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THE USE OF ARBITRATION TO SETTLE TERRITORIAL DISPUTES

Carla S. Copeland

INTRODUCTION

Ever since Great Britain and a recently independent United States agreed to submit a border dispute to arbitration in 1794, in accordance with the Jay Treaty,¹ international arbitration has proved a useful method of settling limited territorial disputes between nations.² One of the most attractive features of arbitration is that the proceedings are generally conducted in ad hoc courts of arbitration specifically designed to deal with a particular dispute.³ The parties can participate in defining the issue to be adjudicated, and they have the power to select the arbitrators, the forum, and the rules of procedure that will be used to settle the dispute.⁴ Arbitration also provides the parties with the option of holding hearings in secret.⁵ Thus, arbitration provides an appealing forum for nations that have decided to resolve their differences through peaceful means because it is much more flexible than a permanent court and allows the parties to maintain more control over the proceedings.⁶

Arbitration has been used in the past, with much success, to settle limited issues of territorial sovereignty.⁷ The question remains, however, as to whether it is an appropriate dispute resolution mechanism to settle ethnic-based claims to land. The proliferation of ethnic-based

1. The official name of the Jay Treaty is the General Treaty of Friendship, Commerce and Navigation. See Barry E. Carter & Phillip R. Trimble, *International Law* 354 (2d ed. 1995) (excerpting J. Simpson & H. Fox, *International Arbitration: Law and Practice* 1-40 (1959)). It is commonly called the Jay Treaty after John Jay, the American Secretary of State. See *id.* The Treaty resolved various outstanding questions between the United States and the United Kingdom that had arisen after the United States declared independence. See *id.* at 354-55. Those issues not resolved by the parties were referred to arbitration. See *id.* at 355. Under Article 5 of the Treaty, arbitration was used to determine part of the boundary between the remaining British possessions and the United States. See *id.* The Jay Treaty is considered to have revived the use of public international arbitration. See *id.* at 354.

2. See, e.g., Henry T. King, Jr. & James D. Graham, *Origins of Modern International Arbitration*, 51 *Disp. Resol. J.*, Jan.-Mar. 1996, at 42, 42 (discussing the history of modern arbitration).

3. See Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 *Colum. J. Transnat'l L.* 65, 70 (1997) (stating the reasons why states want to preserve the flexibility permitted by arbitration).

4. See *id.*

5. See *id.*

6. See Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 *J. Int'l Disp. Resol.* 131, 163-64 (1987) (listing the possible advantages and disadvantages of dispute resolution by a permanent court).

7. See Hazel Fox, *Arbitration, in The International Regulation of Frontier Disputes* 168, 168 (Evan Luard ed., 1970) (stating that the use of arbitration to settle territorial disputes has been most successful in settling limited territorial issues).

violence in the context of the secession and breakup of states currently poses one of the greatest threats to public order and human rights.⁸ But these conflicts are not only about ethnic groups seeking self-determination through political independence and statehood; they are fundamentally issues about control over land.⁹ Thus, constructing effective means to peacefully resolve territorial disputes is a matter of profound importance.

This Note addresses this issue by examining three separate arbitral proceedings that have each involved a territorial dispute between parties with a history of violent ethnic or religious conflict. Part I provides a brief overview of the arbitral process. Part II examines two arbitrations that have been successful in resolving territorial disputes, the Rann of Kutch Arbitration between Pakistan and India, and the Taba Area Arbitration between Israel and Egypt. In an effort to illustrate the types of disputes most appropriate for resolution through arbitration, this part discusses the issues decided, the arguments made, and the evidence presented in each arbitration. Part III examines the arbitration between the two Bosnian Entities over the Brcko area, as provided for by the Dayton Accords. This part shows that the use of arbitration to solve territorial disputes can be successful only where the parties are committed to resolving the dispute peacefully through arbitration, and that such a commitment is unlikely if the dispute involves an issue considered to be of vital national importance. For arbitration to successfully resolve such disputes, the parties must have a modicum of trust in each other and be willing to accept the fact that they may lose. Thus, an arbitration agreement imposed upon the parties by the international community will not work. Part IV considers the appropriateness of other dispute resolution mechanisms that may be used to resolve territorial disputes. This Note concludes that any attempt by the international community to force states to arbitrate such disputes may discourage future parties from using the procedure.

I. ARBITRATION GENERALLY

Arbitration is often compared to the use of judicial settlement.¹⁰ Both are legal means of settling disputes, and both presuppose an obligation of the parties to accept the award (in the case of arbitration)

8. See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 Am. J. Int'l L. 590, 590 (1996) (examining whether the doctrine of *uti possidetis* is appropriate for contemporary challenges related to state unity).

Uti possidetis is a doctrine providing that a state emerging from decolonization shall inherit the colonial administrative borders that it held at the time of independence. See *id.*

9. See *id.*

10. See, e.g., D.H.N. Johnson, *International Arbitration Back in Favour?*, 1980 Y.B. World Aff. 305, 327-28 (explaining that the political climate between states affects the frequency with which arbitration is used as a means of settling international disputes).

or judgment (in the case of judicial settlement).¹¹ In addition, the award or judgment is usually based on rules of international law.¹² The most significant difference between arbitration and judicial settlement is the method used to establish the tribunal. While judicial settlement involves the reference of a dispute to a permanent court whose composition is primarily fixed,¹³ in arbitration the parties to the dispute select the arbitrators.¹⁴

When formulating an arbitration proceeding, the parties to the dispute usually define the composition of the tribunal through either an ad hoc agreement (*compromis*) or by reference to a prior agreement between the parties in which they had agreed to submit future disputes to arbitration.¹⁵ The composition of a tribunal can vary greatly, depending on the parties' wishes. The most common form of arbitral tribunal presently used is a three or five member panel, with each party appointing an equal number of members.¹⁶ The final member of the tribunal is a neutral third party.¹⁷ This type of tribunal usually decides disputes by majority vote.¹⁸ The appointment of the members of the arbitral tribunal is often contentious,¹⁹ particularly the selection of the neutral arbitrator, because it is the decision of this neutral arbitrator that often determines the arbitration's outcome.²⁰ Thus, arbitration agreements often provide that if the parties cannot agree upon

11. *See id.* at 306.

12. Article 38 (2) of the statute of the International Court of Justice permits the Court to decide a case *ex aequo et bono* if the parties agree. In the case of arbitration, the parties to the dispute have the power to instruct the Tribunal on what basis it should render its decision. *See id.* at 306 n.9.

13. *See id.* at 306-07; J.G. Merrills, *International Dispute Settlement* 121 (3d ed. 1998); Louis B. Sohn, *The Future of Dispute Settlement, in The Structure and Process of International Law* 1121, 1125 (R. St. J. Macdonald & Douglas M. Johnston eds., 1986).

14. *See* Louis Henkin et al., *International Law: Cases and Materials* 788 (3d ed. 1993); Johnson, *supra* note 10, at 306-07; Merrills, *supra* note 13, at 92; Sohn, *supra* note 13, at 1125.

15. *See* Henkin et al., *supra* note 14, at 788; Merrills, *supra* note 13, at 88.

16. *See* Merrills, *supra* note 13, at 91. This form of tribunal was first used in the Alabama Claims case (1871-2), which involved Great Britain's responsibilities as a neutral during the American Civil War. *See id.* Among the other forms of arbitration that have been used historically are sovereign arbitration where the dispute is referred to a single person, usually a head of state. *See id.* at 89. During medieval times, the Pope was often called upon to act as arbitrator. *See id.* Other variations include convening a tribunal composed of an equal number of national arbitrators and one neutral member who decides the dispute if the national members cannot agree (the origins of this form of arbitration can be traced back to the Treaty of Ghent (1814)) or selecting only national arbitrators (this method was employed in Jay Treaty (1794)). *See id.* at 88-89.

17. *See* Merrills, *supra* note 13, at 92.

18. *See* Sohn, *supra* note 13, at 1126-27.

19. *See* Merrills, *supra* note 13, at 92-93.

20. *See id.*

the neutral arbitrator, the President of the International Court or another disinterested party shall make the selection.²¹

In addition to establishing the form of the tribunal, the *compromis* or treaty that refers the dispute to arbitration should include the applicable rules of procedure.²² Among these procedural arrangements are the location of the proceedings, how they are to be paid for, the time limit within which the award shall be rendered, the number and order of the pleadings, how the tribunal will obtain evidence, and the majority required for the award.²³ Each procedural arrangement can be negotiated separately, or the parties may elect to adopt standard procedural provisions such as those followed by the International Court of Justice ("I.C.J.").²⁴ Any procedural matter not provided for in the *compromis* must be determined by the tribunal, which "has the inherent power to determine its procedures in a way not inconsistent with the *compromis*."²⁵

The *compromis* also incorporates the issues to be decided by the tribunal.²⁶ The parties may define the issues broadly, but more often the questions presented to the tribunal are narrowly defined.²⁷ Because the tribunal is limited in its function, it must only address the controversy before it and may not delve into any deeper issues that may exist between the parties.²⁸ The definition of the issue is important because it determines the scope of the tribunal's authority;²⁹ thus, it is almost always a matter for negotiation by the parties.³⁰ If the tribunal exceeds its authority by answering questions not presented to it, the parties may challenge the award as a nullity.³¹ The doctrine of nullification is a problem unique to arbitration.³² Although it is similar in effect to the problem of enforcement, common to all international awards or judgments, nullification asserts that there is not even a valid award to enforce.³³ Having outlined the basic formulation of arbitration, part II examines two successful arbitrations.

21. See *id.* at 93.

22. See *id.* at 95.

23. See *id.* (providing a more detailed list of procedural arrangements that are normally included in the *compromis*); see also Henkin, *supra* note 14, at 790-91 (quoting Article 2 of the International Law Commission's Model Rules on Arbitral Procedure).

24. See Merrills, *supra* note 13, at 95 (using the Maritime Delimitation case as an example of parties adopting the I.C.J.'s rules of procedure).

25. Henkin, *supra* note 14, at 791.

26. See Merrills, *supra* note 13, at 97.

27. See *id.* at 96.

28. See *id.*

29. See *id.* at 97.

30. See *id.*

31. See *id.* at 98; Johnson, *supra* note 10, at 310.

32. See Johnson, *supra* note 10, at 310.

33. See *id.*

II. EXAMINATION OF TWO SUCCESSFUL ARBITRATIONS

This part looks at the successful application of international arbitration to two divisive conflicts: the Rann of Kutch and the Taba Area disputes. This part demonstrates that arbitration can be effective when invoked in well-defined, fact-oriented territorial disputes.

A. *The Rann of Kutch Arbitration*

The dispute between India and Pakistan over the Rann of Kutch ("The Rann") has been heralded as "one of the major instances of international arbitration in the post-war period."³⁴ The object of the arbitral tribunal was to determine a sector of the boundary between the territory that, in British times, was known as Sind (now part of the Islamic Republic of Pakistan) and the State of Kutch and other Native Indian States (now part of the Province of Gujarat in the Republic of India).³⁵ The Rann (or marsh) of Kutch spans approximately 200 miles across the southern portion of the Indo-West Pakistan border.³⁶ It has been described as a "desolate wasteland"³⁷ because it is practically uninhabited and has little economic or strategic value.³⁸

1. Background

The territorial dispute had century-old origins, but it became acute shortly after India and Pakistan emerged as independent states in 1947.³⁹ India claimed the Rann as part of its territory, while Pakistan insisted that the boundary ran through the "middle of the Rann or approximately along the 24th parallel."⁴⁰ Early in 1965, India, claiming that Pakistan illegally patrolled the Rann north of the 24th parallel, posted border guards along the line.⁴¹ Pakistani troops fired upon and cleared India's outposts in April.⁴² Hostilities increased and during the next several weeks Pakistani and Indian forces engaged in battles involving several thousand troops.⁴³ Shortly after the fighting began, Britain began negotiations, and soon afterwards, in an agreement dated June 30, 1965, both parties agreed to a cease fire and to submit the dispute to settlement by arbitration.⁴⁴

34. J. Gillis Wetter, *The Rann of Kutch Arbitration*, 65 Am. J. Int'l L. 346, 346 (1971).

35. *See id.*

36. *See* Stanley Wolpert, *A New History of India* 374 (2d ed. 1982).

37. *See id.*

38. *See* William J. Barnds, *India, Pakistan, and the Great Powers* 197 (1972).

39. *See* Wetter, *supra* note 34, at 346.

40. Barnds, *supra* note 38, at 197.

41. *See* Wolpert, *supra* note 36, at 374.

42. *See id.*

43. *See id.* at 375.

44. *See* Wetter, *supra* note 34, at 346. By August of that year, the center of conflict and confrontation had shifted north to Kashmir and the Punjab. *See* Wolpert, *supra* note 36, at 374.

In accordance with the agreement, Pakistan and India each nominated a non-national as member of the tribunal, and the Secretary General of the United Nations appointed the Tribunal's Chairman.⁴⁵ Prior to the commencement of oral hearings, and in accordance with the rules of the Tribunal pertaining to discovery, a delegation from Pakistan visited New Delhi to inspect and obtain copies of maps and documents in Indian Government archives.⁴⁶ A delegation from India visited Islamabad for the same purpose.⁴⁷ The terms of the cease-fire agreement provided that the parties would undertake "to implement the findings of the Tribunal in full as quickly as possible,"⁴⁸ and the parties agreed that the Tribunal should remain intact until its findings had been implemented.⁴⁹

2. Issues and Arguments

The first issue to be decided by the Tribunal was "whether the boundary in dispute [was] a historically recognised and well-established boundary."⁵⁰ The Tribunal examined voluminous documentary evidence, including British maps and surveys dating largely from the period between 1870 and 1947.⁵¹ The Tribunal concluded that "there did not exist . . . a historically recognised and well-established boundary in the disputed region."⁵²

The second main issue was whether Great Britain should be held, by its conduct, to have recognized, accepted, or acquiesced in the claim of the former State of Kutch (now part of India) that the Rann was Kutch territory.⁵³ Such a determination would preclude Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory.⁵⁴ The Tribunal relied primarily on maps published by the British Government in India of a conterminous boundary roughly coinciding with India's claim.⁵⁵ This boundary had become a constant feature on all maps produced as surveys of India after 1907.⁵⁶

45. See Wetter, *supra* note 34, at 346.

46. See *id.* at 347.

47. See *id.*

48. *Id.* at 348.

49. See *id.* After the Tribunal rendered its award, the parties jointly demarcated the boundary, and the Tribunal was dissolved on September 22, 1969. The entire process, from the cease-fire to the implementation of the award took a little more than four years. See *id.*

50. Rann of Kutch Arbitration (India v. Pak.) (The Indo-Pak. Western Boundary Case Trib. 1968), *excerpts reprinted in* 7 I.L.M. 633, 667 (1968) [hereinafter Rann of Kutch Award].

51. See Wetter, *supra* note 34, at 350.

52. Rann of Kutch Award, *supra* note 50, *reprinted in* 7 I.L.M. 633, 672 (1968).

53. See *id.*, *reprinted in* 7 I.L.M. 633, 672 (1968).

54. See *id.*, *reprinted in* 7 I.L.M. 633, 672 (1968).

55. See Wetter, *supra* note 34, at 351.

56. See *id.* at 354.

India also offered into evidence the fact that assertions of the Rao (Ruler) of Kutch that the Rann was his territory had not been contradicted by the British authorities for approximately seventy-five years prior to independence.⁵⁷ Further, India presented reports in which both the Rao and the British had stated that the Rann was Kutch territory.⁵⁸ The Tribunal concluded that these three grounds of India's case were all acts of relinquishment by the British, and that they had the effect of leaving "the disputed territory, or the greater part thereof, in the hands of the sovereign or sovereigns who by reason of geographical proximity were there to receive it."⁵⁹

The Tribunal then looked at further evidence of British acquiescence. Specifically, the Tribunal sought to determine

whether the British Administration in Sind . . . performed acts . . . in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title . . . upon Sind, and thereby upon its successor, Pakistan, or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India⁶⁰

The Tribunal noted that evidence relating to acts of sovereign rights over the territory must be evaluated with the nature of the territory in mind.⁶¹ Two facts were crucial in the understanding of what would constitute sovereign functions in this situation: (1) much of the territory in dispute was uninhabitable; and (2) the two entities were agricultural societies at the time relevant to the proceedings.⁶² Thus, the activities and functions of government were limited to the imposition of customs duties and taxes on land, livestock and agricultural produce, and to the maintenance of peace and order.⁶³ The Tribunal found that the activities of neither Kutch nor Sind authorities within the majority of the Rann were sufficient to constitute continuous and effective exercise of sovereign authority.⁶⁴ The Tribunal concluded, however, that Sind did exercise sovereign control over certain portions of the territory known as Dhara Banni and Chhad Bet, areas that are raised above the level of the Rann and were used by Sind inhabitants as grazing pastures.⁶⁵

57. *See id.*

58. *See id.*

59. Rann of Kutch Award, *supra* note 50, reprinted in 7 I.L.M. 633, 672, 685 (1968).

60. *Id.*, reprinted in 7 I.L.M. 633, 667 (1968).

61. *See id.*, reprinted in 7 I.L.M. 633, 674-75 (1968).

62. *See id.*, reprinted in 7 I.L.M. 633, 674-76, 681 (1968).

63. *See id.*, reprinted in 7 I.L.M. 633, 674-76, 681 (1968).

64. *See id.*, reprinted in 7 I.L.M. 633, 676 (1968).

65. *See id.*, reprinted in 7 I.L.M. 633, 676-78 (1968).

Based on Sind's acts of sovereignty over Dhara Banni and Chhad Bet, the Tribunal awarded these areas to Sind's successor, Pakistan.⁶⁶ The Tribunal also awarded a peninsula of land, known as Nagar Parkar, to Pakistan, even though Pakistan had not established legal title to it.⁶⁷ The Tribunal based this decision on the fact that the area was wholly surrounded by Pakistani territory.⁶⁸ Thus, the Tribunal reasoned that awarding the area to India would inevitably lead to friction and conflict.⁶⁹ With regard to the remainder of the territory, the Tribunal concluded that the evidence of Sind sovereignty over the majority of the Rann was insufficient to establish sovereignty.⁷⁰ The Tribunal thus relied primarily on the evidence produced by India of British relinquishment of rights over the Rann, and awarded the remainder of the territory, approximately ninety percent of the Rann, to India.⁷¹

3. Preliminary Analysis

The Rann of Kutch Arbitration was extremely successful in resolving a territorial dispute between two nations with a history of conflict.⁷² Throughout the proceedings, the parties cooperated with each other and with the Tribunal. Neither side questioned the authority of the Tribunal, and both sides worked together to implement the decision.⁷³ This success can be attributed to several factors. First, the issues before the Tribunal were well-defined. Additionally, the parties had previously agreed that the boundary was conterminous between the two nations and that, therefore, the territory in dispute had to belong to one or the other, which further limited the scope of Tribunal's authority.⁷⁴ Second, as the Tribunal noted, the dispute was essentially factual in nature.⁷⁵ The parties did not focus their arguments on complex legal issues, but relied instead on testimony and documentary evidence.⁷⁶ The Tribunal, in turn, relied on the weight of this evidence and the relative strength of the parties' arguments in rendering its decision. Other than incidentally, the Tribunal did not have to enunciate or expound potentially contentious principles of international law.⁷⁷

66. *See id.*, reprinted in 7 I.L.M. 633, 689-90 (1968).

67. *See* Wetter, *supra* note 34, at 355.

68. *See* Rann of Kutch Award, *supra* note 50, reprinted in 7 I.L.M. 633, 692 (1968).

69. *See id.*, reprinted in 7 I.L.M. 633, 692 (1968).

70. *See* Fox, *supra* note 7, at 192.

71. *See id.*

72. *See* Wetter, *supra* note 34, at 357.

73. *See id.* at 356 (discussing the parties' contributions to the preparation of the Award).

74. *See* Rann of Kutch Award, *supra* note 50, reprinted in 7 I.L.M. 633, 666 (1968).

75. *See id.* reprinted in 7 I.L.M. 633, 671 (1968).

76. *See generally* Wetter, *supra* note 34 (explaining that the types of evidence relied on by the parties included primarily maps and documents).

77. *See id.* at 349.

More important to the success of the arbitration was that the dispute over the Rann did not represent a major political dispute between the two countries.⁷⁸ The Rann had little economic or strategic value and was sparsely populated.⁷⁹ Thus, although large-scale fighting preceded the arbitration proceedings, the dispute was more symbolic than substantive.⁸⁰ Furthermore, shortly after the cease fire, both nations had shifted their attention to disputes over Kashmir and Punjab, areas more vital to the interests of both countries.⁸¹

B. *The Taba Area Arbitration*

The successful arbitration of the dispute over the Taba area between Egypt and Israel "represent[ed] a significant milestone in the development of relations between the two formerly warring nations."⁸² The objective of the arbitral tribunal was restricted to deciding the location of fourteen boundary pillars of "the recognized international boundary between Egypt and the former mandated territory of Palestine,"⁸³ thus deciding the status of the Taba area, a strip of land in the Sinai on the shore of the Gulf of Aqaba.

1. Background

The origins of the dispute can be traced to 1906, when Turkish forces occupied the coastal settlement of Taba but were forced to withdraw under British pressure.⁸⁴ After negotiations between Anglo-Egyptian and Turkish representatives, a territorial agreement was reached⁸⁵ ("the 1906 Agreement") and the border between Egypt and the Ottoman Empire was fixed as running through Taba.⁸⁶ In 1915, however, a British military survey produced a map that showed the border as running along a line approximately three-quarters of a mile to the north-east of the 1906 line.⁸⁷ The 1915 line became the boundary with Egypt under the British Palestine Mandate and remained as

78. See Fox, *supra* note 7, at 191-92.

79. See *id.* at 191.

80. See *id.* at 192.

81. See Wolpert, *supra* note 36, at 374.

82. Haihua Ding & Eric S. Koenig, *Treaties—Treaty of Peace Between Egypt and Israel—Demarcation of Internationally Recognized Boundaries—Arbitration of Disputes—Taba*, 83 Am. J. Int'l L. 590, 594 (1989).

83. Award in Boundary Dispute Concerning the Taba Area (Egypt v. Isr.) para. 15 (Egypt-Isr. Arb. Trib. 1988) [hereinafter Award in Taba Arbitration], *reprinted in* 27 I.L.M. 1421, 1433 (1988).

84. See *id.* para. 32, *reprinted in* 27 I.L.M. 1421, 1438 (1988).

85. See *id.* paras. 33-51, *reprinted in* 27 I.L.M. 1421, 1438-43 (1988) (discussing in depth the delimitation and demarcation of the 1906 line).

86. See Martin Wright, *Egypt-Israel (Taba Strip)*, in *Border and Territorial Disputes* 232 (Alan J. Day ed., 2d ed. 1987). "At this time, Egypt was occupied by Great Britain, while remaining a vassal state of the Ottoman Empire." Ding & Koenig, *supra* note 82, at 592 n.10.

87. See Wright, *supra* note 86, at 232.

such when Israel proclaimed itself an independent state in May 1948.⁸⁸ In the June 1967 war between Israel and Egypt, Israel captured the Sinai peninsula from Egypt, bringing the Taba area under Israeli control.⁸⁹

In the March 1979 Treaty of Peace between Israel and Egypt, Israel agreed to withdraw its troops from the Sinai and to recognize "the full exercise of Egyptian sovereignty up to the internationally recognized border between Egypt and mandated Palestine."⁹⁰ Pursuant to the Treaty of Peace, a joint commission was formed to demarcate the boundary.⁹¹ When survey teams reached the Taba area, the parties could only agree on the placement of three boundary pillars.⁹² Despite negotiations, the parties failed to agree on the placement of the remaining pillars.⁹³ Thus, the parties agreed to submit the dispute to arbitration, in accordance with the 1979 Treaty.⁹⁴

The Tribunal consisted of five members, one national of each state nominated by the respective parties and three non-nationals acceptable to both sides.⁹⁵ The Tribunal's task was extremely limited: it was to decide the location of fourteen boundary pillars, but it was not authorized to establish a location of a boundary pillar other than at a location advanced by Israel or by Egypt.⁹⁶ "At stake were several hundred meters of shoreline, corresponding territorial water rights and a resort hotel complex."⁹⁷

2. Issues and Arguments

Israel maintained that the Tribunal should refer to the boundary defined by the 1906 Agreement because Great Britain, as mandatory power, and Egypt had explicitly recognized this as the boundary between Egypt and Palestine in declarations in 1926.⁹⁸ The Tribunal refused, stating that the 1979 Treaty of Peace referred to the "recognized international boundary between Egypt and the former mandated territory of Palestine" and not to the 1906 Agreement.⁹⁹

88. *See id.*

89. *See id.*

90. Award in Taba Arbitration, *supra* note 83, para. 99 (quoting Treaty of Peace, Mar. 26, 1979, Egypt-Isr., *reprinted in* 18 I.L.M. 362 (1979)), *reprinted in* 27 I.L.M. 1421, 1453 (1988).

91. *See id.* para. 2, *reprinted in* 27 I.L.M. 1421, 1430 (1988).

92. *See id.* para. 104, *reprinted in* 27 I.L.M. 1421, 1454 (1988).

93. *See id.*, *reprinted in* 27 I.L.M. 1421, 1454 (1988).

94. *See id.* para. 3, *reprinted in* 27 I.L.M. 1421, 1430 (1988).

95. *See id.* para. 4, *reprinted in* 27 I.L.M. 1421, 1431 (1988).

96. *See id.* paras. 176-77, *reprinted in* 27 I.L.M. 1421, 1470 (1988).

97. Ding & Koenig, *supra* note 82, at 593.

98. *See* Award in Taba Area Arbitration, *supra* note 83, para. 143, *reprinted in* 27 I.L.M. 1421, 1463 (1988).

99. *See id.* paras. 169-75, *reprinted in* 27 I.L.M. 1421, 1468-70 (1988).

The Tribunal thus established the period of the Palestinian Mandate¹⁰⁰ as the critical period¹⁰¹ and relied on the location of the boundary pillars as they were understood during this period as the basis for its decision.¹⁰²

In support of their respective claims, the parties introduced maps, surveys, and photographs of the area indicating the erection, wear, removal, or replacement of the pillars at issue.¹⁰³ With regard to the nine northernmost pillars, situated in an uninhabited desert region involving "apparently no essential interests of the Parties,"¹⁰⁴ the Tribunal found the arguments of both sides unpersuasive.¹⁰⁵ It therefore decided in favor of the proposed locations of the pillars that came closest to establishing a straight line connecting adjacent agreed pillar locations.¹⁰⁶ The Tribunal thus awarded five of these pillar locations to Egypt and four to Israel.¹⁰⁷ With regard to the location of four other pillars, the Tribunal concluded, based on the factual evidence before it, that the locations advanced by Egypt established the recognized boundary during the critical period.¹⁰⁸

In reaching its decision regarding the final and most contested pillar location, the Tribunal relied primarily on photographs introduced by Egypt indicating the existence of a marker known as the "Parker pillar," which was erected by commissioners implementing the 1906 Agreement.¹⁰⁹ The Tribunal rejected Israel's argument that the Parker pillar was not intervisible with the agreed location of the adjacent pillar to the north, and that this lack of intervisibility contradicted the 1906 Agreement.¹¹⁰ The Tribunal relied on evidence that Egypt and Turkey may have ignored the intervisibility requirement of the 1906 agreement when constructing the pillars in the area of the Parker pillar.¹¹¹ The Tribunal also rejected Israel's argument that the pillar

100. On July 24, 1922, the Council of the League of Nations approved the Mandate for Palestine with Great Britain to act as mandatory power. See Wright, *supra* note 86, at 201-07. This Mandate entered into force on September 29, 1923 and lasted until May 14, 1948, when the State of Israel came into existence. See *id.*

101. The critical period has been defined as the time when the dispute crystallizes into a concrete issue. See Fox, *supra* note 7, at 187.

102. See Award in Taba Arbitration, *supra* note 83, paras. 169-75, reprinted in 27 I.L.M. 1421, 1468-70 (1988).

103. See Ding & Koenig, *supra* note 82, at 592-93.

104. Award in Taba Arbitration, *supra* note 83, para. 182, reprinted in 27 I.L.M. 1421, 1472 (1988).

105. See Ding & Koenig, *supra* note 82, at 594.

106. See Award in Taba Arbitration, *supra* note 83, para. 187, reprinted in 27 I.L.M. 1421, 1473-74 (1988).

107. See Ding & Koenig, *supra* note 82, at 594.

108. See Award in Taba Arbitration, *supra* note 83, paras. 197-213, reprinted in 27 I.L.M. 1421, 1477-83 (1988).

109. See Ding & Koenig, *supra* note 82, at 593.

110. See Award in Taba Arbitration, *supra* note 83, paras. 236-45, reprinted in 27 I.L.M. 1421, 1490-92 (1988).

111. See *id.*, para. 237, reprinted in 27 I.L.M. 1421, 1490-91 (1988).

had been erroneously erected.¹¹² The Tribunal concluded that the Parker pillar existed at the location advanced by Egypt, and that the Parties had recognized this pillar as a boundary throughout the critical period.¹¹³ Thus, Israel could not at this point challenge its location on the basis of an alleged error.¹¹⁴

In its Award, the Tribunal commended the parties for the "spirit of cooperation and courtesy which permeated the proceedings in general and which thereby rendered the hearing a constructive experience."¹¹⁵ On March 15, 1989, following negotiations and the conclusion of an agreement, Israel transferred to Egypt sovereignty over the Taba area in its entirety, including the resort facilities located there.¹¹⁶

3. Preliminary Analysis

Like the Rann of Kutch arbitration, the Taba Area Arbitration successfully resolved a territorial dispute between nations that had a history of violent conflict. The two proceedings attest to the value of international arbitration as a procedure to demarcate boundaries between states. They also have other important similarities. For example, the dispute to be resolved by the Tribunal in the Taba Area Arbitration, like that in the Rann of Kutch Arbitration, was well-defined. The Tribunal had limited authority, authorized only to establish the pillar locations in accordance with one or the other of the party's claims.¹¹⁷ Furthermore, the two disputes, although complex, were primarily factual in nature.¹¹⁸ Thus, after determining the critical period, the Tribunal relied almost exclusively on testimony and documentary evidence in rendering its decision as opposed to relying on international legal theories.¹¹⁹

Unlike the Rann of Kutch, however, the Taba area was economically valuable. The area included a multi-million dollar hotel complex and accompanying tourist village.¹²⁰ In addition, after the award was issued, the Israeli government faced fierce and emotional opposition to the decision from citizens who worked in Taba.¹²¹ In agreeing to arbitration, however, the parties had already decided that control of the Taba was not worth undermining the 1979 peace treaty, which had

112. *See id.* paras. 214-45, reprinted in 27 I.L.M. 1421, 1483-92 (1988).

113. *See id.*, reprinted in 27 I.L.M. 1421, 1483-92 (1988).

114. *See id.* paras. 234-35, reprinted in 27 I.L.M. 1421, 1489-90 (1988).

115. *Id.* para. 14, reprinted in 27 I.L.M. 1421, 1433 (1988).

116. *See* Ding & Koenig, *supra* note 82, at 595.

117. *See* Award in Taba Arbitration, *supra* note 83, paras. 176-77 reprinted in 27 I.L.M. 1421, 1470 (1988).

118. *See supra* notes 50-71, 98-116 and accompanying text.

119. *See supra* notes 50-71, 98-116 and accompanying text.

120. The parties reached an agreement in which Egypt bought the hotel for \$37 million and the adjacent village for \$1.5 million. *See* Timothy M. Phelps, *Israel Returns Sea Resort to Egypt*, *Newsday*, Mar. 16, 1989, at 13.

121. *See id.*

officially terminated the thirty-one year old state of war between the two nations. In other words, “[o]nce the prospect of a meaningful agreement became real, both parties appreciated that the issue was strategically meaningless and that under no circumstances could it be permitted to disrupt the peace relationship that was, by then, seen as serving their common interests.”¹²²

While the Rann of Kutch and the Taba Area arbitrations proved to be successes, not all international arbitrations have fared as well. Part III examines the Brcko Area Arbitration, a recent international arbitration that did not succeed in resolving the territorial dispute between the parties.

III. THE BRCKO AREA ARBITRATION

This part looks at the Brcko Area Arbitration and its surrounding circumstances. This part also offers explanations as to why the arbitration failed to resolve the dispute between the parties, as the Rann of Kutch and Taba Area arbitrations were able to do.

A. *History of The War in Bosnia*

Histories of the war in Bosnia often begin with the secession of the Republic of Slovenia from the Socialist Federal Republic of Yugoslavia in June 1991.¹²³ The true origin of the conflict, however, was Slobodan Milosevic’s rise to power in the late 1980s. Milosevic, then the leader of the Serbian Communists, began gaining political power and popular support by fomenting nationalist sentiment throughout Serbia.¹²⁴ Amidst Yugoslavia’s general political stagnation and economic decline, Milosevic deliberately stoked Serb paranoia and identified other national groups in Yugoslavia as the Serbs’ cardinal enemies.¹²⁵

In the late 1980s, Milosevic began consolidating his political power by filling key Politburo positions with his loyalists and by having the Serbian Assembly abolish the political autonomy of the provinces of Kosovo and Vojvodina.¹²⁶ Milosevic’s political maneuvers and nationalist rhetoric succeeded in convincing the other republics that Milosevic might institutionalize Serbia’s dominance within a federal

122. 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, 41 (1998).

123. See Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *Yale J. Int’l L.* 1, 63-65 (1998).

124. See *id.*

125. See *id.*

126. See Noel Malcolm, *Bosnia: A Short History* 211-12 (1996) (providing a history of Bosnia from the second and first centuries B.C. through 1995).

republic, and persuaded national groups that they would be vulnerable if left outside their national republic.¹²⁷

Milosevic first signaled his new strategy for creating a Greater Serbia in the Knin region of Croatia, part of the Krajina zone on Bosnia's north-western border.¹²⁸ Serbs constituted a majority in the Krajina region, and in the summer of 1990 they held a referendum on autonomy for the Serbs, in defiance of the Croatian government, which had declared the referendum illegal.¹²⁹ After the Croatian authorities tried to confiscate the arms of the local police, the Serb leaders in the Krajina and the media in Belgrade told the Serbs that the Ustaša were planning to massacre them.¹³⁰ When conflicts between the Croatian police and the Serb militia occurred, the federal government sent in troops to maintain order over Croatia's objections.¹³¹

Despite tension and conflict, Slovene and Croatian leaders spent much of 1990 trying to convince Milosevic to agree to a peaceful, negotiated transformation from a federal into a confederal state,¹³² but Milosevic refused.¹³³ The final straw for Croatia and Slovenia was Milosevic's refusal to accept a Croatian, Stipe Mesic, as the next holder of the automatically rotating federal presidency in May of 1991.¹³⁴ On June 25, Croatia and Slovenia simultaneously declared independence.¹³⁵

The federal Yugoslav army ("the JNA") attacked Slovenia two days later.¹³⁶ The JNA was met with a well-mounted opposition and, with a negligible Serb population in Slovenia, the JNA withdrew after ten days of fighting.¹³⁷ The JNA then turned its attention to Croatia, which had a substantial Serb minority, and, with the help of the Croatian Serbs, engaged in a full scale conflict with Croatia.¹³⁸ The fighting lasted until a United Nations negotiated cease-fire between Croatia and Serbia went into effect in February 1992, establishing "U.N. protected" zones around the territory conquered by the Croatian Serb and federal forces.¹³⁹

127. See Orentlicher, *supra* note 123, at 63-64.

128. See Malcolm, *supra* note 126, at 215.

129. See *id.* at 216.

130. See *id.* The Ustaša was a Croatian extreme nationalist and terrorist movement led by Ante Pavelic who was installed in power in the Independent State of Croatia, the German/Italian puppet-state which comprised most of Croatia and Bosnia from 1941-45. See *id.* at 320-21.

131. See *id.* at 215-16.

132. In other words, the Croats and Slovenes wanted to transform Yugoslavia from a state where the federal institutions were primary to one in which the republics would hold the real authority. See *id.* at 215.

133. See *id.*

134. See *id.* at 225.

135. See *id.*

136. See Orentlicher, *supra* note 123, at 64.

137. See *id.*

138. See Malcolm, *supra* note 126, at 225-30.

139. See *id.* at 230.

While the fighting between Croatia and Serbia continued, the European Community ("EC"), at Germany's insistence, recognized Slovenia and Croatia as independent states on January 15, 1992.¹⁴⁰ One consequence of this decision was that multi-ethnic Bosnia had little choice but to seek independence as well.¹⁴¹ Bosnia's only other options were to remain in a Serb dominated Yugoslavia or be divided up between Serbia and Croatia.¹⁴² By this time, however, Serbia's war aims were already fairly clear. By the fall of 1991, the Bosnian Serb party, the SDS, led by Radovan Karadzic had already declared four "Serb Autonomous Regions" in northern and western Bosnia; the federal army had intervened "to protect" the Bosnian Serbs after a series of minor local incidents and shootings; and, as early as July 1991 there was evidence that regular secret deliveries of arms to the Bosnian Serbs were being arranged by Milosevic and Karadzic.¹⁴³

Bosnia applied for EC recognition and, following the advice of the EC's arbitration commission, the Badinter Commission, held a referendum on independence.¹⁴⁴ Approximately sixty-four percent of Bosnia's citizens voted, including many Serbs in the major cities despite Karadzic's order to boycott the poll.¹⁴⁵ The majority voted in favor of independence, and the EC officially recognized Bosnia on April 6, 1992.¹⁴⁶ On April 6, 1992, in anticipation of recognition, the Bosnian Serb paramilitary forces attacked the Holiday Inn in Sarajevo, instigating a war that lasted three and a half years.¹⁴⁷ Backed by Serbia, the Bosnian Serbs seized approximately seventy percent of Bosnia's territory.¹⁴⁸ During the war, the parties committed "atrocities so sweeping and barbarous"¹⁴⁹ that the United Nations established the first war crimes tribunal since the end of World War II.¹⁵⁰

B. *The Dayton Accords*

The war ended in December 1995 as a result of NATO air strikes, American pressure, and Milosevic's waning support for the Bosnian

140. *See id.* at 229-30.

141. *See id.* at 230. At the time, the ethnic composition of Bosnia was approximately 44% Muslim, 31% Serb, and 17% Croat. *See id.* at 222-23.

142. *See Orentlicher, supra* note 123, at 68-69. The President of Bosnia, Alija Izetbegovic, remarked that choosing between Tudjman (Croatia's president) and Milosevic "was like having to choose between leukaemia and a brain tumour." Malcolm, *supra* note 126, at 228.

143. *See Malcolm, supra* note 126, at 224-28.

144. *See id.* at 230-31.

145. *See id.* at 231.

146. *See id.* at 231-34.

147. *See Orentlicher, supra* note 123, at 69-70.

148. *See id.* However, the Bosnian Serbs' control of Bosnia was reduced to just under 50% by the end of September 1995 after Muslims and Croats joined forces. *See Carnegie Endowment for Int'l Peace, Unfinished Peace: Report of the International Commission on the Balkans* 42 (1996).

149. Orentlicher, *supra* note 123, at 70.

150. *See id.*

Serbs.¹⁵¹ American-led negotiations in Dayton, Ohio resulted in the parties' adoption of the General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Accords").¹⁵² The Dayton Accords formally ended the war, as well as any hope for a multi-ethnic Bosnian state. The Bosnian Constitution, included in the Dayton Accords, provides for a single state, Bosnia and Herzegovina, with two constituent entities, the Federation of Bosnia and Herzegovina ("the Federation") and the Republika Srpska ("RS").¹⁵³ The RS, populated mostly by Bosnian Serbs, occupies forty-nine percent of the territory, and the Federation, which incorporates the areas with a Muslim and Croat majority, occupies fifty-one percent.¹⁵⁴ In reality, however, the Federation is split along ethnic lines, with each ethnic group exerting its own authority in its respective areas.¹⁵⁵ The structure of the Bosnian government is also ethnically based.¹⁵⁶ The Bosnian Constitution, as well as the Federation Constitution, require that a certain percentage of government offices be reserved for individuals of a certain ethnicity.¹⁵⁷ Similarly, the presidency consists of three members: a Bosniac and a Croat elected from Federation territory, and a Serb elected from the RS.¹⁵⁸

In the Dayton Accords, the parties committed themselves to conduct their relations in accordance with the UN Charter, to settle their disputes by peaceful means, and to the various programs and arrangements set forth in the annexes.¹⁵⁹ The annexes address a number of issues, including the rights of refugees and displaced persons to return to their pre-war homes, the parties' commitments to observing funda-

151. See Malcolm, *supra* note 126, at 258-68. Milosevic stopped supporting the Bosnian Serbs, at least publicly, in an effort to appease the West and to get economic sanctions against Serbia lifted. See *id.* at 258.

152. The Dayton Peace Agreement was signed in Paris on December 14, 1995 and was witnessed by the Presidents or Prime Ministers of the United States, the Russian Federation, the Federal Republic of Germany, the United Kingdom, France, and by the European Union special negotiator. See General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, U.N. Doc. S/1995/999 (1995), reprinted in 35 I.L.M. 75, 91 (1996) [hereinafter Dayton Accords]. The Dayton Accords was the West's sixth attempt to arrive at a peace agreement. See Bertrand de Rosanet, War and Peace in the Former Yugoslavia 138 (1997).

153. The Constitution of Bosnia and Herzegovina is included as Annex 4 to the Dayton Accords. See Dayton Accords, *supra* note 152, Annex 4, reprinted in 35 I.L.M. 75, 118-28 (1996).

154. See generally Bureau of Democracy, Human Rights, and Labor, U.S. Dep't St., Bosnia and Herzegovina Country Report on Human Rights Practices for 1997 (1998) [hereinafter Country Report] (discussing the current state of the Bosnian government), available in <http://www.state.gov/www/global/human_rights/1997_hrp_report/bosniahe.html> (visited Apr. 5, 1999).

155. See *id.*

156. See Ronald C. Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21 Yale J. Int'l L. 459, 462-71 (1996) (discussing the potential ramifications of an ethnically based constitutional system).

157. See *id.*

158. See *id.* at 465.

159. See Dayton Accords, *supra* note 152, reprinted in 35 I.L.M. 75, 89-90 (1996).

mental human rights, and the placement of an Inter Entity Boundary Line ("IEBL") between the Federation and the RS throughout Bosnia and Herzegovina.¹⁶⁰

The most contentious element in the negotiations at Dayton was the disposition of the Brcko area in northeastern Bosnia.¹⁶¹ Although the Serbs had been a minority in the area before the war, Serb forces had taken over the area for strategic reasons to form a corridor connecting their eastern and western possessions.¹⁶² Large demonstrations by displaced Croats calling for the return of this territory were held in Sarajevo and Zagreb.¹⁶³ Serbs demanded not only that the corridor remain Serb territory but that it actually be widened.¹⁶⁴ Both sides threatened to quit negotiating and to resume hostilities if possession of Brcko was given to the other party.¹⁶⁵ The parties did finally agree to submit the disputed portion of the IEBL in the Brcko area to binding international arbitration within one year from the entry into force of the Dayton Accords.¹⁶⁶

C. *The Brcko Area*

The Brcko area consists of the town of Brcko ("the Grad") and the surrounding municipality ("the Opstina"), situated in a low-lying valley along the Sava River in northern Bosnia and Herzegovina near the current boundaries of Bosnia, the Republic of Croatia, and the Federal Republic of Yugoslavia.¹⁶⁷ Historically, the area had been an important economic center.¹⁶⁸ According to data from the Socialist Federal Republic of Yugoslavia, Brcko was seventh among Bosnian towns in income generated from traffic, transportation, and communications.¹⁶⁹ In addition, several large manufacturing enterprises were located in the area.¹⁷⁰ Before the war, the area was ethnically mixed.

160. See *id.* Annexes 1A-11, reprinted in 35 I.L.M. 75, 91-149 (1996).

161. See de Rossanet, *supra* note 152, at 139 (stating, in reference to the Dayton negotiations, that "the whole effort almost foundered on the disposition of the Brcko area").

162. See Malcolm, *supra* note 126, at 268.

163. See *id.*

164. See *id.*

165. See Arbitration for the Brcko Area (Rep. Srpska v. Fed. of Bosn. & Herz.) U.N. Doc. S/1997/126 para. 37, (Arb. Trib. for Dispute over Inter-Entity Boundary in Brcko Area 1997), reprinted in 36 I.L.M. 396, 409 (1997) [hereinafter Brcko Arbitration Award].

166. See Dayton Accords, *supra* note 152, Annex 2, art. 5, reprinted in 35 I.L.M. 75, 113 (1996). Thus, the Tribunal should have issued its decision by December 14, 1996. However, at the request of the RS, the parties agreed to extend the date until February 15, 1997. See Brcko Arbitration Award, *supra* note 165, para. 6 & n.3, reprinted in 36 I.L.M. 396, 401 (1997).

167. See Brcko Arbitration Award, *supra* note 165, para. 42, reprinted in 36 I.L.M. 396, 411 (1997).

168. See *id.* para. 46, reprinted in 36 I.L.M. 396, 412 (1997).

169. See *id.*, reprinted in 36 I.L.M. 396, 412 (1997).

170. See *id.*, reprinted in 36 I.L.M. 396, 412 (1997).

According to the last census in 1991, the total population of the Grad was 41,346, of which fifty-six percent were Muslim, twenty percent were Serbs, seven percent were Croats, and seventeen percent designating themselves as belonging to some other ethnic group.¹⁷¹ The total population of the Opstina was 87,332, of which forty-four percent were Muslims, twenty-one percent Serbs, twenty-five percent Croats, and ten percent other.¹⁷²

During the war between Serbia and Croatia, the Serb paramilitary troops used Brcko, which housed a JNA barrack, as a training ground for local Serb volunteers.¹⁷³ In April 1992, after the war had spread to Bosnia, the Serbs attacked Brcko and, in a matter of days, took control of the Grad and an area extending several kilometers south and west.¹⁷⁴ During the next several months, Serb forces forcibly expelled virtually the entire population of Muslim and Croat residents.¹⁷⁵ During the first two weeks of May, the Serbs arrested and detained Muslims in camps where up to 5000 inmates were held at any given time during the summer of 1992.¹⁷⁶ Up to 3000 prisoners may have been killed in the primary camp, known as the Luka Camp, alone.¹⁷⁷

The Brcko area witnessed some of the fiercest battles of the war, and while Brcko Grad sustained some damage, numerous towns and villages surrounding the Grad were totally destroyed.¹⁷⁸ Economic activity in the area was brought to a virtual standstill.¹⁷⁹ At the time the Dayton Accords were signed, the RS controlled approximately forty-eight percent of the territory of the Brcko Opstina, including Brcko Grad, and the Federation controlled approximately fifty-two percent.¹⁸⁰ The entire area represents approximately 464 square kilometers.¹⁸¹

D. *The Arbitral Tribunal*

Annex 2(5) of the Dayton Accords provided for the selection of a three-member arbitral tribunal, with each party appointing one arbitrator.¹⁸² The federation appointed Professor Cazim Sadikovic, while the RS appointed Dr. Vitomir Popovic.¹⁸³ The parties' appointees were supposed to select the third arbitrator to serve as presiding of-

171. *See id.* para. 45, reprinted in 36 I.L.M. 396, 411-12 (1997).

172. *See id.*, reprinted in 36 I.L.M. 396, 411-12 (1997).

173. *See id.* para. 48, reprinted in 36 I.L.M. 396, 412-13 (1997).

174. *See id.* para. 49, reprinted in 36 I.L.M. 396, 413 (1997).

175. *See id.* para. 50, reprinted in 36 I.L.M. 396, 413 (1997).

176. *See id.*, reprinted in 36 I.L.M. 396, 413 (1997).

177. *See id.*, reprinted in 36 I.L.M. 396, 413 (1997).

178. *See id.* para. 51, reprinted in 36 I.L.M. 396, 413 (1997).

179. *See id.* para. 56, reprinted in 36 I.L.M. 396, 414 (1997).

180. *See id.* para. 52, reprinted in 36 I.L.M. 396, 414 (1997).

181. *See id.*, reprinted in 36 I.L.M. 396, 414 (1997).

182. *See id.* para. 2, reprinted in 36 I.L.M. 396, 400 (1997).

183. *See id.*, reprinted in 36 I.L.M. 396, 400 (1997).

ficer of the tribunal within thirty days after their own selection.¹⁸⁴ The appointees failed to agree within the required amount of time, however, so the President of the International Court of Justice appointed Roberts B. Owen, an American lawyer, as presiding officer of the tribunal in accordance with article V(2) of annex 2.¹⁸⁵ The Parties also agreed that if a majority decision of the Tribunal was not reached, then the decision of the presiding arbitrator would be final and binding upon both parties.¹⁸⁶ The Arbitral Award justified this decision as follows:

It may be observed that such an agreement was in fact a virtual necessity in this particular case: from the outset the positions of the two parties on the merits have been polar opposites and each party has explicitly refused to compromise. These polar positions and accompanying intense animosities, consistently in evidence from the opening of the Dayton conference onward, made clear from the outset that any party-appointed arbitrator would encounter significant difficulties in conducting himself with the usual degree of detachment and independence.¹⁸⁷

The Arbitral Award also noted the lack of progress made in implementing the provisions of the Dayton Accords relating to the return of the former residents. Only fifteen Muslim families had thus far returned to Brcko Grad.¹⁸⁸ South of the Grad, where Muslims had attempted to reconstruct homes, twenty-seven homes had been destroyed by bombings.¹⁸⁹ In addition, none of the principal enterprises in Brcko had resumed.¹⁹⁰

The preliminary proceedings of the Tribunal were marked by a lack of cooperation and threats of withdrawal by the RS. Neither Dr. Popovic nor any representative of the RS attended a preliminary conference in Sarajevo in August 1996.¹⁹¹ The RS failed to comment on the Tribunal's pre-hearing order regarding its adoption of rules of procedure,¹⁹² nor did it file pleadings when requested.¹⁹³ Finally, on December 1, 1996, Gojko Klickovic, then President of the RS, wrote a letter to the Presiding Arbitrator stating that the RS did not intend to participate in the arbitration proceedings. The letter claimed that the RS's actions were justified because "guarantees for a fair and just procedure do not exist, and . . . [the Presiding Arbitrator] intend[s] to use the arbitration process strictly as a smoke screen for the imposi-

184. See *id.* para. 3, reprinted in 36 I.L.M. 396, 400 (1997).

185. See *id.*, reprinted in 36 I.L.M. 396, 400 (1997).

186. See *id.* para. 5, reprinted in 36 I.L.M. 396, 401 (1997).

187. *Id.*, reprinted in 36 I.L.M. 396, 401 (1997).

188. See *id.* para. 54, reprinted in 36 I.L.M. 396, 414 (1997).

189. See *id.*, reprinted in 36 I.L.M. 396, 414 (1997).

190. See *id.* para. 56, reprinted in 36 I.L.M. 396, 414 (1997).

191. See *id.* para. 8, reprinted in 36 I.L.M. 396, 402 (1997).

192. See *id.* para. 10, reprinted in 36 I.L.M. 396, 402 (1997).

193. See *id.* para. 14, reprinted in 36 I.L.M. 396, 404 (1997).

tion of a pre-ordained, unjust decision, all to the harm of the legitimate and vital interest of Republika Srpska.’”¹⁹⁴ The letter concluded by stating that the RS would consider any future Tribunal decisions to be invalid.¹⁹⁵ Despite the RS’s stated withdrawal, however, a delegation from the RS, including Dr. Popovic, did attend the hearings, which began on January 8, 1997.¹⁹⁶

E. *Issues and Arguments*

1. Jurisdiction of the Tribunal

The preliminary arguments advanced by the RS concerned the jurisdiction of the Tribunal.¹⁹⁷ First, the RS argued that the Tribunal had authority only to resolve the final placement of the IEBL in the Brcko area, as opposed to having the authority to decide whether the Grad and the Opstina should be included in the territory of the RS or in the territory of the Federation.¹⁹⁸ The RS further asserted that the Tribunal had jurisdiction only to move the IEBL to the south of its present temporary location—in other words, that it only had the authority to enlarge RS territory.¹⁹⁹ Second, the RS contended that it had never understood at Dayton that a possible outcome of the arbitration might be a transfer of Brcko Grad from RS to Federation territory.²⁰⁰ The RS then argued that, because it had misunderstood the facts at Dayton, there had been an error or mistake of fact that invalidated the arbitration agreement under article 48(1) of the Vienna Convention on the Law of Treaties.²⁰¹

The Tribunal acknowledged that article V of annex 2 did contain several ambiguities.²⁰² Notably, the provision did not explain the nature of the dispute.²⁰³ Furthermore, it failed to precisely define the area in dispute, only making a somewhat vague reference to “the Brcko area” and the attached maps displayed the IEBL running through the Opstina.²⁰⁴ Finally, the precise segment of the IEBL that lay within the disputed area was not explicitly identified either in the

194. *Id.* para. 21, reprinted in 36 I.L.M. 396, 405 (1997).

195. *See id.*, reprinted in 36 I.L.M. 396, 405 (1997).

196. *See id.* para. 26, reprinted in 36 I.L.M. 396, 406 (1997).

197. *See id.* para. 33, reprinted in 36 I.L.M. 396, 408 (1997).

198. *See id.*, reprinted in 36 I.L.M. 396, 408 (1997).

199. *See id.*, reprinted in 36 I.L.M. 396, 408 (1997).

200. *See id.*, reprinted in 36 I.L.M. 396, 408 (1997).

201. *See id.*, reprinted in 36 I.L.M. 396, 408 (1997). The Vienna Convention on the Law of Treaties “sets forth a comprehensive set of rules governing the formation, interpretation, and termination of treaties” Carter & Trimble, *supra* note 1, at 110. The convention entered into force on January 27, 1980 and over 65 states are now party to it. *See id.*

202. *See* Brcko Arbitration Award, *supra* note 165, para. 36, reprinted in 36 I.L.M. 396, 409 (1997).

203. *See id.*, reprinted in 36 I.L.M. 396, 409 (1997).

204. *See id.*, reprinted in 36 I.L.M. 396, 409 (1997).

annex or the attached map.²⁰⁵ The Tribunal resolved these ambiguities, in accordance with the Vienna Convention on the Law of Treaties, by looking to the ordinary meaning of the language and the circumstances surrounding the treaty's adoption.²⁰⁶ The Tribunal decided that the ordinary meaning of article V(1), read in context and in light of the object and purpose of the article, showed that a dispute existed between the RS and the Federation as to their respective claims for control of the Brcko area and that the parties agreed to resolve this dispute by arbitration.²⁰⁷ The Tribunal also determined that the lack of precise definitions in the article was due to the widely divergent positions of the parties at Dayton and to the fact that negotiations on the issue of Brcko broke down as the conference was coming to an end.²⁰⁸ The Tribunal decided that the exact scope of the dispute was to be resolved through arbitration, and that it had the jurisdiction to resolve the dispute as defined by the parties' disagreement at Dayton²⁰⁹ and the claims they asserted during the arbitral process.²¹⁰ Thus, the Tribunal determined that it had the authority to first define the dispute and then to resolve it.

2. Legal Arguments

The Federation's principal legal argument in support of its claim to the Brcko area was based on the international legal doctrine of non-recognition.²¹¹ The Federation argued that the RS conducted a campaign of ethnic cleansing in the Brcko area, that this campaign violated peremptory international norms of non-aggression, human rights protection, and the laws of war, and that the Tribunal should not reward these acts, but rather reverse their effects by granting the territory to the Federation.²¹² The Tribunal rejected this argument, observing that while the doctrine precluded the RS from asserting a legal right to the territory based on its conquest, it did not automatically follow that the Federation was entitled to control of the territory.²¹³ The Tribunal stated that the injured party, to whom the territory should be restored, was the Republic of Bosnia and Herzegovina, not the Federation which had not been in existence at the time of

205. *See id.*, reprinted in 36 I.L.M. 396, 409 (1997).

206. *See id.* para. 34, reprinted in 36 I.L.M. 396, 408 (1997).

207. *See id.* para. 36, reprinted in 36 I.L.M. 396, 409 (1997).

208. *See id.* para. 39, reprinted in 36 I.L.M. 396, 410 (1997).

209. *See id.* para. 37, reprinted in 36 I.L.M. 396, 409 (1997).

210. *See id.* para. 40, reprinted in 36 I.L.M. 396, 410 (1997).

211. *See id.* paras. 58-61 & n.23, reprinted in 36 I.L.M. 396, 415-16 (1997) (noting that the doctrine of non-recognition provides that an act in violation of a norm having the character of *jus cogens* is illegal and therefore null and void).

212. *See id.*, reprinted in 36 I.L.M. 396, 415-16 (1997). The Federation emphasized this point by noting that the population of Muslims in Brcko Grad had been reduced from its pre-war population of 23,000 to approximately 500 at the time the Dayton Accords were signed. *See id.* para. 60 n.20, reprinted in 36 I.L.M. 396, 416 (1997).

213. *See id.* para. 78, reprinted in 36 I.L.M. 396, 422 (1997).

the Serb conquest, and that the Dayton Accords had confirmed Bosnia's sovereignty over the entire area.²¹⁴

The Tribunal also rejected the Federation's second legal argument.²¹⁵ The Federation, citing the International Court of Justice's opinion in the *Western Sahara* case,²¹⁶ argued that it should be granted control of Brcko because of the historical demographic, cultural, and political ties of the Federation to the Brcko area.²¹⁷ The Tribunal found that due to the demographic diversity of Brcko before the war, neither party had shown sufficiently dominant connections with the area to justify an award of exclusive control.²¹⁸

The RS confined its legal arguments to principles allegedly derived from the Dayton Accords.²¹⁹ First, the RS argued that the Dayton Accords incorporated the principles that Bosnia and Herzegovina should be divided in a ratio of fifty-one to forty-nine, and that the IEBL as shown on the Dayton map gives it less than forty-nine percent by a small margin.²²⁰ The RS thus concluded that the Tribunal was precluded from making any reduction of the RS's territory.²²¹ The Tribunal responded that the fifty-one to forty-nine parameter appeared solely in the preamble to the Dayton Accords and did not itself create a binding obligation,²²² and that the Dayton Accords specifically left unresolved the territorial allocation in the Brcko area.²²³

3. Equitable Arguments

Besides its legal contentions, the Federation, noting that the Tribunal had the authority to apply relevant equitable principals, maintained that the equities in this dispute overwhelmingly favored an award of the Brcko area to the Federation.²²⁴ The Federation argued that permitting the Serbs to maintain control of Brcko, which it had acquired through "brute force and horrific violence, would reward them for their reprehensible conduct and would fly in the face of the most fundamental human values."²²⁵ The Federation further argued that allowing the RS to maintain control was inconsistent with the principals of the Dayton Accords because the RS had, among other

214. *See id.*, reprinted in 36 I.L.M. 396, 422-23 (1997).

215. *See id.* paras. 79-80, reprinted in 36 I.L.M. 396, 423 (1997).

216. *Western Sahara* 1975 I.C.J. 12 (Oct. 16).

217. *See* Brcko Arbitration Award, *supra* note 165, paras. 62, 79, reprinted in 36 I.L.M. 396, 417, 423 (1997).

218. *See id.* para. 79, reprinted in 36 I.L.M. 396, 423 (1997).

219. *See id.* para. 71, reprinted in 36 I.L.M. 396, 419-20 (1997).

220. *See id.* para. 81, reprinted in 36 I.L.M. 396, 423-24 (1997).

221. *See id.*, reprinted in 36 I.L.M. 396, 423-24 (1997).

222. *See id.* para. 82, reprinted in 36 I.L.M. 396, 424 (1997).

223. *See id.*, reprinted in 36 I.L.M. 396, 424 (1997).

224. *See id.* para. 64, reprinted in 36 I.L.M. 396, 417 (1997).

225. *Id.*, reprinted in 36 I.L.M. 396, 417 (1997).

violations, obstructed the right of Bosniacs and Croats to return to their homes.²²⁶ Finally, the Federation asserted that Brcko was crucial to the economic development of the Federation, providing the only link to important markets and products in Europe.²²⁷

The Tribunal conceded that the Federation had demonstrated a compelling equitable interest in the Brcko area,²²⁸ but was unwilling to base its decision on this argument. The Tribunal gave equal weight to the equitable considerations of the RS, namely, the RS's assertion that it had vital strategic and economic interests in preserving a connecting corridor between its eastern and western parts.²²⁹ The Tribunal did note, however, that the RS had not only failed to honor the Dayton Accords but had admitted in a written statement that it would not honor them in at least two respects.²³⁰ First, according to the statement, the RS planned to continue obstructing travel on all but one road,²³¹ and second, former residents of Brcko would be entitled only to compensation, not to recovery of their property.²³² This latter policy would in effect allow the RS to keep Brcko an ethnically pure Serb community.²³³

Instead of awarding the Brcko area to either party, the Tribunal mandated that the Brcko area be placed under international supervision.²³⁴ The Tribunal placed all authority for the running of Brcko in the hands of the Office of the High Representative ("OHR") under the leadership of a Deputy High Representative for Brcko ("Supervisor").²³⁵ In March 1997, United States Ambassador Robert W. Farand was selected to serve as the Supervisor of the Brcko area.²³⁶ The Award granted the right to either party to request further action affecting the Award between the dates of December 1, 1997 and January 15, 1998, and stated that a final decision would be made by March 15, 1998.²³⁷ Dr. Popovic, the Serb Arbitrator, and Professor Sadikovic, the Federation Arbitrator, refused to sign the Award.²³⁸

226. *See id.*, reprinted in 36 I.L.M. 396, 417 (1997).

227. *See id.*, reprinted in 36 I.L.M. 396, 417 (1997).

228. *See id.* para. 89, reprinted in 36 I.L.M. 396, 428-29 (1997).

229. *See id.* para. 90, reprinted in 36 I.L.M. 396, 429 (1997).

230. *See id.* para. 84, reprinted in 36 I.L.M. 396, 424-25 (1997).

231. *See id.* para. 84(1), reprinted in 36 I.L.M. 396, 424-25 (1997).

232. *See id.* para. 84(2), reprinted in 36 I.L.M. 396, 424-25 (1997).

233. *See id.*, reprinted in 36 I.L.M. 396, 424-25 (1997).

234. *See id.* para. 95, reprinted in 36 I.L.M. 396, 431 (1997).

235. *See id.* para. 104(I)(B), reprinted in 36 I.L.M. 396, 434 (1997).

236. *See* Arbitration for the Brcko Area (Fed. Bosn. & Herz. v. Rep. Srpska), U.N. Doc. S/1998/248, para. 6 (Arb. Trib. for Dispute over the Inter-Entity Boundary in Brcko Area 1998) [hereinafter Supplemental Award], available in <<http://www.ohr.int/docu/d980315b.htm>> (visited Apr. 5, 1999).

237. *See* Brcko Arbitration Award, *supra* note 165, para. 104 (II)(A), reprinted in 36 I.L.M. 396, 436 (1997).

238. *See id.* para. 105, reprinted in 36 I.L.M. 396, 436-37 (1997).

4. The Supplemental Award

The Federation requested further action from the Tribunal and on March 15, 1998, the Tribunal issued a Supplemental Award.²³⁹ This award acknowledged that, at the hearings, the Federation provided extensive evidence that throughout 1997 the RS had flagrantly violated the Dayton Accords.²⁴⁰ Specifically, the RS had resisted all efforts to achieve freedom of movement, the return of displaced persons and refugees, and the establishment of a democratic multi-ethnic government.²⁴¹ The RS's basic argument was its interest in territorial continuity, its theory being that maintenance of the corridor under the RS's control was absolutely vital "in order to allow (for example) RS armed forces to move as necessary throughout the Entity."²⁴² The Supplemental Award admits to the veracity of the Federation's evidence.²⁴³ Despite this admission and the fact that the Award contemplated a final decision at this point, the Tribunal refused to grant final control of the Brcko area to either side and deferred a final decision until early 1999, until which time Brcko would remain under international supervision.²⁴⁴

The Tribunal based this decision primarily on political developments within the RS.²⁴⁵ In July 1997, then President of the RS, Biljana Plavsic, had separated herself from the hard-line Bosnian Serb leaders headquartered in Pale, including Karadzic, and set up her own headquarters in Banja Luka.²⁴⁶ Mrs. Plavsic adopted a more progressive stance and appeared to support implementation of the Dayton Accords.²⁴⁷ On January 18, 1998, supporters of Mrs. Plavsic installed a moderate, Milorad Dodik, as Prime Minister of the RS.²⁴⁸ In his testimony before the Tribunal, Mr. Dodik agreed that Bosniacs and Croats should be permitted to return to Brcko, and suggested that Bosnia should become a multi-ethnic democratic state.²⁴⁹ The Tribunal expressed its belief that by the end of the year, the RS government's position toward the implementation of the Dayton Accords could change if the moderates survived politically through the RS election scheduled for September 1998.²⁵⁰ The Tribunal stated that

239. See Supplemental Award, *supra* note 236.

240. See *id.* para. 4(a).

241. See *id.*

242. *Id.* para. 4(b).

243. See *id.* para. 7.

244. See *id.* paras. 13-14.

245. See *id.* paras. 9-12.

246. See *id.* para. 9.

247. See *id.*

248. See *id.* para. 10.

249. See *id.* paras. 11-12.

250. See *id.* para. 12. Despite the Tribunal's hope, Plavsic was defeated in the September elections by Nikola Poplasen, the leader of the Radical party, the RS's most vehemently nationalist party. Although Dodik remained Prime Minister, Poplasen refused to cooperate with him and attempted to install Dragan Kalinic, another hard-

the RS would have to demonstrate clearly its full compliance with the Dayton Accords at the next round of hearings, or else the Tribunal would diminish the RS's position in Brcko. Neither Professor Sadikovic nor Dr. Popovic signed the Supplemental Award.²⁵¹

5. The Final Award

On March 5, 1999, the Tribunal issued its Final Award.²⁵² The Tribunal stated that the basic issue before it was whether the RS could show that it had complied with the Supplemental Award and had thus committed itself to complying with the Dayton Accords.²⁵³ The Tribunal concluded that the leaders of the RS had failed to comply with Dayton's and the Tribunal's objectives.²⁵⁴ Specifically, the Tribunal found that the RS had not allowed displaced persons and refugees to return to their pre-war homes, did not help in developing democratic multi-ethnic institutions, and had refused to cooperate with the international supervisory regime.²⁵⁵ Thus, the Tribunal announced the creation of a new government institution, The Brcko District of Bosnia and Herzegovina,²⁵⁶ to which each entity will delegate all of its powers of governance within the pre-war Brcko Opstina.²⁵⁷

According to the Tribunal, the legal effect of this decision "will be permanently to suspend all of the legal authority of both entities within the Opstina and to recreate it as a single administrative unit."²⁵⁸ The Tribunal granted the authority to implement the changes needed to establish the new district to the Supervisor,²⁵⁹ and ordered the entities to comply with all of his rulings or else risk the possibility of having the district placed within the exclusive control of the other

liner once close to Karadzic. *See Bosnia: Putting It Right*, *The Economist*, Nov. 21, 1998, at 52, 52.

251. *See* Supplemental Award, *supra* note 236, para. 1 n.1.

252. *See* Arbitration for the Brcko Area (Fed. Bosn. & Herz. v. Rep. Srpska) (Arb. Trib. for Dispute over Inter-Entity Boundary in Brcko Area 1999) [hereinafter Final Award], available in <<http://www.ohr.int/docu/d990305c.htm>> (visited Apr. 4, 1999). A few hours before the issuance of the Final Award, the High Representative, Carlos Westendorp, dismissed the hard-line president of the RS, Nikola Poplasen. *See Bosnia's Serbs: Two on the Chin*, *Economist*, Mar. 13, 1999 at 61, 61. The RS's parliament rejected both Poplasen's dismissal and the Final Award. The parliament also "complained of the 'murder' of a member of Mr. Poplasen's Radical Party who had attacked American peacekeepers on the day of the decision, and was shot dead." *Id.* Also in response to the decision, angry Serbs attacked UN vehicles and threw grenades at the offices of international agencies. *See id.* In addition, the Prime Minister of the RS, Milorad Dodik, publicly resigned in protest over the decision although he continues to perform his duties. *See id.*

253. *See* Final Award, *supra* note 252, para. 4.

254. *See id.* para. 6.

255. *See id.*

256. *See id.* para. 9.

257. *See id.*

258. *Id.*

259. *See id.* para. 8.

entity.²⁶⁰ Pending the establishment of the new district, the IEBL will remain in place, and existing laws will remain in force.²⁶¹ Once the new district is established, the territory will be held in "condominium" by both entities simultaneously²⁶² and will remain under the exclusive sovereignty of Bosnia and Herzegovina.²⁶³ The Tribunal will retain the authority to modify the Final Award in the event of non-compliance until the Supervisor and the High Representative notify the Tribunal that the new district is functioning effectively.²⁶⁴

G. Analysis

Unlike the Taba and Rann of Kutch arbitrations, the Brcko arbitration has not resolved the territorial dispute between the Federation and the RS. The lack of cooperation by the parties, particularly the RS, suggests that the issue is unlikely to be resolved in the near future, despite the issuance of a Final Award. The primary reason for this arbitration's failure is the fact that control of Brcko represents a major, ongoing political dispute, with neither side willing to compromise.

In expecting arbitration to solve a major political issue, the negotiators at Dayton overestimated its potential as a procedure for peaceful settlement of international disputes. Although parties may, as in the Taba arbitration, make a deliberate decision to subordinate national issues to an agreed settlement, it is difficult to point to any arbitration that has resolved vital interests of the first importance.²⁶⁵ States are reluctant to submit disputes involving vital interests to adjudication.²⁶⁶ Submission to third party settlement means that parties give up control over outcomes, and states are unwilling to take the chance that they may lose, particularly when the dispute involves what they consider important or "vital" national interests.²⁶⁷ Although the warring parties signed the Dayton Accords, and thus agreed to arbitrate Brcko's status, they did so under duress.²⁶⁸ It was evident from the outset that the hard-liners would try to undermine the agreements whenever possible. The inter-entity boundary line may have been designed to be similar to a boundary between two American states, but it was clear that the Serbs would not voluntarily accept such a

260. *See id.*

261. *See id.*

262. *See id.* para. 11.

263. *See id.* para. 9.

264. *See id.* para. 13.

265. *See Fox, supra* note 7, at 193 (noting that states have rarely submitted issues concerning their vital interests to arbitration).

266. *See id.*

267. *See* Richard B. Bilder, *An Overview of International Dispute Settlement*, 1 *Emory J. Int'l Disp. Resol.* 1, 15 (1986) [hereinafter Bilder, *Overview*] (categorizing disputes by their relative importance to the parties).

268. *See* Richard Holbrooke, *Letters to the Editor: Richard Holbrooke on Bosnia*, *Foreign Affairs*, Mar.-Apr. 1997, at 170, 170 (attempting to refute the suggestion that he had favored the partition of Bosnia).

concept. "As expected, [the Serbs] are trying to turn the inter-entity boundary line into a partition line."²⁶⁹ Thus, the Brcko arbitration has become a complex extension of the conflict.

The second factor that distinguishes the Brcko arbitration from the Taba and Rann of Kutch arbitrations is that the precise issue the Tribunal was to decide was never clearly defined. The definition of the issue is legally important, in that it confers jurisdiction on the arbitrators.²⁷⁰ For example, in the Rann of Kutch arbitration, the Tribunal's authority was limited by agreement of the parties to awarding the disputed territory to either India or Pakistan in light of the parties' respective legal claims.²⁷¹ Thus, the Tribunal had no authority to award the territory to a third party or to decide the issue, *ex aequo et bono*, outside the bounds of the law.²⁷² In addition, in the Taba Arbitration, the parties severely limited the Tribunal's authority, in that it could only choose between the locations of the boundary pillars advanced by either side and could not independently determine the pillars' locations.²⁷³

In contrast, the Dayton Accords did not clearly define either the issue to be decided or the area in dispute. It was not clear at the outset of the proceedings whether the Tribunal was to determine which party would be granted final control of "the Brcko Area," or whether it was to determine the final location of the IEBL, and thus possibly divide the territory between the two entities.²⁷⁴ Therefore, the authority of the Tribunal was also unclear. For example, it is not clear whether the Dayton Accords grant the Tribunal either the right to radically alter Bosnia's current territorial distribution or the power to form a new government. Nor is it clear whether the Tribunal has to base its final decision on the legal and equitable claims of the parties or whether it legitimately has the authority to decide the issue *ex aequo et bono*. In fact, it is unclear whether there are any limitations on the Tribunal's authority. The Dayton Accords do not expressly grant the Tribunal the authority to place Brcko under international supervision or to create a new government. It is well established that arbitrators may not decide issues that have not been referred to their arbitration.²⁷⁵ It is quite possible, therefore, that the parties could legally challenge the Award as a nullity on the ground that the Tribunal has exceeded its jurisdiction.²⁷⁶

269. *Id.* at 171.

270. See Fox, *supra* note 7, at 171.

271. See *supra* note 74 and accompanying text.

272. See Rann of Kutch Award, *supra* note 50, at 642-43.

273. See *supra* note 96 and accompanying text.

274. See *supra* notes 202-10 and accompanying text.

275. See Fox, *supra* note 7, at 171.

276. See *id.* Practically speaking, however, it is doubtful that either side has the resources to effectively challenge the Tribunal's authority.

Additionally, the ambiguity concerning the issue actually before the Tribunal may have undermined any confidence that the parties might have had in the Tribunal's willingness to render a fair, unbiased decision. For example, although the parties might have expected that the Tribunal would award the Brcko area to one of them in its initial award, the Tribunal bestowed upon itself the authority to establish an international supervisory regime and granted that regime the power, not only to oversee the implementation of the Dayton Accords, but also to oversee the administration of the entire area. Under this authority, the Supervisor selected judges and designed Brcko's judicial and administrative systems.²⁷⁷ It is unclear whether either party expected such a result.²⁷⁸

Another distinguishing feature of the Brcko Arbitration is that it involved complex legal issues, unlike the Rann of Kutch and Taba Area arbitrations, which were primarily factual disputes. The Tribunal had to decide which of two newly created entities should be awarded territory within a newly independent state. The Tribunal was thus not able to rely on documentary evidence in rendering its Award, as were the two previous Tribunals. The Tribunal refused, however, to rely upon and possibly expand relevant principles of international law. For instance, the Tribunal rejected the Federation's principal argument that the doctrine of non-recognition supported its claim to the territory.²⁷⁹ The Tribunal rigidly applied the doctrine and concluded that the territory, although forcibly acquired by the Serbs, remained part of Bosnia Herzegovina, the original territorial sovereign, to whom the territory would be returned if the doctrine were applied.²⁸⁰ In so concluding, the Tribunal refused to acknowledge that a traditional application of the doctrine might not be appropriate in this case.

Although Bosnia is technically one state, it has been effectively partitioned into two separate entities, with each entity maintaining control of its own territory.²⁸¹ Furthermore, although the Serbs did not forcibly wrest territory from the Federation, they did take control of the territory in violation of the United Nations Charter and general principles of international law. The majority of the Brcko area is currently located in the RS and, although Brcko is under international supervision, the RS exerts a significant amount of influence over the area. If, as the Tribunal stated, the theory behind the doctrine of non-

277. See Office of the High Representative, Bosnia and Herzegovina: Essential Texts, 214-15, 223 (1998).

278. By the time the Tribunal issued the Final Award, however, the parties most likely realized that the odds were against the Tribunal awarding the territory to either side.

279. See Brcko Arbitration Award, *supra* note 165, paras. 77-78, reprinted in 36 I.L.M. 396, 422 (1997).

280. See *supra* notes 211-13 and accompanying text.

281. See Country Report, *supra* note 154.

recognition is that acts contrary to international law should not become a source of legal rights for a wrongdoer,²⁸² this theory has been defeated by the Tribunal's decision.

The Tribunal was also at times inconsistent in its emphasis. For the purposes of the Federation's non-recognition argument, it treated the parties as belonging to one state and emphasized the Dayton Accords' affirmation of the territorial sovereignty of Bosnia Herzegovina.²⁸³ When discussing the equitable arguments of the parties, however, the Tribunal acknowledged the economic and strategic value of the Brcko area to both sides.²⁸⁴ Nevertheless, the Tribunal admitted that the integration of the entities, according to the principles of the Dayton Accords would render superfluous "some or all" of the economic and strategic necessity of controlling the area.²⁸⁵

The Tribunal did, at times, seem to side with the Federation. At one point in its initial Award, the Tribunal alluded to the possibility of awarding the Federation all the major commercial roads through the corridor and the Brcko Grad itself.²⁸⁶ This statement, however, seems to have been more of a threat to the RS than an actual consideration. Throughout all three of the Awards, the Tribunal emphasized the need for both Parties to implement the Dayton Accords. And, although it criticized both sides for their failures, the Tribunal was particularly critical of the RS. The Tribunal cited the RS's refusal to allow refugees to return to their homes and accused it of attempting to keep Brcko an "ethnically pure" Serb community.²⁸⁷ Despite this, however, and in spite of its acknowledgment of the Federation's equitable arguments, the Tribunal delayed issuing a final award because of the very real possibility that any final resolution of the dispute would reignite the conflict. The delay in rendering a final decision froze the status quo, which undoubtedly worked to the advantage of the RS, since it controlled much of the Brcko Area, including Brcko Grad.²⁸⁸ This provided little incentive for the RS to cooperate with the Tribunal. Indeed, the RS did not cooperate and the Tribunal, faced with the need to issue a final award, devised a political solution devoid of any reference to the parties respective arguments.²⁸⁹

282. See Brcko Arbitration Award, *supra* note 165, para. 77, reprinted in 36 I.L.M. 396, 422 (1997) (citing 1 Oppenheim's International Law 183-84 (Robert Jennings & Arthur Watts, eds. 1992)).

283. See *id.* para. 78, reprinted in 36 I.L.M. 396, 422-23 (1997).

284. See *id.* paras. 89-92, reprinted in 36 I.L.M. 396, 428-30 (1997).

285. See *id.* para. 90, reprinted in 36 I.L.M. 396, 429 (1997).

286. See *id.* para. 86, reprinted in 36 I.L.M. 396, 426 (1997).

287. See *id.* para. 84(2), reprinted in 36 I.L.M. 396, 425 (1997); Supplemental Award, *supra* note 236, paras. 4(a), 7.

288. See Richard B. Bilder, *Judicial Procedures Relating to the Use of Force*, 31 Va. J. Int'l L. 249, 269 (1991) [hereinafter Bilder, *Use of Force*] (stating that where a state uses force to occupy territory, it may refer the matter to adjudication in the hope that this will work to its advantage by freezing the status quo).

289. See Final Award, *supra* note 252, *passim*.

Given the highly political nature of this conflict and the refusal of the parties to cooperate, the Tribunal had little choice but to delay its final decision and, ultimately, to develop a political solution.²⁹⁰ A final decision that awarded the territory to either side could easily have exacerbated already high tensions. To avoid this result, or to at least forestall it, the Tribunal openly based its decisions on purely political considerations.²⁹¹ Indeed, a final decision was delayed for a second time to see what would happen in the upcoming RS elections.²⁹² That the Tribunal would rely on political considerations was to be expected, given the parties' open hostilities and divergent views as early on as the negotiations at Dayton.²⁹³ The problem with this politicization of the arbitral process is that legal and equitable arguments become secondary to political concerns. In this context, the arbitral forum is no longer a judicial body formed by the parties for the purpose of peacefully resolving a legal or factual dispute. Instead, it is reduced to a political spectacle imposed on the parties, and it remains unable to reduce the tensions between the parties, let alone resolve the dispute.

Although the incorporation of an arbitration agreement did permit the conclusion of the Dayton Accords, the hasty inclusion of the Brcko arbitration agreement may have unfortunate repercussions. It is difficult to say at this time what effect such a distortion of the arbitral process will have on future territorial disputes. Most likely, the Brcko Arbitration will not strengthen or encourage the greater use of such dispute mechanisms. Future parties in a similar dispute may very well refer to the Brcko Arbitration as a reason not to submit their dispute to international arbitration, out of fear that an international tribunal will have the authority to decide important issues based on its own political considerations and, in effect, disregard the legal and equitable arguments of the parties.

As the preceding discussion has shown, although arbitration can be used successfully to resolve territorial disputes, it is not always the appropriate dispute resolution mechanism. Other mechanisms do exist, however, and may prove more appropriate to a given situation. Part IV examines these approaches and explains what negotiators should consider when deciding if the use of arbitration is proper.

IV. THE USE OF OTHER DISPUTE RESOLUTION MECHANISMS APPROPRIATE IN SETTLING TERRITORIAL DISPUTES

The most common and accepted methods used to settle international disputes peacefully are those set forth in article 33 of the United Nations Charter. These methods range from diplomatic means to

290. *See id.*

291. *See id.*; Supplemental Award, *supra* note 236, paras. 9-12.

292. *See* Supplemental Award, *supra* note 236, para. 17.

293. *See supra* note 161 and accompanying text.

legal means, and include negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and resort to the United Nations' or other international organization's dispute settlement procedures.²⁹⁴ The primary difference between diplomatic and legal means is the extent of third party involvement in the dispute resolution.²⁹⁵ Diplomatic means of dispute resolution leave control of the outcome primarily to the parties themselves, while legal means grant a third party or parties more control in determining a settlement.²⁹⁶ These various methods are not, however, mutually exclusive. A combination of legal and diplomatic means will often be used either seriatim or in combination to settle a given dispute.²⁹⁷ This part discusses the three methods most significant for the purpose of this analysis, explaining the circumstances in which each may be most appropriate in resolving a territorial dispute. This part then examines the appropriateness of their use in the cases that have been examined in this Note.

A. *The Three Methods*

1. Negotiations

Diplomatic negotiation between the parties concerned is often considered the most efficient method of settling international disputes²⁹⁸ and is "clearly the predominant, usual and preferred method."²⁹⁹ Indeed, negotiation is used more frequently than all other dispute resolution methods combined.³⁰⁰ Parties usually prefer negotiation to other methods for a variety of reasons: negotiation allows the parties to maintain maximum control over the outcome; a negotiated settlement is more likely to be accepted by the parties; and negotiation is simpler and less costly than other methods.³⁰¹

Although negotiation is the method most likely to be combined with other dispute resolution techniques, bilateral negotiations alone have been sufficient to resolve territorial disputes in a number of cases.³⁰² More often, however, parties to a dispute hold such diver-

294. U.N. Charter art. 33, para. 1. For an analysis of the dispute resolution techniques not discussed here, see Merrills, *supra* note 13, at 285-88.

295. See Richard B. Bilder, *International Third Party Dispute Settlement*, 17 *Denv. J. Int'l L. & Pol'y* 471, 480-81 (1989) [hereinafter Bilder, *Third Party*] (discussing the usefulness and success of third party intervention in international disputes).

296. See *id.*

297. See *id.*

298. See Sohn, *supra* note 13, at 1122.

299. Bilder, *Overview*, *supra* note 267, at 22.

300. See Merrills, *supra* note 13, at 2.

301. For a more complete list of the pros and cons of negotiation, see Bilder, *Overview*, *supra* note 299, at 22 & n.36.

302. See Evan Luard, *Frontier Disputes in Modern International Relations, in The International Regulation of Frontier Disputes*, *supra* note 7, at 7, 24 [hereinafter Luard, *Frontier Disputes*] (briefly discussing the use of negotiation to solve territorial disputes between, for example, China and several of its neighbors and between the

gent views that they are unable or unwilling to compromise, making negotiations impossible. This failure to compromise is due in large part to the fact that "territory has a psychological importance for nations that is quite out of proportion to its intrinsic value, strategic or economic."³⁰³ Ideas of national pride and honor may exacerbate the issue and make even the appearance of compromise too contentious to permit effective negotiation. Thus, third party involvement becomes critical to reconciling the views of the two states if a solution is to be reached.³⁰⁴

2. Mediation

Parties to a dispute often agree to mediation³⁰⁵ when bilateral negotiations break down or cannot be initiated, and the parties desire limited third party intervention.³⁰⁶ The function of the mediator, often a third state or an international organization, is to bring the parties together and facilitate their negotiations.³⁰⁷ The mediator may also offer specific suggestions for settlement.³⁰⁸ States may be more willing to request or consent to mediation, as opposed to other third party dispute resolution mechanisms such as adjudication, primarily because any decision reached is not legally binding.³⁰⁹ Thus, as with bilateral negotiations, states have no obligation to reach a settlement or to implement one. Mediation also has the advantage of flexibility in that the mediator is not bound by legal considerations.³¹⁰ The mediator is free to assess the interests of both sides and devise whatever compromise it deems appropriate.³¹¹ In addition, mediation allows the participating parties to interpret the process in "face saving" ways for the benefit of public opinion³¹² and encourages parties to find politically

United States and Mexico); Merrills, *supra* note 13, at 1-26 (discussing negotiation, including examples of its successes and failures, in resolving international disputes in general).

303. Luard, *Frontier Disputes*, *supra* note 302, at 7.

304. See Evan Luard, *Conclusions, in* The International Regulation of Frontier Disputes, *supra* note 7, at 221, 225 [hereinafter Luard, *Conclusions*].

305. Mediation and good offices are often put in the same category in discussions of third party international dispute resolution. In the case of good offices, the role of the third party is usually limited to bringing the parties together and facilitating their negotiations. See Bilder, *Overview*, *supra* note 267, at 24. With mediation, however, the third party usually plays a somewhat more active role and is sometimes allowed to advance proposals for resolution of the dispute. See *id.* In practice, however, such distinctions are often blurred, and a third party that offers its assistance in the form of good offices will, in essence, serve as mediator. See Merrills, *supra* note 13, at 27.

306. See Naomi Schwiesow, *Mediation, in* The International Regulation of Frontier Disputes, *supra* note 7, at 141, 141.

307. See Bilder, *Overview*, *supra* note 267, at 24.

308. See *id.*

309. See Schwiesow, *supra* note 306, at 142.

310. See Luard, *Conclusions*, *supra* note 304, at 228.

311. See *id.*

312. See Schwiesow, *supra* note 306, at 142.

acceptable solutions, which may prove to be more lasting than arbitral or judicial decisions.³¹³

Mediation has been most effective at forestalling or ending hostilities, but it has often fallen short of reaching a fundamental resolution for political and territorial questions involved in border disputes.³¹⁴ This is due, at least in part, to the fact that states involved in territorial disputes will usually only agree to some form of negotiation when the conflict has developed to such a point that negotiation is advantageous to both sides.³¹⁵ For example, if hostilities have occurred, but prolonging them has become too difficult or costly, some form of negotiation is more likely. States are unlikely to agree to any form of negotiation if they believe they can gain their objectives through force at an acceptable cost.³¹⁶ Thus, mediation rarely occurs except when such conflicts have been "exacerbated nearly to, or beyond, the point of military engagement."³¹⁷ Therefore, mediation may be most effective where the main objective is not to resolve the underlying dispute but to pacify the parties and to avoid or to put an end to hostilities.³¹⁸ Once the parties have stopped fighting, they may be able to agree on an appropriate forum for the resolution of the underlying dispute.³¹⁹

3. Judicial Settlement

Judicial settlement involves the reference of the dispute, by the consent of the parties, to a permanent judicial body, such as the International Court of Justice.³²⁰ Judicial settlement and arbitration are often grouped together in discussions of third party dispute resolution mechanisms, because both usually apply international law as the basis for adjudication. They are therefore distinguishable from mediation and negotiation, in which the political aspects of a dispute often determine the outcome.³²¹ In addition, adjudication usually leads to final

313. *See id.*

314. For example, in the territorial dispute between India and Pakistan over Kashmir in 1965, the mediation of the Soviet Union was instrumental in securing a cease-fire between the two warring nations. No progress was made, however, in resolving the underlying dispute. *See* Merrills, *supra* note 13, at 29, 40-41.

315. *See* Schwiesow, *supra* note 306, at 163-64.

316. *See id.* Thus, the effectiveness of mediation, as with any form of negotiation, will be limited by the parties' willingness or ability to compromise. The fact that disputing parties have agreed to third party involvement, however, may, in and of itself, suggest that they are ready to make concessions. *See id.*

317. *Id.* at 165.

318. *See* Luard, *Conclusions*, *supra* note 304, at 228.

319. For example, the United Kingdom served as mediator between India and Pakistan after hostilities erupted over the Rann of Kutch. Although the mediation did not resolve the issue, the two sides did agree to a cease-fire and to submit the dispute to arbitration. *See supra* notes 42-44 and accompanying text.

320. *See* Bilder, *Overview*, *supra* note 267, at 25.

321. *See* Henry Darwin, *Judicial Settlement*, in *The International Regulation of Frontier Disputes*, *supra* note 7, at 198, 198.

and legally binding decisions.³²² The advantages and disadvantages of referring a dispute to a permanent court are similar to those of arbitration.³²³ Among the potential advantages of adjudication is that it is dispositive, and thus, ideally, should put an end to the dispute.³²⁴ As there is often a long delay before disputes are adjudicated, adjudication may also help to “‘de-politicize’ a dispute [by] reducing tensions or buying time.”³²⁵ Adjudication also allows the parties to blame the tribunal for any unfavorable outcome, which may be an important “face saving” technique.³²⁶ In addition, since adjudicated decisions are based on neutral principles of law and equity rather than power or bias, adjudicated decisions may be preferable to negotiated settlements, especially to a state in a weaker bargaining position.³²⁷

There are, however, a number of disadvantages to adjudication. For example, adjudication may decide the legal issues at stake but fail to address the underlying political problems.³²⁸ The absence of political solutions may render any outcome untenable. In addition, adjudication does not foster compromise since only one side will win, and any decision reached is imposed on the parties.³²⁹ The ability of two disputing states to compromise is often crucial to the implementation of a decision and, perhaps more importantly, to future peaceful relations. Furthermore, any adversarial proceeding may serve to exacerbate the dispute.³³⁰

States have rarely agreed to submit territorial disputes to a permanent court for adjudication.³³¹ The primary reason for this reluctance is that states often view territory, or their claim to that territory, as a matter of vital national concern and are unwilling to risk losing that territory or their claim to it.³³² Thus, states may be more willing to agree to refer their disputes to a permanent court if the territory in-

322. See Bilder, *Third Party*, *supra* note 295, at 481-82. The parties may agree to an advisory opinion, however, if the court's rules so allow. Arbitral tribunals may also issue advisory opinions with the parties' consent. *See id.*

323. See generally *id.* at 483-86 (providing a more comprehensive list of the advantages and disadvantages of adjudicated settlements of international disputes).

324. *See id.* at 488-90.

325. *Id.* at 489.

326. *See id.*

327. *See id.*

328. *See id.* at 490.

329. *See id.*

330. *See id.*

331. See Darwin, *supra* note 321, at 201. Although infrequent, states have occasionally agreed to have their territorial disputes decided by permanent courts such as the I.C.J. For example, in the *Frontier Dispute* case, Burkina Faso and Mali asked the I.C.J. to resolve a boundary dispute that less than ten years before had caused a war between them. *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22). For an historical and factual analysis of this dispute see Border and Territorial Disputes, *supra* note 86, at 105-10. For an analysis that focuses on the I.C.J.'s participation in the dispute see Merrills, *supra* note 13, at 129-30, 151, 153, 161.

332. See Darwin, *supra* note 321, at 218.

volved is small and/or not particularly valuable. As discussed above, states have more often consented to arbitration because it provides many of the benefits of a permanent court but is a more flexible procedure.³³³ As with arbitration, however, parties are more apt to agree to judicial settlement in relatively apolitical disputes where they can agree on the nature of the dispute and the appropriate means to resolve it. Where the dispute is more contentious, however, a state may still prefer a judicial settlement to the prospect of going to war.³³⁴ Furthermore, if a state believes it has a superior legal claim, it may prefer to be heard publicly by a permanent court in the hope that the strength of its arguments and commitment to peaceful settlement may strengthen domestic and international support for its cause.³³⁵

B. *The Appropriateness of Arbitration in the Instances
Previously Discussed*

At times, each of the above methods has been effective in resolving territorial disputes. No single method, however, is appropriate for resolving every territorial dispute. To be effective, the third party or parties recommending a technique for resolution must first understand the nature of the dispute, the value of the territory at issue (whether strategic, economic, or symbolic), and the parties' willingness to compromise. Most importantly, third parties must understand that, to be effective, all of these dispute resolution techniques require a commitment to peaceful resolution by the parties involved in the dispute.

Arbitration has proved most productive in relatively apolitical disputes where the parties' claims to the land are based on historical arguments and documentary evidence. The Rann of Kutch and the Taba Area arbitrations provide examples of such situations. The disputes in these arbitrations were either not highly sensitive or the parties had previously decided to subordinate their interests in the territory to more profound national concerns.³³⁶ The parties in both disputes were, therefore, willing to cooperate and participate in the resolution of their respective disputes within the arbitral forum.³³⁷ None of these factors, however, were present in the Brcko arbitration. It is therefore not surprising that the Tribunal refused to award the territory to either party. Additionally, the Brcko Arbitration involved a highly political conflict that involved complex legal issues which further contributed to its failure.³³⁸ This is not to say that arbitration could never be used effectively to resolve more contentious claims to territory, but coerc-

333. See *supra* notes 13-29 and accompanying text.

334. See Bilder, *Use of Force*, *supra* note 288, at 268.

335. See *id.*

336. See *supra* notes 78-81, 122 and accompanying text.

337. See *supra* notes 46-49, 115-16 and accompanying text.

338. See *supra* notes 265-69 and accompanying text.

ing parties into arbitrating novel legal issues in highly political situations has proved ill-advised. Thus, to strengthen arbitration as a dispute resolution mechanism, negotiators should first evaluate the nature of the dispute and then, if appropriate, secure a meaningful agreement to submit the dispute to arbitration. The parties can then work together to determine the precise issue to be adjudicated and the limits on the tribunal's authority. The negotiators at Dayton failed to take these steps and, as a result, the Brcko arbitration will most likely deter future parties from using arbitration as a means to settle territorial disputes.

CONCLUSION

In view of the danger and cost that the use of force poses for all in the international community, it is important to develop every conceivable peaceful means of resolving international conflicts. Increasingly, international conflicts involve complex issues of territorial control based on ethnicity. The inclusion in peace treaties of such dispute resolution mechanisms as arbitral clauses may be one way to peacefully solve such disputes. Such clauses may not only provide a peaceful means of settlement, but may also allow negotiators to defer a final decision on a politically sensitive issue until the parties have had time to cool off and the issue is no longer in the public eye. Resort to adjudication, however, is not appropriate in every situation, as evidenced by the Brcko Area dispute. Because states are usually reluctant to turn to adjudication for the settlement of disputes involving their vital interests, there is little precedent for the use of arbitral tribunals to resolve disputes resulting from recent, large-scale, armed conflicts. The use of other dispute resolution mechanisms may, therefore, be more appropriate in these situations.