting in a mutually acceptable outcome.

Unlike a permanent court, procedural and substantive flexibility is fundamental to interstate arbitration. In contrast to the largely fixed composition of a permanent court, such as the International Court of Justice ("ICJ"),[97] state parties in arbitration are free to choose their decision makers.[98] This allows them to appoint arbitrators with specific non-legal expertise, or those who are familiar with the dispute and the parties' interests, and are thus likely to inspire greater

91 Gent & Shannon, *supra* note 43, at 369-70; MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 111.

92 Allee & Huth, *supra* note 24, at 300-01; Beth A. Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 829 J. CONFLICT RESOL. 829 (2002); BERCOVITCH & FRETTER, *supra* note 12, at 27.

93 BERCOVITCH & FRETTER, *supra* note 12, at 27.

94 Simmons, *supra* note 92, at 831.

95 Gent & Shannon, *supra* note 43, at 369-70; MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 111.

96 Vaughan Lowe, *Is There a Role for International Law in the Middle East Peace Process?: Proceedings of the Annual Meeting*, *Remarks from ASIL Proceedings*, 99 AM. SOC'Y INT'L L. 213, 221 (2005).

97 I.C.J. Art. 31 §3 (a party to an ICJ case that does not have a judge of its nationality on the bench may appoint an *ad hoc* judge to sit for the duration of the case); RUTH MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 7-8 (Oxford Univ. Press ed., 2d ed. 2010); Howard M. Holtzmann, *Some Reflections on the Nature of Arbitration*, *in* THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 73 (Sam Muller et al. eds., 1994).

98 D.H.N. Johnson, *International Arbitration Back in Favour?*, 34 Y.B. WORLD AFF. 305, 306-07 (1980) [hereinafter Johnson, *International Arbitration*]; John W. Bridge, *The Court of Justice of the European Communities and the Prospects for International Adjudication*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY, *supra* note 12 at 111-12; Malintoppi, *supra* note 30, at 141.

confidence in the arbitral tribunal.[99] Indeed, the right of parties to choose their arbitrators is viewed as "a right which is of the very essence of arbitral justice."[100]

The arbitral process itself is also more flexible and informal than judicial settlement by a permanent court,[101] while still guaranteeing the parties procedural fairness and safeguards. The arbitral process can also better accommodate cases requiring fact finding or settlements based on extra-legal principles.[102] Many interstate disputes, such as those concerning territory, are governed by "a few basic legal principles" that must be weighed against dominant "physical, mathematical, historical, political, economic or other facts,"[103] and would therefore benefit from a more flexible and less legally-rigid dispute resolution mechanism.[104]

In addition, state parties are able to retain more control over the course of the arbitral process[105] since they draw up their own arbitration agreement, or *compromis*, and decide on the procedural and substantive rules to be applied by the tribunal.[106] This includes such matters as the place of the arbitration, costs, evidentiary issues, whether the arbitration proceedings are to be held in private, and whether the

99 Johnson, *International Arbitration*, *supra* note 98, at 312; MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 111.

100 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 245.

101 THE CARTER CENTER, *supra* note 30, at vi-vii.

102 COLLIER & LOWE, *supra* note 18, at 33; THE CARTER CENTER, *supra* note 30, at vii; MACKENZIE ET AL., *supra* note 97, at 37; MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 95 (explaining that while the ICJ has, at times, broadened the basis of its decisions by taking into account such considerations as cultural diversity and changing circumstances, and refining the law accordingly, the demands of legal continuity impose limits on this ability of the Court, where such demands do not exist in arbitration).

103 Vidmar, *supra* note 24, at 99.

104 Nejib Jibril, *The Binding Dilemma: From Bakassi to Badme—Making States Comply with Territorial Decisions of International Judicial Bodies*, 19 AM. U. INT'L L. REV. 634, 668 (2004) (explaining how some scholars have therefore called for territorial disputes involving "sensitive issues of political and nationalistic concern" to be referred to arbitration); MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 102; PAN, *supra* note 14, at 60.

105 BOAS GIDEON, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 348 (Edward Elgar, ed., 2012); John W. Bridge, *The Court of Justice of the European Communities and the Prospects for International Adjudication, in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY, *supra* note 12, at 111-12; MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 111.

106 MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 83, 89; Malintoppi, *supra* note 30, at 143.

award shall remain confidential.[107] Perhaps most importantly, the parties also decide on the issues and questions to be referred to the arbitral tribunal for determination, which may be legal or extra-legal, and establish its mandate and jurisdiction.[108] The parties may not always agree upon the issues and questions to be submitted to arbitration, and in such circumstances they may leave these questions to be determined by the arbitral tribunal.[109]

Consistent with its true hybrid nature, the role of law in interstate arbitration is different from its role in adjudication by the ICJ, which is intended to resolve disputes "in strict accordance with international law."[110] While international arbitral tribunals and the ICJ share a legal dimension, since they are both intended to produce procedurally fair and reasoned decisions and presuppose a legal obligation by the parties to accept them,[111] arbitration envisages a more flexible, contextual, and broad interpretation and application of legal rules and principles by the arbitrators. Arbitration's political dimension assigns to law a "basic but by no means exclusive function,"[112] permits decisions *ex aequo et bono* unless explicitly excluded by the parties,[113] and allows arbitrators to act as judge-diplomats.

Arbitrators are therefore not as concerned with "stat[ing] the law" and settling the dispute by "strict application of the legal rules"[114] as they are with "reconcil[ing] national interests . . . eas[ing] the tensions and encourag[ing] the re-building and development of lasting co-operation," and achieving an "acceptable settlement,"[115] all of which are necessary where a dispute involves more than narrow legal

107 COLLIER & LOWE, *supra* note 18, at 33-34; Bridge, *supra* note 105, at 110-11; GERNOT BIEHLER, PROCEDURES IN INTERNATIONAL LAW 307 (Berlin: Springer-Verlag, ed., 2008); Malintoppi, *supra* note 30, at 140, 143, 154 (explaining that the parties may devise their own procedural rules, adopt a set of rules such as the UNCITRAL Arbitration Rules or the Optional Rules of the Permanent Court of Arbitration for Arbitrating Disputes between States, or allow the arbitral tribunal to adopt its own rules); McHugh, *supra* note 42, at 230.

108 MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 90-91; Malintoppi, *supra* note 30, at 143, 147-48; Fox, *supra* note 84, at 170-71.

109 MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 91; Malintoppi, *supra* note 30, at 148, 150.

110 *See* Pinto, *Inter-State Disputes*, *supra* note 2, at 73, 76-77.

111 Copeland, *supra* note 11, at 3074-75.

112 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 247.

113 *See id.*

114 Jean-Pierre Queneudec, *The Eritrea-Yemen Arbitration: Its Contribution to International Law*, *in* THE ERITREA-YEMEN ARBITRATION AWARDS 1998 AND 1999, 1, 5-6 (Bette Shifman ed., 2005).

115 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 247-48.

questions.[116] In contrast, adjudication by a permanent international court commonly involves a strict application of the law,[117] which is likely to produce decisions that are "less persuasive to the layman or the politician,"[118] making it "poorly equipped to resolve complex, multi-issue disputes involving political, social, environmental, and ethical interests."[119]

Arbitration and adjudication by a permanent court also differ in their fundamental functions and purposes in the international system. ICJ decisions, for instance, are expected to create the "continuity required for the consistent and progressive development of international law."[120] This "emphasis on systematic development of jurisprudence" means that the ICJ "may not address or resolve the political dimensions of cases."[121] Arbitration, in contrast, is intended to be an *ad hoc* process carried out by tribunals with no continued existence, no capacity to affect third parties, and tasked solely with resolving the particular dispute before them, whether legal or political.[122] Therefore, "arbitration's capacity to focus on the immediate needs of parties" may be more appealing to states "locked in disputes over grave issues,"[123] or "disputes involving high stakes, matters of political principle, or broad legal standards subject to a controversial range of application,"[124] than "the broader orientation of judicial settlement."[125]

These unique features of interstate arbitration, which are the foundation of its traditional *sui generis* nature, make it well-suited for the resolution of complex interstate disputes involving issues of "important domestic political implications," such as territorial disputes.[126] Purely diplomatic mechanisms may be less likely to "foster lasting

116 Johnson, *International Arbitration*, *supra* note 98, at 311. It should be noted that the ICJ has been increasingly prepared to hear politically charged disputes and "depoliticize" them by separating the legal aspects of the case from the political. However, these risks neglecting a party's non-legal interests, which may result in the rejection of judicial decisions by losing parties. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 30, at 155-56; Shaw, *supra* note 18, at 60-62.

117 Shaw, *supra* note 18, at 53.

118 Lachs, *supra* note 30, at 41.

119 Spain, *supra* note 36, at 16.

120 Brower, *supra* note 63, at 293-94.

121 *Id.* at 309.

122 *Id.* at 295.

123 *Id.* at 308.

124 *Id.* at 298.

125 *Id.* at 296.

126 VICUÑA, *supra* note 18, at 346-47.

peace"[127] absent a binding and authoritative award,[128] and the ICJ remains a "method of last resort" in most interstate disputes.[129]

III. ARBITRATING INTERSTATE TERRITORIAL DISPUTES—CASE STUDIES

A. The Beagle Channel Arbitration, 1977

The Beagle Channel ("the Channel"), a narrow passageway connecting the Atlantic and Pacific oceans at the southern tip of South America, was the subject of a protracted dispute between Chile and Argentina since its discovery in 1830.[130] In 1881, the two countries signed a Boundary Treaty ("the Treaty"), which defined in its Article III the parties' territorial entitlements in the Channel area,[131] but left the Channel itself undefined geographically. As a result, a dispute arose between the parties over the Channel extending also to issues concerning maritime boundaries, sovereignty over certain islands located in the Channel, and associated rights, which negotiations lasting for almost a century failed to resolve.[132] In 1952, Argentina rejected an ICJ ruling awarding control of the Channel to Chile, and civilian and military occupation of the Channel remained a source of contention for the next two decades.[133]

In 1971, Chile and Argentina signed a *compromis*, agreeing to arbitrate their dispute in accordance with the General Treaty of Arbitration they had signed in 1902, which provided for arbitration by the Britannic Majesty's Government of any disputes arising out of the 1881 Treaty.[134] The British Government appointed a five-member

127 Lefler, *supra* note 45, at 3.

128 *See* STUDY GROUP, *supra* note 12, at 127.

129 Spain, *supra* note 36, at 20.

130 FRIEDRICH KRATOCHWIL, ARPREET MAHAJAN & PAUL ROHRLICH, PEACE AND DISPUTED SOVEREIGNTY: REFLECTIONS ON CONFLICT OVER TERRITORY 73 (Lanham, MD: University Press of America, 1985); Malcolm Shaw, *The Beagle Channel Arbitration Award*, 6 INT'L REL. 415, 416 (1978) [hereinafter Shaw, *Beagle Channel*].

131 Argentina v. Chile (1977), Decision of the Court of Arbitration, 17:3 I.L.M. 634, at para. 15 (this was the English translation used by the arbitral tribunal); David M. Himmelreich, *The Beagle Channel Affair: A Failure in Judicial Persuasion*, 12 VAND. J. TRANSNAT'L L. 971, 975 (1979).

132 KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 71; THE CARTER CENTER, *supra* note 30, at 21.

133 BERCOVITCH & FRETTER, *supra* note 12, at 126.

134 *Agreement for Arbitration (Compromiso) of a Controversy Between the Argentine Republic and the Republic of Chile Concerning the Region of the Beagle*

arbitral tribunal composed of five ICJ judges.[135] This procedure departed from that of previous arbitrations between Argentina and Chile pursuant to the General Treaty of Arbitration,[136] in which the tribunals had included only British members. The decision to appoint ICJ judges was intended to ensure that the decision would be based on strict international legal criteria and would be perceived by the parties as objective. From its inception, therefore, the arbitration process "militated against any approach other than a strictly legal one."[137] As the parties could not agree on a common question to put before the arbitral tribunal in the *compromis*, they each formulated a separate question.[138] The arbitral tribunal was to decide the case "in accordance with the principles of international law"[139] and transmit the award to the British Government for ratification.[140] Once the award was ratified by the British government, it was to be considered as final[141] and legally binding[142] on the parties, and no appeal from it was permitted.[143] Both Argentina and Chile relied in their arguments on the legal interpretation of the 1881 Treaty and the application of international law principles,[144] thereby focusing almost exclusively on the legal dimension of the arbitral process. Argentina adopted a "maritime"[145] approach to the dispute, and, based on the international legal doctrine of *uti possidetis*[146] and the related "Oceanic" principle,[147] argued that the

Channel, 66 AM. J. INT'L L. 461, at Preamble (July 22, 1971) [hereinafter "Beagle Channel Decision"].

135 Dillard (U.S.A.), Fitzmaurice (Britain), Gros (France), Onyeama (Nigeria), and Petren (Sweden).

136 The *Cordillera of the Andes Boundary* case of 1902 and the *Argentine-Chile frontier* case of 1966. *See* Shaw, *Beagle Channel*, *supra* note 130, at 415, 417.

137 *Id.*

138 Beagle Channel Decision, *supra* note 134.

139 *Id.* at Article I(7).

140 *Id.* at Article XII(1), XIII(1).

141 *Id.* at Article XIII(1).

142 *Id.* at Article XIV.

143 Beagle Channel Decision, *supra* note 134.

144 F.V., *The Beagle Channel Affair*, 71 AM. J. INT'L L. 733, 737 (1977).

145 *Argentina v. Chile* (1977), Decision of the Court of Arbitration, 17:3 I.L.M. 634 at para. 6 (1978).

146 According to this doctrine, "all territory in Spanish-America . . . is deemed to have been part of one of the former administrative divisions of Spanish colonial rule" and "the title to any given locality is deemed to have become automatically vested in whatever Spanish-American State inherited or took over the former Spanish administrative division in which the locality concerned was situated." Beagle Channel Decision, *supra* note 134, at para. 10.

147 According to this principle, "each Party had a sort of primordial or *a priori* right to the whole of-and to anything situated on-in the case of Argentina, the

Treaty should be interpreted to mean that the disputed islands belonged to Argentina.[148] Chile, on the other hand, adopted a "territorial"[149] approach to the dispute, and objected to the application of the *uti possidetis* doctrine and the Oceanic principle advocated by Argentina.[150] It claimed, instead, that the *uti possidetis* doctrine was replaced by the terms of the 1881 Treaty,[151] and that the disputed islands belonged to Chile in accordance with the Treaty.[152] Moreover, Chile argued that it had exercised effective sovereignty over the islands for many years, and therefore claimed possession over it on the basis of customary international law.[153] Finally, Chile argued that Argentina's interpretation of the 1881 Treaty should be rejected on the basis of the latter's post-Treaty conduct and its acceptance of various maps recognizing Chile's claims.[154]

The tribunal's decision comprised of two main parts, the first dealing with the interpretation of the 1881 Treaty and the considerably shorter second part dealing with "corroborative or confirmatory incidents and material."[155] Similar to the parties' arguments, the arbitrators also focused on the legal dimension of the arbitration and their role as judges. While the arbitrators considered certain extra-legal factors, they ultimately based their decision on the narrow legal interpretation of the treaty.

In the first part of its decision, the arbitral tribunal adopted the Chilean approach to the interpretation of the Treaty,[156] and accordingly proceeded to reject the Oceanic principle invoked by Argentina, agreeing with Chile that the regime established in the Treaty governed

Atlantic coasts and seaboard of the continent, and in the case of Chile the Pacific." Beagle Channel Decision, *supra* note 134, at paras. 21-22, 60; THE CARTER CENTER, *supra* note 30, at 21; KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 73; F.V., *supra* note 144, at 736.

148 KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 74; F.V., *supra* note 144, at 736; Shaw, *Beagle Channel*, *supra* note 130, at 424.

149 Beagle Channel Decision, *supra* note 134, at para. 6.

150 *Id.* at para. 62; Shaw, *Beagle Channel*, *supra* note 130, at 425.

151 Beagle Channel Decision, *supra* note 134, at para. 21.

152 Shaw, *Beagle Channel*, *supra* note 130, at 425.

153 KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 75.

154 Beagle Channel Decision, *supra* note 134, at para. 167; KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 75.

155 F.V., *supra* note 144, at 738; Shaw, *Beagle Channel*, *supra* note 130, at 420.

156 Beagle Channel Decision, *supra* note 134, at para. 31; KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 74; F.V., *supra* note 144, at 738; Shaw, *Beagle Channel*, *supra* note 130, at 420; Himmelreich, *supra* note 131, at 978-79. This characterization of the parties' Compromise has been criticized as "operat[ing] against Argentina's claims." Shaw, *Beagle Channel*, *supra* note 130, at 423.

the parties' territorial claims and rights to the exclusion of the *uti possidetis* doctrine.[157] The tribunal further found that the Treaty allocated all of the islands to one party only, and that external evidence failed to furnish a "certain result."[158] In light of the fact that the drafters had failed to define the Channel's boundary, the tribunal found that such boundary must have been "obvious."[159] Thus the tribunal concluded that this boundary, "as a matter of compelling probability,"[160] located the islands in the territory of Chile.[161]

In the second part of its decision, dealing with "corroborative or confirmatory incidents and material," the tribunal considered several matters which, while expressly not constituting the basis for its conclusions, did confirm them in its view.[162] The tribunal first examined the conduct of the parties between 1881-1888, which it considered as reflecting their respective interpretations of the Treaty.[163] Based on this analysis, the tribunal concluded that Argentina's position in the arbitration contradicted its position at the time the Treaty was drawn up, while the Chilean position remained consistent.[164] Moreover, the tribunal studied several maps of the disputed area, emphasizing that its decision was made independently of cartography, although it may contribute to the ordinary processes of interpretation.[165] The tribunal discarded early explorers' maps as being inconclusive, and noted that on a map given to the British diplomatic representative in Argentina in 1881,[166] and on an official Argentine map of 1882, the disputed area was attributed to Chile.[167] Finally, the tribunal recognized the peaceful, uninterrupted, and undisputed possession of the area by Chile to

157 Beagle Channel Decision, *supra* note 134, at paras. 11, 66, 74. The decision to entirely exclude the *uti possidetis* principle has been criticized since, where treaty interpretation is involved, this principle "can provide a useful guide to the background circumstances, elucidating presumptions and establishing a framework." *See* Shaw, *Beagle Channel*, *supra* note 130, at 421-22.

158 Beagle Channel Decision, *supra* note 134, at para. 91.

159 *Id.* at para. 94.

160 *Id.* at para. 96.

161 *Id.* at para. 99; Shaw, *Beagle Channel*, *supra* note 130, at 427-28; Himmelreich, *supra* note 131, at 980.

162 Beagle Channel Decision, *supra* note 134, at para. 112.

163 *Id.* at paras. 113, 117, 129; F.V., *supra* note 144, at 739; Shaw, *Beagle Channel*, *supra* note 130, at 432-43.

164 Shaw, *Beagle Channel*, *supra* note 130, at 432.

165 Beagle Channel Decision, *supra* note 134, at para. 136; Shaw, *Beagle Channel*, *supra* note 130, at 433-34.

166 Beagle Channel Decision, *supra* note 134, at paras. 122, 131.

167 *Id.* at para. 126; KRATOCHWIL, MAHAJAN & ROHRLICH, *supra* note 130, at 75.

be a relevant consideration,[168] although conceding that it was "in no sense a source of independent right."[169] The tribunal found that certain acts of jurisdiction, such as establishing a land lease system and providing public services, performed by Chile from 1892 onwards, and Argentina's failure to react to such acts,[170] were relevant to the interpretation of the parties' intentions[171] and "tended to confirm the correctness of the Chilean interpretation of the Treaty."[172]

The arbitral award, rendered in February 1977, has been considered to "constitute a highly polished legal document . . . clearly founded upon international legal principles and its discussion of extra-legal factors [wa]s minimal."[173] At the same time, it has also been considered as exceptional in that it completely endorsed one party's claims rather than reaching a compromise between the parties as in most boundary cases, and this result has been attributed to the composition of the tribunal.[174] In May 1977, after the British Crown approved the award,[175] Argentina issued a formal note rejecting it as being null and void under international law on the grounds, *inter alia*, that the tribunal distorted Argentina's arguments, and that there was an imbalance in the evaluation of the arguments and evidence submitted by the parties.[176]

In 1978, Argentina and Chile signed the Act of Puerto Montt, providing for direct negotiations to resolve their dispute. These negotiations failed, however, and military mobilization ensued. In 1979, the parties agreed to Papal mediation,[177] which in 1980 produced a decision that was partially rendered *ex aequo et bono*. The decision awarded the contested area to Chile; however, it also limited potential

168 KRATOCHWIL, ROHRLICH & MAHAJAN, *supra* note 130, at 75.

169 Beagle Channel Decision, *supra* note 134, at para. 165.

170 *Id.* at paras. 166, 172.

171 Shaw, *Beagle Channel*, *supra* note 130, at 437-39.

172 Beagle Channel Decision, *supra* note 134, at para. 165.

173 Shaw, *Beagle Channel*, *supra* note 130, at 420.

174 *Id.* at 441-42.

175 *Argentina-Chile: Beagle Channel Arbitration, Declaration of Her Majesty Queen Elizabeth II, Pursuant to the Agreement For Arbitration (Compromiso) Determined by the Government of the United Kingdom of Great Britain and Northern Ireland and Signed on Behalf of That Government and the Governments of the Argentine Republic and the Republic of Chile on 22 July 1971 for the Arbitration of a Controversy Between the Argentine Republic and the Republic of Chile Concerning the Region of the Beagle Channel*, 17 INT'L LEGAL MATERIALS 632 (1978) [hereinafter *Argentina-Chile: Beagle Channel Arbitration, Declaration of Her Majesty Queen Elizabeth II*].

176 Himmelreich, *supra* note 131, at 980.

177 BERCOVITCH & FRETTER, *supra* note 12, at 127.

Chilean claims to sovereignty in the Atlantic by restricting its maritime right to the Pacific waters based on the Oceanic principle, declaring the Channel itself to be bi-national.[178] The Papal decision therefore "grasped the symbolic importance and face saving potential of the Oceanic principle," which was neglected by the arbitral tribunal, and Chile's acceptance of this principle "belie[d] the [tribunal]'s conclusion that no such principle exist[ed]."[179] The two countries accepted the Papal decision and in 1984 signed a Treaty of Peace and Friendship that finally resolved the dispute.[180]

The failure of the Beagle Channel arbitration to resolve the dispute between Chile and Argentina can be seen to emanate, at least in part, from the parties' and arbitral tribunal's narrow focus on the legal dimension of the dispute and the arbitral process, despite the complex nature of the subject-matter. The parties approached the arbitration as an essentially judicial process, focusing on legal arguments grounded in legal principles and strict treaty interpretation while neglecting, both in their claims and in their perception of the arbitral tribunal's role, the significant non-legal aspects of their dispute. Similarly, the arbitrators appear to have perceived themselves narrowly as judges bound by the strict legal interpretation of a treaty, instead of employing a more flexible interpretation of the law in combination with an extra-legal diplomatic function to adequately address the non-legal issues in dispute.

Several aspects of the parties' approach to the arbitration in this case may have contributed to its ultimate failure. The parties failed to utilize one of the hallmark features and greatest advantages of arbitration—their ability to select their decision maker(s). The arbitrators in this case were all chosen by the British government, and none originated from the parties' region, let alone were nationals of either of the parties. This effectively deprived the parties of their right to appoint arbitrators of their choosing who are familiar with the region, sympathetic to the parties' claims, and cognizant of the broader implications of their decision. The result in this case was an arbitral tribunal comprised solely of ICJ judges, which viewed itself as a court rather than an arbitral tribunal, perceived its role in strictly legal terms, and may

178 KRATOCHWIL, ROHRLICH & MAHAJAN, *supra* note 130, at 73; BERCOVITCH & FRETTER, *supra* note 12, at 127; THE CARTER CENTER, *supra* note 30, at 23-24; Himmelreich, *supra* note 131, at 997.

179 *See* Himmelreich, *supra* note 131, at 997.

180 KRATOCHWIL, ROHRLICH & MAHAJAN, *supra* note 130, at 73; BERCOVITCH & FRETTER, *supra* note 12, at 127; THE CARTER CENTER, *supra* note 30, at 23-24.

have been less familiar and engaged with the parties' underlying interests. Moreover, considering that Argentina had previously rejected an ICJ award granting the disputed area to Chile, its rejection of the same outcome reached by an arbitral tribunal comprised solely of ICJ judges was to be expected.[181]

Although it is an accepted practice in international arbitration to designate a third party to appoint some or all of the members of an arbitral tribunal, such third parties are generally neutral individuals or institutions that are detached from the disputed parties. In this case, however, the designated third party, the British government, shared a turbulent history with Argentina, including a long-standing dispute over the Falkland Islands.[182] Argentina's historic distrust of the United Kingdom and its potential fear of bias, therefore, likely influenced its ultimate rejection of the unfavorable outcome in the Beagle Channel arbitration.[183] If the British government did not have such a major role in setting up the arbitration, effectively subsuming the role naturally reserved for the parties themselves, the outcome of the arbitration, as well as its reception by Argentina, might have been different.

Indeed, in the immediate aftermath of Argentina's rejection of the arbitral award commentators already concluded that one of its likely results would be "a return . . . to a more flexible composition of the tribunal . . . since in this way the parties could ensure that all its [sic] relevant interests might be considered, including those interests that straddled that ambiguous boundary between 'hard' law and 'soft' law."[184] The 1984 Treaty of Peace and Friendship, for instance, provided that in the event that arbitration was commenced, it was to be conducted by a panel of five members, one appointed by each party who may be their nationals, and the remaining three were to be non-nationals to be selected either by agreement of the parties or by the Swiss government.[185]

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181 *See* BERCOVITCH & FRETTER, *supra* note 12, at 126. *See also Argentina-Chile: Exchange of Diplomatic Notes Concerning the Beagle Channel Arbitration*, 17 INT'L LEGAL MATERIALS 738 (1978).

182 *See, e.g.*, Peter J. Beck, *Cooperative Confrontation in the Falkland Islands Dispute: The Anglo-Argentine Search for a Way Forward, 1968-1981*, 24 J. INTERAM. STUD. & WORLD AFF. 37; LOWELL S. GUSTAFSON, THE SOVEREIGNTY DISPUTE OVER THE FALKLAND (MALVINAS) ISLANDS (1988).

183 Himmelreich, *supra* note 131, at 988-89.

184 Shaw, *Beagle Channel*, *supra* note 130, at 445.

185 Treaty of peace and friendship (with annexes and maps), Arg.-Chile., art. 24-25, Nov. 29, 1984, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/ CHL-ARG1984PF.PDF.

In addition, the parties defined the disputed issue in the *compromis* narrowly, as a technical or factual question to be resolved by the arbitral tribunal "[i]n accordance with the principles of international law."[186] This narrow framing of the issues and limited authority granted to the tribunal likely contributed to its strict legal approach and the unsatisfactory outcome. In such a complex dispute, which involves important strategic, economic, and political underlying interests, it is doubtful that the submission of a single narrow legal question to arbitration could result in a comprehensive decision that pays sufficient regard to "interests that are not ordinarily protected as rights."[187] Rather, in order to obtain a satisfactory resolution in such complex disputes, parties should frame the issues to be determined by the arbitral tribunal broadly to include both their legal and non-legal aspects, and allow for some flexibility in the governing law so that the tribunal is able to adapt the applicable rules to the circumstances of the case.[188] While states may be reluctant to entrust a third party with deciding political or vital issues[189] "outside the law,"[190] this case suggests that *not* doing so may thwart the resolution of the overall dispute and result in an inadequate award.

The arbitral tribunal's reasoning and decision-making process also contributed to the ultimate failure of the arbitration. Most notably, the arbitrators did not pay sufficient attention to "political realities" in deciding a dispute that was "primarily a manifestation or symbol of a more generalized conflict between the parties," and in which acceptance of an adverse decision was "not likely to be dissociated from the underlying tension."[191] The fundamental nature of this particular dispute, therefore, required the tribunal to take into account "political, moral, or other extra-legal considerations," and its failure to do so likely contributed, at least in part, to the rejection of the award by Argentina.[192]

This failure to take into account non-legal considerations significantly limited the tribunal's ability to reach a flexible decision that balanced the parties' respective interests. The subsequent Papal mediation, in contrast, was *not* based on strict adherence to legal principles,

186 *Argentina-Chile: Beagle Channel Arbitration, Declaration of Her Majesty Queen Elizabeth II*, *supra* note 175, at 633.

187 Trakman, *supra* note 28, at 642.

188 *But see* Copeland, *supra* note 11, at 3084; RABOW, *supra* note 12.

189 RABOW, *supra* note 12, at 122, 135-36.

190 Trakman, *supra* note 28, at 622.

191 Himmelreich, *supra* note 131, at 991-92.

192 *Id.* at 992.

and therefore succeeded where the arbitral tribunal had failed.[193] Although the parties did not authorize the arbitral tribunal to decide *ex aequo et bono*, it retained the authority to apply equity, at least to the extent that it forms part of international law,[194] in order to take into account "considerations of fairness, reasonableness, and policy often necessary for the sensible application of more settled rules of law."[195] Such an approach would likely have prevented the tribunal from unequivocally accepting the claims of one party while entirely rejecting those of the other. Instead, the tribunal's restrictive legal approach weakened the "logic and moral force" of its decision and may have affected Argentina's motivation to implement it.[196]

The tribunal also did not utilize the advantages of the arbitral process itself in order to reach a compromise, rather than a zero-sum outcome. For instance, since the tribunal concluded that there was nothing in the Treaty pointing definitively to the view of one side or the other,[197] it ought to have furnished a decision that would account for the positions of both parties, rather than adopting one to the exclusion

193 KRATOCHWIL, ROHRLICH & MAHAJAN, *supra* note 130, at 76.

194 Holtzmann, *supra* note 97, at 75.

195 *Id.* at 75. *See also* Lachs, *Equity in Arbitration*, *supra* note 28, at 325; Munkman, *supra* note 12, at 14; D.W. Greig, *The Beagle Channel Arbitration*, 7 AUSTL. Y.B. INT'L L. 332, 384 (1976-1977); Pinto, *Inter-State Disputes*, *supra* note 2, at 83 (for example, discussing how, in the 1968 *Rann of Kutch* arbitration between India and Pakistan, the arbitral tribunal based its decision on equity and "the paramount consideration of promoting peace and stability" even though it was not authorized by the parties to decide *ex aequo et bono*. Similarly, in the G*uinea-Guinea Bissau* maritime delimitation arbitration, the arbitral tribunal was to "decide according to the relevant rules of international law" and found that it was to achieve an "equitable solution" by the rule of law it selected to apply. Both decisions were accepted by the parties and settled their respective disputes).

196 Himmelreich, *supra* note 131, at 982, 985-86, 997 (explaining that while the tribunal's refusal to apply the Oceanic principle may have been "logically defensible," its complete rejection and discrediting of this principle compromised both the logic of its decision and its legitimacy. While the tribunal was not explicitly authorized to decide *ex aequo et bono* or based on equity, this "did not prevent a broad interpretation of the Treaty to include some version of the Oceanic principle" advanced by Argentina); Greig, *supra* note 193, at 382 (explaining the effects of sovereignty over the PNL group on maritime issues was clearly of great importance to Argentina, by "neglect[ing] the important contextual factor of the oceanic divide" the tribunal failed to provide a logically and morally forceful award and led Argentina to question its judgment); KRATOCHWIL, ROHRLICH & MAHAJAN, *supra* note 130, at 74.

197 Greig, *supra* note 195, at 352.

of the other.[198] The tribunal's restrictive legal approach and "narrow view of its role,"[199] however, prevented it from doing so.[200]

This restrictive approach also extended to the arbitral tribunal's use of "confirmatory" materials to supplement its strict treaty interpretation. While the tribunal reviewed such "confirmatory" materials in great length and detail, it declared that it was only using these to reinforce conclusions already made on the basis of treaty interpretation.[201] The tribunal also recognized that "mixed factors of coastal configuration, equidistance, and also of convenience, navigability, and the desirability of enabling each Party as far as possible to navigate in its own waters" were relevant to determining the boundary-line, but it nonetheless maintained that there was "little deviation from the strict median line."[202] This formalistic reasoning may have further eroded the legitimacy and credibility of the tribunal's decision in the eyes of the parties.

Therefore, the "five Members of the Court sat ostensibly as arbitrators but in reality as judges on another bench."[203] They not only restricted their role to that of judges,[204] but also carried out this role in a narrow, rigid, and legalistic manner inappropriate for interstate arbitration. This is evident, for instance, from the length of the proceedings. The tribunal spent six years in deliberations before rendering the award, an unusually long period of time for an arbitration and more characteristic of international court proceedings.[205] The tribunal's self-perception is also evident from the fact that, while it felt compelled to consider and analyze evidence external to the text of the Treaty, it refused to allow such evidence to influence its "positivistic"[206] interpretation of the text, on which it ultimately based its decision. A more

198 Beagle Channel Decision, *supra* note 134, at 116 (statement of tribunal merely noting that "the Chilean version, although not itself entirely free from difficulty, is the more normal and natural on the basis of the actual language of the text"); Himmelreich, *supra* note 131, at 989 (explaining that this, in turn, led Argentina to assert that the tribunal did not clearly favor Chile's interpretation, but rather "merely prefe[red] it" over Argentina's "after having weighed up the sum total of their respective weaknesses.").

199 Greig, *supra* note 195, at 381.

200 Himmelreich, *supra* note 131, at 989-90.

201 Shaw, *Beagle Channel*, *supra* note 130, at 429.

202 Beagle Channel Decision, *supra* note 134, at para. 110; Shaw, *Beagle Channel*, *supra* note 130, at 431.

203 Lachs, *supra* note 30, at 48.

204 McWhinney, *supra* note 13, at 283.

205 Himmelreich, *supra* note 131, at 996-97; JEONG, *supra* note 12, at 178-79.

206 McWhinney, *supra* note 13, at 283.

flexible and contextual approach to treaty interpretation and the arbitrators' role, along with a broader understanding of the arbitral process, was necessary. Such an understanding was in fact raised by one of the members of the tribunal in an earlier arbitration between the parties, in which the "need to adjust as equitably as possible the conflicting claims of the two States"[207] was considered.

In summary, the approach adopted by the arbitral tribunal to the interpretation of the Treaty, while legally sound and seemingly justified in light of the narrow jurisdiction granted to it by the parties in the *compromis*, was nonetheless overly legalistic and formalistic, and neglected to take into account the political dimension of the arbitral process, the broader context of the dispute, and the parties' underlying interests. By so doing, the tribunal wasted an opportunity to formulate a compromise within the limits of the parties' claims and delegitimized itself and the arbitral award in the eyes of the losing party, thereby contributing to the failure of the arbitration to resolve the dispute between the parties.[208]

There were also external factors that converged in 1983 to make the conflict more amenable to resolution than before. First, changes in the law of the sea and a need for greater regional economic cooperation made the resolution of the dispute more pressing. Second, the increase in aggressive military confrontations between the parties made it clear that, absent a peaceful resolution to the dispute, war would be inevitable. Third, and most significantly, major changes in Argentine domestic politics, including the rise of a democratic government, constituted "the primary impetus for the settlement ultimately achieved," as the new government facilitated the concessions made by Argentina in the 1984 Treaty of Peace and Friendship.[209]

While it is possible that the change in government in Argentina was a *necessary* condition for any successful arbitration of this specific dispute,[210] it would not have been a *sufficient* condition so long as the process continued to be used in the same deficient manner. The fact that Papal mediation ultimately brought the dispute to a peaceful conclusion suggests that the involvement of a third party deemed acceptable to the parties was required once the political conditions

207 Greig, *supra* note 195, at 381 (regarding the 1902 Andean boundary dispute).

208 Greig, *supra* note 195, at 382-83.

209 MARK LAUDY, *The Vatican Mediation of the Beagle Channel Dispute: Crisis Intervention and Forum Building*, *in* WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT 305-06, 315 (Melanie C. Greenberg, John H. Barton & Margaret E. McGuinness eds., 2000).

210 *Id.* at 316.

allowed for a settlement, and this requirement could have been satisfied by arbitration if it were properly applied. In any event, the ultimate failure of the arbitration in this case, rather than attesting to the inherent unsuitability of arbitration to resolve complex interstate territorial disputes, emanated from the restrictive perception of the process and its inadequate use by the parties, along with the self-restrictive and legalistic approach of the arbitral tribunal, and the unsuitable external political conditions.

In sum, both the parties and the arbitral tribunal in this case failed to recognize the true nature of interstate arbitration and how to utilize it properly. The parties did not exercise their right to select their arbitrators and consented to arbitrators who were ICJ judges, who unduly restricted the tribunal's jurisdiction to decide only narrow legal or factual issues in accordance with international law.[211] Had the parties appointed neutral arbitrators, preferably including their own nationals or non-nationals who had a better understanding of the underlying conflict and its implications for the parties, and had they provided the tribunal with sufficiently broad jurisdiction to take the parties' non-legal interests into account, the resulting award could have been more effective in resolving their dispute. Similarly, the arbitrators restricted themselves to the rigid role of judges, applying narrow and legalistic approaches to the interpretation of the Treaty that excluded any equitable considerations and crucial extra-legal factors, disregarded the "symbolism of international politics,"[212] and failed to devise a conciliatory settlement in a situation where it was both called for and possible. Therefore, the arbitrators compromised the legitimacy of the award and the likelihood of its implementation.

B. The Taba Arbitration, 1988

This arbitration concerned the dispute between Israel and Egypt over the Taba area, a strip of land in the Sinai desert on the shore of the Gulf of Aqaba.[213] In the 1967 Six-Day War, Israel gained control of the Sinai Peninsula, including the Taba area.[214] Fighting between Israel and Egypt continued until the 1979 Camp David Accords, when the Treaty of Peace was signed and Israel agreed to return Sinai to

211 Himmelreich, *supra* note 131, at 971-72.

212 *Id.* at 998.

213 Copeland, *supra* note 11, at 3081.

214 A. Kemp & Y. Ben-Eliezer, *Dramatizing Sovereignty: The Construction of Territorial Dispute in the Israel – Egyptian Border at Taba*, 19 POL. GEOGRAPHY 315, 320 (2000).

Egypt in exchange for peace.[215] However, there was continued disagreement regarding the location of the boundary between the two countries in the Taba area. Since the Treaty of Peace required conciliation or arbitration of disputes not resolved by negotiations, the parties entered into an agreement in 1982 to submit the question regarding the location of the boundary "to an agreed procedure which will achieve a final and complete resolution."[216] Israel wanted the dispute to be resolved by conciliation, so that economic and geographical considerations would be taken into account, whereas Egypt preferred arbitration, since it considered the border question to require a more formal procedure.[217] In 1986, the parties signed an agreement referring the dispute to arbitration.[218]

Aside from the issue of territorial sovereignty, the dispute over Taba also concerned several hundred meters of shoreline, corresponding territorial water rights, and a multi-million dollar resort hotel complex and tourist village, which made this area economically valuable.[219] That said, there is no doubt that when compared with other territorial concessions made by Israel under the Treaty of Peace, the Taba area was relatively insignificant. The protracted dispute over the area is therefore a testament to the complexity of territorial disputes in the Middle East, and to the "intractable nature" of the Israeli-Palestinian conflict,[220] in which territory may have greater symbolic significance than actual objective value.

On September 11, 1986, Egypt and Israel signed an arbitration agreement (the "Arbitration Agreement"), which provided that the "boundary dispute concerning the Taba beachfront" shall be submitted

215 BERCOVITCH & FRETTER, *supra* note 12, at 282; Kemp & Ben-Eliezer, *supra* note 214, at 320. *See* Art. VII of the Treaty of Peace, available on the website of the Israeli Ministry of Foreign Affairs, https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-egypt%20peace%20treaty.aspx.

216 Treaties and Agreements Egypt – Israel: Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront, Isr. – Egypt, Jan. 1987, 26 I.L.M 1987; Initial Procedure for Resolving Boundary Questions (April 25, 1982) 26 I.L.M. 1987 at 14 [hereinafter Taba Arbitral Award].

217 Ruth Lapidoth, *Some Reflections on the Taba Award*, 35 GER. Y.B. INT'L L. 224, 234 (1992); Ruth Lapidoth, *The Taba Controversy*, 37 JERUSALEM Q. 29, 35 (1986).

218 Treaties and Agreements Egypt – Israel, *supra* note 216, paras. 2-3 at 104; BOWETT, *supra* note 12, at 429; Copeland, *supra* note 11, at 3082; Gunnar Lagergren, *The Taba Tribunal 1986 – 1989*, 1 AFR. J. INT'L & COMP. L. 525, 525 (1989).

219 Haihua Ding & Eric S. Koenig, *Boundary Dispute Concerning the Taba Area*, 83 AM. J. INT'L L. 590, 593 (1988); Copeland, *supra* note 11, at 3082, 3084.

220 Kemp & Ben-Eliezer, *supra* note 214, at 316.

to an arbitral tribunal consisting of five members.[221] The Arbitration Agreement further provided that the tribunal was to decide "the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty; the April 25, 1982 Agreement; and the Annex."[222]

The Arbitration Agreement contained two unusual features. First, pursuant to an Israeli formula of "conciliatory arbitration,"[223] the Agreement provided for a conciliation process *within* the arbitration. For this purpose, it created a "three-member chamber" composed of the two party-appointed arbitrators and one of the non-national members of the tribunal, to be selected by the tribunal's President. The task of this chamber was to "explore the possibilities of a settlement of the dispute" and to make recommendations to the parties regarding such possibilities before the completion of the written pleadings. Should the parties jointly accept a settlement recommendation made by the chamber, the arbitration process would terminate.[224] Second, the Annex to the Arbitration Agreement provided that "the Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Israel or by Egypt," and that "the Tribunal also is not authorized to address the location of boundary pillars other than those specified in paragraph 1."[225]

In their arguments, both parties focused on the legal dimension of the arbitration, basing their arguments largely on treaty interpretation and principles of international law such as the legal principle of "critical date."[226] Israel submitted that the critical date was 1906, when Egypt and Turkey agreed to establish the boundary line. According to Israel, any pillars that were at variance with the 1906 agreement were of no legal significance.[227] Israel relied exclusively on the 1906

221 The tribunal members included three non-nationals, Gunnar Lagergren (Sweden) as President, Pierre Bellet (France), and Dietrich Schindler (Switzerland), and two nationals of the parties, Hamed Sultan (Egypt) and Ruth Lapidoth (Israel).

222 Treaties and Agreements Egypt – Israel, *supra* note 216, at 43.

223 Kemp & Ben-Eliezer, *supra* note 214, at 325.

224 *Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront* (Israel and Egypt), 26 I.L.M. 1, at IX (Sept. 11, 1986).

225 *Id.* at Art. 5.

226 According to this principle, a tribunal must determine the date on which the dispute over territorial sovereignty or boundary location can be said to have "crystallised." The Tribunal then decides who was sovereign, or where the boundary lay, on that critical date. *See* BOWETT, *supra* note 12, at 430-31.

227 Taba Arbitral Award, *supra* note 216, at paras. 142-143; Prosper Weil, *Some Observations on the Arbitral Award in the Taba Case*, 23 ISR. L. REV. 1, 3 (1989).

agreement since it described the boundary pillars as "intervisible," and Israel's suggested locations met this "intervisibility test."[228] Egypt, on the other hand, submitted that the critical date could be anytime during the Mandate period between 1922 and 1948, and therefore argued that the "recognized international boundary" was the line linking the boundary pillars existing on the ground during this period.[229] Egypt referred in this regard to the need "to bring into operation the general legal principles of the stability and finality of boundaries, the succession of States to territory, estoppel, acquiescence, and *de facto* agreement so as to preclude Israel's claims based on application of the terms of the 1906 Agreement."[230]

Despite the parties' narrow legal attitude, the arbitral tribunal adopted a diplomatic approach to their dispute by interpreting broadly any relevant legal principles and taking into account extra-legal considerations. The tribunal accordingly rejected the parties' reliance on the principle of "critical date" and adopted a "critical period" instead as the basis for its decision. The tribunal also rejected Israel's position, finding that it did not accord with the description of the boundary in the Treaty of Peace and the Arbitration Agreement.[231] The tribunal therefore rejected Israel's legalistic approach and set out to determine the location of the disputed pillars on the basis of "where the boundary pillars stood" and what "the situation on the ground" was during the relevant period.[232] Professor Ruth Lapidoth, the arbitrator appointed

228 Taba Arbitral Award, *supra* note 216, at paras. 144, 149-50; BOWETT, *supra* note 12, at 432.

229 Taba Arbitral Award, *supra* note 216, at paras. 111-13; BOWETT, *supra* note 12, at 431-32; Copeland, *supra* note 11, at 3082.

230 Taba Arbitral Award, *supra* note 216, at para. 113; Weil, *supra* note 227, at 3.

231 Taba Arbitral Award, *supra* note 216, at paras. 169-175; BOWETT, *supra* note 12, at 431; Copeland, *supra* note 11, at 3082.

232 Taba Arbitral Award, *supra* note 216, at para. 173. With regard to the location of the disputed "Nine Northern Pillars," the tribunal found the evidence presented by both sides unpersuasive and decided in favor of the proposed locations nearest to a straight line drawn from agreed pillar locations, which resulted in five of the pillars being awarded to Egypt and four to Israel. With respect to the pillars in the "Ras-el-Naqb area," the majority found that the three existing pillars had been in Egypt's territory since at least 1915 and that the available maps did not support the boundary line as claimed by Israel. The majority therefore rejected Israel's argument based on the 1906 agreement, finding that the three existing pillars located in Egypt's territory were not inconsistent with this agreement. The majority also discussed the speculative situation that would have arisen had there been such inconsistency between the existing pillar locations and the 1906 agreement, finding that a jointly agreed demarcation should prevail over the text of the agreement. Finally, the majority also awarded the fourth new pillar to Egypt, since its proposed location was closer to the straight line it had drawn between the existing pillars. *See also* Taba Arbitral Award,

by Israel, rendered a dissenting opinion in which she adopted a more textual, legalistic approach, finding that the correct boundary was that recognized by Egypt and Great Britain in 1906, regardless of later developments on the ground.[233]

In 1988, two years after the parties entered into the Arbitration Agreement, the arbitral tribunal rendered an award in which it decided that five of the disputed Pillars were located on Egyptian territory and four on Israeli territory.[234] After the arbitral award was rendered, there was concern that Israel would refuse to withdraw from the Taba area on the ground.[235] However, Israel eventually withdrew from the Taba area after an agreement was signed between the parties in 1989.

While seemingly concerned with a narrow issue of the location of a few boundary pillars, the Taba arbitration in fact turned out to be quite complex and unusual. The parties' underlying interests in the Taba area were not clearly evident, and there seemed to be little economic or strategic value to this piece of land. However, the boundary question submitted to arbitration was in fact highly political and constituted merely one aspect of a much broader and more complex conflict that the parties eventually resolved through negotiations. While the arbitrators ultimately managed to resolve the disputed issue submitted to them by adopting a broad view of the arbitral process and of their own role as judges-diplomats, their success in doing so was partial at best as a result of the extremely limited jurisdiction granted to them by the parties. Israel and Egypt's narrow view of the arbitration as a strictly legal process and their refusal to allow the arbitral tribunal to reach a settlement compromised the tribunal's ability to effectively resolve even the narrow question submitted to it, and the complete failure of the arbitration was prevented only by the flexible approach adopted by the tribunal and the unique circumstances of the conflict between the parties.[236]

The parties' narrow and overly-detailed framing of the issue presented for consideration by the arbitral tribunal in the Arbitration

supra note 216, at paras. 187, 197-13; BOWETT, *supra* note 12, at 432-34; Ding & Koenig, *supra* note 219, at 594; Copeland, *supra* note 11, at 3083.

233 Taba Arbitral Award, *supra* note 216, at paras. 18-31, 41-42, 49 (dissenting opinion of Prof. Lapidoth).

234 Lagergren, *supra* note 218, at 531.218

235 Taba Arbitral Award, *supra* note 216, dissenting opinion of Prof. Lapidoth, at para. 165; Kemp & Ben-Eliezer, *supra* note 214.

236 David W. Rivkin, *Arbitrating for Peace in the Middle East: The Taba Award*, *in* ARBITRATING FOR PEACE: HOW ARBITRATION MADE A DIFFERENCE 156 (Ulf Franke, Anette Magnusson & Joel Dahlquist eds., 2016).

Agreement, as well as the limited authority granted to the tribunal to decide this issue, reflected their narrow legalistic view of the arbitral process and led to a partial, "winner-takes-all" outcome that was not readily implemented and left many disputed issues unsettled. The parties' overly-specific instructions and overly-detailed descriptions of the issue to be determined by the arbitral tribunal also frustrated the tribunal's ability to render a comprehensive decision that accounted for the parties' positions and all relevant facts. The restrictive authority granted to the tribunal to decide only between the parties' positions compromised the tribunal's ability to render a logically sound decision within the confines of the Arbitration Agreement, since it was forced to choose between locations that did not entirely comply with the requirements of the Arbitration Agreement. Although the tribunal found that the original pillar was not at any of the locations advocated by the parties and clearly preferred a different location, it was required to choose one of the parties' positions over the other.[237]

As a result of the narrow legal issue submitted to the arbitral tribunal's determination, the arbitral award only partially resolved the parties' dispute, leaving unsettled such issues as the extension of the boundary to the sea,[238] which were finally settled in a negotiated agreement in 1989.[239] While the issue of the location of the boundary pillars may seem technical, the tribunal was in effect charged with the task of establishing facts on the ground through a careful consideration of the evidence rather than the application of legal principles.[240] In light of the nature of this task, it is regrettable that the parties effectively tied the hands of the tribunal and prevented it from reaching an informed decision based on the available evidence and on the parties' respective interests.

With all that being said, the particular nature of the dispute in this case should be noted. The parties' narrow approach to the arbitration may have been rooted in their desire to dispense with a relatively minor issue that was standing in the way of implementing a much broader and more complex peace agreement.[241] In fact, "once the prospect of a meaningful agreement became real, both parties appreciated that the issue was strategically meaningless and that under no circumstances

237 Lapidoth, *supra* note 217, at 236.

238 E. Lauterpacht, *The Taba Case: Some Recollections and Reflections*, 23 ISR. L. REV. 443, 461 (1989); Weil, *supra* note 227, at 24.

239 Lapidoth, *supra* note 217, at 248.

240 BOWETT, *supra* note 12, at 430.

241 Copeland, *supra* note 11, at 3083-84; Rivkin, *supra* note 236, at 157.

could it be permitted to disrupt the peace relationship that was, by then, seen as serving their common interests."[242] Therefore, Israel and Egypt were not seeking to use arbitration to reach a compromise so much as to have an authoritative third party choose between their respective positions, and they were prepared to accept whatever zero-sum result was decided so long as the issue was resolved. The parties' inclusion of a parallel but separate conciliation process in the Arbitration Agreement also evidences their intention to either agree on a compromise suggested by the conciliators or accept the consequences of an "all or nothing" arbitral award.[243] Secure in the knowledge that all other possibilities have been considered and rejected, the parties may have been more comfortable with accepting the binding zero-sum decision of the arbitral tribunal.

Furthermore, while the parties failed to recognize the full potential of arbitration, they did utilize other advantages of the arbitral process. The parties were able to agree on neutral arbitrators and to appoint their own nationals to the tribunal, which presumably was of particular importance in light of the politically charged background of the dispute and the parties' prolonged conflict.[244] They also succeeded in obtaining an authoritative and binding decision peacefully settling a disputed question that proved impossible to settle by agreement and that jeopardized their broader peace process.

As for the arbitral tribunal's reasoning, although its authority and discretion were severely restricted by the parties in the Arbitration Agreement, it managed to conduct the proceedings effectively and paid considerable regard to the political context and complexity of the dispute, the sensitive relationship between the parties, and the need for a diplomatic or political, rather than strictly legal, solution that is as practical and fair as possible under the circumstances. Any weaknesses in the arbitral award, therefore, should be attributed to the parties' narrow approach rather than the attitude and conduct of the arbitral tribunal.

Conscious of the sensitive circumstances of the case and their role as judge-diplomats, the arbitrators avoided any "emotive"[245] reasoning that might have clouded its appearance of impartiality, and

242 Reisman, *Stopping Wars and Making Peace*, *supra* note 35, at 41.

243 Israel and Egypt have been criticized for pursuing a parallel arbitration and conciliation before the same decision-makers in light of the "virtually inevitable challenges associated" with doing so. *See* Rivkin, *supra* note 236, at 149.

244 Copeland, *supra* note 11, at 3082.

245 BOWETT, *supra* note 12, at 339.

maintained a diplomatic and unbiased position throughout the proceedings.[246] The tribunal also took care to address, in detail, the arguments of both sides, even when these arguments could have been dismissed outright.[247] The tribunal's diplomatic, yet legally "rigorous" approach, was therefore both "prudent and compelling" and likely contributed to the ultimate acceptance and execution of the award.[248]

The arbitral tribunal's approach to the application of international law and accepted legal principles is also noteworthy. While the Arbitration Agreement contained no direct reference to international law, but only to three agreements concluded by the parties, it is doubtful that this effectively excluded the application of international law, particularly since the Treaty of Peace explicitly referred to such application.[249] Nonetheless, the arbitral tribunal largely relied on testimony and documentary evidence submitted by the parties in its decision making, rather than on established international law,[250] and ultimately found that the location of the disputed pillars was to be determined on the basis of the effective situation on the ground during the critical period, rather than the provisions of the delimitation treaty.[251]

Furthermore, the arbitral award has been considered by some commentators as "running so clearly against the mainstream of international law,"[252] since in disputes over boundary delimitation considerations of legal title under treaties tend to prevail over factual situations.[253] It may be that the absence of a specific reference to

246 For instance, the tribunal avoided Egypt's assertion that Israel had acted in bad faith by not disclosing to Egypt during negotiations the existence of the "Parker pillar" and allowing the latter to describe the proposed location of the "Ras Taba" pillar as the "final pillar" in the Arbitration Agreement. Similarly, the tribunal stayed clear of many other accusations brought by Egypt against Israel, including that Israel had destroyed boundary pillars, altered maps post-1982, falsified photographs, withheld evidence, and concealed its true case until the oral hearing. *See* BOWETT, *supra* note 12, at 339-41.

247 BOWETT, *supra* note 12, at 433 (explaining that although the tribunal accepted Egypt's position regarding the location of the boundary pillars in the "Ras-el-Naqb area," the tribunal did not reject Israel's argument in this regard merely on the ground that these pillars had been accepted by Great Britain and Egypt during the Mandate period and therefore had to be respected, as it could have. Rather, the tribunal analyzed Israel's argument, in detail, based on the 1906 agreement and map evidence, and rejected it on its merits).

248 BOWETT, *supra* note 12, at 440-42.

249 Lapidoth, *Some Reflections on the Taba Award*, *supra* note 217, at 237.

250 Copeland, *supra* note 11, at 3084.

251 Lapidoth, *Some Reflections on the Taba Award*, *supra* note 217, at 243, 246-47.

252 Weil, *supra* note 2277, at 12.

253 *See id.* at 10-11.

international law in the Arbitration Agreement was interpreted by the tribunal as permitting it to depart from established international legal principles in favor of what it may have perceived to be a better outcome applicable to the circumstances.[254] Therefore, the majority's flexible approach to the application of international legal principles, while perhaps not contributing much to their development or force, was necessary in order for the arbitrators to properly carry out their dual role as judge-diplomats and render a decision that would effectively resolve the question submitted to them. While the majority's interpretation of the Arbitration Agreement may be seen as "illogical" at times and may be charged with exceeding its jurisdiction,[255] such criticism emanates from the narrow modern perception of arbitrators as judges interpreting and applying strict legal principles, and is therefore misplaced. The majority's contextual view of its own role was necessary for the arbitration to effectively settle the dispute, and this view facilitated its success in doing so.

In conclusion, while a territorial dispute over a piece of desert 10 km^2 in size seems relatively insignificant in light of the broader and more complex peace agreement concluded between Israel and Egypt,[256] the severity of a territorial dispute is assessed in subjective terms, and may be motivated by psychological considerations without necessarily conforming to the "value" of the territory in objective terms.[257] It is therefore not necessary for vital interests to be at stake for a territorial dispute to become politicized and threaten peace and stability. "Status politics" and "prestige contests" between states can easily translate into conflicts over territory,[258] and, as the Taba case illustrates, the true nature of interstate arbitration can also be effectively employed in these instances to resolve territorial disputes involving a long history of violent conflict.

In many respects, the arbitration in this case constitutes only a partial success due to the parties' narrow view of the arbitral process. As "poor questions can only receive poor answers,"[259] the narrow question submitted to the arbitral tribunal in this case and the manner in which it was submitted resulted in many disputed issues remaining

254 *See id.* at 14-15.

255 Lapidoth, *Some Reflections on the Taba Award*, *supra* note 217, at 247.

256 *See* Kemp & Ben-Eliezer, *supra* note 214, at 315-16; *see also* Lagergren, *supra* note 218, at 525.

257 Yoram Dinstein, *Psak HaBorerut BeParashat Taba* [The Taba Arbitration Award], 14 TEL AVIV U. L. REV. 57, 59 (1989) (Isr.).

258 Kemp & Ben-Eliezer, *supra* note 214, at 318.

259 Weil, *supra* note 227, at 25.

unresolved, although the arbitration laid the foundation for further negotiations on these issues. Had the parties fully accepted the political dimension of the arbitral process and allowed the arbitrators to devise a binding compromise with regard to all aspects of the Taba dispute, they could have been spared the considerable time and effort spent on subsequent negotiations.

Although eventually the arbitral award was implemented by the parties, the initial Israeli response to it was negative, and could have easily led to further friction and deterioration in the already fragile relationship between the parties. While the parties presumably intended to protect their broader peace process by submitting only a narrow legal question to arbitration and severely limiting the arbitral tribunal's decision-making powers, this narrow approach instead exposed the peace negotiations to unnecessary risk. Moreover, had the circumstances been different—for instance had Taba been more strategically important[260]—this approach may have led to the ultimate failure of the arbitral process, leaving the parties with no solution to this contested issue.

Therefore, this case exhibits several problematic features that, if taken out of the specific and atypical context of this dispute, may set a negative precedent for states in future interstate territorial arbitrations.[261] The restrictions imposed on the arbitral tribunal by the parties resulted in what has been considered by some to be a somewhat illogical and inconsistent award rendered by the tribunal in an effort to remain within the strict limits of the Arbitration Agreement.[262] The parties' legalistic approach to the arbitrators' role and the nature of the arbitral process also resulted in a zero-sum outcome favoring the position of one party almost to the exclusion of the other, even though the tribunal found both positions largely unacceptable.

At the same time, this case also makes some positive contributions to the practice of interstate arbitration that reinforce its true nature. These include the parties' choice of non-judges to act as arbitrators; the national, cultural, and ethnic diversity of the members of the tribunals; and the flexible approach of the tribunal, which enabled it to resolve the disputed issue despite the constraints placed on it by the parties and to render an award that was ultimately implemented by the losing party. This case unfortunately remains the only instance where a dispute between an Arab state and Israel was submitted to

260 Reisman, *Stopping Wars and Making Peace*, *supra* note 35, at 41.

261 Copeland, *supra* note 11, at 3084.

262 *See* Weil, *supra* note 227, at 23.

arbitration,[263] and had it not taken place, even in the limited form that it did, "the Taba problem would have remained unresolved indefinitely."[264]

C. The Red Sea Islands Arbitration, 1998

The islands and island groups located in the Southern end of the Red Sea ("the Islands") were the subject of a violent dispute between Eritrea and Yemen lasting from 1995 to 1998. In the 1923 Treaty of Lausanne, Turkey renounced its sovereignty over the Islands, leaving them with "an objective legal status of indeterminacy."[265] After gaining independence from Ethiopia in 1993, Eritrea proceeded to claim sovereignty over the Islands, which was disputed by Yemen. In 1995, after negotiations failed to resolve the dispute, a full-scale battle erupted threatening to escalate into an Arab-African conflict. Mediation attempts by several states and international organizations, including the United Nations ("UN"), led to a cease fire. In May 1996, Eritrea and Yemen signed an Agreement on Principles in which they agreed to settle their dispute peacefully by arbitration. Concurrently with the Agreement on Principles, the Parties issued a brief Joint Statement, emphasizing their desire to settle the dispute, and "to allow the reestablishment and development of a trustful and lasting cooperation between the two countries," contributing to stability and peace in the region.[266]

The parties' dispute concerned territorial sovereignty over the Islands, the definition of their maritime boundary, and related rights to tourism, fishing, minerals, and oil. For both Eritrea and Yemen, two of the world's poorest countries, these issues were directly linked to national economic development as well as to perceptions of national honor, thereby magnifying their significance; the Islands were also of

263 *See* Lapidoth, *Some Reflections on the Taba Award*, *supra* note 217, at 224.

264 Lauterpacht, *supra* note 238, at 450.

265 Constance Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, 13 LEIDEN J. INT'L L. 427, 431 (2000) [hereinafter Johnson, *Case Analysis: Eritrea-Yemen Arbitration*]; Queneudec, *supra* note 114, at 9; Jeffrey A. Lefebvre, *Red Sea Security and the Geopolitical-Economy of the Hanish Islands Dispute* (1998) 52 MIDDLE EAST J. 367, 369-70 (1998).

266 *Eritrea v. Yemen* (1998) Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), at para. 3 [hereinafter Red Sea Islands First Award]. *See also* Barbara Kwiatkowska, *Award of the Arbitral Tribunal in the First Stage of the Eritrea/Yemen Proceedings*, 14 INT'L J. MARINE & COASTAL L. 125, 125 (1999) [hereinafter Kwiatkowska, *Award of the Arbitral Tribunal*].

great strategic importance to the parties, since they were situated along central shipping lanes and in an area of possible oil reserves, and the dispute therefore raised concerns about a possible threat to international navigation.[267]

In October 1996, the parties concluded an arbitration agreement ("the Arbitration Agreement"), which provided for a five-member arbitral tribunal, each party appointing two arbitrators, who were then to appoint the President of the tribunal in cooperation with the parties.[268] Should the party-appointed arbitrators fail to agree on a president, the Arbitration Agreement provided that the President shall be appointed by the President of the ICJ in consultation with the party-appointed arbitrators.[269]

The Arbitration Agreement further provided that the tribunal was to decide "in accordance with international law"[270] in two stages. The first stage concerned the definition and scope of the dispute, to be decided "on the basis of the respective positions of the two Parties," and the issue of territorial sovereignty, to be decided "in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles."[271] The second stage concerned the delimitation of maritime boundaries, and was to be decided "taking into account the opinion that [the tribunal] will

267 *See, e.g.*, BERCOVITCH & FRETTER, *supra* note 12; J.G. Merrills, *Reflections on Dispute Settlement in the Light of Recent Arbitrations Involving Eritrea*, *in* THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 109-10 (Leiden; Boston: Martinus Nijhoff Publishers, 2009) [hereinafter Merrills, *Reflections on Dispute Settlement*]; Queneudec, *supra* note 114, at 2; Nuno Sérgio Marques Antunes, *The Eritrea-Yemen Arbitration: First Stage—the Law of Title to Territory Re-Averred*, 48 INT'L & COMP. L. Q. 362, 362 (1999) [hereinafter Antunes, *Eritrea-Yemen Arbitration First Stage*]; Kwiatkowska, *Award of the Arbitral Tribunal*, *supra* note 266, at 126; Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 OCEAN DEV. & INT'L L. 1, 2 (2001) [hereinafter Kwiatkowska, *The Eritrea-Yemen Arbitration*]; Spain, *supra* note 36, at 37-38; Lefebvre, *supra* note 265, at 369, 372, 374-76.

268 *See* Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 267, at 2 (explaining that Eritrea appointed as arbitrators ICJ President Stephen Schwebel [U.S.A.] and ICJ judge Rosalyn Higgins [Britain], while Yemen appointed Ahmed Sadek El-Kosheri [Egypt] and Keith Highet [U.S.A.], both leading international counsel. Pursuant to the joint recommendation of the parties, the four arbitrators appointed Sir Robert Jennings [Britain], former President of the ICJ, as President of the arbitral tribunal).

269 *Eritrea v. Yemen*, PCA Case Repository 51, ¶ 4-5 (Perm. Ct. Arb. 1996).

270 *Id.* at Art. 2(1).

271 *Id.* at Art. 2(2).

have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor."[272]

At the first stage of the proceedings, therefore, the arbitral tribunal was to determine the parties' respective territorial sovereignty over the Islands.[273] Both Eritrea and Yemen claimed title to the Islands on the basis of both legal and non-legal factors. Both parties invoked historical evidence: the Ottoman Empire's long-lasting domination in the case of Yemen, and Italy's nineteenth-century colonial activity in the case of Eritrea.[274] Yemen based its claims, *inter alia*, on an "original, historic and traditional" ancient title preceding the Ottoman Empire, which, it asserted, "reverted" back to it when the Empire fell and Yemen became independent in 1918.[275] Therefore, according to Yemen, despite its incorporation into the Ottoman Empire it has

272 *Id.* at Art. 2(3). *See also* Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 110; Queneudec, *supra* note 117, at 12 (interestingly, at the time Eritrea was not a party to the Convention on the Law of the Sea).

273 *See* Red Sea Islands First Award, *supra* note 266, at paras. 75, 90. A preliminary issue to be determined by the arbitral tribunal was the scope of the dispute, and particularly whether the northern islands of Jabal al-Tayr and the Zubayr group ("Northern Islands") were to be included in the arbitration. With respect to the meaning of the expression "the respective positions of the parties" in the Arbitration Agreement, Yemen argued that this referred to the parties' positions regarding the scope of the dispute at the time the Agreement on Principles was concluded in 1996, and that, at that time, Eritrea had not claimed sovereignty over the Northern Islands. Therefore, Yemen claimed that these islands should be excluded from the arbitration. Eritrea, on the other hand, argued that the parties were "free to put forth and elaborate on their positions concerning the scope of the dispute at any point in the proceedings," and therefore that the claims contained in its submissions to the arbitral tribunal were sufficient to justify the inclusion of the Northern Islands in the arbitration. In deciding this question, the arbitral tribunal considered the "ordinary meaning" of the terms of the Arbitration Agreement, its object and purpose, and the fact that Yemen had included in its submissions arguments to support its claims to sovereignty over the Northern Islands. The tribunal concluded that these Islands were disputed at time the Arbitration Agreement was concluded, even if the parties may have held different positions earlier, when the Agreement on Principles was concluded. It therefore "prefer[red] the view of Eritrea" and included in the scope of the dispute "all the islands and islets with respect to which the parties have put forward conflicting claims." *See also* Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 364; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 429-30; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 111.

274 Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 111; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 366; Michael W. Reisman, *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 (Territorial Sovereignty and Scope of the Dispute)* 93 AM. J. INT'L L. 668 at 669 (1999) [hereinafter Reisman, *Eritrea-Yemen Award First Stage*].

275 Red Sea Islands First Award, *supra* note 266, at para. 99.

retained continuous title to the Islands on the basis of a "doctrine of reversion" and the principle of *uti possidetis*.[276] Eritrea founded its claims on more recent historical grounds, following the demise of the Ottoman Empire. It argued that Italy had acquired title to the Islands by effective occupation after Turkey relinquished its sovereignty over them in the Treaty of Lausanne, rendering them *res nullius*.[277] According to Eritrea, Ethiopia had succeeded this title in 1952, and as a result of Eritrea's secession from Ethiopia it then succeeded the Ethiopian legal position with respect to the Islands.[278] In making their respective historical and legal claims, the parties relied on evidence of state and governmental authority, as well as use and possession they had allegedly exercised over the Islands,[279] and both parties incorporated concepts of "contiguity," "appurtenance,"[280] and "unity of islands and archipelagos" in their submissions.[281]

In the second stage of the proceedings, the issue to be determined by the arbitral tribunal was the location of the maritime boundary.[282] The parties' arguments at this stage were largely of a legal nature and concerned the interpretation of the international law principle of

276 *Id.* at paras. 96, 118; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 365-67.

277 Red Sea Islands First Award, *supra* note 266, at paras. 17-18, 165, 183.

278 *Id.* at paras. 13-30.

279 Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 432-33.

280 According to which "any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the state on the opposite coast has been able to demonstrate a clearly better title," Red Sea Islands First Award, *supra* note 266, at para. 458.

281 Red Sea Islands First Award, *supra* note 266, at para. 458 (according to which "any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the state on the opposite coast has been able to demonstrate a clearly better title.").

282 Nuno Sérgio Marques Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law*, 50 INT'L & COMP. L. Q. 299 at 317-18 (2001) [hereinafter Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*]; Michael W. Reisman, *Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)*, 94 AM. J. INT'L L.721 at 723 (2000) [hereinafter Reisman, *Eritrea-Yemen Award Phase II*]. (Eritrea and Yemen geographically mirrored each other, with Eritrea to the west and Yemen to the east, and their mainland coasts ran gradually apart from each other from south to north. The presence of the islands in various locations, both near the coasts of the parties and in mid-sea, was a key geographic consideration in the delimitation. Given this diverse location and the configuration of the Red Sea, the delimitation in the south and parts of the middle sectors divided only territorial waters, while in the north the delimitation divided continental shelf and exclusive economic zones.).

equidistance.[283] Yemen claimed that "one single international boundary line for all purposes," based on a division of the delimitation areas into three parts: "northern," "central," and "southern." According to Yemen, in the "northern" part, the Islands' base points of both sides should be treated equally because they each possessed islands of comparable size lying at similar distances from their respective mainland. As for the "central" part, Yemen argued that Eritrea's Haycock Islands were mere "navigational hazards" and therefore "inappropriate for a delimitation role" and entitled only to be considered as "limited enclaves." In the south, Yemen's claim was based on a simple equidistance line between the parties' mainland coasts. In contrast, Eritrea claimed that a distinction should be drawn between delimiting areas of continental shelf and exclusive economic zones in the north, and areas of territorial seas in the center. According to Eritrea, in the northern area Yemen's "small northern mid-sea islets" should not be taken into account, while in the center its Haycock Islands should be considered in applying the equidistance principle since Yemen's proposed solution would render both shipping channels within Yemen's territorial waters. Eritrea's alternative solution was based on what it considered to be the "historical median line," an equidistance line between the respective mainland coasts that gave effect to some of Eritrea's "historically owned islands" but disregarded completely Yemen's "recently acquired" mid-sea islands, as well as on the establishment of a "resource box system" that confined the Islands in certain "boxes" that would become joint resource areas.

In response to the parties' submissions, the arbitrators adopted a broad and flexible approach to the resolution of the parties' dispute, recognizing both the legal and the political dimensions of the arbitral process and their own role as judge-diplomats.

Dealing first with the parties' historical and legal arguments, the tribunal found that in order to establish title the parties had to prove both continuity and passage of time,[284] and that the Treaty of Lausanne covered all the contested Islands.[285] The tribunal rejected Yemen's

283 *Eritrea v. Yemen* (1999) Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) at paras. 17, 114 [hereinafter Red Sea Islands Second Award]; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 318-19; Malcolm D. Evans, *The Maritime Delimitation Between Eritrea and Yemen*, 14 LEIDEN J. INT'L L.141, at 152-153 (2001).

284 Red Sea Islands First Award, *supra* note 266, at para. 106; Queneudec, *supra* note 117, at 8.

285 Red Sea Islands First Award, *supra* note 266, at para. 163; Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 670.

claim to a "reversion of title," doubting that it was a valid principle of international law,[286] and found that, in any event, "the concept of territorial sovereignty was entirely strange" to Yemen during the time of the Ottoman Empire, and that it was questionable whether Yemen possessed sovereignty over the Islands prior to this time.[287] Therefore, the tribunal concluded that Yemen could not claim ancient title due to lack of continuity.[288] While the tribunal also doubted whether the doctrine of *uti possidetis* "could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War,"[289] it did apply a form of this doctrine by finding that "when the whole region was under Ottoman rule it was assumed that the powers of juris diction and administration over the islands should be divided between the two opposite coasts,"[290] and that this was a historic fact that should be given "a certain legal weight."[291]

With respect to Eritrea's claims to Italian sovereignty on the basis of *res nullius*, the tribunal interpreted the Lausanne Treaty to mean that Italy had not acquired valid title to the Islands at any point in time, and therefore such title could not have been transferred to Eritrea through Ethiopia.[292] Concluding that neither party was able to establish historic title to the Islands,[293] the tribunal turned to evidence of "demonstration of use, presence, display of governmental authority, and other ways of showing a possession which may gradually consolidate into a title."[294]

The tribunal divided this evidence into four categories of *effectivités*[295]: "assertion of intention to claim the islands," "activities relating to the water," "activities on the islands," and "general

286 Red Sea Islands First Award, *supra* note 266, at paras. 125, 443; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 433-34.

287 Red Sea Islands First Award, *supra* note 266, at para. 143.

288 *Id.* at paras. 144, 443; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 367-368; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 434-35.

289 Red Sea Islands First Award, *supra* note 266, at para. 99.

290 *Id.* at para. 100.

291 *Id.* at paras. 126, 142; Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 669.

292 Red Sea Islands First Award, *supra* note 266, at paras. 169-186, 448; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 435-36.

293 Red Sea Islands First Award, *supra* note 266, at paras. 447-49.

294 *Id.* at para. 450.

295 *Id.* at para. 451; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 371-372 (these reflect "continuous and peaceful display of the functions of state").

activities."[296] Within these categories the parties presented evidence relating to petroleum-related activities,[297] the establishment and maintenance of lighthouses in the Red Sea,[298] and cartographic evidence.[299] Since these different types of evidence concerned different islands with different legal histories, the tribunal found that it could not consider the sovereignty of the Islands as a whole as claimed by the parties.[300] Moreover, the tribunal found that this evidence revealed "a chequered and frequently changing situation," and since "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."[301]

The tribunal therefore proceeded to consider such "other factors," and divided the Islands into four sub-groups, assigning them individually to one or other of the parties based on the "portico doctrine,"[302] and principles of appurtenance or proximity, and unity.[303] Finally, the

296 Red Sea Islands First Award, *supra* note 266, at paras. 240-361; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 373-74; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 438-39; Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 2677, at 5-6.

297 Red Sea Islands First Award, *supra* note 266, at paras. 389-39.

298 *Id.* at paras. 200-38.

299 *Id.* at para. 362-88.

300 *Id.* at para. 459.

301 *Id.* at para. 456-57.

302 According to which control established over one of the mainland coasts should be considered to continue to islands or islets off that coast which are naturally "proximate" to the coast or "appurtenant" to it. Red Sea Islands First Award, *supra* note 266, at para. 463; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 377-78; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 437-38.

303 With respect to the first sub-group—the Mohabbaka Islands located in or near Eritrea's territorial sea—the tribunal considered that since "no convincing alternative title" to these islands was shown by Yemen to rebut the principle that "islands within the territorial sea of a state were to belong to that state," they belonged to Eritrea. With respect to the second sub-group, the Haycocks Islands, the tribunal noted their historical connection with African jurisdiction during the Ottoman rule as well as some evidence of Italian presence, but ultimately also relied on geographical proximity to the Eritrean mainland coast for granting sovereignty over these islands to Eritrea. With respect to the third sub-group, the Zuqar-Hanish Group located in the central part of the Red Sea, the tribunal found historical and cartographical evidence to be inconclusive, and relied instead on recent evidence of governmental authority, including lighthouses, naval patrols, and petroleum agreements. The tribunal referred to Yemen's presence, display of authority, "widespread repute" regarding these islands, and its effective presence in them and concluded that, although there was also some evidence supporting Eritrea's claims, Yemen's claim was stronger. With respect to the fourth sub-group, Jabal al-Tayr Island and the

arbitral tribunal recognized that "intertwined with the question of sovereignty was the problem of the immemorial access to fishing resources by fishermen from both States," and therefore stated that in exercising its sovereignty over certain islands, Yemen was to ensure "that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved."[304] In the *dispositif*, the tribunal therefore decreed that "the sovereignty found to lie within Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen."[305]

The second stage of the proceedings mainly dealt with the location of the maritime boundary. However, the tribunal first addressed in greater detail its ruling in the first stage regarding the preservation of "the traditional fishing regime,"[306] since the parties differed in their interpretation of this ruling. The tribunal viewed this regime as rooted in the Islamic heritage of the area and in the legal rules contained in the Qur'an, and considered it most relevant that "fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto."[307] Eritrea claimed that this "traditional fishing regime" required the establishment of joint resource zones that the tribunal should delimit, and that the tribunal should "specify with precision what was entailed by its finding as to the traditional fishing regime."[308] Yemen, on the other hand, argued that its sovereignty over the Islands was not made conditional by the tribunal's ruling, that it alone was to ensure the preservation of traditional fishing rights, that no agreement with Eritrea was required, and that

Zubayr Group, which were more isolated, the tribunal accepted that there was "little evidence" of governmental authority and found the construction and maintenance of lighthouses by Yemen, its conclusion of petroleum agreements, and the legal history of these islands to favor Yemen. Red Sea Islands First Award, *supra* note 266, at paras. 472, 476-507, 509-24; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 2677, at 378, 380-82; Evans, *supra* note 283, at 142-144; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 441-45; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 111-12; Queneudec, *supra* note 117, at 12.

304 Red Sea Islands First Award, *supra* note 266, at para. 526.

305 *Id.* at para. 527 (vi).

306 Red Sea Islands Second Award, *supra* note 283, at paras. 87-112.

307 *Id.* at para. 95. The reference to the rules of the Qur'an has been attributed to arbitrator El-Kosheri. Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 28282, at 302.

308 Red Sea Islands Second Award, *supra* note 283, at para. 89.

the tribunal's finding was in favor of fishermen of the two countries, not only Eritrea.[309]

The tribunal clarified in this regard that the sovereignty over the Islands awarded to Yemen was not "conditional," but was rather sovereignty that "respect[ed] and embrace[d] and [wa]s subject to the Islamic legal concepts of the region . . . precisely because classical western territorial sovereignty would have been understood as allowing the power in the sovereign State to exclude fishermen of a different nationality from its waters."[310] The traditional fishing regime was therefore "one of free access and enjoyment for the fishermen of both Eritrea and Yemen," but Eritrea could act for its nationals "through diplomatic contacts with Yemen or through submissions to this Tribunal."[311] Moreover, the tribunal rejected Eritrea's claim to joint resource areas by stating that this "regime is not an entitlement in common to resources nor is it a shared right in them."[312]

The tribunal then described the activities encompassed by the fishing regime, who was entitled to benefit from them, and where they could be carried out.[313] It stated that both Eritrean and Yemeni fishermen were entitled "to engage in artisanal fishing around the islands,"[314] and that the regime covered "those entitlements that all fishermen have exercised continuously through the ages . . . [including] . . . to enter the relevant ports, and to sell and market fish there," and was not restricted "by the maritime zones specified under" the United Nations Convention on the Law of the Sea ("UNCLOS") or the international maritime boundary decided by the tribunal.[315]

Although the purpose of the fishing regime was not to limit Yemen's competence to regulate either the fishing activities of nationals of third states or industrial fishing activities by Eritreans, it was to limit its competence to regulate the traditional fishing regime and to

309 *Id.* at paras. 37, 90; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 28282, at 301-02; Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 722.

310 Red Sea Islands Second Award, *supra* note 283, at paras. 94-95.

311 *Id.* at para. 101.

312 *Id.* at para. 103.

313 *Id.* at paras. 103-09.

314 *Id.* at para. 103 ("artisanal fishing" was interpreted broadly by the tribunal to include diving for shells and pearls and related traditional activities such as drying fish); Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 303 n.14.

315 Red Sea Islands Second Award, *supra* note 283, at paras. 104, 107, 110; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 303-04; Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 267, at 13.

enact environmental measures that could affect that regime, which from now on could be taken only "with the agreement of Eritrea."[316] The parties were also to "inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary between them or that lie in its immediate vicinity" and to "give every consideration to the shared or joint or unitized exploitation" of resources that "straddle maritime boundaries."[317] This traditional fishing regime, however, was to have no bearing on the determination of the maritime boundary line.[318]

With regard to this determination, the tribunal again utilized the hybrid nature of arbitration to produce a legally sound, but also pragmatic and equitable, solution to the parties' dispute. The parties based their arguments in this regard largely on principles of international law, and the tribunal recognized that the Arbitration Agreement referred to UNCLOS and did not mention customary law.[319] Nonetheless, principles of customary law of the sea were incorporated through the inclusion of UNCLOS, as some of its articles included a number of relevant customary elements that "were consciously designed to decide as little as possible" and "envisage[d] an equitable result."[320] Moreover, the term "other pertinent factors" in the Arbitration Agreement was interpreted by the tribunal to be a "broad concept" that included "various factors that are generally recognized as being relevant to the process of delimitation such as proportionality, non-encroachment, the presence of islands, and any other factors that might affect the equities of the particular situation."[321]

The basic rationale guiding the tribunal's ultimate determination of the maritime boundary was that a single all-purpose boundary was to be delimited, which "as far as practicable, [should] be a median line between the opposite mainland coastlines."[322] This finding was based on both legal and non-legal factors, including the following: the

316 Red Sea Islands Second Award, *supra* note 283, at para. 108; Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 723.

317 Red Sea Islands Second Award, *supra* note 283, at para. 86.

318 Reisman, *Eritrea-Yemen Award Phase II*, *supra* note 282, at 725.

319 Red Sea Islands Second Award, *supra* note 283, at para. 130.

320 *Id.* at para. 116.

321 *Id.* at para. 130; Queneudec, *supra* note 117 at 13; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 320; Evans, *supra* note 283, at 148-149.

322 Red Sea Islands Second Award, *supra* note 283, at para. 132; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 320.

"generally accepted view" that in cases such as this, "the median or equidistance line normally provides an equitable boundary;" the fact that such a line was in accordance with the requirements of the Convention; and the fact that both parties relied on the equidistance method "although based on different points of departure."[323] In deciding the location of the maritime boundary line, the tribunal also took into account international navigation interests, referred to by the parties in the preamble of the Arbitration Agreement as "their responsibilities toward the international community as regards . . . the safeguard of the freedom of navigation in a particularly sensitive region of the world."[324] The tribunal also assessed the equitable nature of the equidistance boundary in accordance with the test of "a reasonable degree of proportionality," which both parties agreed meant that the division of waters was to be proportional to the lengths of their respective coasts, but differed on how these lengths should be calculated.[325] Finally, the tribunal considered the possible claims of neighboring states, namely Saudi Arabia in the north and Djibouti in the south, and while noting that it did not have authority to decide such claims, it

323 The median line ultimately drawn by the tribunal, however, largely followed a different course from the lines proposed by the parties. In the northern part of the boundary, the arbitral tribunal considered factors such as "size, importance and like considerations in the general geographical context" and found that an equitable result required that Yemen's mid-sea islands be treated differently from Eritrea's islands due to their far location and barren nature, and that they should not be considered in the calculation of the equidistance boundary. In the central part of the boundary, the tribunal found that the parties' territorial waters overlapped and rejected Yemen's "enclave solution," which it found to be "impractical" in light of the vicinity of a major international shipping route, as well as potentially interfering with Eritrea's rights and security. The tribunal decided instead on a mainland coastal median, which cut through the area of overlap of the territorial seas of the parties and created a "neater and more convenient international boundary." In the southern part of the boundary, as there were no mid-sea islands, there were few differences between the parties' equidistance lines and the line determined by the tribunal attempted to reflect the desirability of "simplicity in the neighborhood of a main shipping lane." Red Sea Islands Second Award, *supra* note 283, at paras. 113-20, 124-25, 127-28, 131, 147-53, 154-59, 162-63; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 320-21, 324; Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 267, at 8, 10; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 112-13; Evans, *supra* note 283, at 154-57.

324 Annex 1: The Arbitration Agreement, *in* Red Sea Islands Second Award, *supra* note 283, at Preamble.

325 Red Sea Islands Second Award, *supra* note 283, at paras. 39-43, 117, 165-68; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 338-39; Evans, *supra* note 283, at 163-65; Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 267, at 10-11.

reached a compromise between their positions and that of the parties, particularly Yemen.[326]

The first award rendered by the arbitral tribunal was praised for achieving "a well-struck balance between individual justice *in casu* and the need for predictability demanded by 'international society,'" as well as taking due account of the parties' aspiration to "allow the re-establishment and the development of a trustful and lasting co-operation" between them.[327] Both states expressed their intention to abide by the award and Eritrea proceeded to withdraw its forces from the islands awarded to Yemen in the arbitration.[328] The parties also signed the Treaty Establishing the Joint Yemeni-Eritrean Committee for Bilateral Cooperation of October 16, 1998, which testified to the restoration of friendly relations between the parties.[329]

The findings of the arbitral tribunal in the second award were accepted by both parties as "balanced."[330] Eritrea stated that the settlement of the dispute "will not only pave the way for a harmonious relationship between the littoral states of the Red Sea, but also opens a new window of opportunity for the consolidation of peace and stability in the region and the creation of a zone of peace, development and mutual benefit." Yemen, in contrast, stated that the award "represents a culmination of a great diplomatic effort and an important historic development in political and diplomatic relations between two neighboring countries . . . [and] . . . a way that should be followed for resolving Arab, regional and international disputes."[331]

As in the Beagle Channel and Taba cases, both the parties' perceptions of the arbitration and the arbitral tribunal's reasoning and approach to its own role shaped the outcome of the Red Sea Islands arbitration. Unlike in the previous two cases, however, the parties' and the arbitral tribunal's recognition of the political and legal dimensions of the arbitral process and the proper exercise of their dual role in this case likely contributed to the successful resolution of the parties' conflict. The parties' perception of the arbitration process as designed to

326 Red Sea Islands Second Award, *supra* note 283, at paras. 44-46, 136, 164; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 325, 340; Evans, *supra* note 283, at 165-66.

327 Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 2677, at 384.

328 *Id.*

329 Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 267, at 2.

330 Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 341; Queneudec, *supra* note 117, at 1.

331 Spain, *supra* note 36, at 40; Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 2677, at 3.

resolve multiple aspects of their dispute and produce an equitable result is reflected in several aspects of this arbitration: the language and scope of the Arbitration Agreement; the constitution of the arbitral tribunal and the relatively broad authority granted to it; and, ultimately, in the parties' prompt acceptance of the arbitral award even though it was not based solely on international law principles.

Notably, the parties exercised their right to appoint arbitrators of their choice, and the arbitral tribunal included both current and past ICJ judges and non-judges, one of whom, Dr. El-Kosheri, "was brought up in the Islamic culture."[332] This balanced composition of the tribunal ensured both that international law would be adequately followed and applied, and that local circumstances—such as the history of the dispute, the parties' culture, particular legal tradition, and underlying interests—would be accounted for. The composition of the tribunal may have contributed to its flexible legal approach in the First Award, applying novel concepts of land acquisition, and its consideration of extra-legal factors in delimiting the parties' maritime boundary in the Second Award. Moreover, the presence of Dr. El-Kosheri, who was familiar with the region and Islamic law, may have contributed to the tribunal's consideration of local customs concerning fishing and its incorporation of Islamic law in the protection of traditional fishing rights.

The flexible approach of the parties is also evident in the Arbitration Agreement, which provided that the tribunal was to determine "territorial sovereignty . . . in accordance with the principles, rules and practices of international law . . . and . . . in particular, historic titles . . . [and] . . . 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."[333] The parties therefore used broad and general language to define the issues to be determined, namely "territorial sovereignty" and "maritime boundaries," and, at least with respect to their maritime dispute, granted broad authority to the tribunal to take into account potentially extra-legal considerations, which may indicate their interest in avoiding a restrictive reading of UNCLOS.[334]

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332 Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 2677, at 385 n.100.

333 Annex 1: The Arbitration Agreement, *in* Red Sea Islands Second Award, *supra* note 283, at art. 2(2).

334 Reisman, *Eritrea-Yemen Award Phase II*, *supra* note 282, at 728.

This broad language translated into flexibility and creativity in the arbitral tribunal's decision making, allowing it to allocate sovereignty over the islands based on varied considerations and in accordance with what it perceived to be best for the parties.[335] In contrast, the term "any other pertinent factor" was not sufficiently clear,[336] and although it was interpreted broadly by the tribunal as including "factors that might affect the equities of the particular situation,"[337] the parties would have been well advised to use a clearer term such as "equitable factors" if they indeed intended to give such authority to the tribunal.

The Arbitration Agreement also illustrates how differences between state parties over the scope of the dispute, which are a "well-known obstacle to utilizing" interstate arbitration,[338] can be overcome by allowing the arbitral tribunal to determine its own mandate. The parties in this case still maintained some degree of control by providing that such determination was to be made "on the basis of the respective positions of the two parties,"[339] although the meaning of this expression was itself disputed and left to be resolved by the tribunal. Rather than narrowly defining the scope of the dispute in the Arbitration Agreement, as was the case in the Beagle Channel arbitration, Eritrea and Yemen rightly granted the tribunal the authority to determine the precise scope of the dispute it was to decide, which likely also facilitated the conclusion of the Arbitration Agreement.[340]

In addition to the parties' commendable approach to the arbitration process, the arbitral tribunal's reasoning and decision-making process also contributed to the successful resolution of the dispute. Exercising their role as judges broadly and creatively, the arbitrators applied both flexible and innovative reasoning in the First Award, and traditional legal analysis in the Second Award.[341] They incorporated both established international law and equitable considerations in their decision making and applied novel and creative reasoning where established international law failed to provide an adequate answer.[342]

335 Red Sea Islands First Award, *supra* note 266, at paras. 102, 454-55; Queneudec, *supra* note 117, at 7.

336 Queneudec*, supra* note 117 at 13.

337 Red Sea Islands Second Award, *supra* note 283, at para. 130.

338 Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 111.

339 *Id.* at 116.

340 Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 677.

341 Queneudec, *supra* note 117, at 3.

342 In the First Award, for instance, the tribunal was faced with a novel situation in which neither recourse to legal title nor to effective occupation could provide the

The arbitrators also effectively invoked their role as diplomats by finding that their authority to decide "on territorial sovereignty"[343] allowed them to decide on related issues, such as the fishing rights of the Eritrean people around the islands awarded to Yemen. The arbitrators therefore did not restrict their own jurisdiction to the legal issues disputed by the parties, and considered also the parties' culture and tradition, which likely made the ultimate outcome of the arbitration easier for the parties to accept and implement.[344]

Effectively utilizing the legal dimension of the arbitral process, the tribunal applied legal standards flexibly in its decision making, finding, for instance, that decisions should not be reached merely by balancing the relative strength of the parties' claims as presented, particularly "when looking at other possible factors might strengthen the basis of decision."[345] Therefore, in determining sovereignty over the Islands, since the tribunal found that the evidence provided by the parties was inconclusive, it applied criteria that the Arbitration Agreement did not authorize.[346] As the tribunal stated:

> [I]n order to make decisions on territorial sovereignty, the Tribunal has hardly surprisingly found no alternative but to depart from the

basis for the settlement of the territorial conflict. The tribunal found that Article 16 of the Treaty of Lausanne was biding *erga omnes*, severed any links of succession the parties may have relied on, and gave the islands an "indeterminate status" that could not be amended by subsequent action, and also that neither party could establish effective occupation of the disputed islands. Rather than issuing a decision *non liquet* as a result of this finding, however, the tribunal effectively created new law and "innovative prescriptions regarding territorial acquisition" by setting out a presumption of sovereignty based on geographical proximity that can be defeated only by a "fully-established case to the contrary" or another "superior title." Queneudec, *supra* note 117, at 10-11; Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 678-79; Red Sea Islands First Award, *supra* note 266, at paras. 474, 480.

343 Annex 1: The Arbitration Agreement, *in* Red Sea Islands Second Award, *supra* note 283, at art. 2(2).

344 In the First Award, for instance, the tribunal rejected Yemen's claim to "historic title" partially on the ground that it was inappropriate to attribute western concepts of sovereignty to a medieval Islamic society such as that which existed in the Yemen area at the time. Red Sea Islands First Award, *supra* note 266, at paras. 123, 143, 446; Johnson, *Case Analysis: Eritrea-Yemen Arbitration*, *supra* note 265, at 434. Still, some argue that the tribunal did not go far enough in its departure from Eurocentric political-cultural notions since it continued to demand "socio-political power over the geographic area" in order to secure title, rather than applying a more "sensitive socio-ecological test" to these uninhabited islands and thereby recognizing and giving effect to forms of political organization that have evolved in ecologies different from those of Europe. Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 681-82.

345 Red Sea Islands First Award, *supra* note 266, at paras. 452-57.

346 Reisman, *Eritrea-Yemen Award First Stage*, *supra* note 274, at 674.

> 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 . . . [t]he 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.[347]

Therefore, rather than confining itself to the legal arguments of the parties and a strict reading of the Arbitration Agreement, the tribunal departed from the parties' contemplated solution and devised an alternative one, which provided a just and fair allocation of sovereignty between the parties.[348] At the same time, the tribunal took care to acknowledge evidence that supported the parties' contradictory claims to sovereignty, balanced "all relevant historical, factual and legal considerations," and noted its "greatest respect for the sincerity and foundations of the claims of both parties."[349]

The arbitral tribunal also considered equity in determining the parties' maritime boundary in the Second Award. Indeed, the tribunal preferred to "refashion geography" rather than to produce an inequitable boundary in the northern mid-sea islands area.[350] Therefore, achieving an equitable result seemed to trump, in the tribunal's view, the strict application of the equidistance principle. In addition, the tribunal relied on considerations of proportionality to assess the equitability of the final delimitation decision, which allowed it to depart from the application of strict equidistance where it saw fit.[351]

In carrying out their roles as judge-diplomats, the arbitrators went beyond the disputed issues submitted by the parties and considered the need to respect their "regional legal traditions," noting that "western

347 Red Sea Islands First Award, *supra* note 266, at para. 466.

348 *Id.* at para. 475 (the tribunal proceeded to allocate the groups of islands between the parties by applying a variety of principles, such as proximity, shared "legal destiny," unity, and appurtenance).

349 Red Sea Islands First Award, *supra* note 266, at para. 508; Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 267, at 381.

350 Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 335.

351 Evans, *supra* note 283, at 165; Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 338-39 (the proportionality test devised by the tribunal, while criticized as "legally meaningless," (since it did not include any objective and standard criteria) was not aimed at setting out "internationally defined objective criteria," but rather at achieving an equitable result between the parties, which it succeeded to do.).

ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition," and ruling that the parties were to maintain and perpetuate the traditional fishing regime which had existed around the disputed islands for many years.[352] The tribunal thereby construed the Islamic tradition of territorial sovereignty as distinct from the corresponding Western ideas, and antedated to "the relatively modern, European-derived, concepts of exclusionary sovereignty."[353] Although Islamic law was neither selected nor argued by the parties, the arbitral tribunal purported to use it as the basis for the continuing traditional fishing regime.

This approach has been criticized as "unwise in context" since "the essential function of general international law, as a secular *corpus juris*, is to provide a common standard and to play a mediating role between states with different cultures, legal systems, and belief systems."[354] Still, it does not necessarily follow that *ad hoc* arbitral tribunals deciding a specific dispute between particular parties must "stick to international law"[355] when the parties included broad language in their arbitration agreement and allowed for the application of other "pertinent factor[s]" as the tribunal sees fit. While inappropriate application of religious or other law not contemplated or authorized by the parties may indeed prove "mischievous, even pernicious."[356] In some cases, applying legal norms shared by the parties that address significant aspects of their dispute that international law fails to adequately address, may also strengthen the legitimacy of the outcome in the eyes of the parties and facilitate its acceptance and implementation.

The issue of fishing rights, although also not explicitly submitted to the tribunal for determination, was of great importance to the parties, since it presented a potential source of income—generating jobs, food, and revenues from exports and from granting foreign fishing licenses.[357] The fishing regime set out by the arbitral tribunal entitled fishermen from both states to freely practice traditional fishing in the waters surrounding the islands attributed to Yemen, independent of the international boundary, and granted to them related rights and

352 Red Sea Islands First Award, *supra* note 266, at para. 525; Queneudec, *supra* note 117, at 6.

353 Red Sea Islands Second Award, *supra* note 283, at paras. 85, 92-95; Red Sea Islands First Award, *supra* note 266, at para. 525; Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 2677, at 11.

354 Reisman, *Eritrea-Yemen Award Phase II*, *supra* note 28282, at 729.

355 *Id.*

356 *Id.*

357 Lefebvre, *supra* note 265, at 374.

privileges, such as free access to the islands and the right to sell catches in the ports of the other state.[358] This fishing regime constituted a special legal order that was non-territorial in nature, "a transnational order of inter-individual dimensions"[359] intended to "benefit of the lives and livelihoods of this poor and industrious order of men."[360] While the tribunal may have gone beyond what the parties had intended it to decide upon and effectively limited their sovereignty,[361] this was justified in order to ensure the continued protection of the economic and cultural rights of fishermen from both countries. In devising the fishing regime, the tribunal emphasized "human" over legal considerations; although its legal foundation in international law was admittedly not entirely clear, the tribunal rationalized and described it in such a way that did not compromise the overall reasonableness of its decision.[362] Rather, it reflected its desire to "deal fully with the issues before it and do justice to the parties' arguments."[363]

The tribunal's decision to limit the parties' sovereign rights respecting the fishing regime was not based on treaties in similar situations[364] or on customary international law.[365] Therefore, the decision can best be seen as equitable in nature, reflecting the tribunal's understanding of the fairest result in light of the history and culture of the parties, and its objective "not to disturb the socio-economic reality of the community of fishermen."[366] While the absence of a clear basis in international law for the tribunal's decision in this regard has been criticized,[367] such criticism is misplaced. While the parties did not

358 Red Sea Islands Second Award, *supra* note 283, at paras. 103-07; Queneudec, *supra* note 117, at 6; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 113.

359 Queneudec, *supra* note 117, at 7.

360 Red Sea Islands First Award, *supra* note 266, at para. 526.

361 Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 305.

362 *Id.* at 342.

363 Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 117.

364 Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 311.

365 *Id.* at 308-09, 316 (although there are several possible legal foundations for this decision, such as viewing the traditional regime as *lex specialis* and the rules of international law as *lex generalis*; applying the principle of *quieta non movere*, i.e., that "a state of things which actually exists and has existed for a long time should be changed as little as possible;" or comparing it with the theory of the indigenous peoples' rights. However, the tribunal did not explicitly refer to any of these.).

366 Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 310.

367 *Id.* at 310.

explicitly authorize the tribunal to decide based on equity, the authority of the tribunal to incorporate equity, fairness, and other relevant considerations into its decision-making is inherent in the true nature of arbitration and integral to the successful resolution of complex interstate territorial disputes by arbitration. Moreover, the parties' acceptance and implementation of the awards rendered by the tribunal in this case suggest that this aspect of the tribunal's decision was both required and legitimate.

Likely having in mind the practical effects of its decision on the lives of the people of both states, and in order to facilitate its implementation, the tribunal rightly adopted a broad view of the dispute, its own role, and the underlying interests of the parties.[368] The inclusion of the detailed fishing regime in the Second Award and the tribunal's consideration of broader non-legal issues—beyond the narrow territorial dispute submitted to it by the parties—evinces the arbitrators' recognition of the political dimension of interstate arbitration and the inadequacy of strictly legal solutions to non-legal questions.

Further developing their role as judge-diplomats, in the Second Award, the arbitrators also took into account relevant factors that extended beyond the immediate interests of the parties, including international navigation considerations, the international importance of the shipping lane in the disputed area,[369] and the fact that there were potentially additional claims by other states in this area. These evidence the tribunal's consideration of its own responsibility to account for the practical effects of its decisions and to prevent any escalation in a "sensitive region,"[370] where there may be multiple and overlapping territorial claims. Therefore, the tribunal considered the delimitation of the parties' maritime boundary not merely as a legal question to be determined based on strict legal criteria, but as a broader regional issue, which required the application of diplomacy and extra-legal considerations. This approach taken by the tribunal likely contributed to the equitable and balanced outcome that was readily accepted by the parties.

The flexible approach adopted by the arbitrators, their liberal interpretation of the Arbitration Agreement, and their incorporation of equitable considerations as part of international law and other relevant non-legal considerations where appropriate, all contributed to the

368 *See generally id.* at 307-08.

369 Red Sea Islands Second Award, *supra* note 283, at paras. 125, 128, 155, 162.

370 Annex 1: The Arbitration Agreement, *in* Red Sea Islands Second Award, *supra* note 283, at Preamble.

successful resolution of the parties' dispute and evidence the arbitrator's proper understanding of the arbitral process and their dual role as judge-diplomats within this process. This approach enabled the arbitral tribunal to formulate a compromise taking into account the parties' underlying interests and the broader implications of its own decisions, which legitimized the tribunal's adoption of a broad and flexible interpretation of the Arbitration Agreement and the limits placed on its authority by the parties.

The Red Sea Islands arbitration has been considered as one of the most significant international arbitrations of the end of the twentieth century,[371] successfully resolving a dispute in one of the most strategically sensitive regions of the world.[372] There were critically important issues associated with the disputed legal questions of sovereignty and maritime boundaries submitted to the arbitral tribunal in this case. These included the historical and economic fishing rights of the two peoples and the impact of possible regional instability on international navigation. The tribunal's "intention of reconciling in a fair manner the opposite *political* and *legal* interests of Eritrea and Yemen [wa]s patent,"[373] and its goal was undoubtedly to balance "all the considerations invoked by the parties," demonstrating how "social reality and the perimeter of law could simultaneously form the foundation of a territorial decision."[374]

The social reality considered by the tribunal in this case had to reflect not only the ancillary rights of the parties that would inevitably be affected by its decision on territorial sovereignty, but also the fact that this case involved a newly-independent state, Eritrea, and its potential reaction to "international law of a pro-European and pro-Western origin."[375] The tribunal's decision accounted for both of these interrelated legal and extra-legal aspects by providing specific instructions for the protection of the fishing rights of the Eritrean people, and thereby "bridging the gap between different regional legal traditions and contemporary international law."[376]

This arbitration has been viewed as "remarkable" because the tribunal "endeavored to fulfill a pedagogical role towards the two States

371 Queneudec, *supra* note 117 at 1.

372 Kwiatkowska, *The Eritrea-Yemen Arbitration*, *supra* note 2677, at 1.

373 Antunes, *The 1999 Eritrea-Yemen Maritime Delimitation Award*, *supra* note 282, at 341 (emphasis added).

374 Antunes, *Eritrea-Yemen Arbitration First Stage*, *supra* note 2677, at 382-83.

375 *Id.* at 385.

376 *Id.* at 385.

while taking great care to scrupulously analyze the arguments put forward by each and to readily reveal the grounds which it deemed it had to retain or, on the contrary, reject them."[377] Therefore, although the tribunal adopted a strong diplomatic approach to its own role, this did not prevent it from rendering two awards that were also well-reasoned and founded in law, and that were unequivocally implemented by the parties.

While some aspects of the tribunal's decisions, particularly with respect to the application of Islamic law and the enforcement of a "traditional fishing regime" of its own creation are unusual and may be controversial, it is precisely such "arbitral activism" that is required in interstate territorial arbitrations involving political, cultural, historical, or other extra-legal issues. As some of the other arbitrations reviewed in this article demonstrate, confining such issues to resolution based on strict legal analysis is unlikely to succeed, and arbitral tribunals should therefore be authorized to apply, or apply *sua sponte*, legal principles flexibly, as well as extra-legal principles as required for rendering a fair and effective decision.

In summary, the Red Sea Islands arbitration illustrates the advantages of interstate arbitration as a dispute resolution mechanism and its potential to successfully resolve interstate territorial disputes where the parties' and arbitral tribunal's perception of the purpose of arbitration "is not only to 'state the law' and to settle the dispute . . . by strict application of the legal rules . . . [but] also to ease the tensions and encourage the re-building and development of lasting co-operation between the two disputing States."[378] This case therefore reflects the true "role of arbitration in the peaceful resolution of disputes and the maintenance of peaceful relations between states,"[379] and demonstrates the arbitrators' ability to effectively resolve legal as well as political, strategic, or other questions by exercising both legal and diplomatic judgment.[380]

377 Queneudec, *supra* note 117, at 16.

378 *Id.* at 5-6.

379 Johnson, *Case Analysis: Eritrea-Yemen Arbitration, supra* note 265, at 446.

380 The arbitral tribunal's approach in this case facilitated a fair compromise despite the presence of circumstances external to the arbitration suggesting that a successful outcome would be difficult to obtain. Both parties reportedly felt "confident that their respective claims to the islands will be recognized by the tribunal," the actions of the relatively inexperienced Eritrean government were difficult to anticipate since it was "infused with nationalism" and "in the habit of resorting to arms without hemming and hawing," and Yemen was resisting domestic pressure to reclaim its national honor. Nevertheless, neither party could afford the financial toll of an arms race to defend their right. This case, therefore, evidences the utility of

D. The Eritrea-Ethiopia Boundary Commission, 2002

Following Eritrea's secession from Ethiopia in 1993, a series of economic and political disagreements and border clashes between the neighboring states culminated in a full-scale war lasting from May 1998 to June 2000.[381] The war erupted in the Ethiopian-held border village of Badme, an essentially barren piece of land devoid of any resources, seized by Eritrea.[382] Unlike the common intrastate conflicts in Africa during the post-Cold War era, the Ethiopia-Eritrea war displayed the hallmarks of a conventional interstate border confrontation.[383] Ethiopia eventually gained the upper hand militarily and advanced deep into Eritrean territory until a cease-fire was concluded in June 2000 and the Algiers Peace Agreement ("the Agreement") was signed in December 2000 to regulate the postwar relationship between the parties.[384]

The main issue in dispute between the parties was the location of their mutual border,[385] which was first delimited in three treaties

arbitration where the parties are entrenched in opposing positions and find it politically advantageous to leave the resolution of the dispute in the hands of a neutral third party, thereby avoiding being seen as weak or conciliatory by their domestic constituencies. Lefebvre, *supra* note 265, at 371, 376, 380, 384-385.

381 Bahru Zewde, *The Historical Background of the 1998-2000 War: Some Salient Points*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 22 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini eds., 2009); Jibril, *supra* note 104, at 640; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 117; SCHWEIGMAN, *supra* note 12, at 149.

382 Dominique Jacquin-Berdal, *Introduction-The Eritrea-Ethiopian War*, *in* UNFINISHED BUSINESS: ETHIOPIA AND ERITREA AT WAR, at xiii (Dominique Jacquin-Berdal & Martin Plaut eds., 2005); Patrick Gilkes, *Violence and Identity along the Eritrean-Ethiopian Border, in* UNFINISHED BUSINESS: ETHIOPIA AND ERITREA AT WAR, at 229 (Dominique Jacquin-Berdal & Martin Plaut eds., 2005).

383 The Ethiopia-Eritrea war was viewed as "the world's largest and deadliest" interstate conflict of its time, claiming 50,000-75,000 lives and displacing over 100,000 people from both states. Jacquin-Berdal, *Id.* at ix; Fausto Pocar, *Introductory Remarks*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA, at xiii (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini eds., 2009); Martin Plaut, *Background to War–From Friends to Foes*, *in* UNFINISHED BUSINESS: ETHIOPIA AND ERITREA AT WAR, at 2 (Dominique Jacquin-Berdal & Martin Plaut eds., 2005) [hereinafter Plaut, *Background to War–From Friends to Foes*]; Getahun Seifu, *Ethiopian-Eritrean Conflict: Options for African Union Intervention*, *in* MANAGING PEACE AND SECURITY IN AFRICA: ESSAYS ON APPROACHES TO INTERVENTIONS IN AFRICAN CONFLICTS, at 148 (2012).

384 Plaut, *Background to War–From Friends to Foes*, *supra* note 383, at 1-2; Martin Plaut, *The Conflict and its Aftermath*, *in* UNFINISHED BUSINESS: ETHIOPIA AND ERITREA AT WAR, at 107, 110 (Dominique Jacquin-Berdal & Martin Plaut eds., 2005) [hereinafter Plaut, *The Conflict and its Aftermath*].

385 The border consisted of three sections—central, western, and eastern.

concluded in 1900, 1902, and 1908 between Italy, the colonial power that ruled Eritrea at the time, and Ethiopia. This delimitation, however, was only partial, and the boundary was left undemarcated on the ground.[386] Eritrea became part of Ethiopia in 1952, at which point Ethiopia unilaterally declared the boundary treaties void.[387] After Eritrea's independence, the dispute over the location of its common border with Ethiopia became inexorably linked to the parties' respective territorial control and integrity in a region where "geography determines politics" and colonial legacy divides peoples and territories along the common border.[388] For Eritrea, a new state, the process of defining its boundaries was an integral part of asserting its sovereignty both domestically and internationally. For Ethiopia, an established state whose geostrategic position and access to the sea were already compromised by Eritrea's independence, any additional territorial concession would be interpreted as a sign of weakness.[389]

In addition to the location of their mutual boundary, the "question of nationality" was also prominent in the parties' dispute, with Ethiopian and Eritrean leaders boasting incompatible conceptions of nationhood and a tradition of suspicion and hostility despite their shared ethnic and linguistic origins.[390] The parties' mutual boundary acquired a significant symbolic role in the formation of Eritrean nationalism, helping to create an Eritrean national identity that was antithetical to that of Ethiopia.[391] Economic disagreements, such as the question of Ethiopia's access to the sea, further exposed the parties' dysfunctional relationship and imprecise mutual border; these disagreements would underline the parties' motivations to escalate the conflict and remained

386 Decision Regarding the Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, (Erit.-Eth.), 41:5 I.L.M. 1057 (2002), at ¶ 2.7 [hereinafter Eri.-Eth. Decision]; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 119; Zewde, *supra* note 381, at 22; Malcolm N. Shaw, *Title, Control, and Closure? The Experience of the Eritrea–Ethiopia Boundary Commission* 56 INT'L & COMP. L.Q. 755, 756 (2007).

387 McHugh, *supra* note 42, at 212-13; Shaw, *supra* note 386, at 756.

388 Gian Paolo Calchi Novati, *The Lines of Tension in the Horn and the Ethiopia-Eritrea Case*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA, at 3 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini eds., 2009); Federica Guazzini, *The Eritrean-Ethiopian Boundary Conflict: the Physical Border and the Human Border, in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA, at 109 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini eds., 2009).

389 Jacquin-Berdal, *supra* note 382, at xiv.

390 *Id.* at xiii; Plaut, *Background to War–From Friends to Foes*, *supra* note 383, at 4; Novati, *supra* note 388, at 17.

391 Guazzini, *supra* note 388, at 130, 134.

fundamental to its resolution.[392] Therefore, while the war was initially characterized as a mere "border dispute," it in fact concerned many complex underlying historic and nationalistic issues arising out of the parties' problematic relationship, and has even been labeled by Eritrea as its "second war of independence."[393]

After the war and the signing of the Agreement, the village of Badme remained a symbol of the parties' sacrifice, national identity, and honor. While the war ended with a military victory for Ethiopia, a "war of words" continued to accompany a diplomatic battle over Badme and other disputed areas.[394] The positions of the parties, moreover, remained essentially unchanged after the war, and they were both equally stubborn in refusing to make concessions. Ethiopia demanded Eritrea's unconditional withdrawal, asserting that Badme was part of its sovereign territory. Eritrea, for its part, sought a demilitarization of the area and arbitration, since it believed that the colonial boundary treaties located the village within its borders.[395]

The Agreement provided for the cessation of hostilities, reaffirmed "the principle of respect for the borders existing at independence,"[396] and established "a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law."[397] Despite the vague terminology used in the Agreement for political purposes, the process that the parties had in mind was clearly arbitration.[398]

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392 Jacquin-Berdal, *supra* note 382, at xiii-xiv; Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 17; Seifu, *supra* note 383, at 165-166.

393 Richard Reid, *"Ethiopians believe in God, Sha'abiya Believe in Mountains": the EPLF and the 1998-2000 War in Historical Perspective*, *in* UNFINISHED BUSINESS: ETHIOPIA AND ERITREA AT WAR 25, 34 (Dominique Jacquin-Berdal & Martin Plaut eds., 2005).

394 Guazzini, *supra* note 388, at 133.

395 Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 90, 110; Siphamandla Zondi & Emmanuel Réjouis, *The Ethiopia-Eritrea Border Conflict and the Role of the International Community*, 6 AFR. J. CONFLICT RESOL. 69, at 73 (2006).

396 Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea art. 4.1, Eth.-Eri., Dec. 12, 2000, 2138 U.N.T.S. 94 [hereinafter Eth.-Eri. Agreement].

397 *Id.* at art. 4.2.

398 Kaiyan Homi Kaikobad, *The Eritrea-Ethiopia Boundary Commission: A Legal Analysis of the Boundary Delimitation Decision of 13th April 2002 and Relevant Subsequent Decisions*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 175 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini, eds., 2009).

The Agreement further provided that the Boundary Commission ("the Commission") "shall not have the power to make decisions *ex aequo et bono*,"[399] and that each party shall appoint two commissioners, "neither of whom shall be nationals or permanent residents of the party making the appointment,"[400] and those commissioners shall select the president of the Commission, who also shall be neither a national nor permanent resident of either party.[401] The parties were to provide their claims and evidence to the Commission within forty-five days,[402] and the Commission was to endeavor to make its delimitation decision within six months.[403] Finally, the Agreement provided for the establishment of a second five-member neutral Claims Commission,[404] in line with the parties' commitment to address "the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported."[405]

399 Eth.-Eri. Agreement, *supra* note 396, at art. 4.2.

400 *Id.* at art. 4.4.

401 *Id.* at art. 4.5. Sir Elihu Lauterpacht (Britain) served as President of the Commission, Ethiopia appointed Sir Arthur Watts (Britain) and Prince Bola Adesumbo Ajibola (Nigeria), and Eritrea appointed Michael Reisman (U.S.A.) and former President of the ICJ, Stephen Schwebel (U.S.A.).

402 Eth.-Eri. Agreement, *supra* note 396, at art. 4.8.

403 *Id.* at art. 4.12.

404 While the work of the Claims Commission is important in illustrating the potentially broad use of arbitration in interstate dispute resolution, it did not directly address the territorial dispute between the parties and its related issues. A detailed analysis of its work is therefore beyond the scope of this paper.

405 Eth.-Eri. Agreement, *supra* note 396, at art 5.1. Claims were to be submitted to the Commission by the state parties on their own behalf, on behalf of their nationals, or on behalf of non-nationals, within one year. Similar to the Boundary Commission, the Claims Commission was to apply relevant rules of international law and was not authorized to make decisions *ex aequo et bono*. Although the two Commissions were conceived as complementary, the mandate of the Boundary Commission was to resolve a specific territorial dispute, while the Claims Commission was set up to resolve a wide range of disputed issues and multiple claims emanating from the parties' armed conflict. These included claims regarding unlawful expulsion, displacement, and detention of civilians; unlawful treatment of prisoner of war; loss, damage, or injury claims, issues of diplomatic law; and issues regarding economic relations during the armed conflict. The Commission rendered a total of seventeen partial and final awards concerning both liability and damages arising from the parties' claims, which have been regarded as a reaffirmation of "essential principles of international law outlined in the Geneva Conventions." Eth.-Eri. Agreement, *supra* note 396, at art. 5.8, 5.9, 5.13; Edoardo Greppi, *The 2000 Algiers Agreements*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 61 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini, eds., 2009); Merrills, *Reflections on Dispute Settlement, supra* note 267, at 127; *Eritrea-Ethiopia Claims Commission*, Rules of Procedure, art. 30; Andrea de Guttry, Harry H.G. Post & Gabriella Venturini, *Preface*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA, at vi (2009); Brooks W.

The arguments of both Eritrea and Ethiopia centered on the interpretation of the colonial treaties purporting to delimit their common boundary and the accompanying maps, thereby largely focusing on the legal dimension of the arbitration.[406] The parties differed, however, on the limits placed on the Commission's authority in carrying out this interpretative task. Eritrea contended that the 1900 treaty map provided sufficient guidance to enable the Commission to identify each of the disputed components of the boundary line.[407] Eritrea, therefore, claimed that the treaty effectively delimited the boundary and led to a distinctive cartographic outline.[408] Ethiopia, on the other hand, claimed that the boundary had not been delimited and that the task of the Commission was not to delimit it *de novo* based on the treaty.[409]

The Commission made several findings that seemed to indicate its recognition of the political dimension of the arbitral process.[410]

Daly, *Permanent Court of Arbitration*, *in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 55-57 (Chiara Giorgetti ed., 2012).

406 In the central section of the boundary, Article 1 of the 1900 treaty provided that the boundary ran along "the line from the Mareb-Belesa-Muna, traced on the map annexed," and the parties differed on the actual identity of these named rivers. In the western section of the boundary—which included the contentious village of Badme—Ethiopia claimed a straight line going north-east, while Eritrea claimed a "v" shape line that dipped south-east and then moved north-east in a straight line. Article 1 of the 1902 treaty provided that the boundary was to follow the course of the river Maiteb "so as to leave Mount Ala Tacura to Eritrea, and join the Mareb at its junction with the Mai Ambessa," and so that "the Canama tribe belong to Eritrea." The dispute in this section of the border therefore concerned the identity and course of the river "Maiteb" with regard to which contemporary maps differed, and the question of the location of the Canama tribe. The treaty was written in three different languages—Amharic, English, and Italian—which resulted in translation problems, and it did not contain a map. Therefore, the relevant rivers were described by different names in the three versions of the treaty, and the parties disagreed as to which of two possible rivers the treaty was in fact referring to. In the eastern section of the boundary, Article 1 of the 1908 treaty provided that from the "frontier of the French possessions of Somalia . . . the boundary continues south-east, parallel to and at a distance of 60 kilometres from the coast." Shaw, *supra* note 386, at 764, 768-769, 771; Eri.-Eth. Decision, *supra* note 386, at ¶ 5.3, 5.14-5.15, 6.2; Abebe Zegeye & Melakou Tegegn, *The Post-War Border Dispute between Ethiopia and Eritrea: On the Brink of Another War?*, 24 J. DEVELOPING SOC'YS 245, 262-263 (2008); McHugh, *supra* note 42, at 214; Kaikobad, *supra* note 398, at 179, 186.

407 Eth.-Eri. Agreement, *supra* note 396, at art 5.1.

408 Eri.-Eth. Decision, *supra* note 386, at ¶ 2.27.

409 Ethiopia also claimed that a comparison should be made between the map annexed to the treaty and a modern map based on satellite imaging, since the former did not accurately represent the relevant geography, particularly with respect to the depiction of the named rivers. *Id.* at ¶¶ 2.29-2.30.

410 For instance, the Commission decided that the reference in the Agreement to "applicable international law" entitled it to go beyond the law of treaty interpretation

However, this recognition was not ultimately reflected in its decision making, which instead adopted a narrow and legalistic approach to the resolution of the dispute.

The Commission adopted a literal and restrictive interpretation of the Agreement, finding as a preliminary matter that the relevant date for determining the parties' border was the date of Eritrea's independence in 1993, and that no subsequent developments were to be taken into account unless they were "a continuance or confirmation of a line of conduct already clearly established, or tak[ing] the form of express agreements between [the parties]."[411] Therefore, all elements of effective Ethiopian administration in certain sections of the boundary became irrelevant.[412] The Commission also strictly followed the principle of contemporaneity,[413] which involved giving expressions used in the treaties the meaning that they would have possessed at that time.[414]

While the Commission found that the description contained in the 1900 treaty "fell short of a desirably detailed description, particularly in the light of the uncertain knowledge at the time concerning the topography of the area and the names to be given to geographical features,"[415] it nonetheless considered the map annexed to the treaty to be of "critical importance."[416] The Commission decided the location of the named rivers based on this map, noting that it should be followed "so long as it is not shown to be so at variance with modern knowledge as to render it valueless as an indicator of what the Parties could have intended on the ground," but that it was important not to attribute "far-reaching consequences to relatively minor discrepancies."[417] Furthermore, the Commission took note of the parties' subsequent conduct

and to take into consideration customary international law, even if it may alter the colonial treaties. *Id.* at ¶¶ 3.14-3.15; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 119, 122. Nonetheless, the Commission proceeded to rely on the "pertinent colonial treaties" for much of its decision. Jon Abbink, *Law Against Reality? Contextualizing the Ethiopian-Eritrean Border Problem*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 146 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini, eds., 2009).

411 Eri.-Eth. Decision, *supra* note 386, at ¶ 3.36; Greppi, *supra* note 405, at 63.

412 Greppi, *supra* note 405, at 64-65.

413 According to which, "a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded." Shaw, *supra* note 386, at 762.

414 Eri.-Eth. Decision, *supra* note 386, at ¶ 3.5.

415 *Id.* at ¶ 4.8.

416 Shaw, *supra* note 386, at 768.

417 Eri.-Eth. Decision, *supra* note 386, at ¶ 4.36.

and activities,[418] but found this evidence to have no legal effect on the delimitation of the boundary other than in several specific areas.[419]

Although the Commission purported to analyze the 1902 treaty in light of its object and purpose, it found that this included the assignment of the Cunama tribe, who inhibited the village of Badme, to Eritrea,[420] even though the village was continuously under the *de facto* control of Ethiopia.[421] The Commission also considered evidence of Ethiopia's collection of taxes, establishment of an elementary school, and the destruction of incense trees in the area, but nonetheless rejected Ethiopia's claim to effective title, finding that this evidence "was not sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea."[422]

Finally, the Commission found that the 1908 treaty provided for a "geometric method of delimitation," which it interpreted to mean that "prior effectivités . . . are not to play a role in the calculation as to where the boundary is located."[423] While the Commission found that this method did not mean, as Eritrea argued, that all the Commission had to do was to apply the treaty delimitation to a map of the area, but rather that what was provided was "a formula, the application of which required a series of subsidiary decisions on other critical matters,"[424]

418 *Id.* at ¶ 4.60, Appendix A, "Subsequent Conduct of the Parties in the Sector Covered by the 1900 Treaty." The Commission has been criticized for not including the evidence of subsequent conduct in the body of the award. Kaikobad, *supra* note 398, at 178-179.

419 Two such areas were awarded to Eritrea on the basis of both an admission made by Ethiopia during the proceedings and on Eritrean activity, and another two areas were awarded to Ethiopia on the basis of the parties' conduct. Eri.-Eth. Decision, *supra* note 386, at ¶¶ 4.62, 4.71, 4.75, 4.78; Kaikobad, *supra* note 398, at 178; J.G. Merrills, *The Contribution of the Permanent Court of Arbitration to International Law: 1999-2009*, *in* PERMANENT COURT OF ARBITRATION SUMMARIES OF AWARDS 1999-2009, at 1, 5 (Belinda MacMahon & Fedelma Claire Smith eds., 2010) [hereinafter Merrills, *The Contribution of the Permanent Court of Arbitration to International Law: 1999-2009*].

420 Eri.-Eth. Decision, *supra* note 386, at ¶¶ 5.29, 5.90, Appendix B, "The Location of the Cunama"; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 119-20; Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 112; McHugh, *supra* note 42, at 215. The Commission has also been criticized for not including the discussion of the Cunama nation in the body of the award. Kaikobad, *supra* note 398, at 180.

421 Eri.-Eth. Decision, *supra* note 386, at ¶¶ 5.44-5.96.

422 *Id.*, *supra* note 386, at ¶¶ 5.92-5.95; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 120; Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 112.

423 Eri.-Eth. Decision, *supra* note 386, at ¶ 6.5.

424 *Id.*, *supra* note 386, at ¶ 6.14.

it nonetheless proceeded to find that "departures from the geometric method in the demarcation process would only be permissible to take account of the nature and variation of the terrain."[425]

The Commission delivered a unanimous delimitation decision in April 2002.[426] While the Commission concluded that the western section of the boundary belonged to Eritrea, it did not indicate the exact location of the contentious village of Badme on the accompanying maps; instead, the Commission only provided the coordinates of the line along which the border would run.[427] Shortly thereafter, Ethiopia submitted a "Request for Interpretation, Correction and Consultation," which mostly concerned the relation between the Commission's delimitation decision and the second phase of demarcation.[428] This request constituted "an open objection and challenge" to the decision,[429] and was rejected by the Commission on the ground that it sought the reopening of matters clearly settled by the decision, and therefore went beyond the Commission's powers of interpretation or revision and was inadmissible.[430] Eritrea ultimately accepted the Commission's delimitation decision, despite the fact that it continued to dispute several issues it had lost, in order not to jeopardize the decision regarding Badme.[431] Widespread opposition to the decision persisted, however,

425 With regard to the application of the geometric method, the Commission decided that this was a question of both delimitation and demarcation, and that the line of delimitation would "serve as the basis for the demarcation." The Commission decided to use satellite images to produce this boundary, which it then reviewed in light of the parties' subsequent conduct and common agreement. With regard to the application of the geometric method, the Commission decided that this was a question of both delimitation and demarcation, and that the line of delimitation would "serve as the basis for the demarcation." The Commission decided to use satellite images to produce this boundary, which it then reviewed in light of the parties' subsequent conduct and common agreement. Eri.-Eth. Decision, *supra* note 386, at ¶¶ 6.14, 6.17, 6.20-6.32, 6.34; Shaw, *supra* note 386, at 771, 782; Kaikobad, *supra* note 398, at 186-187; Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 120.

426 *See* Eri.-Eth. Decision, *supra* note 386. *See also* Shaw, *supra* note 386, at 758.

427 Jibril, *supra* note 104, at 648; Shaw, *supra* note 386, at 785.

428 *See, e.g.*, Martin Pratt, *A Terminal Crisis? Examining the Breakdown of the Eritrea-Ethiopia Boundary Dispute Resolution Process*, 23 CONFLICT MGMT. & PEACE SCI. 329, 330 (2006).

429 Michael K. Addo, *The Role of Intergovernmental Agencies in the Management of Human Rights Risk*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 458 (Andrea de Guttry, Harry H.G. Post & Gabriella Venturini eds., 2009).

430 Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 118, 120; Kaikobad, *supra* note 398, at 213-14.

431 Gilkes, *supra* note 382, at 229.

within Ethiopia, which prevented the government from accepting the Commission's decision.[432]

Ethiopia argued that the demarcation of the boundary should be adapted to account for "human and physical geography," or else it would result in an impractical boundary that divided communities.[433] The Commission claimed, however, that since it was not authorized to decide *ex aequo et bono*, it could not take into account physical divisions of communities that may adversely affect the interests of the local inhabitants.[434] Ethiopia proceeded to request the UN Security Council to set up an alternative mechanism to demarcate the boundary, claiming that the Commission was in a "terminal crisis;" however, the Commission rejected the accusation that any "crisis" existed that could not be cured by Ethiopia's compliance with its decision.[435] In 2004, Ethiopia stated that it was willing to accept the delimitation decision in principle if adjustments were made in the demarcation phase by way of negotiations between the parties; however Eritrea refused, demanding unconditional demarcation in accordance with the lines set out in the Commission's delimitation decision.[436]

The Commission attempted to commence its task of demarcating the boundary, but its work was obstructed by both parties. Ethiopia refused to allow the necessary preparatory work to be carried out in the territory subject to its control in the western and central sections of the border. Eritrea refused to allow the Commission to proceed in the eastern section, claiming that the demarcation activity was to be carried out simultaneously in all sections of the border.[437] The Commission therefore proceeded to demarcate the boundary "virtually" by using image processing techniques, a process which was completed in 2006.[438] Since the parties continued to refuse to cooperate with the Commission in the demarcation process on the ground, the

432 Jacquin-Berdal, *supra* note 382, at xix.

433 Seifu, *supra* note 383, at 168-69.

434 Guazzini, *supra* note 388, at 138.

435 Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 115; Pratt, *supra* note 428, at 331.

436 Abbink, *supra* note 410, at 157; Seifu, *supra* note 383, at 169; Jibril, *supra* note 107, at 667; Terrence Lyons, *The Ethiopia–Eritrea Conflict and the Search for Peace in the Horn of Africa,* 36 REV. AFR. POL. ECON. 167, 169 (2009).

437 Greppi, *supra* note 405, at 64-65; Shaw, *supra* note 386, at 790.

438 Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 118, 120-21; Daly, *supra* note 405, at 53.

Commission declared this "virtual" demarcation to be final and its mandate to be completed, ending all of its activity in 2007.[439]

The impact of the Commission's unilateral demarcation decision continued to be uncertain for several years, as the border remained unmarked and sealed and Ethiopia retained control of areas allocated to Eritrea in the delimitation decision, including the village of Badme.[440] Both parties also refused to compromise, with Eritrea asserting that the Commission's delimitation decision is final and backed by international law, while Ethiopia remained unmotivated to alter the status quo in light of its control over Badme and the lack of significant international pressure.[441] The two countries therefore continued to live "[at] an impasse of 'no-war,' 'no-peace,'" as low intensity conflicts have been witnessed recently along the common boundary.[442] Only in 2018, sixteen years after the Commission's decision was rendered and following a change of government in Ethiopia, the two states signed a "joint declaration of peace and friendship" pursuant to which Ethiopia withdrew from Badme.[443]

The failure of the Commission to resolve the parties' boundary dispute in this case may be understood as rooted in its narrow and legalistic approach to its own role as well as to the parties' conflict. Indeed, its delimitation decision has been criticized for its "relentless effort to exclude anything that allows the application of initiative or discretion in line with the peculiarities and realities of creation and maintenance of Africa's large artificial borders."[444] However, the Commission's approach to its task may have resulted, at least in part, from the similarly narrow and legalistic formulation of the issue by the

439 Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 118, 120-21; Daly, *supra* note 405, at 53.

440 Daly, *supra* note 405, at 54; Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 119; Lyons, *supra* note 436, at 167; ODUNTAN, *supra* note 26, at 196-97.

441 Lyons, *supra* note 436, at 167, 169-70.

442 Seifu, *supra* note 383, at 146.

443 *See, e.g.*, *Ethiopia, Eritrea Officially End War*, DEUTSCHE WELLE NEWS (July 9, 2018), https://www.dw.com/en/ethiopia-eritrea-officially-end-war/a-44585296; *Ethiopian Leader Arrives in Eritrea for Landmark Summit*, DEUTSCHE WELLE NEWS (July 8, 2018), https://www.dw.com/en/ethiopian-leader-arrives-in-eritrea-for-landmark-summit/a-44575416; *Ethiopia's Abiy and Eritrea's Afwerki Declare End of War*, BBC NEWS (July 9, 2018), https://www.bbc.com/news/world-africa-44764597; Ethiopian, *Eritrean Leaders Sign Peace Agreement in Jeddah*, REUTERS (Sept. 16, 2018), https://www.reuters.com/article/us-ethiopia-eritrea-saudi/ethiopian-eritrean-leaders-sign-peace-agreement-in-jeddah-idUSKCN1LW0KV.

444 Ghenga Oduntan, *Africa Before the International Courts: The Generational Gap in International Adjudication and Arbitration*, 5 J. WORLD INV. & TRADE 975, 988 (2004).

parties and the limited jurisdiction granted to the Commission. Therefore, the "very seeds for the failure of the Commission's work were already laid in the formulation of the task given to the commission" by the parties.[445]

With respect to the composition of the Commission, a body charged with the task of demarcation or delimitation of boundaries should include at least one geographer or other relevant professional if the process is to be comprehensive and effective. The flexibility of the arbitration process and the freedom of the parties to appoint arbitrators of their choosing makes the appointment of a non-jurist possible and, in some cases, desirable. While the parties in this case appointed the UN Cartographer as Secretary to the Commission and provided for the use of the technical expertise of the UN Cartographic Unit and other experts as the Commission deemed necessary, the primary role of the UN Cartographer and his unit appears to have been providing cartographic support to the Commission, which is different from having a geographer as a member of the Commission.

A geographer sitting on the Commission could have offered "a different perspective on the issues under discussion, provide map-interpretation skills during deliberations, and advise the legal experts on the many complex geographical aspects of the delimitation," thereby facilitating the political dimension of the arbitral process.[446] Moreover, the presence of a geographer would likely have helped the other Commission members in the interpretation of geographic evidence and might have prevented some of the technical errors in the delimitation decision, which later on were used by Ethiopia to challenge its validity. A geographer would have likely insisted on a field survey of the disputed territory, and considering the poor quality of the mapping available to the Commission, "a geographer's insight into the landscape through which the boundary runs would have been invaluable in interpreting the three old boundary treaties."[447]

Instead, the Commission was comprised of a majority of former ICJ judges, no nationals of the parties, and only one member from the African region. While the choice of a majority of ICJ judges may guarantee international law expertise and strengthen the legal dimension of the arbitral process, it may also result in the adoption of an overly-legalistic approach. Moreover, the parties' choice not to appoint their own nationals, or non-nationals familiar with the particulars of the

445 *Id.* at 197.

446 Pratt, *supra* note 428, at 337.

447 *Id.*

dispute, may have compromised the Commission's ability to fully appreciate the parties' interests, their shared history, and the symbolic significance of their boundary and the contested village of Badme.

The parties also presented the border dispute as the ultimate cause of the war and framed the question presented to the Commission narrowly, as concerning the location of their "colonial treaty border," whereas the conflict in fact extended far beyond a boundary dispute. This narrow focus on the technical border issue may have contributed to the Commission's approach to the resolution of the dispute[448] and left it unaware of the true complexity of the conflict; this narrow focus has therefore been considered as the "utmost problem" with the arbitral process.[449] The parties effectively masked a fundamentally political and historical conflict, "infused with a symbolism probably not found among other borders of the continent,"[450] as a legal conflict, thereby hindering the Commission's ability to render a practical and realistic decision.

Adding insult to injury, the parties presumed that "outdated and fallible"[451] colonial treaties, whose marks on the ground had substantially changed by the events and circumstances of the last century, would be sufficient to resolve their border dispute, and granted very narrow discretion to the Commission. While the parties' motivation in limiting the Commission's mandate was probably to protect their interests, it led to an ultimately detrimental outcome.[452] For instance, a broader mandate might have allowed for creative solutions to the problem of the village of Badme that would have been more acceptable to the parties if proposed as part of an overall boundary settlement package, rather than following an unequivocal ruling on legal title based on colonial treaties.[453] Granting broad authority to the arbitral tribunal is therefore to be preferred over a narrow and legalistic arbitration agreement[454] where disputed boundaries were established by colonial treaties, which often contain vague descriptions. To limit an arbitral tribunal's recourse to additional material beyond the interpretation of such treaties may be counterproductive and lead to either an unreasoned or unreasonable award.[455]

448 Guazzini, *supra* note 388, at 110.
449 Seifu, *supra* note 383, at 171.
450 Guazzini, *supra* note 388, at 121.
451 Seifu, *supra* note 383, at 172.
452 Pratt, *supra* note 428, at 334.
453 *Id.* at 335.
454 Merrills, *Reflections on Dispute Settlement, supra* note 267, at 122.
455 *Id.*

The parties' express exclusion of a decision *ex aequo et bono* also evidenced their restrictive approach to the arbitration. This approach likely affected the Commission's perception of its own mandate, and may have signaled to it that the parties would not tolerate any decision not made purely on the basis of law. As mentioned previously, excluding the power to decide *ex aequo et bono* is often the chosen course in interstate arbitrations concerning disputes with political implications, as in the present case, and may seem appropriate at first blush.[456] However, it was precisely this exclusion of any consideration of what is fair and just that led to Ethiopia's perception of the delimitation decision as being "unjust" and to its request that the Commission reconsider its decision on the basis of fairness and justice.[457] From Ethiopia's perspective, it had won the war and its people were hoping that it would at least retrieve access to the ports it lost with Eritrea's independence and to "contested and symbolically significant" places like Badme.[458] It therefore seems rather counterintuitive that the Ethiopian government agreed to entrust such politically significant issues to an external commission that was to be guided by "colonial treaties of indeterminate status"[459] and was not permitted to consider what was just and fair in the circumstances.

In order for an arbitration process to successfully resolve an interstate territorial dispute, the parties must be committed to the process and view it as suitable in the circumstances. In the present case, it seems that arbitration was, at least to some extent, imposed on the parties from outside, which may explain Ethiopia's hostility toward it.[460] Ethiopia objected to arbitration throughout the process, from the conclusion of the Agreement and the selection of the arbitrators to the Commission's application of the Agreement, and although the parties generally agreed to submit their dispute to arbitration in 2000, it took six months of diplomatic pressure and mediation before Ethiopia agreed to actually proceed with the process.[461] Ethiopia's reservations may have been related also to its significantly stronger position relative to that of Eritrea at the time the Agreement was concluded. Ethiopia had a substantially larger population, resources, and military

456 Greppi, *supra* note 405, at 61-62.
457 Jibril, *supra* note 107, at 652-653.
458 Zewde, *supra* note 381, at 23.
459 *Id.*
460 Pratt, *supra* note 428, at 334.
461 Jibril, *supra* note 107, at 663.

might, and it made substantial territorial gains during the war.[462] In any event, "the circumstances leading to the establishment of the Boundary Commission and its resulting lack of perceived legitimacy" likely made it more difficult for Ethiopia to accept the Commission's decision.[463]

The parties therefore failed to appreciate the true nature of the arbitral process. They did not give due consideration to the broader context of their conflict and the practical reality on the ground, and largely confined the Commission's authority to the interpretation of ambiguous colonial treaties, whose statuses were originally controversial[464] and were declared "null and void" by Ethiopia in 1952.[465] In addition, the parties, and particularly Ethiopia, were not sufficiently invested in the arbitration process and were forced into it by external parties. In these circumstances, the legitimacy of the entire arbitration process was compromised from the start, and coupled with the Commission's overly legalistic approach, it inevitably resulted in a narrow delimitation decision limited in scope and impact.[466]

It may be argued that in light of the narrow mandate granted to it by the parties, the role of the Commission in the delimitation phase was "simply to clarify the alignment of an existing boundary, albeit one whose original definition was vague and frequently ambiguous."[467] According to this narrow technical view, the Commission had no authority to adjust the boundary as depicted in the colonial treaties to take account of historical and geographical developments, regardless of how desirable this may have been. This position, however, seems "unreasonably inflexible" and should thus be rejected.[468]

Although the Commission was authorized to decide only in accordance with the three colonial treaties and international law principles, rather than *ex aequo et bono*, this should not have prevented it from adopting an approach that would allow it to interpret such treaties and principles flexibly and take into account relevant extra-legal considerations such as the history of the parties' shared boundary, the symbolic significance of its location, the need for stability along the border, trade routes, social systems, and the rights of the affected

462 *Id.* at 663, 665.
463 Pratt, *supra* note 428, at 334.
464 Abbink, *supra* note 410, at 145; Guazzini, *supra* note 388, at 121.
465 Greppi, *supra* note 405, at 61-62.
466 Abbink, *supra* note 410, at 152, 155.
467 Pratt, *supra* note 428, at 334.
468 *Id.* at 334-35.

communities.[469] Therefore, the parties' exclusion of an *ex aequo et bono* decision should not have prevented the Commissioners from fully exercising their role as judges by conducting their own fact-finding, including ground survey, interviews, and review of local documents, rather than relying almost exclusively on archival material and secondary documents,[470] and their role as diplomats by considering activities that had been taking place on the ground for decades, such as settlements, economic activities, customs ports, and court proceedings.[471] The Commission's decision might have fared better with the parties, and particularly Ethiopia, had it taken into account such significant non-legal factors, and its failure to do so contributed to a decision that "has not necessarily provided the basis for a lasting settlement."[472]

The Commission's legalistic approach to its own role and to the parties' dispute was also illustrated by its over-reliance on the colonial treaties, even though "decades of historical events" have since passed.[473] In addition to being "partly fictitious and outdated" and lacking "clarity and status,"[474] these treaties were of minimal assistance in determining the border, since they failed to provide any agreed upon point of departure or supporting details. The cartographic depictions of rivers in the map annexed to the 1900 treaty did not conform to reality and presented many discrepancies as a result of lack of knowledge of the geographical features.[475] The Commission's use of this map evidence further disregarded the importance of state activity on the ground, and maps which did not accurately represent legally

469 The Commission was clearly aware of the customary rights of the local population, since with respect to a river boundary line that was left to be determined at the demarcation stage, it noted that "regard should be paid to the customary rights of the local people to have access to the river." Nonetheless, it largely failed to take these rights into account in its determination of the parties' mutual border. Eri.-Eth. Decision, *supra* note 386, at ¶ 7.3; Merrills, *The Contribution of the Permanent Court of Arbitration to International Law: 1999-2009*, *supra* note 419, at 8.

470 Abbink, *supra* note 410, at 151-52, 155.

471 *Id.* at 153.

472 Jacquin-Berdal, *supra* note 382, at xiv, xix.

473 Greppi, *supra* note 405, at 62.

474 Abbink, *supra* note 410, at 146, 148.

475 Guazzini, *supra* note 388, at 121. The Commission also misapplied the available maps and relied on unilateral Italian-drawn maps claiming Eritrean territory, which was misunderstood by the Commission as having been accepted by Ethiopia, rather than on an Italian map showing the extent of Italy's claims and effective occupation in the early twentieth century, which did not extend to the Badme area. Abbink*, supra* note 410, at 149-50.

relevant activity on the ground should have been awarded little probative weight.[476]

Had the Commissioners properly executed their roles as judge-diplomats, they may have recognized the colonial treaties as artificial and merely indicative of the ever-changing power balance between the relevant regimes,[477] and conducted a proper assessment of the colonial legacy of the border issue and its significance to the parties in terms of national identities and prestige politics.[478] This would have been permissible had the Commission interpreted the parties' use of the term "delimit" in the Agreement as indicating that they did not intend to confine the Commission to mere interpretation of the treaties.[479] This broader interpretation of the Agreement would have been the proper one and, had it been adopted by the Commission, may have resulted in a more flexible and less strict application of the colonial treaties. Instead, the Commission produced an impractical decision that contributed nothing to the resolution of the parties' territorial dispute[480] and offered "little possibility of any solutions to the problems posed by the border."[481]

A proper exercise of their role as judge-diplomats would have led the Commissioners to broadly interpret the authority granted to them by the parties to consider "applicable international law" and to include various relevant legal principles, such as *uti possidetis*, *effectivités*, and equitable rules of international law, rather than focusing solely on the strict interpretation of the colonial treaties.[482] The importance of the *uti possidetis* principle in determining the location of the parties' boundary was emphasized early on in the parties' reaffirmation of the "principle of respect for the borders existing at independence" in the Agreement and their instruction that the boundary "shall be determined on the basis of pertinent colonial treaties and applicable international law."[483] The application of this principle may have proven difficult in this case, since Eritrea was part of Ethiopia and not a colony in the legal sense, but it should have at least been considered by

476 Kaikobad, *supra* note 398, at 200-01.

477 Abbink, *supra* note 410, at 141-48.

478 *Id.* at 145.

479 Kaikobad, *supra* note 398, at 182.

480 Abbink, *supra* note 410, at 151-52, 155.

481 Gilkes, *supra* note 382, at 230.

482 Abbink, *supra* note 410, at 149.

483 *See* Eth.-Eri. Agreement, *supra* note 396, at art. 4.1. *See also* Merrills, *Reflections on Dispute Settlement*, *supra* note 267, at 117.

the Commission, especially in light of its possible effect on Ethiopia's access to the sea.[484]

The Commissioners' legalistic approach to their own role was also evident in their reliance on evidence of subsequent conduct and administrative activity. The Commissioners essentially used this evidence to illuminate relevant provisions of the colonial treaties, rather than as a possible source of variation of the treaties. This is problematic since the probative value of relevant evidence should be evaluated in light of the "facts and overall perspectives of the dispute," and independently of any treaty it is used to interpret.[485] Instead, the Commission adopted a textbook approach to this evidence in its interpretation of the treaties, and failed to allow it to vary the boundary line to accommodate activities carried out on the ground that were inconsistent with their terms.[486]

Another relevant consideration that the Commissioners failed to take into account was the self-determination of people in the border area.[487] The Commission has been criticized for the potential impact of its decision on the ethnic minorities living between Eritrea and Ethiopia, exposing them to "the danger of disintegration and possible ethnic cleansing."[488] Indeed, the Commission's decision not only failed to resolve existing disputed issues, but also reinforced one of the main problems associated with the parties' mutual border, namely thousands of displaced people unable to return to their lands, thereby almost guaranteeing that the border would remain unstable.[489] Whether intentionally or not, the Commission effectively supported Eritrea's aim to divide these populations as a means of defining its national identity, "emphasizing national political claims at the expense of

484 Abbink, *supra* note 410, at 153-54.

485 Kaikobad, *supra* note 398, at 194.

486 Although the Commission recognized that Ethiopia presented stronger evidence of administrative activity and that this may justify modifying the 1900 treaty boundary, it ultimately decided that a modification of the treaty was uncalled for. Kaikobad, *supra* note 398, at 193-94, 209-11. In addition, Eritrea was unable to provide any evidence of its administrative presence in the area of Badme, and prior to 1998 never raised claims to it. In order to establish ownership over it, moreover, there was a need for "international display of power and authority", which Ethiopia, rather than Eritrea established in this case. However, the Commission ignored the evidence provided by Ethiopia and reverted to the colonial treaties and maps, neglecting the "applicable international law." Abbink, *supra* note 410, at 150-51, 154.

487 Abbink, *supra* note 410, at 153-54.

488 Gilkes, *supra* note 382, at 249.

489 *Id.* at 230.

existing local cultural cross-border or trans-national links."[490] The result has been the rise of a host of new problems along the border, with no alternatives offered by the Commission for their resolution.[491]

This narrow approach adopted by the Commission also led to confusion and misinterpretation of its award by the parties. Ethiopia's initial interpretation of the decision was that it retained sovereignty over the contentious village of Badme while the rest of the western section of the border was awarded to Eritrea, which it viewed as a "win-win situation."[492] It later became clear, however, that Ethiopia's interpretation of the decision was inaccurate, and that Badme was in fact awarded to Eritrea.[493] While the Commission may have believed that its decision was sufficiently clear and that it was sparing Ethiopia from further humiliation,[494] it effectively avoided dealing with the most contentious issue in dispute between the parties, even though "to anyone with the slightest familiarity with the origins and courses of the conflict Badme had . . . a critical symbolic significance."[495] This "rather childish move" compromised the authority and legitimacy of its decision and contributed to its rejection by Ethiopia.[496]

490 *Id.* at 250.

491 *Id.* at 249-50.

492 Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 113.

493 As the disputed sovereignty over Badme ignited the conflict to begin with, and since whoever had legitimate title to it could claim that it was justified in going to war over it, the Commission's failure to pronounce the location of the village "unleashed a controversy that has yet to be resolved." It seems that the Commission in fact had no idea of the importance of Badme to the parties, which had a "critical impact" on the reception of its decision. As the Ethiopian Prime Minister commented: "for us Badme is nothing, but the principle behind invading Badme is everything." Failing to take these sentiments into account, the Commission's decision, rather than signaling the beginning of a peace process between the parties, brought them closer to war. Christopher Clapham, *Indigenous Statehood and International Law in Ethiopia and Eritrea*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 159, 167 (Andrea de Guttry et al. eds., 2009); Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 112-13.

494 Plaut, *The Conflict and its Aftermath*, *supra* note 384, at 112.

495 Clapham, *supra* note 493, at 167.

496 Zegeye & Tegegn, *supra* note 406, at 260. The decision of the Commission to terminate its mandate also seems somewhat extreme, as it could have instead suspended itself for an indefinite period of time, which would have allowed it to reclaim its mandate if and when appropriate. While this may have been intended to encourage Ethiopia to accept the Commission's decisions as final and implement them, it was an insufficient incentive in light of the partial and unsatisfactory nature of these decisions and resulted in the dispute continuing unresolved and the parties remaining with no alternative recourse for de-escalating the growing military tensions between them. Guazzini, *supra* note 388, at 139.

In summary, while the Commission's approach may be understandable in the light of the relatively narrow framing of its authority in the Agreement, it cannot be justified when viewed from the perspective of the arbitral process advocated here. Regardless of the limits placed on it by the parties, the Commission ought to have exercised its dual role and account for reality, justice, custom, and equity, rather than merely strict law.[497] Although only one narrow aspect of the parties' conflict, namely the location of their mutual border, was submitted for resolution to the Commission, demarcating this border was a "necessary prerequisite" for progress on other issues[498] and represented a window of opportunity to normalize the parties' relationship.[499] To achieve this, however, the Commission had to consider the broader context, origins, and history of the dispute, as well as the parties' interests, shared norms, and established practices. In failing to do so, it merely raised the stakes so that both parties became locked in their positions in a "prestige psychological battle."[500] The fact that the Commission also attempted to demarcate the boundary based on a narrow and impractical delimitation decision, even if legally sound, further exacerbated the negative attitude of the parties and countered the reality on the ground.[501]

The failure of the Commission's delimitation decision to resolve the parties' boundary dispute, and the demarcation debacle that ensued, left the conflict between Eritrea and Ethiopia unresolved for almost two decades.[502] The parties' narrow approach to the arbitration process both artificially isolated the border question from the broader context of their dispute, and failed to give this complex aspect of the dispute, which had an "almost spiritual significance" to them,[503] its due weight. The Commission's reasoning and decision, moreover, reflected a similarly legalistic analysis that over-simplified the parties' conflict.[504]

497 Abbink, *supra* note 410, at 142-43.

498 Lyons, *supra* note 436, at 169.

499 Greppi, *supra* note 405, at 62.

500 Abbink, *supra* note 410, at 144.

501 *Id.* at 151.

502 *Id.* at 142.

503 Clapham, *supra* note 493, at 162.

504 This approach was prevalent in the West at the time and dismissively characterized the dispute as "two bald men fighting over a comb." Uoldelul Chelati Dirar, *Rivalry, Antagonism and War in the Nation & State-building Process: The H Factor in the Relations Between Eritrea and Ethiopia*, *in* THE 1998-2000 WAR BETWEEN ERITREA AND ETHIOPIA 25, 26 (Andrea de Guttry et al. eds., 2009); Clapham, *supra* note 493, at 161.

The narrow framing of the Commission's mandate by the parties, and the rigid interpretation of this mandate by the Commission, therefore, led to a decision that "sealed off the prospects for flexibility, amendment and compromise."[505] In light of the significant symbolic value of Badme, its grant to Eritrea against the initial expectations of both parties guaranteed that a compromise solution to this issue would not be reached and that the threat of armed conflict would continue to loom large. "Due to local pressures and the promises during mobilisation for war, both sides became stuck on getting that territory or their national pride is lost. The sentiment in the populations of the parties makes the matter of handing over Badme to Eritrea or Eritrea agreeing to dialogue look like a 'political suicide' none of whom could justify."[506]

This arbitration therefore demonstrates the importance of considering "the various levels of tension" involved in a particular dispute in order to "fully appreciate the situation on the ground, its causes, and possibilities for resolution," as well as the importance of expertise beyond the "pure understanding and appreciation of international law norms" to the resolution of disputes of this kind.[507] In the present case, the significance of the parties' mutual border extended beyond its legal conception to shape the parties' expectations and claims, and to underline the tensions between them. Since the Commission failed to fully grasp and consider these tensions, it was unsuccessful in resolving the parties' conflict.[508]

The Commission's decision is similar in many respects to the arbitral award rendered in the Beagle Channel case, and the failure of these two arbitrations to resolve the respective disputes can be usefully compared. In the Beagle Channel arbitration, the tribunal perceived its task in a restrictive manner, as the determination of the boundary between Chile and Argentina, and the allocation of three disputed islands governed by the rights granted to the parties in a boundary treaty from 1881. Accordingly, the arbitrators focused exclusively on the interpretation of the treaty, thereby restricting their role to that purely of judges, and inflexible judges at that.[509] A similarly narrow perception was adopted by the Ethiopia-Eritrea Boundary Commission, confining itself to a large extent to the legalistic exercise of interpreting the three

505 Abbink, *supra* note 410, at 158.
506 Seifu, *supra* note 383, at 169-70.
507 Pocar, *supra* note 383, at xvii-xviii.
508 *Id.*
509 Kaikobad, *supra* note 398, at 183.

colonial treaties, rather than delimiting the boundary in accordance with the relevant situation on the ground. In both cases, this approach was responsible, at least in part, for the failure of the arbitral process, and the rejection of the outcome by the losing party.

Some have argued that, in light of its failure, arbitration was the wrong dispute resolution model to apply in this case,[510] and that "this dispute settlement procedure ought not to have been embarked upon in the first place."[511] However, it may equally be argued that it was not the arbitration itself so much as the parties' and the Commission's misperception and misapplication of the process that prevented the successful resolution of the conflict in this case. The dispute submitted to the Commission, while seemingly legal in nature, carried with it significant non-legal implications, which were compounded by the parties' shared history and unstable relationship, and which both the parties and the Commission failed to take into consideration.[512] Had the parties and the Commission recognized that the disputed issue was far more complex than a simple boundary delimitation, and had they perceived the arbitral process as "more efficient than diplomatic instruments and more flexible than adjudication by a permanent court,"[513] a fair and practical decision would have ensued, compatible with realities on the ground, and capable of effectively resolving the conflict.

IV. CONCLUSION

One of the continuous goals of the international community is the prevention of war through peaceful resolution of interstate disputes.[514] Although a host of dispute resolution mechanisms—from mediation to judicial settlement—has been developed for this purpose, this goal remains unattained.[515] Some may see this as resulting from the absence of a dispute resolution mechanism capable of settling interstate disputes definitively and effectively.[516] Yet, as this article argues, such a mechanism (namely interstate arbitration) in fact exists, and it has been in existence for centuries.

510 Zewde, *supra* note 381, at 24; Seifu, *supra* note 383, at 172.
511 Kaikobad, *supra* note 398, at 223.
512 Abbink, *supra* note 410, at 155.
513 Greppi, *supra* note 405, at 60; Clapham, *supra* note 493, at 161
514 Reisman, *Stopping Wars and Making Peace*, *supra* note 35, at 6, 13.
515 Muller & Mijs, *supra* note 18, at 203.
516 *Id.*

Interstate arbitration has a long history of resolving political and military interstate conflicts[517] and "prevent[ing] the recurrence of war"[518] by finding a middle ground based on both law and diplomacy that is accepted as binding and fair by disputing states.[519] In the context of interstate territorial disputes that involve the most sensitive aspect of a state's existence, its sovereignty,[520] and are not necessarily amenable to either purely diplomatic dispute resolution mechanisms or judicial determination, this true nature of arbitration is particularly invaluable. Yet, with the gradual judicialization of interstate arbitration, it has largely become a legalistic and formalistic "judicial process designed to reach a decision based on the application of legal principles."[521]

The case studies analyzed in this article illustrate both the limited extent to which interstate arbitration's true nature has been recognized in the context of interstate territorial disputes, and the impact that such limited recognition may have on the ultimate outcome and the successful resolution of such disputes by arbitration. With the exception of the Red Sea Islands arbitration, the cases examined reflect the judicialized contemporary perception of interstate arbitration, according to which it is merely a procedurally flexible form of judicial settlement rather than a truly hybrid alternative mechanism designed to resolve all aspects of states' disputes.

The parties in the Beagle Channel arbitration, the Eritrea-Ethiopia arbitration, and particularly the Taba arbitration, restricted the authority of the arbitral tribunal to decide their dispute based on international law and treaty interpretation. Moreover, they all submitted a single factual or legal issue to be determined by arbitration, which represented only a narrow aspect of their broader conflict. It seems, therefore, that the parties in these cases perceived the arbitration as a legalistic dispute settlement procedure designed to resolve legal questions based on the strict application of legal principles. Similarly, the arbitral tribunals in the Beagle Channel arbitration and the Eritrea-Ethiopia arbitration, which were largely comprised of ICJ judges, also perceived the arbitral process as an essentially judicial and legalistic procedure, in which their own mandate was strictly defined by the

517 Fry, *supra* note 12, at 419; Werner, *supra* note 22, at 69.

518 *See* Werner, *supra* note 22, at 73.

519 Holtzmann, *supra* note 97, at 266.

520 Lauterpacht, *supra* note 238, at 465-66.

521 Holtzmann, *supra* note 97, at 265.

parties' arbitration agreement and excluded any residual discretion or authority.

The parties of the Red Sea Islands arbitration, in contrast, agreed to relatively broad language and scope in the Arbitration Agreement, a diverse constitution of the arbitral tribunal, and relatively broad authority granted to the tribunal, all of which contributed to the arbitral tribunal's ability to effectively resolve the parties' dispute. Moreover, the tribunal's own progressive perception of its own role, its liberal interpretation of the Arbitration Agreement, and its incorporation of equitable and extra-legal considerations, even though it was not explicitly authorized to do so by the parties, may have contributed to a balanced and fair award that was implemented by both parties, and successfully resolved their dispute.

Similarly, the arbitral tribunal's flexible approach to the parties' dispute and to its own mandate in the Taba arbitration enabled it to overcome the practically impossible situation created by the parties in their Arbitration Agreement, and to produce a sensible decision that ultimately resolved the disputed issue submitted to it. Had the parties' approach to the arbitral process in this case not been quite so restrictive, and had they not placed such severe restrictions on the arbitral tribunal, it might have also been able to devise a compromise settlement that would have been easier for Israel to accept, rather than a zero-sum award. The fact that the arbitral award, as rendered, was ultimately implemented by both parties may be credited to the atypical circumstances of this case and the arbitral tribunal's resourcefulness and creative approach.

It seems, therefore, that state parties' and arbitral tribunals' perception of the nature, function, and purpose of the arbitral process, and of their own respective roles in that process, may impact its ultimate success or failure. While not discounting the significance of other elements external to the arbitration itself, the cases examined in this article suggest that the 1794 Jay Treaty got it right—in order to effectively resolve complex interstate disputes, the arbitration should be understood and used by parties and arbitrators in its original hybrid "essence."[522] Otherwise, the arbitral process will suffer, and the award will likely be unsatisfactory and risk remaining unimplemented. Granted, there may never be real peace, whether by means of arbitration or negotiation, between disputing states that do not "want it badly

522 *See* Pinto, *Essence of International Arbitration*, *supra* note 13, at 261.

enough."[523] However, if the spirit of arbitration from 1794 is revived, it is the most likely to achieve such peace where states do want it.

523 Daniel Bethlehem, *Is There a Role for International Law in the Middle East Peace Process?*, 99 AM. SOC'Y INT'L. L. PROC. 217, 220 (2005).