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ARBITRALES**

**Case concerning the location of boundary markers in Taba between Egypt and
Israel**

29 September 1988

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PART I

**Case concerning the location of boundary markers
in Taba between Egypt and Israel**

Decision of 29 September 1988

**Affaire concernant l'emplacement des balises frontalières
à Taba, entre l'Égypte et Israël**

Sentence du 29 septembre 1988

CASE CONCERNING THE LOCATION OF BOUNDARY MARKERS IN TABA BETWEEN EGYPT AND ISRAEL

29 SEPTEMBER 1988

Critical period for which the location of boundary markers represents legal boundary between the States—Critical period in respect of appropriate evidence—Succession of States to territory—Estoppel—Acquiescence and *de facto* agreement—Conduct of a party as evidence of its acquiescence—Conduct of both parties as evidence of their acquiescence—The principle of stability of boundaries—Relevance of events subsequent to the critical period.

Decision of the Tribunal in the absence of conclusive evidence and on the basis of “better” claim—“Preponderance of evidence” rule—Relevance of maps to determining boundary markers—Inconsistency between existing boundary line and the description of such line in a boundary agreement—Evidentiary value of publications—The absence of intended intervisibility in the boundary markers—The principle of *non licet*—Execution of the award—The powers of the Tribunal.

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AWARD

In the Dispute Concerning Certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel

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Adviser
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Coordinator
Mrs. Shirley Rainbow
Secretary

The Tribunal, composed of
Gunnar Lagergren, President
Pierre Bellet,
Dietrich Schindler,
Hamed Sultan, and
Ruth Lapidot,
delivers the following Award:

I. THE ARBITRAL PROCEEDINGS

A. Introduction

1. The Arab Republic of Egypt ("Egypt") and the State of Israel ("Israel") concluded a Treaty of Peace on 26 March 1979. Article I of the Treaty of Peace provides that: "1. The state of war between the Parties will be terminated and peace will be established between them . . ." and "2. Israel will withdraw all its armed forces and civilians from the Sinai behind the international boundary . . . and Egypt will resume the exercise of its full sovereignty over the Sinai." Article II of the Treaty of Peace establishes that the permanent boundary between Egypt and Israel is "the recognized international boundary between Egypt and the former mandated territory of Palestine".

2. A Joint Commission was established pursuant to Article IV of the Treaty of Peace for the purpose of, among other functions, "organiz[ing] the demarcation of the international boundary" as set forth in Article IV(3) (d) of the Appendix to Annex I to the Treaty of Peace. In the course of the Joint Commission's work relating to the demarcation of the international boundary, the precise locations of some of the nearly 100 pillars demarcating the boundary line could not be agreed upon prior to 25 April 1982, the date established pursuant to Annex I to the Treaty

of Peace for the final Israeli withdrawal behind the international boundary. On 25 April 1982, the Parties agreed to submit the remaining technical questions concerning the international boundary "to an agreed procedure which will achieve a final and complete resolution, in conformity with Article VII of the Treaty of Peace". In the interim, each Party agreed "to move behind the lines indicated by the other".

3. Article VII of the Treaty of Peace provides that:

1. Disputes arising out of the application or interpretation of this Treaty shall be resolved by negotiations.

2. Any such disputes which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.

Negotiations between the Parties, assisted through the mediation of representatives of the United States of America as contemplated by the 25 April 1982 Agreement, did not result in any agreement. The Parties then agreed on 11 September 1986 to submit to arbitration their differences regarding the location of fourteen of the boundary pillars demarcating their international boundary between a point on the coast of the Mediterranean Sea near Rafah to a point called Ras Taba on the western shore of the Gulf of Aqaba. The Parties also agreed that the locations of two other disputed pillars depended directly on the decision made by the arbitral tribunal regarding neighbouring disputed pillars.

B. *The Principal Provisions of the Compromis and Their Implementation*

4. The Arbitration Compromis of 11 September 1986 provided for the establishment of the Tribunal and identified its five Members: Ruth Lapidot, nominated by the Government of Israel, Hamed Sultan, nominated by the Government of Egypt, Pierre Bellet, Dietrich Schindler, and Gunnar Lagergren, named as President of the Tribunal. The Tribunal first met in Geneva, Switzerland on 8 December 1986 at Le Saugy in Genthod and was formally constituted on 10 December 1986 in the Alabama Room of the Hôtel de Ville of the Republic and Canton of Geneva in the presence of the Agents for the Parties and certain invited guests. Basic procedural questions were resolved during the first, second, and third meetings of the Tribunal on 8, 9, and 10 December 1986, including the timetable for the submission of the written pleadings and the appointment of Professor Bernard Dutoit of the University of Lausanne as temporary Registrar of the Tribunal.

5. Article VIII, paragraph 3, of the Compromis provides that:

The proceedings shall consist of written pleadings, oral hearings and visits, to sites which the Tribunal considers pertinent, in accordance with the following schedule:

(A) The written pleadings shall include the following documents:

(i) A memorial, which shall be submitted by each party to the Tribunal within 150 days of the first session of the Tribunal, and

(ii) A counter-memorial, which shall be submitted by each party to the Tribunal within 150 days of the exchange of memorials, and

(iii) A rejoinder, if a party, after informing the other party, notifies the registrar within 14 days of the exchange of counter-memorials of its intention to file a re-

joinder. In the event of such notification by one party, the other party shall also be entitled to submit a rejoinder. The rejoinders shall be submitted to the Tribunal within 45 days of the notification . . .

(B) The oral hearings and the visits shall be conducted in such order and in such manner as the Tribunal shall determine. The Tribunal shall endeavor to complete its visits and the oral hearings within 60 days of the completion of the submission of the written pleadings . . .

6. In accordance with this Article, the Parties exchanged their Memorials on 13 May 1987 in the presence of the President and the temporary Registrar. Pursuant to Article V of the Compromis, and during August 1987, the President appointed as Registrar Douglas Reichert, Member of the Bar of the State of California and presently located in Geneva. The Counter-Memorials were exchanged on 12 October 1987 in the presence of the Tribunal and the Registrar, convened for the occasion to discuss procedural matters related to the schedule of the visit and the hearing. By the drawing of a lot, it was determined that Egypt would present first its oral arguments at the hearing, followed by Israel. At the joint request of the Parties, Rejoinders were submitted on 1 February 1988 in the presence of the Tribunal and the Registrar, convened to finalize the schedule for the remainder of the proceedings. The various written pleadings were accompanied by Annexes, including maps, documents, and two models.

7. The Tribunal conducted a visit to selected sites within the disputed areas on 17 February 1988. The Tribunal's visit itinerary was established in consultation with the Parties. Air and ground transportation within the disputed areas was provided by the Multinational Force and Observers (MFO), an organisation established by the Parties pursuant to the Treaty of Peace and charged, *inter alia*, with maintaining security in the Taba area pursuant to Article XI of the Compromis.

8. In parallel with the Tribunal's activities during the written phase of the proceedings, a Chamber was constituted pursuant to Article IX of the Compromis to "explore the possibilities of a settlement of the dispute." Article IX provides:

1. A three-member chamber of the Tribunal shall explore the possibilities of a settlement of the dispute. The three members shall be the two national arbitrators and, as selected by the President of the Tribunal sometime before the submission of the suggestions, one of the two non-national arbitrators.

2. After the submission of counter-memorials, this chamber shall give thorough consideration to the suggestions made by any member of the chamber for a proposed recommendation concerning a settlement of the dispute. Suggestions based upon the memorials, the counter-memorials, and other relevant submissions shall be presented to the chamber commencing from the month immediately preceding the counter-memorials. The chamber shall thereafter consider these suggestions, and the counter-memorials, during the period after submission of the counter-memorials until the completion of the written pleadings. Any proposed recommendation concerning a settlement of the dispute which obtains the approval of the three members of the chamber will be reported as a recommendation to the parties not later than the completion of the exchange of written pleadings. The parties shall hold the report in strictest confidence.

3. The arbitration process shall terminate in the event the parties jointly inform the Tribunal in writing that they have decided to accept a recommendation of

the chamber and that they have decided that the arbitration process should cease. Otherwise, the arbitration process shall continue in accordance with this Compromis.

4. All work pursuant to the above paragraphs absolutely shall not delay the arbitration process or prejudice the arbitral award, and shall be held in the strictest confidence. No position, suggestion, or recommendation, not otherwise part of the presentation of a party's case on the merits, shall be brought to the attention of the other members of the Tribunal, or be taken into account in any manner by any of the members of the Tribunal in reaching their arbitral decision.

9. The Chamber was composed of the two national arbitrators, Hamed Sultan and Ruth Lapidot, and Pierre Bellet, who was selected by the President on 1 September 1987. The Chamber convened following the exchange of the Counter-Memorials on 12 October 1987, appointed Mr. Bellet as its Chairman, and empowered him to meet with the Agents of the Parties separately and together. The Chamber met on 13 October 1987, 6-7 January 1988, and 3 February 1988 following meetings between the Chairman and the Agents for the Parties.

10. Since the Compromis provides that the mandate of the Chamber expired with the "completion of the written pleadings", and in order to permit the Chamber to take into consideration the arguments contained in the Rejoinders, an arrangement was made with the Parties that they should informally exchange their Rejoinders on 1 February 1988 as decided, but that the formal filing, and hence the completion of the written pleadings, be extended until 1 March 1988.

11. On 1 March 1988, the Chairman of the Chamber informed the President of the Tribunal and the Agents of the Parties that the Chamber regretted not having been able to propose to the Parties any recommendation for a settlement of the dispute, despite their efforts to find a reasonable proposal which might be acceptable to both Parties.

12. The oral arguments were heard in private during two rounds from 14 March to 25 March 1988 and from 11 April to 15 April 1988 in the Salle du Grand Conseil and in the Alabama Room of the Hôtel de Ville in Geneva. At the opening of the hearing, a short video film was presented by Israel. During the hearing, 13 witnesses gave testimony, 10 presented by Egypt and 3 by Israel. One additional witness for Egypt, unable to attend the hearing for health reasons, provided, with the leave of the Tribunal, an affidavit concerning his testimony.

13. A number of additional maps, photographs, and documents were introduced during the hearing by both Parties with the consent or at the request of the Tribunal. In response to the testimony of an expert witness for Egypt that one of the photographs submitted by Israel might not be authentic, Israel requested leave to introduce additional witnesses in order to testify with regard to the authenticity of the series of photographs in question. The Tribunal considered the question but decided, with one Member dissenting, that there was no reason at the time to grant the request. The original print of the questioned photograph was later submitted for inspection by the Tribunal and no further action was taken.

14. The Tribunal wishes to commend the Parties for the spirit of cooperation and courtesy which permeated the proceedings in general and which thereby rendered the hearing a constructive experience.

15. In connection with its present task, the Tribunal notes the following important provisions of the Compromis and related documents regarding the functions of the Tribunal and the rendering of its Award.

Article II

The Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex.

Article VIII, paragraph 1

The Tribunal shall apply the provisions of this Compromis.

Article XI

1. In accordance with the provisions of the agreement of 25 April 1982:

(A) Egypt and Israel agree to invite the MFO to enter Taba and maintain security therein through the establishment of an observation post in a suitable topographic location under the flag of the MFO in keeping with the established standards of the MFO. Modalities for the implementation of this paragraph have been discussed and concluded by Egypt and Israel through the liaison system before the signature of the Compromis. The interpretation and implementation of this paragraph shall not be within the jurisdiction of the Tribunal.

(B) During the interim period any temporary arrangements and/or any activities conducted shall not prejudice in any way the rights of either party or be deemed to affect the position of either party or prejudice the final outcome of the arbitration in any manner.

(C) The provisions of the interim period shall terminate upon the full implementation of the arbitral award.

2. The Tribunal shall have no authority to issue provisional measures concerning the Taba area.

16. The relevant provisions of the Treaty of Peace were noted above in the Introduction.

17. The 25 April 1982 Agreement provides:

Egypt and Israel agree on the following procedure for resolving the remaining technical questions concerning the international boundary, in conformity with all the relevant provisions of the Treaty of Peace, which they have been unable to resolve through negotiations. Egypt and Israel agree that these questions shall be submitted to an agreed procedure which will achieve a final and complete resolution, in conformity with Article VII of the Treaty of Peace. Pending conclusion of the Agreement, each party agrees to move behind the lines indicated by the other. The parties agree to request the Multinational Force and Observers to maintain security in these areas. In the interim period, activities which have been conducted in these areas shall continue. No new construction projects will be initiated in these areas. Meetings will be held between Egypt and Israel to establish the arrangements which will apply in the areas in question, pending a final determination of the boundary demarcation questions. Representatives of the United States Government will participate in the negotiations concerning the procedural arrangements which will lead to the

resolution of matters of the demarcation of the International Boundary between Mandated Palestine and Egypt in accordance with the Treaty of Peace, if requested to do so by the Parties. The temporary arrangements hereby or subsequently established and the activities conducted pursuant thereto shall not be deemed to affect the position of either party, or prejudice the final outcome.

18. The Annex to the Compromis provides:

1. A dispute has arisen on the location of the following boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine: 7, 14, 15, 17, 27, 46, 51, 52, 56, 85, 86, 87, 88, and 91. The parties agree that boundary pillars 26 and 84 are on the straight lines between boundary pillars 25 and 27, and 83 and 85, respectively, and that the decision of the Tribunal on the locations of boundary pillars 27 and 85 will establish the locations of boundary pillars 26 and 84, respectively. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 27, the parties accept the Egyptian location of boundary pillar 26, recorded in Appendix A; and, if the Tribunal establishes the Israeli location of boundary pillar 27, the parties accept the Israeli location of boundary pillar 26, recorded in Appendix A. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 85, the parties accept the Egyptian location of boundary pillar 84, recorded in Appendix A; and, if the Tribunal establishes the Israeli location of boundary pillar 85, the parties accept the Israeli location of boundary pillar 84, recorded in Appendix A. Accordingly, the Tribunal shall not address the location of boundary pillars 26 and 84.

2. Each party has indicated on the ground its position concerning the location of each boundary pillar listed above. For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

3. The markings of the parties on the ground have been recorded in Appendix A.

4. Attached at Appendix B is the map referred to in Article II of the Treaty of Peace, which provides:

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip. The parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace.

A 1:100,000 map is included in order to permit the indication of the locations of the 14 disputed boundary pillars advanced by the parties and provides an index to Appendix A. The Tribunal is requested to refer to the general armistice agreement between Egypt and Israel dated 24 February 1949.

5. The Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A. The Tribunal is also not authorized to address the location of boundary pillars other than those specified in paragraph 1.

19. In connection with the formulation of its Award, the Tribunal also notes the following further provisions of the Compromis:

Article XII

1. The Tribunal shall endeavor to render its award within 90 days of the completion of the oral hearings and visits. The award shall state the reasons upon which it is based.

2. The award shall be deemed to have been rendered when it has been presented in open session, the agents of the parties being present, or having been duly summoned to appear.

3. Two original copies of the award, signed by all members of the Tribunal, shall immediately be communicated by the President of the Tribunal to each of the agents. The award shall state the reason for the absence of the signature of any member.

4. The Tribunal shall decide the appropriate manner in which to formulate and execute its award.

5. Any member of the Tribunal shall be entitled to deliver a separate or dissenting opinion. A separate or dissenting opinion shall be considered part of the award.

6. The Tribunal shall at the joint request of the parties incorporate into its award the terms of any agreement between the parties relating to the issue.

Article XIII

1. Any dispute between the parties as to the interpretation of the award or its implementation shall be referred to the Tribunal for clarification at the request of either party within 30 days of the rendering of the award. The parties shall agree within 21 days of the award on a date by which implementation will be completed.

2. The Tribunal shall endeavor to render such clarification within 45 days of the request, and such clarification shall become part of the award and shall not be considered a provisional measure under the provisions of Article XI (2) of this Compromis.

Article XIV

1. Egypt and Israel agree to accept as final and binding upon them the award of the Tribunal.

2. Both parties undertake to implement the award in accordance with the Treaty of Peace as quickly as possible and in good faith.

C. The Factual Background of the Dispute

1. Introduction

20. During the 19th century and before, the territories of present-day Egypt and Israel were both contained in the Ottoman Empire. However, in 1841, the Sultan conferred upon Mohammed Ali the hereditary Pashalik of Egypt, creating thereby, within boundaries defined by the Sultan, a privileged vassal State within the Empire. Egypt was empowered to administer the territory of Sinai. The precise bounds of this administrative control of territories in Sinai fluctuated during the reign of the first three Khedives and the western limits of the neighbouring Vilayet of Hedjaz were never clearly expressed.

21. The Suez Canal was opened in 1869. In order to secure the Canal as its route to India, Great Britain occupied Egypt in 1882 without, however, seeking to alter the formal status of the Khedivate as an Ottoman vassal. On 24 October 1885, Great Britain and Turkey concluded a Convention relative to Great Britain's special status in Egyptian affairs.

22. Upon the succession of Abbas Hilmi as Khedive in January 1892, the British Agent and Consul General in Cairo, Sir Evelyn Baring

(later Lord Cromer), was concerned by the apparent differences between the wording of the Firman of Investiture issued to Abbas Hilmi by the Sultan on 27 March 1892 and that issued to his predecessor. The new Firman made no mention of the Sinai territories administered by the previous Khedives and defined the territory of the Khedivate of Egypt in terms of the line from Rafah to Suez. The Grand Vizier of the Sultan sent a telegram to the Khedive on 8 April 1892, confirming that certain Egyptian garrisons outside of the Sinai, including Aqaba, were to be restored to the Vilayet of Hedjaz, but that the status quo of Khedival administration of the parts of the Sinai lying east of the Rafah-Suez line was to be maintained. It may be noted that the land route across Sinai for the Haj was apparently falling into disuse at the time. Lord Cromer wrote to Tigrane Pasha, the Egyptian Minister for Foreign Affairs, on 13 April 1892 and informed him that Great Britain consented to this confirmation of Egypt's administration of Sinai, adding his understanding that the Sinai peninsula consisted of "the territory bounded to the east by a line running in a south-easterly direction from a point a short distance to the east of El Arish [which apparently meant Rafah] to the head of the Gulf of Akaba", leaving Aqaba itself in the Vilayet of Hedjaz.

2. *The Taba Crisis of 1906*

23. At the end of December 1905, Lord Cromer received intelligence from Constantinople that the Sultan had been informed of Egyptian plans to construct "barracks" on the Sinai frontier near Aqaba and that he had decided to establish a Turkish guardhouse there first. On 2 January 1906, Lieutenant W. E. J. Bramly, the Inspector of Sinai (a title equivalent to Governor), was instructed by the British Acting Director of Intelligence for the area in Cairo, Captain R. C. R. Owen, to form a small post at Naqb el Aqaba. He was informed that he might find that the Turks had already established a post at the spot and that he should avoid a confrontation.

24. On 10 January 1906, Bramly reported that he had established himself at the foot of the Naqb el Aqaba, in Marashash (present-day Eilat) at the mouth of the Wadi el Arabi near to a well at the head of the Gulf, had met with the Turkish *Kaimakam* (head of district) at Aqaba, and had ascertained that Turkey was claiming Taba and Kuntilla, both places with water which Egypt considered to be west of the Rafah-Aqaba line asserted by Lord Cromer. Bramly proposed that he and a Turkish representative should demarcate the boundary and that he would thereafter map it, as he had been sketching maps of the area for the War Office and the Palestine Exploration Fund over the previous two years.

25. On 14 January 1906, Bramly reported that he had met with the Commandant of Aqaba and had decided to return to Nekhl, the main Egyptian garrison in the center of the Sinai, after agreeing to remove his tents at Marashash upon receipt from the Commandant of a written claim by Turkey to the place. He stated that he would observe Turkish actions on the frontier while awaiting further instructions.

26. Owen then dispatched the Egyptian Coast Guard steamer "Nur el Bahr", with Saad Bey Rifaat, the former Egyptian Commandant at Aqaba prior to 1892, and 50 men to re-occupy the Naqb el Aqaba and, if Bramly thought necessary, Taba also. On 23 January 1906, the Commander of the "Nur el Bahr" wrote to Bramly in Nekhl to inform him that, on their arrival at Taba, they had encountered a Turkish officer who refused them permission to land and had threatened to fire on the ship if they so attempted. The Egyptian force established itself on nearby Pharaon Island instead.

27. Bramly joined the force at Pharaon and received instructions dated 28 January 1906 from Captain A. C. Parker, the Assistant Director of Intelligence in Cairo, to hold his position but to see to it that nothing in the nature of hostilities should take place. On 14 February 1906, Owen sent Parker to replace Bramly at Pharaon and instructed Bramly to return to Nekhl and resume administration of the Sinai territory since it appeared to him that resolution of the crisis might take some time.

28. The British Ambassador in Constantinople meanwhile suggested a joint delimitation of the Sinai frontier, but Turkey objected, arguing that it was impossible to change the description of Egyptian territory already effected by the Imperial Firman of Investiture of 1892. Negotiations continued for several months.

29. On 27 March 1906, Lord Cromer suggested to the Foreign Office in London that the main point had become to achieve withdrawal of Turkish troops from Egyptian territory and that demarcation was now less important. He regretted the absence in the 8 April 1892 telegram from the Grand Vizier mentioned above of any definition of the eastern limit of the Sinai, and referred to his definition given at the time in his letter of 13 April 1892. Lord Cromer then suggested a refinement of that definition, which he felt could be achieved through an exchange of diplomatic notes between Great Britain and Turkey, confirming that the frontier was as defined in his note of 13 April 1892, but describing the limits more precisely as: "the territory bounded to the east by a straight line running from Rafah—a point a short distance east of El-Arish—in a south-easterly direction to a point on the Gulf of Akaba, lying three miles to the west of the existing fort of Aqaba".

30. Turkey rejected this definition, reserving to itself the right to interpret the 1892 Firman, which spoke only of the Suez-Rafah line as the frontier of Egypt, and the right to revoke at any time the Grand Vizier's telegram of 8 April 1892 regarding Egyptian administration of the Sinai to the east of the Suez-Rafah line. Turkey argued that Taba was a dependency of Aqaba, and informed the Khedive that it was contemplating the extension of the Hedjaz railway to Aqaba and from thence to Suez. The railway would traverse the Sinai peninsula south of the Suez-Rafah line referred to in the 1892 Firman as constituting the actual limit of Egyptian territory. The Sultan's special representative, sent to Cairo to settle the dispute, nonetheless suggested a compromise line from El Arish to Ras Mohammed.

31. These proposals and positions greatly alarmed the British, who viewed the Rafah-Aqaba line as vital to the security of the Canal.

Lord Cromer suggested that forceful measures were necessary, but not in the area of the Sinai, in order to persuade the Sultan to accept the British understanding of the Egyptian administrative frontier.

32. An ultimatum was addressed to the Sultan on 3 May 1906, underscored by a British naval threat to seize certain Turkish islands in the Mediterranean, giving the Sultan 10 days in which to agree to evacuate Taba and to a demarcation of the line from Rafah to the head of the Gulf of Aqaba on the basis of the 8 April 1892 telegram. The Sultan agreed to evacuate Taba and on 13 May 1906 the Turkish forces at Taba were withdrawn. On 14 and 15 May 1906, Great Britain and Turkey exchanged diplomatic notes expressing their agreement "to delimit and record on a map", prepared jointly by representatives of the Sultan and the Khedive, "the line of demarcation running approximately straight from Rafah in a south-easterly direction to a point on the Gulf of Akaba not less than 3 miles from Akaba".

3. *The Delimitation and Demarcation of the 1906 Line*

a. *Negotiations and Survey*

33. On 22 May 1906, the Khedive appointed Ibrahim Fathi Pasha and Captain Owen as his representatives for the settlement of the frontier between Aqaba and Rafah with the representatives of the Ottoman Government. He gave them full powers to agree to whatever petty changes were deemed necessary to the boundary line, which he described as beginning at "Rafah, near El Arish, and tak[ing] a south-easterly direction until it ends in a point on the Gulf of Akaba at least 3 miles from Akaba" and that it "should be an approximately straight line".

34. In May, Mr. E. B. H. Wade and Mr. B. F. E. Keeling from the Survey Department of the Egyptian Ministry of Finance were assigned to accomplish the difficult task of rapidly and accurately charting the territory along the length of the expected frontier line. Owing to the hot desert conditions during the summer months, a triangulation survey was ruled out. Instead, the surveyors decided to conduct their survey by determining the latitude of a number of intervisible points, designated astronomical stations, the azimuth of the lines connecting them, and then to calculate the longitude of each point after ascertaining, as accurately as possible, the longitude of the two end points of this chain of astronomical stations established near to the hypothetical straight line from Rafah to the point at least three miles from Aqaba.

35. Owen and Fathi Pasha left Cairo on 24 May 1906, joined the surveyors and the "Nur el Bahr" at Suez, and arrived at Aqaba on 26 May 1906. Wade established a site for astronomical observations at Taba, describing it as A.1.

36. The Egyptian Commissioners had their first meeting in Aqaba with Muzaffer Bey and Fahmi Bey, the two Commissioners appointed by the Sultan, on 27 May 1906. Wade, who had expected to be able to return to Taba on 28 May for his astronomical observations, instead determined the azimuth of a line he made at Aqaba. On the 29th he established his station A.2 near the camp at Aqaba. From A.2 he could

see the granite knob at Taba, near to which he had established his station A.1.

37. Wade finally returned to Taba on 30 May and determined the latitude of his station A.1. On 31 May, he established a station B.1 on the "conspicuous granite knob on shore at Taba", from which he could see A.2, not having been able to see A.2 from A.1.

38. Meanwhile, on 29 May 1906, all of the Commissioners rode up the Naqb el Aqaba to the head of the pass on to the plateau where the Nekhl-Aqaba and Gaza-Aqaba roads meet. In their initial discussion, the Turkish Commissioners indicated that they were most interested in securing the whole of the Naqb el Aqaba as it was "part of Aqaba" and necessary to its security. Owen reported to Lord Cromer the day of this visit that he thought that "we can without any loss to ourselves give the Turks the Nakb-el-Akaba, provided we hold the head of it . . . Our frontier line, I think, will then run along the ridge north of Taba in a northerly direction till it reaches a prominent hill (which we have named Jebel Ibrahim) about 1,000 yards from the head of the Nakb-el-Akaba, and from thence to the head of the pass and edge of the plateau . . . We, of course, keep Taba, running the boundary line in such a way that no position can command the Wadi-el-Taba, which will be our road down to Taba and so to the Gulf of Akaba."

39. In one of two Reports of 3 June 1906, Owen further described his proposal for the course of the line in the area of the Naqb el Aqaba. He "proposed that the boundary-line should commence on the Gulf of Akaba at Ras Taba, that is at the point where the ridge north of Taba meets the sea, thence along ridge in a north-westerly direction up to a certain fixed point, thence north-east, south of Jebel Ibrahim to Mufrak, the head of the pass and edge of plateau . . ." In later descriptions, Owen referred to "Jebel Fort" in place of the "fixed point".

40. There was much discussion in the early meetings of the location of the point at least "3 miles from Akaba" where the boundary line was intended to start. The Turkish Commissioners advanced several interpretations; among them that this could be measured from Naqb el Aqaba up on the plateau, construing the Naqb el Aqaba as part of the locality of Aqaba, that this could be measured directly across the Gulf from Aqaba Fort, or that the boundary should commence at Taba. The Egyptians claimed that the point "3 miles from Akaba" was intended to be measured around the Gulf, along the shoreline, to Marashash. Owen had written to Parker on 1 June 1906 that the location of this point would "probably decide to whom Kassima, which is the most important point along the line, belongs". He added that "[w]e must have Kassima." In his General Report, written after returning to Cairo in October, Owen remarked that the starting point of the boundary was "the principal and most difficult point to decide" in the early discussions.

41. The general procedure thereafter was for Keeling to proceed in advance and to beacon places he felt could serve as astronomical stations to which he could tie his topographical observations, once Wade had made the necessary astronomical observations and calculated the values for these points so that they could be plotted on the map

paper. In all, 16 astronomical stations were established by Wade. The Commissioners apparently travelled with the main camp, while reconnoitering the areas where they believed the boundary should pass.

42. Owen next reported on 12 June 1906 from Mayein that the surveyors, owing to the rough nature of the terrain and the limited time available to them, were only able to make "a fairly rough though very accurate survey".

43. The Commissioners eventually reached Rafah on 28 June 1906. Wade reported that, on 30 June 1906, he observed the local time and latitude for his station A. 13. This station was established 80 metres south of the marble frontier pillars at Rafah, which had been long before erected to indicate the frontier of Egypt. From Rafah, time signals were exchanged by telegraph with the Helwan Observatory in Cairo in order to establish the longitude of A. 13. From this information, Wade was able to calculate the latitude and longitude of all of his astronomical stations, as well as of the marble pillars themselves. In early July 1906, the surveyors then worked on their map in El Arish.

44. Owen next reported on 10 July 1906, after receiving from the surveyors the completed maps of the area along the Rafah-Aqaba line, that the discussions again had become difficult since the Turkish Commissioners indicated that they lacked full powers. Difficult and prolonged discussions followed. They were not crowned with success until after the Sultan on 11 September 1906 issued an Imperial Iradé to the following effect, *inter alia*: "1. The starting-point of the line on the Gulf to be Marashash. 2. Such commanding positions of Nagb-el-Akaba as are necessary to Akaba from a strategic point of view are to remain on the Turkish side, while Mofrak is to be left to Sinai" (from a telegram of 12 September 1906 from Sir N. O'Connor to Sir Edward Grey). An agreement on the line was reached soon thereafter and signed on 1 October 1906.

b. *The 1 October 1906 Agreement*

45. While the Egyptian Commissioners requested that the agreement be written in French, the Turkish Commissioners insisted on Turkish, as that was the official language for communications between the Sultan and the Khedive. The negotiated text was therefore written in Turkish and then translated from Turkish into Arabic and then from the Arabic translation into English for the benefit of the English-speaking members of the Egyptian delegation. The British decided that it was important to conclude the agreement rapidly, and so the decision was taken not to attempt to correct the inconsistencies between the informal English translation and the authentic Turkish text, or to refine further the language. English translations were printed in a number of official sources and apparently were relied on thereafter. This expediency has led to some questions of interpretation in the present case, as it transpired that up until after the conclusion of the Compromis in 1986, no authorities since before the First World War had ever consulted the authentic Turkish text, not even the Parties to this dispute. The Tribunal, unless it specifies otherwise, will follow in this Award the general

practice of the Parties and refer to the contemporaneous English translation as included in Owen's General Report.

46. The Agreement, signed at Rafah on 1 October 1906, reads in Article 1:

The administrative separating line, as shown on map attached to this Agreement, begins at the point of Ras Taba on the western shore of the Gulf of Akaba and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort, from thence the separating line extends by straight lines as follows:

From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha, thence to that point which is formed by the intersection of a prolongation of this line with a perpendicular line drawn from a point 200 metres measured from the top of Jebel Fathi Pasha along the line drawn from the centre of the top of that hill to Mofrak Point (the Mofrak is the junction of the Gaza-Akaba and Nekhl-Akaba roads). From this point of intersection to the hill east of and overlooking Thamilet-el-Radadi—place where there is water—so that the Thamila (or water) remains west of the line, thence to top of Ras Radadi, marked on the above-mentioned map as (A 3), thence to top of Jebel Safra marked as (A 4), thence to top of eastern peak of Um Guf marked as (A 5), thence to that point marked as (A 7), north of Thamilet Sueilma, thence to that point marked as (A 8), on west-north-west of Jebel Semaui, thence to top of hill west-north-west of Bir Maghara (which is the well in the northern branch of the Wadi Ma Yein, leaving that well east of the separating line), from thence to (A 9), from thence to (A 9 *bis*) west of Jebel Megrah, from thence to Ras-el-Ain, marked as (A 10 *bis*), from thence to a point on Jebel Um Hawawit marked as (A 11), from thence to half-distance between two pillars (which pillars are marked at (A 13)) under a tree 390 metres southwest of Bir Rafeh, it then runs in a straight line at a bearing of 280° of the magnetic north—viz., 80° to the west—to a point on a sand-hill measured 420 metres in a straight line from the above-mentioned pillars, thence in a straight line at a bearing of 334° of the magnetic north—viz., 26° to the west—to the Mediterranean Sea, passing over hill of ruins on the sea-shore.

47. Egypt made a new translation of the Agreement directly into English in August 1987, which reads in its first part of Article 1:

The Separating Line, as shown on map attached to this AGREEMENT, begins at Ras Taba on the western shore of the GULF OF AKABA and extends to the summit of the mountain called JEBEL FORT, passing by the summits of the mountains lying east of and overlooking WADI TABA, and from the summit of JEBEL FORT the Separating Line extends by straight lines as follows: . . .

48. Israel disagrees with certain aspects of this translation and responded in its Rejoinder with another translation into English, rendering the same passage as follows:

The separating line as shown on the map attached to this agreement begins at Ras Taba, which is situated on the western shore of the Gulf of Akaba, and arrives at the hill called Jabal Fort while passing by the heights that are [situated] at the east[ern side] of Wadi Taba and overlook this Wadi, and from this hill it continues straight as follows.

49. Article 2 of the Agreement provides that the separating line described by Article 1 was "indicated by a black broken line on duplicate maps . . . signed and exchanged simultaneously with the Agreement". The Parties do not differ on this translation. The fate of these duplicate maps annexed to the Agreement is not clear. Owen reported that "[t]he original Agreement and map were sent to the British Agency from Rafeh on the 5th October, 1906". All trace of this copy disappeared after 1926, and the British Government informed the Parties in 1985 that

it believes that the copy it had received may have been destroyed during a rapid evacuation of the British Embassy in Cairo, e.g. in 1952 or 1956. Turkey's copy of the map, however, is reportedly still in Turkish archives. A photocopy of a map, sent by Turkey and asserted to be a copy made from the map annexed to the original Agreement, was submitted by Egypt, but Israel contests the authority of the map since there is no trace of the signatures reported to have been made to the map and alleges that portions of the line indicated thereon are manifestly at variance with the terms of Article 1 in the vicinity of the terminus of the line near Rafah and at astronomical station A.5.

50. Article 3 provides:

Boundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line, from the point on the Mediterranean shore to the point on the shore of the Gulf of Akaba.

Egypt's new translation did not differ from this version, but Israel submitted a different direct English translation:

Pillars will be erected while the officials of each side are present, in such a manner that from the one of them the other will be seen, the length of the Separating Line from the point on the Mediterranean shore as far as the point on the shore of the Gulf of Akaba.

51. In addition, it may be noted that Articles 5, 6, and 7 provide:

Art. 5. Should it be necessary in future to renew these pillars, or to increase them, each party shall send a representative for this purpose. The positions of these new pillars shall be determined by the course of the separating line as laid down in the map.

Art. 6. All tribes living on both sides shall have the right of benefiting by the water as heretofore—viz., they shall retain their ancient and former rights in this respect.

Necessary guarantees will be given to Arab tribes respecting above.

Also Turkish soldiers, native individuals and gendarmes, shall benefit by the water which remained west of the separating line.

Art. 7. Armed Turkish soldiers and armed gendarmes, will not be permitted to cross to the west of the separating line.

c. The Demarcation of the Line

52. Owen stated in his General Report that, "[w]ith reference to Article 3 of the Agreement, it was decided that telegraph poles be erected in the presence of the Commissioners at intervisible points along the boundary line". Wade was recalled from Cairo to assist this operation, and an Egyptian officer and a Turkish officer also joined the Boundary Commission to observe the placement of the telegraph poles, as they both would be present for the subsequent construction by the Egyptian Department of Public Works of the masonry pillars at the site of each telegraph pole.

53. A few days after concluding the Agreement, and after Wade and the necessary materials had arrived from Cairo, the Commissioners commenced placing telegraph poles along the boundary line near Rafah, and then started down the line towards Taba on 6 October 1906. Wade reported that the demarcation operations were on the whole uneventful. After setting up the poles around Rafah, the first traverse from A.13 to

A.11 took three days, and Wade stated that he was able to keep the line of intervisible telegraph poles “perfectly straight”, although his technical discussion concedes that the margin of error could be as much as 12 metres on either side of the abstract straight line between the astronomical stations. Later on, in the area just north of astronomical station A.9 *bis*, Wade reported that the line of telegraph poles had deviated from the intended line by 500 metres to the east, and that while two of the poles placed off the straight line were corrected after discovery of the error, some earlier ones were accepted by the Commissioners as placed, apparently in the interest of bringing the work to conclusion without losing time.

54. Owen reported that the Commissioners arrived at Taba on Wednesday, 17 October 1906, after having erected “[n]inety intervisible pillars . . . on the boundary line . . . at varying intervals from 1/2 kilom. to 3 kilom.”. Between the pillar placed on Jebel Fort and the pillar at Ras Taba, Owen reported that two pillars were erected on the “Taba Hills”. Wade’s account conflicts with this in two respects. He reported that the final pillars were set on 18 October 1906 and that three pillars were erected on the “east cliffs of Taba” between the beacon placed on Jebel Fort and the beacon placed at the point where the east cliffs “strike the gulf”. Everyone then left the area, the work having been completed.

55. As noted above, arrangements had been made for the construction by the Public Works Department of Egypt of masonry pillars at the site of each telegraph pole. Very little evidence concerning this project was submitted in these proceedings. As mentioned above, it was intended to be done under the supervision of an Egyptian officer, in the presence of a Turkish officer, both of whom had been summoned to participate in the October demarcation operations. It appears from the records produced that Parker, who had in the meantime been named Governor of Sinai, was present during at least the first part of the operations, as well as the two Turkish Commissioners. Mr. Naum Shoucair, the Secretary to the Egyptian Commissioners, seems to have been present again, as he relates certain features of the operation in his subsequent book published in 1916.

56. Parker’s 1906 diaries, although not those for 1907, were produced by Egypt, having been located in the possession of his daughter in England. Parker’s diary shows that he came overland from Suez via Nekhl and arrived at Taba on 5 December 1906, where he was met by the Egyptian Coast Guard steamer “Aida” with stores on 7 December 1906. The Turkish Commissioners were not yet in Aqaba, and he was instructed to wait. Finally, on 31 December 1906, he met in Aqaba with the Turkish Commissioners Muzaffer Bey and Fahmi Bey and they reached an agreement that the masonry pillars would be constructed 2 metres high, topped by one metre of iron. In the afternoon, they all went to Taba, and Parker took a series of photographs of the group and of the construction of the first pillar. These photographs were introduced by Egypt in these proceedings.

57. Ottoman documents from October 1911 clearly indicate that the border was marked by officials assigned by both sides. The letter of

22 October states that "it is obvious that there is no need for such work to be done again".

58. Shoucair wrote later in his book that the first pillar was built on 31 December 1906 at Ras Taba and numbered 91. He related that the last pillar, numbered 1, was built on 9 February 1907 and that the absence of water at certain places along the route had complicated the task.

4. *The Subsequent History of the Separating Line*

a. *The Pre-Mandate Period (1907-1923)*

59. Events concerning the boundary during the first few years involved two joint operations of Egyptian and Ottoman authorities to repair pillars. Parker stated in his monthly summary for November 1908 to the Intelligence Department in Khartoum that it was reported that several pillars near to Rafah had become unstable due to the shifting sand. His report for May 1909 related that arrangements had been made with the Turkish authorities and in late April 1909 a Turkish officer was present for the rebuilding or repair of eight pillars, six of which were identified as pillars 8-13 near Rafah. The British Consul in Jerusalem passed on a similar report on 26 May 1909 to the Foreign Office. Again, in February 1911, the British Consul in Jerusalem reported that a joint Turkish-Egyptian delegation was to be present at the re-erection of some boundary columns in the Beersheba district which had fallen down during the heavy rains that season.

60. A number of maps from this period, introduced into the record of this proceeding, appear to be based on the 1906 Wade/Keeling survey map or derivative copies of that map, at least with respect to the area near to the separating line, including, for instance, the map printed in the 1908-09 Rushdi book and the 1911 Survey Department of Cairo map. In addition, the first trigonometrical and plane table survey map of the area was prepared during this period. On 16 May 1908, the British War Office proposed to the Egyptian Government that they collaborate on the production of a detailed map of the Sinai Peninsula, whereby the Survey of Egypt would do the basic trigonometrical work and the detail survey would be done by Royal Engineers of the British War Office. This was agreed, and each winter from 1908 to 1914 teams worked in the field preparing the detail for the maps based on the Egyptian triangulation, which apparently was completed by 1911. Work along the boundary area started from the north in 1911 and evidently reached the Taba area during the 1914 season, although the map recites that the survey work was completed in 1913.

61. In connection with this survey, on 27 September 1911, the Grand Vizier received an intelligence report that on 5 September 1911 the British had dug a trench on the border, carried out a survey, and that a bedouin had claimed to have seen the British secretly remove several border signs. At about the same time, the Egyptian authorities made a request that the surveyors not be prevented from taking short-cuts and crossing over into Turkish territory. This request was apparently approved in Jerusalem. Finally, the Ottoman authorities decided in late

October 1911 to dispatch a Turkish officer to check whether any modifications or changes had been made to the line.

62. During the winter of 1914, the Turkish side of the border in the Negev from Rafah over to the Dead Sea and south to Aqaba was to be surveyed under the auspices of the Palestine Exploration Fund, a non-governmental organisation which had also sponsored earlier surveys of northern Palestine regions. The group was headed by Captain S. F. Newcombe, who had participated up till then in the Sinai surveys for the British War Office. Two civilians accompanied the surveyors to undertake archeological work during February 1914, Mr. T. E. Lawrence and Mr. C. L. Woolley. While Newcombe, accompanied by Lawrence, was in the Aqaba region in February, the Commander at Aqaba refused him permission to survey the area along the border in the vicinity of Aqaba. Consequently, the survey was incomplete.

63. Apparently, however, the actual detail survey for the Taba and Ras el Naqb areas on the Egyptian side of the border was undertaken in 1914, for during the course of the proceedings, the Parties discovered in the British Library the original surveyor's field sheets and clean tracings made from those sheets used in the construction of the Sinai map by the War Office in 1915. These field sheets were registered at the War Office in London on 6 June 1914. Drawn on a scale of 1:125,000, the original sheet for Wadi Taba indicates some pillars on the heights east of the Wadi, and, in particular, with some technical explanation, two pillars just near the shore. The tracing of this original, which apparently was used in the preparation of the map itself, only picked up one of these pillars, the one further up the ridge from the shore. That pillar, indicated at an elevation of 298 feet, was marked as a boundary pillar on both versions of the map printed in 1915 in England at the scales of 1:125,000 and 1:250,000. Owing to the war, the map apparently was not publicly released at the time. (But see paragraph 75 below.)

64. In August 1914, Egypt established posts at Taba and at Ras el Naqb and used them to observe developments in Aqaba, as there were reports of large troop movements throughout the region. In October 1914, Turkey entered the war on the side of the central European powers and, in November, Great Britain imposed martial law in Egypt. Finally, in December, Great Britain declared a Protectorate over Egypt due to the state of war with Turkey.

65. In early 1915, Great Britain withdrew its forces towards the Suez Canal and Turkey occupied much of the Sinai, remaining there until El Arish was taken in December 1916. No evidence has been submitted regarding the boundary during the war period, except that Germany produced a 1:250,000 map of the Sinai based on a road survey it conducted for Turkey in 1915.

66. During the fall of 1917, Allied forces advanced into Palestine following the fall of Aqaba in July 1917 to the Arabs of the Hedjaz.

67. At this time, the Survey of Egypt conducted a trigonometrical and plane table survey of the area of Aqaba on the scale of 1:40,000. The map produced in 1917 from this survey, a small portion of which was introduced into these proceedings, shows two boundary pillars near the

shore on the ridge east of Wadi Taba, one on a cliff at the shoreline and another at a triangulated position at an elevation of 298 feet. The map, however, apparently produced for military purposes, was not given public distribution. The triangulation information, dated perhaps 1917 but possibly based on earlier survey work, still exists according to testimony elicited under cross-examination of an expert witness for Egypt, but was not submitted in evidence.

68. Following the war, British forces occupied both sides of the separating line and the Turks were not to return. In Article 101 of the Treaty of Sèvres of 10 August 1920 concerning the terms of peace with Turkey, which treaty never entered into force, Turkey had to renounce all rights and titles over Egypt. By Articles 16 and 17 of the Treaty of Lausanne of 24 July 1923, which replaced the Treaty of Sèvres and did become effective, Turkey renounced all rights and titles over territories lying outside of the Turkish frontiers established by the treaty, and this was declared effective with respect to Egypt and the Soudan as of 5 November 1914, the date on which Great Britain instituted martial law in Egypt.

69. Egypt sought independence from British rule after the war, but negotiations with Great Britain foundered largely on the question of continued British military occupation in order to protect the Canal. Instead, Great Britain achieved this objective by unilaterally terminating the Protectorate and recognizing Egypt as an independent sovereign State on 28 February 1922, but reserving to its discretion four areas of interest, including in particular the defense of Egypt and the security of its communications, evidently meaning the Canal.

70. On 17 February 1922, Mr. H. J. Llewellyn Beadnell, of the Survey of Egypt, visited Taba during his exploration of the Sinai and tied his survey to the "penultimate beacon" and took a photograph of it showing a plaque with the number 90 on it. This photograph, discovered by the Parties during the proceedings, was submitted by both Parties.

b. *The Mandate Period (1923-1948)*

71. By the time the Council of the League of Nations had approved the text of the Mandate for Palestine on 24 July 1922, and later when the Mandate finally entered into force on 29 September 1923, no boundaries had been established for the mandated territory. The Preamble to the Mandate Resolution recites that the Principal Allied Powers had decided to entrust to Great Britain the mandate for Palestine, "within such boundaries as may be fixed by them". Article 5 of the Mandate stipulated, however, that:

The Mandatory shall be responsible for seeing that no Palestine territory is ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.

72. A few years later, in answer to a question raised on 16 July 1925 in the British House of Commons with regard to the status of Aqaba, Mr. McNeill answered for the Government of Great Britain that "[t]he line dividing the territories under Egyptian and Turkish administration respectively was defined in 1906 by a boundary commission and

has not since been modified". He informed the questioner that "Akaba lies a few miles to the east of this line".

73. On 6 October 1925, Great Britain invited Egypt to recognize the special situation of Great Britain in the territory of Palestine. The Egyptian Prime Minister and Minister for Foreign Affairs, Ahmed Ziwer Pasha, did so in a letter to the British High Commissioner in Cairo of 4 February 1926, but reserved Egypt's position regarding the Egyptian frontier with Palestine since the Mandate provided that the frontiers of Palestine would be decided at a later date "by the Principal Allied Powers". The letter concluded that the Egyptian frontier with Palestine could not in any way be affected by the delimitation of the frontiers of Palestine.

74. Following consultations with the relevant British authorities, the British High Commissioner informed the Egyptian Foreign Minister by letter of 25 June 1926 in response to the letter of 4 February that "the Palestine and Egyptian frontier as defined in the year 1906 will be in no way affected by the delimitation of the frontiers of the mandated territory of Palestine".

75. In 1926 the Survey of Egypt published the 1915 British Map of the Sinai at the scale of 1:250,000. The Tribunal was not informed when the 1915 British Map was made public by Great Britain. It remained the only map for some time which plotted the position of individual boundary pillars along the line. In subsequent years, the authorities of mandated Palestine repeatedly sought survey information from the Survey of Egypt concerning the locations of the boundary pillars in order to describe accurately the south-western boundary of Palestine, but the Survey of Egypt replied that the boundary pillars had never been surveyed.

76. On 4 April 1932, the Eastern Department of the British Foreign Office issued a lengthy memorandum on the question of the frontiers of mandated territories in the Middle East due to a question raised in the League of Nations concerning the necessity of submitting the frontiers of mandated territories to the Principal Allied Powers or to the Council of the League for approval. Attached to this memorandum was an annex describing the frontiers of each of the mandated territories. The description of the Egypt-Palestine frontier affirmed that the then-present frontier was the same as the "Separative Administrative Line" established by the 1 October 1906 Agreement, but remarked that the line "does not appear at any stage to have been formally constituted an international frontier". After noting the letter of 4 February 1926 from the Egyptian Government to the British High Commissioner, the annex stated that the assurance given in response to Egypt's reservation "seems to imply recognition by His Majesty's Government and the Egyptian Government of the 1906 line as the definitive frontier between Palestine and Egypt".

77. In 1933, Mr. R. H. Mitchell, a geologist in Palestine, presented a geological map of the Naqb el Aqaba area, part of a mineral concession, on which were plotted nine boundary pillars from Ras el Naqb to the shore. The map shows two pillars near to the shore on the ridge to the

east of Wadi Taba. A number of other details, such as buildings and ruins, also appear on the map.

78. Great Britain's Report for 1935 to the Council of the League of Nations on the administration of Palestine and Trans-Jordan described the south-western boundary of the mandated territory of Palestine in the following terms:

From a point on the Mediterranean coast north-west of Rafa, passing in a south-easterly direction to the south-west of Rafa, to a point west-north-west of Ain Maghara; thence to the junction of the Gaza-Aqaba and Nekl-Aqaba roads, from whence it continues to the end of the boundary line at the point of Ras Taba on the western shore of the Gulf of Aqaba.

This description was repeated in subsequent Reports for the years 1936 and 1937.

79. During the years 1935-38, the Survey of Egypt apparently conducted a survey in the Sinai to update the 1915 British Map and coordinate it with Egyptian maps of the southern Sinai regions at the scale of 1:100,000. A surveyor was sent to Taba to determine the course of the Taba-Mofrak road which had recently been improved for motorized vehicles. That road crossed over into Palestine in order to utilize the route up the Wadi el Masri in the Naqb el Aqaba, an area which Newcombe had not been permitted to survey in 1914. The surveyor's sketch map of the area submitted in these proceedings reproduced the same pillars as those shown on the 1915 British Map. The depiction of the boundary on the map itself, with most of its pillars, is very similar to that shown on the 1915 British Map. New details, however, of the topography in the Naqb el Aqaba appeared for the first time on this map.

80. During World War II, the British Army compiled all available survey data on trigonometrical points in Palestine, and included information obtained from the Survey of Egypt concerning points along the Sinai boundary. This information was then organized in the form of lists covering specified areas. The list relevant to the Sinai boundary was called Trig List 144.

81. During 1943, the British also apparently conducted two surveys: an aerial survey based on photographs taken in April 1943 and a detailed ground survey about which the Tribunal received little specific information. The aerial survey resulted in a large-scale map of the Aqaba area, including Taba, introduced by Egypt in these proceedings.

82. Following the war, a Foreign Office official, Mr. D. M. H. Riches, in a letter dated 16 April 1947 to Mr. W. Low of the Air Ministry, recalled the 1926 recognition by Great Britain that the delimitation of the frontiers of the mandated territory of Palestine in no way altered the line defined in 1906 and observed that "although the 1906 boundary-line was a Turkish creation, its position as the correct and suitable line between Palestine and Egypt has not been called into question since that time. The status of the countries which it divides has changed since 1906, but not the line."

83. It appears that a British military camp at Rafah, which apparently had grown in importance during World War II, extended over the 1906 frontier into Egyptian territory along a strip 2 miles wide by

7 miles long. In January 1947 the Governor of Sinai informed the Rafah camp Commander that he intended to construct a fence along the frontier in that area to prevent smuggling and that the fence would bisect the camp. The British authorities attempted to have the camp's perimeter fence continue to be deemed the frontier for practical reasons, but the Egyptian Minister of National Defence refused this request and reaffirmed the fixed nature of the frontiers of Egypt.

c. The Post-Mandate Period (1948-1982)

84. By 1947, the United Kingdom announced its intention to give up the Mandate for Palestine and requested the United Nations General Assembly to form a Special Committee to prepare recommendations on the question of the future government of Palestine. The Special Committee recommended a Plan of Partition with Economic Union, which the General Assembly adopted by its Resolution 181(II) of 29 November 1947.

85. With the end of the Mandate on 14 May 1948, the State of Israel was proclaimed as an independent State. The Act of Independence took effect at one minute after midnight of 14/15 May 1948. Military forces from neighbouring States simultaneously entered Palestine and informed the United Nations Security Council on 15 May 1948 that they intended to restore order. Hostilities between the forces of the new State of Israel and the Arab forces ensued. The United Nations Security Council ordered a truce, considering that the situation in Palestine constituted a threat to the peace within the meaning of Article 39 of the Charter of the United Nations, appointed a Mediator, and on 16 November 1948 decided to establish an armistice to facilitate the transition from the truce to a permanent peace in Palestine, calling upon the parties directly involved to seek agreement on the establishment of an armistice as a provisional measure under Article 40 of the United Nations Charter.

86. The General Armistice Agreement between Egypt and Israel was entered into at Rhodes on 24 February 1949. The Armistice Agreement established a general armistice between the armed forces of the two Parties and provided that no military or para-military forces of either Party were to pass over the Armistice Demarcation Line set forth in Article VI of the Agreement, nor elsewhere violate the international frontier. Article IV of the Agreement affirmed the following principle in its paragraph 3:

It is further recognized that rights, claims or interests of a non-military character in the area of Palestine covered by this Agreement may be asserted by either Party, and that these, by mutual agreement being excluded from the Armistice negotiations, shall be, at the discretion of the Parties, the subject of later settlement. It is emphasized that it is not the purpose of this Agreement to establish, to recognize, to strengthen or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine or any part or locality thereof covered by this Agreement . . .

87. Article V provided in part:

1. The line described in Article VI of this Agreement shall be designated as the Armistice Demarcation Line . . .

2. The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question.

88. Article VIII provided for the demilitarization of the area comprising the village of El Auja and vicinity. Paragraph 4 of that Article stipulated that “[t]he road Taba-Qouseima-Auja shall not be employed by any military forces whatsoever for the purpose of entering Palestine”.

89. A Mixed Armistice Commission was established to supervise the execution of the Agreement and maintained its headquarters at El Auja pursuant to Article X.

90. Finally, Article XI provided:

No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question.

91. Similar Armistice Agreements were thereafter entered into between Israel and Lebanon, Jordan, and Syria.

92. On 10 March 1949, shortly after the Armistice Agreement with Egypt was signed, Israeli military forces established a post at Umrash-rash (present-day Eilat). Each day thereafter a group travelled to Taba to fetch water, having reached an arrangement with the Egyptian officer there. During some of these visits, the Israeli soldiers and a Government press official took photographs of the area, several of which were placed in the archives of the Government of Israel and introduced in these proceedings. Some of the private photos by the soldiers were also introduced in these proceedings.

93. General Sadek Pasha of the Egyptian Army on 21 March 1949 directed a complaint about the use of the Taba well by Israeli soldiers to General Riley of the United Nations Truce Supervision Organization (UNTSO), which led to an investigation of the matter in conjunction with that of the Aqaba area in general. General Riley observed that there was no other road from Taba to Mofrak than passed through the Palestine side of the frontier and that Egyptian personnel used this route. For this reason, he suggested that Egypt continue to allow Israeli soldiers to draw water from the Taba well as part of this local arrangement. However, General Sadek Pasha decided instead to stop using the road between Taba and Mofrak, and closed off transborder access to the well, informing General Riley of this decision on 28 March 1949. Two days later the Mixed Armistice Commission decided that its Taba observer was no longer required.

94. During the so-called Sinai war of 1956, the General Assembly of the United Nations on 2 November 1956 adopted a resolution urging all parties involved in hostilities in the area to agree to an immediate cease-fire and urging all parties to the Armistice Agreements to withdraw behind the armistice lines. It thereafter decided on 5 November 1956 to form a United Nations Command for an Emergency International Force (UNEF) to secure and supervise the cessation of hostilities. Israeli forces ultimately withdrew from the Sinai and the Gaza Strip in

March 1957 and UNEF forces were deployed on the Egyptian side of the armistice line.

95. In order to fulfil UNEF's functions, UNEF officials erected barrel markers as navigation aids for its patrols at some locations along the armistice line. In many places, however, the border pillars had long since disappeared since no effort apparently had been made to maintain them since 1911 and several armies had crossed the frontier since then. These barrels were apparently therefore placed on the basis of the available map information. Surveys were conducted by UNEF in this area to place as accurately as possible the markers, but it was emphasized at all times that these markers were not necessarily placed "on the frontier". They also were movable, and some were later found to have shifted position with the sand dunes on which they were placed.

96. The Survey of Israel apparently conducted a thorough survey of the frontier area during May 1960, and placed new pipe markers at a number of points on the western side of the UNEF patrol route in the Kuntilla area. UNEF considered that its patrol route lay entirely on the western side of the armistice line.

97. Egypt introduced a large-scale map in Hebrew produced by Israel in 1964 showing the Taba and Ras el Naqb areas. This map also shows two pillars near the shore on the ridge above Wadi Taba, as well as essentially the same line, but with more pillars than depicted on the 1915 British Map and its derivatives. An Arabic version of this map, printed in 1967 at a scale of 1:50,000, was also introduced by both Parties, plotting the same two pillars near the shore at Taba, as well as all of the pillars in the Ras el Naqb area.

98. Little other information concerning the Taba area is available for this period. The Egyptian Army, which pursuant to its agreement with UNEF was deployed at least 5 kilometres from the armistice line, planned to make a comprehensive survey of the southern portion of the frontier in 1964, but ultimately desisted. No UNEF patrols covered the Taba area, and, except for occasional night patrols, no Egyptian forces visited Wadi Taba from 1956 until after the Treaty of Peace was signed in 1979. UNEF operations relevant to the present dispute ceased after the 1967 war, when UNEF was disbanded. The second UNEF force, established after the 1973 war, was deployed elsewhere in the Sinai until withdrawn after the conclusion of the Treaty of Peace.

99. The Treaty of Peace resulted from the Framework for the Conclusion of a Peace Treaty between Egypt and Israel, signed on 17 September 1978 at the end of the Camp David Conference. In the Framework, Egypt and Israel agreed, among other things, to the withdrawal of Israeli armed forces from Sinai and "the full exercise of Egyptian sovereignty up to the internationally recognized border between Egypt and mandated Palestine". The Treaty of Peace, concluded on 26 March 1979 as noted earlier, again defined the international boundary between Egypt and Israel, and expressed it in Article II in terms of "the recognized international boundary between Egypt and the former mandated territory of Palestine". Attached to the Treaty of Peace were a number of maps, including one on a scale of 1:250,000

indicating the international boundary. The name "Ras Taba", which had not appeared on any maps since before 1910, was printed at the southern end of the line.

100. The Joint Commission formed pursuant to the Treaty of Peace was charged with demarcating the boundary and it undertook this task in 1981-82. The Israeli Delegation to the Joint Commission proposed on 20 September 1981, in an outline for the working plan for Phase II of the Israeli withdrawal, and in relation to the demarcation of the international boundary and Lines A, B, and D, all defined in the Treaty of Peace, that "the work of the sub-committee on survey, including preliminary reconnaissance tours, plan and timetable for the marking of the International Boundary . . ." be continued, that the work method consist of "locating the existing border stones on aerial photographs and in sections where these boundary stones are missing to locate the points of the boundary according to the description in the 1906 agreement", and that the marking in the field and the setting of the remaining boundary markers be carried out.

101. Israeli survey teams conducted a preliminary reconnaissance of the state of the markers along the boundary and presented the results of these investigations, in the form of photograph albums, to Egypt during 1981. Joint inspections of portions of the boundary took place from October to December 1981. A report prepared by the Israeli delegation dated 8 November 1981 on Demarcation of the International Boundary stated that the starting point of work was the border stones situated along the line, noting that some were clearly "stones erected in 1906" and others were stones and markings erected at later dates. After the first week of work, only one border stone indicated by the Israeli surveyors had been confirmed by the Egyptian delegation and 18 others remained under study in that section of the boundary by the Egyptian survey experts.

102. By this time, according to the Israeli report, the Joint Commission and its sub-committee on the demarcation of lines had agreed upon two authentic sources for "the identification and delimitation of the International Boundary". The two sources, as described by the Israeli delegation, were first, "[t]he positions of the border stones erected in 1906", and second, where no border stones exist, the verbal description of the boundary in the 1906 Agreement. The same report observed that due to the low precision of survey methods in 1906, the positions of some stones were not as exact as they would be if the work were done today.

103. The survey teams continued their demarcation work during November 1981 and by 3 December 1981 reached agreement on locations for over seventy pillars along the boundary, including some new locations for original pillars and the locations for some additional pillars settled upon in order to mark more precisely the course of the boundary.

104. When the survey teams visited the Taba and Ras el Naqb areas on 3 December 1981, however, the Parties were only able to agree on the pillar locations of BP 83, BP 89, and BP 90, as well as the utility of a new pillar location north of BP 89, which they designated BP 88,

although they were not able to concur on the precise location for this new pillar. Following several attempts to reach agreement on the remaining locations during January, February, and March 1982, including efforts at the highest level of the Joint Commission, the Parties concluded their agreement regarding the initial procedure for resolving boundary questions, referred to above as the 25 April 1982 Agreement. The Joint Commission was thereafter apparently dissolved in accordance with the Treaty of Peace and its remaining functions transferred to the Liaison System established thereby.

5. *The Parker Pillar*

105. In the course of the proceedings, it became clear that a boundary pillar ("the Parker pillar") formerly existed at a location in the Taba area not recorded by either Party in Appendix A to the Compromis. The Parker pillar, identified from the Parker photographs and from maps, was located on a cliff which used to be above the shoreline in the Taba area. The cliff was removed during construction of the road along the western shore of the Gulf of Aqaba in about 1970. The pillar itself had apparently disappeared sometime after 1949 and before 1967.

106. Evidence for the existence of the Parker pillar was submitted by both Parties, and consists primarily of the Parker photographs from 31 December 1906, photographs of the pillar at the Parker location taken in 1949, and maps and survey information gathered at various times since 1914. The original field sheet from 1914 shows that the surveyor marked two pillar locations near the shore in the Taba area. But the tracing of that work only reproduces one pillar. The actual map, based on the tracing, also only shows one pillar, identified there as a boundary pillar, located at an elevation of 298 feet. The evidence indicates that the pillar was located at a trig point. The 1917 map of the Aqaba area also shows a trig point at an elevation of 298 feet, identified as a boundary pillar, but also another pillar on the cliff at the shore. The 1933 Mitchell map, introduced by Israel, clearly shows on a large scale the two pillars, identifying both as boundary pillars by their numbers BP 90 and BP 91, and their placement on the boundary line indicated on the map. Israel asserted during the oral proceedings that the 1943 ground survey identified the Parker pillar, but the actual survey information was not submitted to the Tribunal. Finally, a 1964 Survey of Israel map, introduced by Egypt, clearly shows pillars at both the Parker and at the BP 91(E) locations. The same applies to a 1967 map in Arabic, introduced by both Parties.

107. As already noted above, Parker took photographs of the first pillar erected at Taba on 31 December 1906, introduced by Egypt, and Israel introduced several 1949 photographs of the pillar at the Parker location. Both Parties observed that the photographs from 1906 and 1949 show differences in the pillars (the pillar shown in the 1949 photographs being shorter, having an iron flange extending out of the top, and a plaque stuck on the side with the number 91 engraved in it). The pillar shown in the 1949 photographs is substantially similar in these respects to the pillars shown in other photographs taken in the area, first that of a pillar numbered 90 and photographed by Beadnell in 1922, and second

those pillars numbered 85, 86, and 87 photographed by Egypt for these proceedings. On the basis of these differences, Israel alleges that new pillars must have been erected in the area sometime between 1907 and 1922, probably in 1917, and that these new pillars were not necessarily constructed at the same locations as the original telegraph poles or the masonry pillars that replaced them.

108. While a new pillar was erected at or practically at the location of the Parker pillar, Israel does not concede that the Parker pillar was legally a correct boundary pillar. Israel further alleges that the pillar erected at the location BP 91(E) and photographed by Beadnell in 1922 was not at the location of any boundary pillar in 1906 and that this location had originally been established as a trig point. Israel alleges that the constructor of the 1915 British Map may have taken the trig point for a boundary pillar and so erroneously indicated a boundary pillar at that location on the map. When replacement pillars were allegedly constructed in the area thereafter, Israel believes it was done on the basis of the pillars shown on the map, including the pillar shown at the elevation of 298 feet corresponding to BP 91(E). In the case of the replacement pillar at the Parker location, which was not shown on the 1915 British Map, Israel believes that this must have been done on the basis of whatever remains were present of the original Parker pillar. Egypt contends, for its part, that whatever the reasons for the construction of a new pillar at the Parker location and its different style from the original Parker pillar, the pillar at BP 91(E) marked on the 1915 British Map and photographed by Beadnell had always been a boundary pillar, supporting this conclusion with the indication by Wade that three pillars had been erected between the pillar placed on Jebel Fort and the pillar at the Parker location on Ras Taba at the locations of BP 89, BP 90, and BP 91(E), respectively.

D. *Contentions of the Parties*

1. *Egypt's Contentions*

109. Egypt, in its Memorial, made the following submissions:

In view of the facts, historical evidence, documents and the statement of law referred to in this Memorial; and

Considering that under the Compromis the Parties have requested the Tribunal to decide the location of certain boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, namely, Pillars 7, 14, 15, 17, 27, 46, 51, 52, 56, 85, 86, 87, 88 and 91; and

Considering further that each Party has recorded in its description cards in Appendix A to the Compromis its position concerning the location of each boundary pillar listed above;

May it please the Tribunal, rejecting all claims and submissions to the contrary, to adjudge and declare that the location of each such boundary pillar as set forth in the Egyptian description cards in Appendix A to the Compromis, as further described and identified in Part VI(D) of this Memorial, is the exact location of such boundary pillar on the recognized international frontier between Egypt and the former mandated territory of Palestine.

These submissions were reaffirmed in Egypt's Counter-Memorial, but the following submissions were set forth in the Egyptian Rejoinder:

. . . Egypt requests the Tribunal to adjudge and declare:

A. That BP 91, identified in the Compromis as being the one remaining pillar on the recognized international boundary between Egypt and the Former Mandated Territory of Palestine following agreed BP 90, is at the location set forth in the Egyptian description card in Appendix A to the Compromis and marked on the ground and is *not* at either of the alternative locations set forth in the Israeli description cards in Appendix A to the Compromis;

B. That the remaining boundary pillars in dispute on the recognized international boundary (as specified in the Annex to the Compromis) are at the locations set forth in the Egyptian description cards in Appendix A to the Compromis and marked on the ground and are *not* at the locations set forth in the Israeli description cards in Appendix A to the Compromis.

110. These two submissions were reiterated during the hearing.

111. Egypt contends that the task of the Tribunal under Article II of the Compromis is to identify the locations of the disputed pillars of the boundary defined in Article II of the Treaty of Peace. In Egypt's contention, the formulation of the boundary between Egypt and Israel as "the recognized international boundary between Egypt and the former mandated territory of Palestine" implies that 24 July 1922 is the critical date at which time the Tribunal must establish the factual location of boundary pillars as representing the legal boundary between Egypt and Palestine. This date, being the date when the Council of the League of Nations adopted the Mandate for Palestine, was selected since it constituted the first date on which the two distinct entities of Egypt and mandated Palestine could be said both to have attained status on the international plane. Egypt contends that this early date is the appropriate one in terms of application of the concept of the critical date. In the course of the proceedings, however, Egypt conceded that 14 May 1948, the date on which the Mandate expired, or any date within the period of the Mandate, could just as well serve as the critical date since the Parties were in agreement that no changes had occurred in the boundary during that period.

112. Egypt alleges that the Tribunal must weigh the claims of the Parties on the basis of the physical, geodesic, cartographic, photographic, documentary, and other evidence of the location of pillars on the ground on the critical date—as against whatever conclusions could be reached on the basis of evidence of the situation prior to the critical date—and in light of the conduct of relevant parties after the critical date, to the extent that such conduct confirms the understanding reached of what the situation was on the critical date.

113. Egypt alleges that the effect of application of the critical date concept is thus to fix the boundary in time and to bring into operation the general legal principles of the stability and finality of boundaries, the succession of States to territory, estoppel, acquiescence, and *de facto* agreement so as to preclude Israel's claims based on application of the terms of the 1906 Agreement.

114. With respect to the Taba area, Egypt contends that the location of BP 91 at "Ras Taba" is at an elevation of 91 metres on the

eastern ridge overlooking Wadi Taba, where remains of the boundary pillar were found in 1981 during the work of the Joint Commission. This location is identified on the relevant description card in Appendix A to the Compromis as BP 91(E).

115. Egypt alleges that this location is consistent with evidence of what the Commissioners in 1906 understood as "Ras Taba" and with the strategic considerations which underlay the negotiations concerning the course of the boundary line. Owen wrote that Ras Taba was "the point where the ridge north of Taba meets the sea". Owen had moreover rejected during the negotiations the Turkish proposal that the line run down the thalweg of the Wadi. Egypt points out that the text of the 1906 Agreement speaks of the line running along the eastern ridge, not in the Wadi. Egypt does not consider the granite knob as part of the eastern ridge, but rather as an isolated feature in the bed of the Wadi.

116. Egypt draws support for its location for BP 91 from the 1915 British Map, which plotted a boundary pillar at the location of BP 91(E) and does not show any further pillar nearer to the shore. Egypt points out that pre-1915 maps do not indicate the location of any boundary pillars on the line except those which were placed at Wade's astronomical stations and used subsequently as points of reference for the delimitation and demarcation of the line. Egypt also considers that pre-1915 maps are not accurate in the sense that the topographical features on the maps are shown by conventional symbols rather than the more precise contour lines produced by the plane table survey methods employed in preparation of the 1915 British Map, even though most of these pre-1915 maps clearly indicate that the boundary line did not end close to an astronomical station at Taba, as Israel contends.

117. Egypt further alleges that a boundary pillar is plotted at the location of BP 91(E) on all maps produced since 1915 showing boundary pillars along the boundary line. The maps submitted by Egypt in this category include the original 1915 British Map, a 1922 oil-concession map based on the 1915 British Map, a reproduction of the 1915 Map made by the Survey of Egypt in 1926, and a revised version prepared on a larger scale by the Survey of Egypt between 1935 and 1938. Egypt noted that the 1917 map and the 1933 Mitchell Map introduced by Israel both show a boundary pillar at the location BP 91(E). A large-scale map including the Taba area and produced by the British War Office in 1943 also plotted a boundary pillar at an elevation of 91 metres at the location of BP 91(E). Large-scale maps produced after the Mandate period, showing the armistice line, also indicate a pillar at BP 91(E), including the map attached to the Compromis.

118. Egypt draws further support for BP 91(E) from lists of surveyed trigonometrical points in the region which identify the location of BP 91(E) as a boundary pillar. A list of triangulation points in the vicinity of Aqaba and a sketch of those positions was found in the archives of the Survey of Egypt, together with a copy of an unsigned letter dated 6 December 1931 addressed to the Acting Director of Surveys of the Survey of Palestine, in response to a request dated 27 November 1931. The sketch, on a scale of 1:40,000, shows triangulated

boundary pillars identified as A.3, B 83, B 85, and B 90. Written in pencil next to these locations, evidently by a different hand, are the labels L 193, L 192, L 191, and L 190, respectively. The list enclosed with the letter gives "provisional final values" for the four boundary pillars plotted on the sketch, plus a boundary pillar at A.4 not shown thereon, with altitudes in feet. For B 90, the values given are: Latitude $29^{\circ}29'36.8''$, Longitude $34^{\circ}54'07.3''$ with an altitude of 298 feet.

119. Egypt also submitted a photocopy of a survey card with the name of Dr. Ball on it, showing the same coordinates as on the 1931 list, expressed however to the nearest hundredth of a second and showing the elevation in metres rather than feet. Egypt alleges that this card was made in 1941, although a witness for Israel testified that Dr. Ball had retired from the Survey of Egypt by 1936. The card also shows that the original coordinates were later revised by someone using a different pen and slightly different handwriting to read: Latitude $29^{\circ}29'35.66''$, Longitude $34^{\circ}54'07.15''$, altitude 91.65 metres. Three sets of grid coordinates, also apparently later added to the card, are also given.

120. Egypt also produced the first edition of Trig List No. 144, "probably produced during 1941-45 and probably before 1943" by a British military survey organisation established in 1941: the Survey Directorate of the General Headquarters Middle East. The list has been described as "a compendium of survey information, some pre-[World War II], some wartime revision. The earliest material is information drawn from the work of the civil Surveys of Palestine and Egypt." The list, consisting of two pages, shows rectangular coordinates of trig points on the Palestine Grid. It gives coordinates and heights for each point to the nearest metre. The last entry on the list shows a "third order" trig point identified as a boundary pillar, labelled 190, with the coordinates Eastings 140 295, Northings 878 478, and height of 91.6 metres. A second edition of this list, consisting of 19 pages, was prepared in 1956, covering a larger area and superseding former trig lists, including the first edition of Trig List No. 144. The same values for boundary pillar 190 are found on page 17 of the second edition of the list.

121. On 10 August 1960, Major General Amin Hilmy II, Commander of the Egyptian Liaison to UNEF, wrote to Lt. General P. S. Gyani, Commander of UNEF, enclosing a list of surveyed points of the international frontier between Egypt and Palestine intended to assist UNEF in its identification of the international frontier. This list included an entry for a boundary mark identified as point L190 with coordinates from the 35th Meridian East of $x = 1043\ 829.86$, $y = 290\ 495.24$, altitude 91.65 metres, in these proceedings, uncontestedly assumed to be equivalent to the values shown on the 1931 list, to those shown on Dr. Ball's survey card for the Egyptian Grid coordinate system, and to those expressed for the point in Trig List No. 144, which used the Palestine Grid system. Egypt alleged that General Hilmy's list would presumably have been transmitted to Israel by UNEF, although no direct evidence for this was produced from UNEF files.

122. The existence of a boundary pillar at the location of BP 91(E) is also supported by a photograph of the pillar made in 1922 by Beadnell,

of the Survey of Egypt, and a photograph from the Israel Government Press Office, dated March 1949. General Hamdy, a witness for Egypt, stated that in 1949 there was only one pillar in the Taba area, not near the sea but up on the mountain at the side of BP 91(E). The testimony of Mr. Yigal Simon, a witness for Israel, that a pillar taken to be a boundary pillar was on the site in 1966-67 was also cited by Egypt in support for its location BP 91(E).

123. Egyptian presence in the Wadi was demonstrated by reference to the establishment of an outpost in 1914 and after 1917 a Frontier Districts Administration post, as well as the guest house outfitted near the granite knob in 1932 and the continuous military presence from 1949 to 1956.

124. Finally, Egypt invoked the description given by J. M. C. Plowden in her book *Once in Sinai* published in 1940, where she writes on page 281: "Shortly after quitting Taba we passed round the base of a high hill upon whose summit a cairn marks the frontier. There is, however, nothing on the beach to indicate the exact moment when we crossed into Palestine."

125. The conduct of Israel with respect to the line in the Taba area is also invoked by Egypt to demonstrate the understanding of the line by the Parties. Egypt notes that Israel withdrew from Sinai, including Taba, in 1957 and established its forces behind the ridge east of Taba. A Background Paper on the Gulf of Aqaba, submitted by the Israel Ministry of Foreign Affairs to the Secretary-General of the United Nations in May 1956, described the frontier between Egypt and Israel as running "from a point south of Umm Rash Rash in a northeasterly direction" that "coincides with the former international frontier between Palestine and Egypt, confirmed by the General Armistice Agreement . . . of 24 February 1949".

126. In the Ras el Naqb area, Egypt contends that the existing pillars at the locations claimed for BP 85, BP 86, and BP 87 are fully consistent with the terms of the 1906 Agreement and the descriptions of the demarcation operations given by Owen and Wade. Wade provided a technical description of how he laid out the line in this area with a chain and prismatic compass in order to comply with the description of the boundary in this area contained in Article 1 of the 1906 Agreement.

127. More importantly, in Egypt's view, its pillar locations are plotted on the 1915 British Map and in subsequent maps referred to above. In addition, Egypt alleges that all maps produced prior to the dispute, including the pre-1915 maps and maps prepared between 1948 and 1982 by the Survey of Israel, show the line as claimed by Egypt and readily distinguishable from the line as claimed by Israel, no matter the scale of the map.

128. The same trig lists as mentioned above contain similar information concerning certain of the boundary pillars in this area. For instance, the list accompanying the 1931 letter refers to a station B 85, identified also on the sketch as L 191. The equivalent coordinates for this point also appear in Dr. Ball's survey cards, both editions of Trig List No. 144, and General Hilmy's letter. The coordinates thus given

correspond to BP 85(E). Similarly, the coordinates for BP 87(E) appear in Dr. Ball's survey cards as a boundary mark 87 or L 113 and also in General Hilmy's letter, but in neither occasion with a given altitude.

129. Egypt also invokes Israeli conduct in this area since the 1949 Armistice, in particular the withdrawal in 1957 behind the line indicated by the pillars now asserted by Egypt as representing the boundary. In addition, Egypt notes that UNEF forces were deployed in the area and presented three witnesses who had participated in the Yugoslav battalion of UNEF stationed in the Ras el Naqb area. Two of these witnesses testified that their camp, patrol routes, and an observation post in the area were all located to the east of the line now claimed by Israel, which would have been inconsistent with Israel's requirement at the time that UNEF only be deployed west of the armistice line, i.e. on Egypt's side of the line.

130. Egypt moreover contends that BP 88 should be placed at the location identified as BP 88(E) since that corresponds to the coordinates and the angle of the turning point of the line derived from the 1935-38 map, which Egypt alleges was the rationale for the agreement of the Parties in the Joint Commission to erect a new pillar at that location. Egypt contends in this connection that Article 1 of the 1906 Agreement does not provide guidance for the location of this pillar between BP 89 and that on Jebel Fort as, in Egypt's interpretation, the text does not indicate that the "eastern ridge" or Wadi Taba extend any further than a point about 600 metres north-west of BP 89.

131. With respect to the nine disputed pillars north of the Ras el Naqb area, Egypt bases its claimed locations on a variety of reasons.

132. For disputed boundary pillars nos. 7, 14, 15, and 17, Egypt does not find any physical evidence at the places it believes the pillars should be located and disputes the relevance of the UNEF markers or other alleged remnants invoked by Israel at the corresponding disputed locations. The basis for Egypt's claim at each of these locations is the indication of a boundary pillar on its 1935-38 map of the area.

133. Egypt states that the 1935-38 map, as well as all other pre-Peace Treaty maps, uniformly show a straight line between BP 3 and BP 14. BP 7(E) and BP 14(E) both are located on this straight line, whereas the locations claimed by Israel diverge from this line. Egypt also alleges that the Joint Commission agreed to apply the criterion of straightness for the location of boundary pillars in this area.

134. Egypt determined its location for BP 15(E) by measuring the angle of the change in direction of the line at BP 14 shown on the 1935-38 map as well as the distance from the mark for BP 16, and then applying that data by electronic measuring means to the ground. Egypt alleges that this location is confirmed by assessing the coordinates for the pillar indicated on the map.

135. Egypt's case for BP 17(E) is based again on the 1935-38 map, which it alleges shows a boundary pillar at a certain distance on the prolongation of the straight line drawn from BP 19 through BP 18 towards the location for BP 17. By measuring the distance shown on the

map and applying it along the straight line on the ground, Egypt alleges that it has established the location for BP 17(E).

136. For BP 27(E), Egypt bases its claim on a cement trig point marker found at the location in 1981 and the information contained on one of Dr. Ball's survey cards, Trig List No. 144, and the list attached to the Hilmy letter, all of which indicate that the boundary marker at this location was used as a trig point.

137. For BP 46, 51, and 56, Egypt bases its claims on remnants of the original pillar found at each of these locations piled a few metres from the pipe marker or remnants invoked by Israel. Egypt contests the relevance of such pipe markers.

138. Egypt's cases for BP 46(E) and BP 56(E) are based on the pile of stones found at each site in 1981. Egypt also alleges that BP 46(E) lies on the prolongation of a straight line extended from BP 48 through BP 47 to BP 46(E), as shown on the 1935-38 map.

139. Egypt's claim for BP 51(E) is based, first of all, on measurements of distances and angles derived from the 1935-38 map and applied to the ground with electronic devices. Egypt also alleges that the location thus derived is confirmed by the presence of remnants of the original boundary pillar found at the site.

140. Finally, Egypt's case for BP 52(E) is based on the depiction on all pre-1982 maps of a straight line in this region between BP 51 and BP 53. Egypt derives its location on the straight line from measurements taken from the 1935-38 map and applied to the ground between disputed location BP 51(E) and agreed BP 53.

2. *Israel's Contentions*

141. In its Memorial, Israel requested the Tribunal:

to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine specified in paragraph 1 of the Annex to the Compromis

(i) as being at the locations advanced by Israel and indicated in Appendix A to the Annex of the Compromis and/or

(ii) as not being at the locations advanced by Egypt and indicated in Appendix A to the Annex of the Compromis.

In its Counter-Memorial, Israel submitted that:

The Tribunal should decide that:

Principal submissions:

1. *As regards BP 91: . . .*

a. Egypt has abandoned its claim to a location for BP 91 at the point identified by Egypt as BP 91 E in the relevant Egyptian description card in Appendix A of the Compromis;

b. The claim by Egypt to a location for BP 91 at a point other than BP 91 E is not admissible;

c. In the absence of any admissible claim by Egypt to a location for BP 91 conflicting with Israel's claim to a location for BP 91 at either of the locations identified on the Israeli description cards as BP 91 I (G.K.) or BP 91 I (B.T.), the location of BP 91 is at one or the other of the latter locations.

2. *As regards the Boundary Pillars other than BP 91:* for the reasons set out in Chapters 9 of the [Israeli Memorial] and Part V of the present Counter-Memorial,

the Boundary Pillars other than BP 91 are at the locations advanced by Israel and indicated in Appendix A to the Annex of the Compromis.

3. Further or in the alternative, as regards all the disputed Boundary Pillars, they are not at the locations advanced by Egypt and indicated in Appendix A to the Annex of the Compromis.

Alternative submission:

As regards all the Boundary Pillars specified in paragraph 1 of the Annex to the Compromis,

(i) the pillars are situated at the locations advanced by Israel and indicated in Appendix A to the Annex of the Compromis and/or

(ii) the pillars are not situated at the locations advanced by Egypt and indicated in Appendix A to the Annex of the Compromis.

Israel reaffirmed these submissions at the end of its Rejoinder and during the hearing.

142. With respect to the task of the Tribunal, Israel contends that the Tribunal must decide, in conformity with Article II of the Compromis, the course of the legal boundary adopted by the Parties in Article II of the Treaty of Peace and express the line in terms of the location of boundary pillars where these are in dispute. The legal boundary, according to Israel, is “the recognized international boundary” which separated Egypt from the mandated territory of Palestine.

143. Israel alleges that Great Britain, as mandatory power in Palestine, and Egypt had both explicitly recognized in 1926 the line defined in 1906 as that boundary, and that Great Britain had assured Egypt that its boundary would not be affected by the delimitation of the boundaries of Palestine. By virtue of a *renvoi*, or referral, to the 1906 Agreement made by Egypt and Great Britain in 1926, and in the absence of any explicit agreement between Egypt and Great Britain defining the frontier of Egypt and Palestine, Israel contends that the Tribunal is, pursuant to the Treaty of Peace and the Compromis, referred to the terms of the 1906 Agreement to determine the course of the legal boundary. For Israel, any pillars or pillar remains which are at variance with the terms of the 1906 Agreement are of no significance since no pillars of whatever nature, type, or designation were ever recognized as boundary pillars during the period of the Mandate, which Israel agrees is the legally relevant period according to the Treaty of Peace for the definition of the boundary between Egypt and Israel. Israel further contends that the several conventions between the Parties related to the boundary, with their implicit reference to the 1906 Agreement, are sufficient for the Tribunal’s task and that the Egyptian reliance on general principles of law is unnecessary.

144. In the Taba area, Israel contends that BP 91 is on the granite knob at a location intervisible with BP 90, identified on the relevant description card. This location, while approximate in the sense that it falls within a small zone near to the shore intervisible with BP 90, is supported by its proximity to the geographical feature identified by Israel as “Ras Taba”, being the promontory or cape on which the granite knob is located. The combination of these factors satisfies the conditions laid down by the 1906 Agreement: the description of the course of the boundary line contained in Article 1 as “at the point of Ras

Taba on the western shore of the Gulf of Akaba” and the requirement of intervisibility between pillars set forth in Article 3.

145. Further support for this location is drawn from the contemporaneous reports made by Owen and Wade in 1906 and 1907 respectively regarding Ras Taba and in the description given by Shoucair in his 1916 book that the 91st pillar was placed “on a small hill” which the Commissioners had named “Ras Taba”.

146. Israel also draws support for BP 91(I) on the granite knob from several maps produced soon after the demarcation of the boundary in October 1906. The map attached to Owen’s Report is captioned “map annexed to the Agreement of 1st October 1906”. This map, as well as the map attached to the Wade Report, the 1909 Turkish military map, and the 1916 Turkish-German map, show the line ending at a triangle, which in the context could only represent Wade’s astronomical station A.1 or B.1. Israel contends that the triangle represents B.1.

147. Israel finds confirmation of its claim for BP 91 on the granite knob in the description of Egyptian boundaries contained in the *Statistical Yearbook of Egypt for 1909*, which reads in relevant part:

East.—The boundary follows the line laid down in 1907 from Rafa, near El Arish, to the head of the Gulf of Aqaba at Taba (lat. 29°29’12” N. and long. 34°55’05” E., granite knob on the shore). Thence down the Red Sea . . .

148. Israel alleges that additional evidence indicating a Turkish police or frontier post down in the Wadi during the years immediately following the 1906 Agreement supports the conclusion that the 1906 line ended at BP 91(I) on the granite knob. In this connection, Israel cites the guidebook by Meistermann, *Guide du Nil au Jourdain*, published in 1909 (repeated in 1913), at page 190:

On laisse à gauche le ouâdi Mezarik (1h. 10), puis on arrive au ouâdi Tabah (15 min.), qui possède un puits d’eau saumâtre entouré de quelques palmiers doums, et une citerne en bonne maçonnerie. Cet endroit acquit une certaine notoriété en 1906. Les troupes turques l’avaient occupé, malgré les protestations des Anglais; définitivement il est resté dans le territoire égyptien. Mais en deçà de l’oasis passe la nouvelle frontière de l’empire ottoman, sur laquelle veille un poste de soldats turcs, casernés dans un petit fort.

La route fléchit vers l’est et contourne un petit cap, râs el Masri, traversé par la gorge du naqb es Sath (1 h.). Dans la direction du nord court une chaîne de basalte, de granit et de porphyre d’une coloration remarquable . . .

A similar description found in Baedeker’s *Palestine and Syria* (5th ed. 1912), also invoked by Israel, reads at page 213:

In about 1 hr. 10 min. we reach the *Wâdi Mezârik*; 1/4 hr. the *Wâdi Tâba*, with a bitter spring and dûm-palms. Close by is a cistern of red stone. Just beyond is the Egyptian-Turkish frontier, with a Turkish military post. The *Râs el-Masri*, a promontory of dark stone, is rounded (1 hr.) . . .

Israel suggests that a rest house located next to the granite knob and prepared from “an old building” for visiting officials by the Egyptian Frontier Districts Administration in 1932-33 may be a reference to the Turkish military post noted by Meistermann and Baedeker. Further, Israel cites the April 1913 *Sudan Intelligence Report*, a centralized British compilation of reports from agents throughout the Middle East, where on page 6 “[i]t is reported that . . . a Pasha with two guns have

arrived at Akaba. The guns are said to have been placed in position at Taba and on J. Bereio.”

149. Finally, Israel submits a photograph published in June 1946 in *Western Arabia and the Red Sea*, part of the Geographical Handbook Series prepared by the British Naval Intelligence Division, showing the rest house near the granite knob and a “cairn”, which itself, although not alleged to be a boundary pillar, is alleged to be related to the boundary and intervisible with BP 90.

150. Israel also contends, in the alternative, that BP 91, if it is not found by the Tribunal to have been located at the granite knob, must have been located at the site near Bir Taba identified in the description cards, which site is also intervisible with BP 90.

151. Apart from satisfying the conditions of the 1906 Agreement, Israel contends that the alternative location is supported by several descriptions of the boundary made by officials of the British Government during the Mandate period which all mention “Bir Taba” in conjunction with the boundary line. The first of these descriptions is found in another volume of the Geographical Handbook Series in December 1943 on *Palestine and Transjordan*. The book describes the southern and south-western boundaries of Palestine at page 1 as extending “[f]rom Akaba along the gulf to Bir Taba and then north-westwards to the Mediterranean immediately north-west of Rafa . . .” It likewise describes at page 522 the Sinai-Palestine frontier in the vicinity of Aqaba as running “north-west from Bir Taba, about 8 miles south-west of Akaba round the coast of the gulf”. Furthermore, on 16 September 1945, in response to an inquiry from the Colonial Office prompted by a request for information from the Anglo-Iranian Oil Company, a Foreign Office official minuted his response regarding “the actual length of the coast line in the Gulf of Aqaba deemed to be Palestine territory” by stating that “[t]he Palestinian coast line on the Gulf of Aqaba extends from a point two miles west of the village of Aqaba as far as Bir Taba . . . The frontier between Egypt and Palestine follows the former boundary between Egypt and the Ottoman Empire, as drawn in 1906 . . .” On 17 September 1945, the Map Section of the Research Department of the Foreign Office issued an inter-departmental memo to the Eastern Department describing the Palestine-Transjordan boundary as running along the coast west and south-west “a distance of 6 1/2 miles to Bir Taba”, where the Palestine-Sinai boundary leaves the coast and runs in a north-west direction. A Note describing the boundaries in the neighbourhood of Aqaba was attached to the minutes of a meeting held on 30 October 1945 in the Colonial Office. The Note states that the Palestine-Egypt boundary follows the old boundary between Egypt and the Ottoman Empire. “It leaves the Gulf of Aqaba at Bir Taba and then goes north-westwards to the Mediterranean.”

152. In the Ras el Naqb area, Israel contends that the existing pillars on the ground are not properly situated in respect to the geographic features of Wadi Taba and its eastern ridge, Jebel Fort, Jebel Fathi Pasha, and the Mofrak, invoked in the description of the course of the line contained in Article 1 of the 1906 Agreement. According to

Israel, the pillar locations claimed by Egypt in this area are not on the boundary line because they do not overlook Wadi Taba from the east, and are not located on Jebel Fort or near Jebel Fathi Pasha as stipulated in the 1906 Agreement. Moreover, Israel contends that the burden of proving the authenticity of the existing pillars lies with Egypt.

153. Israel alleges that Wadi Taba extends nearly as far north as the edge of the Ras el Naqb plateau near to the Nekhl road and that, according to the terms of Article 1 of the 1906 Agreement, the disputed pillars placed from Ras Taba up to or close to Jebel Fort must have been on the heights overlooking the Wadi, as are the pillars at the agreed locations of BP 89 and BP 90. Israel contends that Wadi Taba, in its upper reaches, follows a drainage line which does not bear any name on any maps. Israel further alleges that it could not be either of the tributaries identified on some maps as Wadi Gasairiya or Wadi Haneikiya. Support for this contention is drawn from Owen's understanding of the extent of Wadi Taba as shown by his "rough map" of the area included with his letter to Lord Cromer of 3 June 1906 and from his description of nearby features, such as Jebel Fathi Pasha, overlooking part of Wadi Taba.

154. The feature of Jebel Fort, in Israel's view, overlooks the beginning of Wadi Taba and is represented on the map attached to the Wade Report of 1907 at Israel's location for BP 86. Israel also argues that its location is on the real Jebel Fort since the feature better satisfies the description of a fortress.

155. Likewise, the feature of Jebel Fathi Pasha, in Israel's view, dominates the Ras el Naqb area and coincides on the Wade Map with Israel's location for BP 85. Further support for this assertion is found in Owen's and Wade's descriptions of the area. While the 1906 Agreement stipulates that the line passes within 200 metres of the summit of Jebel Fathi Pasha and the Owen and Wade Reports indicate that two pillars were erected in this locality, Israel, after having added a pillar location (BP 87(I)) south of its location for Jebel Fort, now claims only one pillar location in order to respect the number of pillars agreed to by the Joint Commission.

156. The locations of BP 88(I) and BP 87(I) were selected in light of the description in Article 1 of the 1906 Agreement that the line from Ras Taba to Jebel Fort "follows along the eastern ridge overlooking Wadi Taba"

157. In response to Egypt's reliance on the deployment of UNEF forces, Israel contends that this is evidence only of the course of the armistice line which was established without prejudice to the political frontier between Egypt and Israel.

158. With respect to the pillars north of the Ras el Naqb area, Israel bases its claims on a variety of reasons.

159. Israel's claim for BP 7(I) is based on concrete remains of an authentic pillar and the proximity of a UNEF barrel marker, found about 9 metres west of the base of the hillock on which BP 7(I) is located. Israel alleges that UNEF markers constitute strong, though not irrefut-

table, evidence of the boundary. Israel also alleges that all pillars in this area were agreed to on the basis of remnants and not straight lines.

160. Israel's case for BP 14(I) is based on the discovery at the site in 1981 of a concrete-filled pipe of the same type agreed to indicate the locations of BP 8, 11, and 16 and all apparently UNEF pipe markers. Israel also alleges that BP 14(I) was a boundary pillar/trig point coordinated by the Survey of Egypt and included as a boundary pillar location in the Hilmy letter.

161. For BP 15(I) and BP 17(I), Israel's claims are based on slight remnants of an authentic boundary pillar and corroborated by unspecified information drawn from a UNEF survey.

162. Israel's case for BP 27(I) is based on an inference drawn from a 1955 Israeli survey description card that the authentic pillar was next to the cement trig point marker found on the site in 1981 and advanced by Egypt as BP 27(E). The survey card contains a sketch of the cement trig point and the old pillar. The pillar shown on the sketch was not at the site in 1981. The location of BP 27(I), taken to be the location of the old pillar, was derived by extending lines through multi-layered concrete pyramid markers placed along the armistice line in this area by Israel before 1956. BP 27(I) is the point where these lines intersect.

163. Israel's claimed locations at BP 46(I), BP 51(I), BP 52(I), and BP 56(I) are based on various steel pipes or the remains of their concrete bases erected by Israel in the early 1960s to mark the armistice line. Israel alleges that such steel pipes marked the agreed locations of BP 42, 43, 44, 49, 53, and 55. Israel disputes the relevance of the piles of stones found near to the pipe markers at BP 46(I), BP 51(I), and BP 56(I) on the grounds that no base of an original pillar was found under the stones to indicate the location of the original pillar, as was the case at other agreed locations. Israel alleges that the original base was used in each instance for the pipe markers and that the stones were displaced for this purpose.

II. REASONS FOR THE AWARD

A. *Preliminary Issues*

1. *The Task of the Tribunal*

164. Article II of the Compromis states:

The Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex.

165. The relevant Article II of the Treaty of Peace of 26 March 1979 stipulates, *inter alia*:

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the status of the Gaza Strip. The Parties recognize this boundary as inviolable . . .

166. Article IV(3) of the Treaty of Peace provides that a “Joint Commission will be established to facilitate the implementation of the Treaty, as provided for in Annex I [concerning Israeli withdrawal and security arrangements]”.

167. The 1982 Agreement specifies that “[r]epresentatives of the United States Government will participate in the negotiations concerning the procedural arrangements which will lead to the resolution of matters of the demarcation of the International Boundary between Mandated Palestine and Egypt in accordance with the Treaty of Peace, if requested to do so by the parties”. (See also Article IV(3)(d) of the Appendix to Annex I to the Treaty of Peace.)

168. The demarcation matters referred to in the 1982 Agreement are reduced in the Annex to the Compromis to the location of fourteen “boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine” (see also the preamble to the Compromis).

a. *Meaning of the phrase “the recognized international boundary between Egypt and the former mandated territory of Palestine”*

169. The formula concerning “the recognized international boundary between Egypt and the former mandated territory of Palestine” originated in the 1978 Camp David Accords and was repeated, in a slightly revised form, in the 1979 Treaty of Peace and the 1986 Compromis. This description of the boundary is not very clear or specific, particularly the word “recognized” is in the context ambiguous.

170. As has been stated above in paragraph 143, Israel submits that both Great Britain, as mandatory power, and Egypt in 1926 explicitly recognized the line defined in 1906 as the boundary between Egypt and Palestine. By virtue of this *renvoi* to the 1906 Agreement, Israel contends, the Tribunal is referred to the line defined in the 1906 Agreement, not to the boundary pillars established pursuant thereto. The Tribunal cannot share this view. First of all, the expressions “defined in 1906” and “defined by the 1906 Agreement”, which were used in British and Egyptian declarations in 1926, do not have a particular technical meaning in the sense that they refer only to the description of the boundary line in the Agreement to the exclusion of the demarcation of the boundary also expressly provided for by the 1906 Agreement. It can hardly have been the meaning of the declarations of Great Britain and Egypt in 1926 that the demarcation of the boundary, as it took place in 1906-07, could be disregarded. It is important in this respect that both Great Britain and Egypt were well acquainted with the demarcated boundary. Egypt had taken part in the demarcation of the boundary. Both States had made surveys and produced maps of the region, both before and during the time of the British Mandate over Palestine. The 1915 British map and the 1926 and 1935-38 Egyptian maps even indicate the location of boundary pillars. Neither State ever questioned the demarcated line.

171. It would also hardly be understandable why the Treaty of Peace and the Compromis should refer to “the recognized international

boundary between Egypt and the former mandated territory of Palestine” if reference could just as well have been made directly to the 1906 Agreement. Moreover, Israel’s contention that the boundary line proposed by it corresponds to “the legal line” as defined by the 1906 Agreement, while the Egyptian line, which in its southern part is based on boundary pillars, deviates from the Agreement, has not been confirmed by the evidence submitted to the Tribunal, as will be shown later in the Award.

172. The Tribunal will therefore have to decide the locations of the fourteen boundary pillars on the basis of the boundary between Egypt and the former mandated territory of Palestine as it was demarcated, consolidated, and commonly understood during the period of the Mandate (29 September 1923–14 May 1948, also referred to as “the critical period”). Although both Parties referred to 24 July 1922 as the starting date of the Mandate, the Tribunal considers that 29 September 1923, the date of the formal entry into force of the Mandate, is the appropriate date in the circumstances.

173. In so far as there are doubts as to where the boundary pillars stood during the period of the Mandate or for confirmation of its findings, the Tribunal, for its part, will also consider the 1906 Agreement, but merely as an indice among others, as to what was the situation on the ground during the critical period. In the same way, the Tribunal will consider any relevant evolution with regard to the delimited and demarcated boundary prior to the critical period.

174. In this context it is worth mentioning that even when the Annex to the Compromis refers to “the final boundary pillar No. 91” it adopts literally and without qualifications the following words from the translation of the 1906 Agreement included in Owen’s General Report: “at the point of Ras Taba on the western shore of the Gulf of Akaba”.

175. Events subsequent to the critical period can in principle also be relevant, not in terms of a change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period. However, in the present case the Tribunal has felt it to be of only limited use to consider events belonging to the troublesome period after the termination of the Mandate and during which period also the nations involved were not the same as before.

b. *Restrictions imposed upon the Tribunal concerning the locations advanced by the Parties*

176. The Annex to the Compromis provides further that the Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A. The Parties agree that, if the evidence of one Party is not conclusive in itself, the Tribunal has to weigh the evidence of one Party against that of the other, and the decision will be in favour of the Party with the “better” claim. However, it has also been proposed by Egypt, with Israel in opposition, that this power to decide according to the “relative weight” of evidence may be translated into physical distance,

namely: if there is no proof for locations A and B claimed by the respective Parties, but there is proof for location C which is physically nearer to A than to B, the Tribunal may attribute this evidence to A and consider this as “preponderance of evidence”. The Tribunal does not consider it to be either logical or reasonable to draw such conclusions. The “preponderance of evidence” rule means that the Tribunal may find for location A in the above example if the evidence for A is stronger than the evidence for B. But if there is no evidence for A, it cannot be replaced by evidence for C, even if C is physically nearer to A than to B.

177. The Tribunal must also consider the meaning of the word “address” in the following sentence in paragraph 5 of the Annex: “The Tribunal . . . is not authorized to address the location of boundary pillars other than those [fourteen] specified in paragraph 1.” Does this mean that the Tribunal may not discuss any other pillar, or does it mean merely that the Tribunal may not adopt any decision concerning other pillars? The Tribunal holds the second interpretation to be the correct one. The word “address” appears also in paragraph 1 of the Annex. There, the Parties state that the location of pillars 26 and 84 depends on the location of pillars 27 and 85 respectively, and that therefore “the Tribunal shall not address the location of boundary pillars 26 and 84”. Certainly, in this context the prohibition to “address” those pillars concerns only the adoption of a decision on their location. It is only logical that the word “address” should be given the same interpretation in two paragraphs of the same Annex. Hence, the Tribunal is not precluded from discussing “other” locations, but it may not adopt any decision on their location. In particular, the Tribunal has not the task to determine the course of the boundary from BP 91 to the shore and beyond.

2. *The admissibility of Egypt’s claim for BP 91(E)*

178. Egypt produced with its Memorial the so-called Parker photographs (see paragraphs 105-108 above) and submitted that they established the location of BP 91(E), because the pillar shown therein was at or in the immediate vicinity of BP 91(E). Israel could conclusively demonstrate that the Parker photographs are not related to BP 91(E). They show instead a pillar erected 284 metres apart from the location BP 91(E) in horizontal distance and 64 metres in vertical distance. Israel argues that Egypt, by claiming a location for BP 91 at the site of the Parker pillar, had abandoned its claim to BP 91(E) and hence to any location of which the Tribunal is permitted to take cognizance. In procedural terms, Israel in effect asks the Tribunal to declare that the Egyptian claim for BP 91(E) is no longer admissible because Egypt was now asking for another location and that, in the absence of an admissible Egyptian claim to a location for BP 91, the Tribunal must find in favour of one or the other of the Israeli locations.

179. Egypt states that it is a blatant distortion of Egypt’s position to maintain that Egypt has abandoned its claim to BP 91(E). In its Memorial, Egypt submits that the Tribunal should “adjudge and declare that the location of each such boundary pillar as set forth in the Egyptian description cards in Appendix A to the Compromis . . . is the exact

location of such boundary pillar on the recognized international frontier". In the final paragraph of the Egyptian Counter-Memorial, Egypt reaffirms its "Submissions" in the Memorial. And once again in the "Submissions" in the Egyptian Rejoinder, Egypt requests the Tribunal to adjudge and declare that "BP 91 . . . is at the location set forth in the Egyptian description card in Appendix A to the Compromis".

180. Egypt submits that at the time when the Memorial was prepared, Egypt was unable to identify precisely where, on the eastern ridge overlooking Wadi Taba, the site of the original pillar shown in the photographs was. This explains why, in the Memorial, the Parker photos were cited as demonstrating conclusively that neither of the claimed Israeli locations for BP 91 could be correct and as indicating the existence of a pillar "at or in the immediate vicinity of the location indicated by Egypt".

181. It follows from these contentions that Egypt, when it submitted with its Memorial the Parker photographs, was erroneously of the opinion that the Parker pillar stood at or in the immediate vicinity of the location of BP 91(E). When it realized its error, however, it reiterated in the Counter-Memorial, in the Rejoinder, and at the oral proceedings its Submissions made in the Memorial. The location of BP 91(E) falls undoubtedly within the scope of all these Submissions. Under these circumstances, there is no reason to disregard Egypt's claim for BP 91(E). Evidently, the Tribunal is not authorized to decide on the location of the Parker pillar.

B. *The Fourteen Pillar Locations*

1. *The Nine Northernmost Pillars*

182. The Parties have neither in their written nor in their oral pleadings put much emphasis on the nine northernmost disputed pillars nos. 7, 14, 15, 17, 27, 46, 51, 52, and 56. This lack of attention is understandable in light of the fact that the distances between the disputed pillar locations are very small. In four instances the disputed pillar locations are less than six metres apart, in another four between 34 and 65 metres, and in one case about 145 metres. In only two of these cases does the difference of the respective locations create a divergence of more than 20 metres between the boundary lines claimed by Egypt and Israel. In addition, the nine pillars are situated in an uninhabited desert region where apparently no essential interests of the Parties are involved and little evidence was available to assist the Parties or the Tribunal in the establishment of the pillar locations. Moreover, despite the Tribunal's request, the Parties did not even succeed in producing a coherent large-scale map showing the disputed locations of the nine pillars.

183. The facts and contentions with regard to these nine pillar locations submitted during the written and oral proceedings proved to be largely inconclusive. The Tribunal must take into account the relative strength of the titles invoked by the Parties, as stated in paragraph 176 above and as was done by the arbitrator in the *Island of Palmas* case (2 RIAA 869-70).

184. The Parties base their respective claims on several types of evidence whose relative weight must be examined. First, for most of the disputed pillar locations, one or the other Party alleges the existence of remnants of original boundary pillars. In addition, other types of markers, some erected by UNEF and others by the Survey of Israel during the 1950s and 1960s, are alleged by Israel to indicate the boundary pillar locations in several places. In no case of alleged remnants of original pillars, however, could the Tribunal find sufficient evidence demonstrating that the loose stones considered as remnants actually marked the location of an original boundary pillar, even if it is accepted that the stones might have come from original boundary pillars. As to UNEF markers or markers erected by the Survey of Israel, the Tribunal similarly finds no sufficient evidence as to the accuracy of their placement or certainty of their origin. Second, in the absence of alleged remnants or other physical markers, Egypt bases its claims on map evidence. Egypt systematically derives information concerning coordinates, elevation, and distances regarding its disputed pillar locations from its 1935-38 map of the Sinai. The Tribunal does not consider these map-based indications to be conclusive since the scale of the map (1:100,000) is too small to demonstrate a location on the ground as exactly as required in these instances where the distances between disputed pillar locations are sometimes only of a few metres. By way of illustration, it is sufficient to recall that on a map of the scale of 1:100,000, 1 millimetre on the map represents 100 metres on the ground. On the other hand, maps can be of some assistance, for instance where they show straight lines through a number of boundary pillars. They will be taken into consideration in this respect.

185. The Parties in some cases also refer to the terms of the 1906 Agreement and the Owen and Wade Reports on the delimitation and demarcation of the boundary. As was stated in paragraph 173 above, the Tribunal considers the 1906 Agreement in cases of doubt as to where boundary pillars stood during the critical period. The 1906 Agreement and the two Reports, however, contain little relevant information concerning these nine pillar locations. For instance, the fact that the 1906 Agreement and the two Reports mention that some of the disputed boundary pillars were set at locations of Wade's astronomical stations (BP 27 on A.11, BP 46 on A.9 *bis*) is not helpful. Even if it were possible to translate accurately the old coordinates of the astronomical stations given by Wade into exact locations on the ground today, this would not help distinguish between the claims of the Parties at these locations, as they are literally next to each other. Neither does the requirement of intervisibility of boundary pillars, stipulated by Article 3 of the 1906 Agreement, lead to any results since no undisputed information as to intervisibility was given to the Tribunal. The Parties did not in fact put any decisive weight on the question of intervisibility in respect of these northern pillars. The 1906 Agreement and the Owen and Wade Reports are thus relevant only as to their indications concerning straight lines drawn through a number of boundary pillars.

186. In two cases (BP 14 and BP 27), the Parties assert that their locations coincide with a trig point identified as a boundary pillar. The

Tribunal will take this evidence into account, but only found it to be determinative in one case (BP 14).

187. Where no other relevant evidence for a pillar location has been produced by the Parties, the Tribunal will, in a subsidiary way, consider which of the claimed locations is on or closest to a straight line extended through adjacent agreed pillars, and decide on that basis. This subsidiary criterion seems legitimate in cases where the Joint Commission of 1906 intended to establish a straight line through a number of boundary pillars (see paragraph 53 above) and in view of the fact that it was the aim of the parties to the 1906 Agreement that the boundary should run approximately straight from Rafah to a point on the Gulf of Aqaba (see paragraphs 29, 32-34 above). The fact that the parties to the 1906 Agreement spoke of an "approximately" straight line (see paragraphs 32 and 33) and that they did not in fact achieve an exactly straight line, is no argument against choosing the location which is closer to the straight line. If it is impossible to ascertain the original location of a pillar and if no other indications are available, the straight line is the criterion best corresponding to the intention which was at the basis of the 1906 Agreement. The best means at the disposal of the Tribunal to ascertain which pillar location is on or closer to the straight line are, in the view of the Tribunal, the description cards supplied by the Parties in Appendix A to the Compromis. The description cards give indications as to straight lines only on one side of the disputed pillar locations, not on both sides. The Tribunal had to rely on the straight lines extended through adjacent pillars rather than on the straight line from Rafah to Taba since the position of the disputed pillar locations could not be exactly identified relative to this straight line for want of a coherent large-scale map which the Parties did not succeed in producing for the Tribunal.

a. *Boundary Pillar 7*

188. For BP 7 the Parties dispute the significance of map evidence and certain remnants, which, as has been stated, cannot be considered as decisive. The Tribunal notes that according to the 1906 Agreement the boundary line was to proceed straight between astronomical stations A.13 (BP 3) and A.11 (BP 27). The maps presented to the Tribunal show, however, that the line between these two points is not in fact perfectly straight, but forms a slight irregular curve. The imperfect nature of this stretch of the boundary is implicit from the contentions of the Parties and is confirmed by Wade's description of the techniques he employed in this area for the placement of the original telegraph poles. The Tribunal will therefore decide on the basis of straightness relative to neighbouring agreed pillars as shown on the relevant description cards. The description cards for BP 7(E) and BP 7(I) show that there is an absolutely straight line connecting the Egyptian location for BP 7(E) to BP 10, the angle at BP 8 being $180^{\circ}00'00''$, while the angle at the same location on Israel's card is $179^{\circ}06'17''$. The Tribunal therefore decides in favour of Egypt's location BP 7(E).

b. *Boundary Pillars 14 and 15*

189. The Tribunal considers it appropriate to consider these two consecutive pillar locations together. In both instances, the Parties again disagree on the significance of map evidence and certain remnants or other physical markers. For BP 14, however, the Tribunal notes that the coordinates of a boundary pillar in this area are indicated on the list of coordinates attached to the letter of General Hilmy of 10 August 1960. This list, prepared by Egypt, gives the coordinates for trig point L 174, identified as a frontier pillar. The coordinates on the list do not match the coordinates asserted by Egypt in its pleadings for BP 14(E) but instead seem to coincide with BP 14(I). The Tribunal therefore decides in favour of Israel's location BP 14(I).

190. For BP 15, in the absence of any other relevant criterion, the straight line relative to neighbouring pillars is decisive, as was the case for BP 7. Having decided in favour of Israel's location for BP 14, it follows from the description cards that Israel's location BP 15(I) is closer to the straight line between BP 14(I) and the agreed location of BP 16. The Tribunal therefore decides in favour of Israel's location BP 15(I).

c. *Boundary Pillar 17*

191. For BP 17, the Parties also disagree on the significance of map evidence and certain remnants found on the ground. The straight line is again the only relevant criterion on which the Tribunal can rely. The only data available to the Tribunal to determine the relative straightness of the line are the angles at BP 18 shown on the respective description cards for BP 17. The angle is $180^{\circ}14'19''$ on the Egyptian card and $179^{\circ}33'18''$ on the Israeli card. Egypt's location BP 17(E) is therefore slightly closer to the straight line than Israel's location. The Tribunal therefore decides in favour of Egypt's location BP 17(E).

d. *Boundary Pillar 27*

192. With regard to BP 27, Egypt's and Israel's locations are only 1.77 metres apart. Here the Parties dispute the significance of a trig point marker. Egypt's location BP 27(E) is based on a cement trig point marker found on the site in 1981 and allegedly identical with trig point L 172 identified as a boundary pillar on one of Dr. Ball's survey cards and on the list attached to General Hilmy's letter. Israel, on the other hand, bases its claim on a Survey of Israel description card from 1955 for its trig point 559 Q. The card contains an illustration showing next to the cement trig point marker a masonry construction identified as an old boundary pillar, which in Israel's opinion is the correct location of BP 27. Neither the cement trig point nor the masonry pillar exist any longer. As no further evidence is available, the Tribunal, on the basis of these submissions, has no possibility to ascertain which of the two locations is the correct one. It has therefore to rely on its subsidiary criterion, the straight line. As the Egyptian location is closer to the straight line, it decides in its favour.

e. *Boundary Pillar 46*

193. In the case of BP 46, the Parties dispute the significance of a pile of loose stones near to a modern pipe marker. In these circumstances, the straighter line is again the only adequate criterion for the decision. Egypt contends that BP 46 lies on the prolongation of a straight line extended from BP 48 through BP 47 to BP 46, as shown on the 1935-38 map, and alleges that its location BP 46(E), based on a pile of loose stones, is on such a straight line. Israel, for its part, points to the fact that the description cards demonstrate that its location BP 46(I) is closer to the straight line asserted by Egypt than Egypt's location BP 46(E). In fact, the description cards for BP 46 show that the angle at BP 47 for the line between BP 48 through BP 47 to the disputed locations of BP 46 is $180^{\circ}01'19''$ for Israel's location and $180^{\circ}03'50''$ for Egypt's location. The Tribunal therefore decides in favour of Israel's location BP 46(I).

f. *Boundary Pillars 51 and 52*

194. The Tribunal considers it appropriate to deal with BP 51 and BP 52 together. As at other locations, the Parties disagree on the significance of loose stones and of a pipe marker at the site of BP 51 and the significance of map evidence versus remnants for BP 52. Israel maintains that its location is on a hilltop, as in the case of other agreed pillar locations in the area where deviations were made from the straight line.

195. The Tribunal notes that the 1906 Agreement stipulates a straight line between astronomical station A.8 (BP 53) and "the top of the hill west-north-west of Bir Maghara" (BP 51). In addition, Wade's Report makes clear that he verified with the theodolite, together with one of the Turkish Commissioners, that the position of the telegraph pole placed at BP 52 was "in line with" BP 53 at A.8 on the summit of Gebel Samawi and BP 51. Moreover, all maps from the critical period, which indicate the boundary line, show a straight line between the location of BP 51 and BP 53. The Tribunal notes that Egypt's line between BP 51(E) and BP 53 is straight while Israel's line forms a distinct angle at BP 52(I), being separated from BP 52(E) by 145 metres. Israel objects against this reasoning that Egypt had determined its location for BP 52(E) on the basis of the straight line between undisputed BP 53 and BP 51(E), the location of which it had already decided on other grounds. Since the Tribunal takes the straight line between BP 51 and BP 53 as the basis of its decision, it is clear that only the two Egyptian locations can be considered in conformity with this requirement. At BP 51 the Egyptian and the Israeli locations are only 5 metres apart, while at BP 52 they have a distance of about 145 metres. This shows that even if a straight line were drawn between the Israeli location of BP 51 and the uncontested BP 53, the Egyptian location would be considerably closer to the straight line than the Israeli one. The Tribunal therefore decides for the Egyptian location of BP 51 and BP 52.

g. *Boundary Pillar 56*

196. For BP 56, the Parties again dispute the significance of loose stones and a pipe marker at the site. No other relevant criterion is

available than the straight line relevant to the neighbouring agreed pillars, in this case, agreed BP 58 through agreed BP 57 to BP 56. The description card for BP 56(E) shows an angle of $180^{\circ}18'50''$ at the location of BP 57. The description card for BP 56(I) shows an angle of $180^{\circ}16'12''$ at the same location. Israel's location BP 56(I) is therefore slightly closer to the straight line than Egypt's location. The Tribunal therefore decides in favour of Israel's location BP 56(I).

2. *Boundary Pillars 85, 86, 87, and 88*

197. The Parties disagree on the locations of the four consecutive pillars 85, 86, 87, and 88 in the Ras el Naqb area. As to pillars 85, 86, and 87, Egypt bases its claim on the fact that old pillars are at the Egyptian locations. Egypt considers them to be the original pillars erected in 1907 at the site of the temporary poles. Egypt also refers to maps of different periods which indicate pillars at these locations or show the boundary line passing through these locations. Israel recognizes that pillars exist at these locations but asserts not only that their origin is uncertain but also that their locations do not correspond to the 1906 Agreement. Article 1 of this Agreement mentions the names of several places which determine the course of the boundary line in this area (Wadi Taba, Jebel Fort, Jebel Fathi Pasha). Israel contends that the Egyptian locations do not correspond to the correct places of these geographical features and are therefore in contradiction with the Agreement. As to pillar 88, the Parties agree that no such pillar had previously existed. The Joint Commission in 1981 decided to add a new pillar in order to indicate more clearly the course of the boundary line, but could not agree on its precise location. The addition of pillar 88 led to the renumbering of the following pillars.

a. *Boundary Pillars 85, 86, and 87*

198. Before dealing more closely with the arguments of the two Parties, the Tribunal considers it necessary to point to some facts which are relevant with regard to the existing pillars and the boundary line as indicated on maps. There is no clear evidence that the existing pillars at locations BP 85(E), BP 86(E), and BP 87(E) are original pillars erected in 1907. The fact that their shape is different from the pillar seen on the Parker photographs of 1906 suggests that they were erected or rebuilt at a later date. However, there is no doubt that boundary pillars have been at their present locations at least since 1915. Several maps produced from 1915 on show pillars at the Egyptian locations, especially the 1915 British Map and the maps of the Survey of Egypt of 1926 and 1935-38. Moreover, all other maps submitted to the Tribunal dating from 1906 through the entire period of the British mandate over Palestine up to 1982, on which the boundary line of 1906 is indicated (approximately 25 maps), show the same direction and shape of this line as does the line formed by the existing pillars. Slight differences which can be observed may easily be explained by the inexactness of several maps. No map made before 1982 shows a line similar to the one corresponding to Israel's locations for pillars 85, 86, and 87. On no such map does the boundary line form a sharp break at BP 85 as it does if one follows

Israel's locations. While on all pre-1982 maps the angle at BP 85 is widely open (mostly approximately 135°) the angle of the line drawn through BP 85(I) is much smaller (approximately 75°). On no map from 1906 to 1982 does the boundary line at BP 85 lie as far west as Israel claims. This can easily be recognized not only by the form of the boundary line but also if one compares the relative positions of Israel's and Egypt's locations for BP 85 in relation to the triangular flat area on the plateau north of BP 85 which can be seen on most maps. The Tribunal can therefore assume that boundary pillars were in existence at Egypt's locations for BP 85, 86, and 87 during the entire period of the British mandate over Palestine.

199. On the basis of these facts and the contentions of the Parties, the Tribunal will, under the two following headings, examine two questions. First: Do the locations of the existing boundary pillars at BP 85(E), 86(E), and 87(E) contradict the 1906 Agreement? Secondly: If such a contradiction exists, is it the line formed by the pillars or the line described by the 1906 Agreement which prevails?

i) DO THE LOCATIONS OF THE EXISTING PILLARS CONTRADICT THE 1906 AGREEMENT?

200. As has been stated above in paragraph 172, the Tribunal has to base its decision on the recognized international boundary as it existed between Egypt and Palestine during the period of the British mandate. The 1906 Agreement is therefore to be taken into consideration only in order to clarify the situation which existed during this period. It is with this proviso that the Tribunal will examine the contention that the locations of the existing pillars at BP 85(E), BP 86(E), and BP 87(E) are in contradiction with the 1906 Agreement.

201. Article 1 of the 1906 Agreement reads in its initial part as follows:

The administrative separating line, as shown on the map attached to this Agreement, begins at the point of Ras Taba, on the Western shore of the Gulf of Akaba, and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort; from thence the separating line extends by straight lines as follows:

From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha . . .

As already mentioned, Israel asserts that three places mentioned in this provision, *viz.*, Wadi Taba, Jebel Fort, and Jebel Fathi Pasha, have been incorrectly identified on the ground by the persons who erected the pillars and by Egypt.

202. According to the 1906 Agreement, the boundary line should pass through the top of Jebel Fort and lie at a distance not exceeding 200 metres east of Jebel Fathi Pasha. However, on the map attached to Wade's Report of 1907 ("the Wade Map"), Jebel Fort and Jebel Fathi Pasha are indicated considerably to the west of the boundary line, the boundary line itself taking the same course as shown on all maps. This discrepancy leads Israel to conclude that the boundary line has to be drawn more to the west in order to pass through the top of Jebel Fort and

to a point not exceeding 200 metres east of Jebel Fathi Pasha. A further map, the Turkish Military Map of 1909, which does not mention Jebel Fort, indicates Jebel Fathi Pasha also more west of the boundary line than would correspond to the 200 metres mentioned in the 1906 Agreement. A third map, the 1911 Egyptian Map, shows Jebel Fort west of the boundary line while it remains uncertain to which feature the words Jebel Fathi Pasha exactly refer. These three maps are the only ones in favour of Israel's contentions, but, as has been mentioned, the boundary line on these maps takes the same course as the one shown on all the other maps.

203. On other maps which were also produced in the years of the conclusion of the Agreement and of the demarcation of the boundary, Jebel Fort and Jebel Fathi Pasha are in accordance with Egypt's locations and with the corresponding boundary line. Two other maps made by Wade in July 1906, the "Wade Original" and the "Wade Sketch Map" (also called "Wade Survey" and "Aqaba-Rafah Map") confirm Egypt's claim. Although neither map shows the boundary line (they were made before the demarcation), the names of both Jebel Fort and Jebel Fathi Pasha appear in places corresponding to Egypt's locations. The 1907 British War Office Map also shows both Jebel Fort and Jebel Fathi Pasha at Egypt's locations and in their correct relation to the boundary line.

204. The maps invoked by Israel, taken alone, do therefore hardly furnish sufficient evidence against the correctness of the existing boundary pillar locations. This seems all the more being the case as even the maps invoked by Israel show differences among each other. Although there is no obvious explanation for the deviations on a few maps, one has to bear in mind that all maps concerned have a very small scale (the map attached to the Wade Report 1:500,000) and do not show a particular precision. Both Parties repeatedly observed during the pleadings that the maps in question differ in many details. It may also be pointed to the fact that on the Wade Map attached to his Report, which is the principal evidence of Israel, the words "Ras Taba" are printed in a place which neither of the Parties considers as correct.

205. Israel points to a further discrepancy of maps which, however, relates to Jebel Fathi Pasha only. Most maps dating from 1906 to 1911 and which have a scale not smaller than 1:100,000 show, in the region of Jebel Fathi Pasha, a group of three small hills close together (Wade Original, Wade Sketch Map, the map alleged to have been annexed to the authentic Turkish text of the 1906 Agreement, 1906 Egyptian Map, Rushdi Map, 1911 Egyptian Map). On all of these maps, except on the Wade Original and the Wade Sketch Map which were made before demarcation, the boundary line runs between the middle and the eastern hill. According to Egypt, the middle hill is Jebel Fathi Pasha. However, Israel points out that on two maps (Wade Original and 1906 Egyptian Map) the words "Jebel Fathi Pasha", or an abbreviation of them, are printed next to the westernmost of the three hills and therefore do not support Egypt's position. On other maps, however, the words "Jebel Fathi Pasha" rather relate to the middle hill or can be

related to either the middle or the western hill (Wade Sketch Map, Rushdi Map, and 1911 Egyptian Map). Here again, we are in the presence of a difference of maps which are not too reliable as to details. The fact that on some maps the words "Jebel Fathi Pasha" for one reason or another are not printed exactly where the Parties claim they ought to have been printed can hardly be taken as convincing evidence to disprove the correctness of the boundary line as it is indicated on most maps and demarcated on the ground.

206. Israel advances another argument against the correctness of Egypt's locations. It refers to Article 1 of the 1906 Agreement which states that the separating line "follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort". Israel argues that according to this provision Jebel Fort must lie at the end of the eastern ridge overlooking Wadi Taba or, at least, not too far from that end. Egypt's location of Jebel Fort, obviously, lies far away from Wadi Taba (Wadi Taba as understood either by Egypt's or by Israel's definition, as will be stated below). Israel contends that only its location of Jebel Fort is in accordance with Article 1 of the 1906 Agreement. Israel's contention presupposes, however, that Wadi Taba is understood according to Israel's definition. While Egypt asserts that Wadi Taba embraces only the region between Taba and the point north of BP 89 where Wadi Taba bifurcates into three tributaries, Israel contends that Wadi Taba does not end at this point but continues into the middle one of the three tributaries. Israel's location of Jebel Fort has, consistent with its contention, been placed on the eastern ridge of this middle tributary.

207. Israel's argumentation depends on two assumptions: First, on a particular interpretation of Article 1 of the 1906 Agreement, and secondly, on the definition of Wadi Taba. As to the interpretation of Article 1 of the 1906 Agreement, the Tribunal cannot see any incompatibility between Egypt's location of Jebel Fort and Article 1. The wording of Article 1 does not require that Jebel Fort must be on the eastern ridge of Wadi Taba or a point not far from it. It does not exclude that Jebel Fort lies at a considerable distance from the end of the eastern ridge. It may also be observed that both according to Owen and to Wade, Jebel Fort is not considered to be on the "east cliffs" or the "Taba Hills". As to the definition of Wadi Taba, there is no conclusive evidence for the Israeli view. In almost all maps which show the designation "Wadi Taba", this designation is printed in the lowest part of the Wadi. On only two maps the designation "Wadi Taba" is used for one of the tributaries above the bifurcation north of BP 89. One is Owen's "rough map" of 1906 which in fact is a handmade sketch obviously designed from memory only. Wadi Taba on this sketch reaches up to the plateau of Ras el Naqb and is met in its higher part by Wadi Tuéba. As the three tributaries of Wadi Taba north of BP 89 are not distinguished on this sketch it seems hardly possible to draw the conclusion from it that it must be the middle tributary which is Wadi Taba. The other map is the 1933 Mitchell Map on which the eastern, not the middle, tributary is designated as "Wadi Taba". Only two further pre-1948 maps give an indication as to the names of the tributaries, but do not designate any of

them as "Wadi Taba": the 1915 British Map and the 1935-38 Egyptian Map. Both maps show the names "W. Haneikiya" for the western tributary and "W. Gasairiya" for the eastern tributary, but give no name for the middle tributary. The contention that the middle tributary bears the name "Wadi Taba" finds no basis in any pre-1982 document or map submitted to the Tribunal.

208. The Tribunal therefore arrives at the conclusion that the locations of the existing boundary pillars 85, 86, and 87 are not in contradiction with the 1906 Agreement.

ii) THE LEGAL SITUATION IN CASE OF CONTRADICTIONS BETWEEN EXISTING PILLAR LOCATIONS AND THE 1906 AGREEMENT

209. Although the Tribunal does not find any contradiction between the existing boundary pillar locations and the 1906 Agreement it will also examine the question whether in case of such contradiction it is the line formed by the existing pillars or the line described by the 1906 Agreement which prevails. Such an examination seems appropriate in view of a complete exploration of the case.

210. Article 3 of the 1906 Agreement states that "[b]oundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line . . ." The demarcation took place in two phases: first, the erection of provisional telegraph poles during October 1906, and, secondly, the replacement of them by permanent masonry pillars between 31 December 1906 and 9 February 1907. Both operations were carried out in the presence of the Egyptian and Turkish Commissioners or representatives. As to the first operation, the Owen and Wade Reports confirm the cooperation of both Parties. For the second operation, the Parker photographs of 31 December 1906 show the presence of the Commissioners or representatives of both sides at the erection of the first masonry pillar. As to the rest of the pillars, the collaboration of the Parties has to be presumed since Article 3 of the 1906 Agreement prescribes it and no party ever claimed that the Agreement had not been correctly executed. (See paragraph 170 above.) At two later occasions, in 1909 and 1911, Turkish and Egyptian officials cooperated in the rebuilding of certain boundary pillars. If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps. This has been confirmed in practice and legal doctrine, especially for the case that a long time has elapsed since demarcation. Ress concludes an examination of cases with the following statement: "If the parties have considered over a long time the demarcated frontier as valid, this is an authentic interpretation of the relevant international title." (Ress, *The Delimitation and Demarcation of Frontiers in International Treaties and Maps*, Institute of International Public Law and International Relations in Thessaloniki 1985, pp. 435-37, especially 437; see also Münch, "Karten im Völkerrecht", *Gedächtnisschrift für Friedrich Klein*, Munich 1977, p. 344) It may also be referred

to the Judgment of the International Court of Justice in the *Temple* case where the Court states:

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious. (1962 *ICJ Reports* 34)

It is therefore to be concluded that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected. As has been stated, no such contradiction exists.

211. For these reasons, the Tribunal decides in favour of Egypt's locations BP 85(E), BP 86(E), and BP 87(E).

b. *Boundary Pillar 88*

212. Egypt's and Israel's locations for this new pillar are near the top of the same hill, only 44.53 metres apart and apparently at the same elevation, with the Egyptian location on the eastern side, the Israeli on the western side of the hill. Egypt argues that its location corresponds to pre-1982 maps and to the coordinates of the place where the boundary line forms a slight bend, which can be seen on the 1935-38 map. Israel disputes Egypt's methodology and contends that pillar 88 must satisfy the requirement of being situated on "the eastern ridge overlooking Wadi Taba". Israel therefore places the pillar at a point from where one can look down into the middle of the three tributaries, which it considers to be Wadi Taba. Egypt's location does not overlook this tributary.

213. Since no previous pillar 88 is known to have existed, the Tribunal has to choose the one of the two locations which fits more logically into the context of the neighbouring pillars. The Tribunal takes into consideration that no conclusive evidence could be found to show that the middle tributary of Wadi Taba bore the name Wadi Taba. The Israeli argument that pillar 88 must overlook this tributary cannot therefore have any weight for the Tribunal. Furthermore, the Tribunal has arrived at the conclusion that Article 1 of the 1906 Agreement does not presuppose that the "eastern ridge overlooking Wadi Taba" extends all the way up to Jebel Fort. There is therefore no necessity to place the new pillar on the eastern ridge overlooking Wadi Taba, wherever that ridge may be. As no other criterion is available, the Tribunal has to base its decision on the straight line criterion to which the parties to the 1906 Agreement repeatedly referred during their negotiations leading to the conclusion of the Agreement (see paragraphs 29 and 32-34 above) and which has already been used by the Tribunal with regard to several of the northern pillars (see paragraph 187 above). In the circumstances of BP 88, the Tribunal finds it most appropriate to take the straight line between Egypt's location BP 87(E), accepted by the Tribunal, and the agreed location of BP 89 as the basis for its decision. The two neighbouring pillars are here recognizable on the maps and on the ground.

Egypt's location is closer to the straight line. For these reasons, the Tribunal decides in favour of Egypt's location BP 88(E).

3. *Boundary Pillar 91*

214. The Tribunal has from the beginning been conscious of the particular importance both Parties attach to pillar 91. Indeed, the Annex to the Compromis contains a sentence dealing specifically with this pillar:

For the final pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

215. The positions of the Parties with regard to BP 91 were most strongly affected during the written and oral proceedings by the so-called Parker photographs, submitted by Egypt with its Memorial (see paragraphs 105-108 and 178-181 above). These photographs show a pillar at a location on a cliff above the shoreline of Taba which does not correspond to any of the three locations advanced by the Parties for BP 91. The pillar had disappeared by the time Israel removed part of the cliffs on which it was built when constructing a new road along the coast around 1970.

216. The existence of the Parker pillar has considerable repercussions on the claims of the two Parties concerning BP 91. If the Parker pillar was correctly located as the first (or final, if one takes the opposite direction) pillar in 1906 and formed part of the international boundary line during the critical period, it excludes the two locations advanced by Israel for the final pillar location. On the other hand, if the Parker pillar existed during the critical period, the pillar at the Egyptian location of BP 91 was not the final pillar at that time. In view of the considerable impact on the Parties' claims for BP 91, the Tribunal will have to take the question of the Parker pillar into consideration when examining the claims concerning BP 91. The Tribunal is, however, excluded by paragraph 5 of the Annex to the Compromis from taking any decision on the location of this pillar.

a. *Israel's Alternative Locations*

217. Israel advances two alternative locations for BP 91: BP 91(I) (east)—the location on the westerly lower end of the granite knob—and BP 91(I)(west)—the location at Bir Taba. In the oral proceedings, Israel concentrated its arguments on BP 91(I) (east), without abandoning the alternative location. Israel brought forward several arguments in favour of its locations which will be taken into consideration, together with contrary arguments, in the following paragraphs.

218. Israel's strongest argument is based on *intervisibility*. Israel argues that its locations are intervisible with the preceding pillar (agreed pillar 90) while Egypt's location is not. Israel argues that intervisibility between boundary pillars is mandatory, because Article 3 of the 1906 Agreement provides that "[b]oundary pillars will be erected . . . at intervisible points". Owen's Report also states that "[n]inety intervisible pillars were erected". It is not contested that intervisibility exists

for the two Israeli locations but not for the Egyptian location. The value of this argument will be judged in connection with BP 91(E) (see paragraphs 236-237 below). The argument will lose its weight if it can be shown—as will be shown in paragraph 237 below—that BP 91(E), in spite of the lack of intervisibility, was a regular pillar of the recognized international boundary between Egypt and the former mandated territory of Palestine.

219. Israel also advances *map evidence*. It relies principally on the maps attached to the Wade and Owen Reports, as well as on two military maps from 1909 and 1916, because these appear to show the boundary as terminating at a triangle which must be one of the astronomical stations A.1 or B.1. However, only two maps, the 1909 Turkish military map and the 1916 Turkish-German map, show the boundary line clearly ending in a triangle. On the maps attached to the Owen and Wade Reports, the boundary line ends at the eastern edge of the triangle. As the scale of these maps is 1:500,000 and the triangle is relatively large, no conclusions can be drawn from these maps as to where the line in fact ended. It is furthermore uncertain whether the triangle on these maps represents A.1 or B.1. Other maps of the early years clearly show the boundary line ending east of the triangle and therefore rather at the location of the Parker pillar. This applies to the 1906 Survey of Egypt map, the 1907 British War Office map, the 1908-09 Rushdi map, and the 1911 Survey Department of Cairo map. In view of such divergences, evidence drawn from the early maps with regard to the final pillar location cannot lead to any clear conclusion. All later maps (from 1915 on), except the 1916 Turkish-German map, show the line passing through BP 91(E) or both BP 91(E) and the Parker site, as will be shown in paragraphs 227-228 below.

220. Israel furthermore argues that the *Statistical Yearbook of Egypt for 1909* identified the boundary as terminating at the granite knob. However, the evidentiary value of such technical publications, designed to provide general information, is low, for such publications are not designed as authoritative statements about boundaries. They fall within the category of what could be described as encyclopaedic reference books and not administrative acts. In any event, that reference to the terminal point of the boundary disappeared in the following years, and certainly throughout the critical period of the Mandate there is no evidence that either Egypt or Great Britain relied upon that one, isolated reference to the granite knob as evidence of the terminal point. Israel's argument is also weakened by the fact that the *Statistical Yearbook of Egypt for 1909* refers to the coordinates of astronomical station B.1, which was on the top of the granite knob. Israel's location for BP 91(I) (east), however, is at a considerable distance from it at the western end of the granite knob, almost at the bottom of the Wadi.

221. Other evidence produced by Israel proved to be inconclusive. A photograph of a *cairn of stones* next to the western end of the granite knob, taken in 1936, does not prove that the stones formed a boundary pillar. The object is even so badly recognizable that it cannot be said what it really was. Israel furthermore alleges a *presence of a*

Turkish military post in the Wadi Taba in the time following the conclusion of the 1906 Agreement. It refers in this connection to statements in the *Meistermann* and *Baedeker* guidebooks and to the fact that in 1913 the *Sudan Intelligence Report* stated that a Turkish gun had been placed in position at Taba. All three references to a possible Turkish presence in the Wadi Taba can well be taken as indices in favour of the Israeli locations, but they are not conclusive as to where the boundary line actually ran. A Turkish presence in the Wadi Taba could also be explained by other grounds, such as the right under Article 6 of the 1906 Agreement for Turkish soldiers to cross over to the Egyptian side to draw water from the well at Bir Taba. It also has to be kept in mind that a boundary pillar was at the Parker site, well visible from the Wadi, in 1906 and in later years (see paragraph 227 below). A possible Turkish presence at Taba can therefore hardly prove that the boundary line reached the shore at another location.

222. Several arguments have also been brought forward *against* Israel's locations. One of them, the erection of the Parker pillar in 1906 and its existence during the critical period, has already been mentioned. If the Parker pillar was in fact the first (or final) pillar of the boundary line as recognized during the critical period, it excludes both locations proposed by Israel for BP 91. This argument will be dealt with in paragraph 233 below.

223. At neither of its locations could Israel show any evidence of pillar remnants. Nor was Israel able to produce any photographic or map or other evidence showing that telegraph poles or boundary pillars had existed at either location at any time.

224. Another argument against the Israeli locations stems from Article 1 of the 1906 Agreement, which provides that the separating line, which begins at Ras Taba, "follows along the eastern ridge overlooking Wadi Taba" or, in the new translation from the official Turkish text presented by Egypt, "passing by the summits of the mountains lying east of and overlooking Wadi Taba", or, in the new translation presented by Israel, "while passing by the heights that are [situated] at the east[ern side] of Wadi Taba and overlook this Wadi". This description is confirmed by statements in the Owen Report ("following along the top of the ridge north of Wadi Taba" and "the boundary-line, as finally agreed upon, runs for the most part along the watershed") and in the Wade Report ("[b]y the afternoon there was nothing left than to place the beacons on the eastern margin of Wadi Taba" and "[t]hen two more along the line of east cliffs of Taba and one at the point where they strike the gulf"). Neither of the two Israeli locations is in conformity with these descriptions. The lines connecting agreed pillar 90 with the two Israeli locations do not follow the ridge of the hills east and north of Taba nor do they overlook Wadi Taba, but run to a great extent within Wadi Taba and Wadi Khadra (see map no. 4 attached to Israel's Memorial). Furthermore, the eastern Israeli line, before it reaches the hill upon which BP 90 is situated, touches partly the bottom of the eastern margin, but at no place its ridge. The western Israeli line, before reaching the hill at BP 90, nowhere touches either the eastern margin or the eastern

ridge of Wadi Taba. It is also notable in this connection that during the negotiations between Turkey and Egypt in 1906 the Turkish proposal that the line run down the thalweg of the Wadi was rejected. Also, it is questionable whether the granite knob, which is one of the two Israeli locations, could be considered part of the eastern ridge since it is separated from it by the area on which a road and a hotel complex was built.

225. Israel's case for the granite knob is also weakened by the fact that Israel's location is not on the top of the granite knob, where astronomical station B.1 was situated. Israel did not claim the top because it is not intervisible with BP 90. Rather, Israel claims an inconspicuous place at the western end of the long-stretched granite knob where intervisibility exists, at a height of only a few metres above the bottom of the Wadi. This place evidently does not correspond to the description given by Wade as "the point where the east cliffs . . . strike the gulf".

b. *Egypt's Location*

226. Egypt's claim for BP 91(E) is closely related with the question of the Parker pillar. It seems appropriate therefore to state at the outset during which periods boundary pillars were in existence at the two locations of the Parker site and the site of BP 91(E).

i) PERIODS DURING WHICH BOUNDARY PILLARS WERE IN EXISTENCE AT THE PARKER SITE AND AT THE SITE OF BP 91(E)

227. The *Parker pillar* was erected on 31 December 1906 as the first masonry pillar of the boundary. Neither Party contests that it was built as a boundary pillar although Israel argues that it was wrongly located. The continuing existence of the Parker pillar was confirmed by the surveys of 1914 and 1917 (see paragraphs 63 and 67 above), indirectly by the Beadnell photograph of 1922 which shows a pillar at the place of BP 91(E), and which Beadnell described as the "penultimate beacon", by the Mitchell map of 1933, by the 1949 photographs introduced by Israel, by the 1964 Survey of Israel map, by the 1967 map in Arabic, and by an MFO map. In 1967, according to a witness, Mr. Yigal Simon, the Parker pillar was no longer in existence. Around 1970 its site was destroyed in connection with the construction of the road along the shore. This evidence demonstrates that the Parker pillar must have been in existence during most of the years between 1906 and 1967, including the period of the Mandate. It is possible that it was damaged or destroyed sometime after 1906, particularly during World War I, as the 1949 photograph shows a structure different from the 1906 photograph. But there is no doubt, and Israel confirmed it during the oral proceedings, that one must proceed from the assumption that the Parker pillar existed during the critical period.

228. As to the pillar at *BP 91(E)*, there is no evidence with respect to the erection of this pillar in 1906-1907 nor with regard to its existence in the following years. The first evidence of its existence appears on the 1915 British map, which shows a boundary pillar at the elevation of

298 feet (91 metres) conforming to BP 91(E). A pillar at BP 91(E) is also confirmed by the 1917 Survey of Egypt map, the 1922 Beadnell photograph, the 1933 Mitchell geological map, the 1935-38 Egyptian map, the 1943 British map, the lists of trig points prepared during the mandate period (1937 survey letter, Dr. Ball's 1941 survey card, and First Edition Trig List 144, probably produced in 1943), and one of the 1949 photographs submitted by Israel. Furthermore, Egyptian and Israeli witnesses confirmed that they had seen a pillar at BP 91(E) in 1949 and 1964. Although Israel contests that BP 91(E) was erected during the demarcation process in 1906-07 and argues that it was originally a trig point marker which by error was reconstructed as a boundary pillar, around 1917, it does not contest that at least from this time on there was a pillar at the location of BP 91(E) which remained there during the critical period and thereafter until it was destroyed sometime between 1967 and 1981.

229. After having determined that boundary pillars were in existence at the site of the Parker pillar as well as at that of BP 91(E) during the critical period, the Tribunal has to examine Israel's arguments that these pillars were wrongly located and therefore cannot be considered as part of the boundary line. Israel advances mainly four arguments which shall be taken into consideration under the following four headings.

ii) THE ARGUMENT THAT PARKER HAD NO AUTHORITY TO TAKE PART IN THE DEMARCATION PROCESS AND THAT THE PARKER PILLAR WAS WRONGLY LOCATED

230. The Parker photographs show that the masonry pillars which were to replace the provisional telegraph poles were erected in the presence of the two Turkish Commissioners, who had already taken part in the erection of the telegraph poles in October 1906, and of Parker, then Governor of Sinai. The two Egyptian Commissioners who were members of the Joint Commission no longer took part in this stage of the demarcation. No evidence exists concerning the reasons for this change nor on Parker's authorization. Israel contends that Parker was not authorized to take part in the demarcation as the representative of Egypt. It furthermore alleges that the Parker pillar was not placed at the site where the telegraph pole for the final pillar site had been placed in October 1906.

231. The question whether Parker had any authority to take part in the work of the Joint Commission cannot be answered either positively or negatively as no evidence was submitted relating to this point. The Tribunal has to base its decision on the fact that Parker took part in the demarcation process as a representative of Egypt and was not contested in that function at that time nor at any later time. Therefore, there is no basis for Israel's submission. As to the site of the Parker pillar, the Tribunal could find no indication in any of the documents submitted to it that the first masonry pillar was placed at a site different from that on which a telegraph pole had been placed two and a half

months earlier. Israel's assertion is all the less acceptable as the same two Turkish Commissioners were present at both occasions. It is hardly likely that they would have agreed to change the site against Turkey's interests. In the years following the demarcation, Turkey never made any complaint about the location of this first boundary pillar, although this was one of the most crucial of all the pillars of the boundary line and well visible from the coast line and the Gulf. The fact that Turkey, in 1909 and 1911, collaborated with Egypt in the repair and rebuilding of pillars which had become unstable—although not pillars of the southern region—and that Turkish authorities became suspicious when, in 1911, the British War Office and the Survey of Egypt carried out a survey of the area, shows that Turkey did not neglect the observation of this boundary.

232. An implicit recognition of the demarcated line by Turkey can also be seen in the Ottoman documents of October 1911 which confirm the demarcation that had taken place (see paragraph 57 above).

233. The Tribunal therefore comes to the conclusion that, even if Parker had not been properly empowered to represent Egypt in the Joint Commission and even if the Parker pillar had not been placed at the same location as the telegraph pole—assumptions for which no evidence could be found—the parties to the Agreement of 1906 had, by their conduct, agreed to the boundary as it was demarcated by masonry pillars in 1906-07 and to the location of the Parker pillar as the final pillar of the boundary line at that time.

iii) THE ARGUMENT THAT BP 91(E) WAS A TRIG POINT ERRO-
NEOUSLY MARKED AS A BOUNDARY PILLAR

234. Israel contends that at the site of BP 91(E) no boundary pillar was erected in 1906-07. It assumes that a mere trig point was later established at this location, possibly in 1911 or in 1914, and that the map constructor of the 1915 British map by mistake took the trig point for a boundary pillar and marked it as such. Israel furthermore assumes that the pillar at BP 91(E) may have been destroyed by the Turks between 1915 and 1917 and that after their retreat it may have been rebuilt mistakenly as a boundary pillar on the basis of the 1915 map. Egypt, on the other hand, points to the fact that Beadnell, when surveying the region in 1922, spoke of BP 91(E) (then No. 90) as the "penultimate beacon, the position of which was determined years ago by an international boundary commission". This statement, Egypt argues, confirms that the pillar was erected in 1906-07. Egypt also contends that if BP 91(E) had not existed as a boundary pillar from the beginning, there would have been one pillar missing in the numbering of that time between BP 89 (now 90) and the Parker pillar whose number was 91.

235. None of these arguments really proves what the Parties intend to prove. The Tribunal therefore must base its decision on those facts on which no doubt exists. It is not contested that at least from around 1917 and throughout the critical period until a time after 1967 there was a boundary pillar at the location of BP 91(E) which, during this

whole period, was considered to be a boundary pillar. It was marked as such on the ground, on maps, on trig lists, and affirmed by photographs. This suggests that throughout the Mandate period both Egypt and Great Britain treated it as a boundary pillar. Indeed, even Israel itself did not advance this argument of an error in identification until the oral proceedings. The Tribunal considers that where the States concerned have, over a period of more than fifty years, identified a marker as a boundary pillar and acted upon that basis, it is no longer open to one of the Parties or to third States to challenge that long-held assumption on the basis of an alleged error. The principle of the stability of boundaries, confirmed by the International Court of Justice (see paragraph 210 above), requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error. The Israeli submission is all the more unfounded as not even Israel itself considers the different elements of its argumentation—the mistake of the map constructor, the destruction of the trig point marker by the Turks, and the erroneous rebuilding of a boundary pillar—as proven, but only as possibilities.

iv) THE ARGUMENT THAT NEITHER BP 91(E) NOR THE PARKER PILLAR WAS INTERVISIBLE WITH BP 90

236. As has been stated earlier, Article 3 of the 1906 Agreement provides that boundary pillars will be erected “at intervisible points”. Israel argues that BP 91(E) is not intervisible with agreed pillar 90 and therefore is in contradiction with the 1906 Agreement. It is true that the Agreement does not provide for any exceptions to intervisibility. Yet, it seems that this principle was not complied within the course of the demarcation of the pillars which were to be located “along the eastern ridge overlooking Wadi Taba”. In fact, there is no intervisibility between the sites of BP 90 and either BP 91(E) or the Parker pillar. There is intervisibility only between BP 91(E) and Parker.

237. There are several indications which may explain the lack of intervisibility. Firstly, Wade in his Report does not mention intervisibility between the last three pillars. Although this is not exceptional as he did not mention intervisibility in all cases where it existed, the silence concerning intervisibility between the last three pillars becomes significant if seen in connection with Wade’s other statements. With regard to the last pillars he writes: “These are of quite a different character from the preceding, and the text of the treaty must be carefully studied to appreciate them, but they presented no difficulty.” Wade refers to the difference existing between the two sectors of Article 1 of 1906 Agreement. In the first sector, the line between Ras Taba and Jebel Fort is described in geographical terms (“along the eastern ridge overlooking Wadi Taba”) while in the second sector in terms of straight lines between specified points. While in the second case intervisibility seems to be essential, it does not seem absolutely necessary in the first case, because the boundary follows the line of the cliffs. Secondly, referring to the days immediately preceding those when the last beacons (telegraph poles) were set, Wade writes: “From this cause and also from the

desirability of bringing the whole business to a conclusion, movements were exceedingly rapid.” This may also explain why intervisibility at the end of the demarcation was not observed. Wade’s description of the last day of the demarcation (18 October 1906) furthermore suggests that the Commissioners did not climb the hills but remained in the Wadi and selected points on the hills which were visible from sites in the Wadi. All these indications may explain why intervisibility was not observed although there is no absolute certainty in this respect. However, as the Tribunal has already come to the conclusion that both the Parker pillar location and the location of BP 91(E) were recognized by the States concerned as forming part of the boundary line during the critical period, lack of intervisibility cannot affect this finding since the boundary line, in spite of non-intervisibility, was accepted by the parties concerned.

V) THE ARGUMENT THAT BP 91(E) IS NOT “THE FINAL PILLAR” NOR “AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA” AND THE QUESTION OF *NON LICET*

238. Paragraph 2 of the Annex to the Compromis states:

Each party has indicated on the ground its position concerning the location of each boundary pillar listed above. For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

239. Israel argues that if the Parker pillar existed throughout the period of the Mandate, it is logically and legally impossible for the Tribunal to find that BP 91(E) satisfies the definition in paragraph 2 of the Annex. BP 91(E), as Israel states, was not “the final pillar” during the critical period nor situated “at the point of Ras Taba on the western shore of the Gulf of Aqaba”. Israel contends that if the Tribunal finds that Israel’s case for BP 91(I) is not acceptable, it must decide that, as a result of the existence of the Parker pillar, Egypt’s case is not acceptable either since BP 91(E) does not satisfy these conditions. In these circumstances, Israel contends, the Tribunal cannot decide in favour of either Party, because paragraph 5 of the Annex stipulates that the “Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A.” This Israel characterizes as a situation of *non licet* that has nothing to do with the absence of applicable law leading to *non liquet*. *Non licet* exists when for some other reason the Tribunal cannot reach a decision on the merits of the case.

240. Egypt affirms that it was not aware that the pillar shown in the Parker photographs was at a different location than BP 91(E) when it submitted its Memorial. It furthermore argues that the adjective “final” in the Annex refers to what the Parties understood by it in 1986, not what it may have signified in 1906. And in 1986, they meant the pillar following agreed boundary pillar No. 90. Egypt asserts that, if the “final pillar argument” succeeded and the Tribunal decided that none of the three locations indicated by the Parties for BP 91 was the correct one, this

would mean the frustration of the arbitration and would be contrary to what both Parties accepted in the preamble to the Compromis, namely "to resolve fully and finally" the dispute that had arisen.

241. The question which the Tribunal has to decide is whether BP 91(E) satisfies the test of being "the final boundary pillar . . . at the point of Ras Taba on the western shore of the Gulf of Aqaba". It must be stated beforehand that the words "final pillar" and "at the point of Ras Taba on the western shore of the Gulf of Aqaba" in paragraph 2 of the Annex would not have been necessary in order to identify the location BP 91(E) and the two alternative locations of BP 91(I) since the three locations had been unequivocally fixed by the Parties. Yet, as these words have been adopted by the Parties, they must be interpreted by the Tribunal.

242. The words "final pillar" must be seen in connection with the first sentence of paragraph 2 of the Annex which states that "[e]ach party has indicated on the ground its position concerning the location of each boundary pillar listed above". According to paragraph 3, the markings of the Parties on the ground have been recorded in Appendix A. Appendix A contains the description cards concerning the locations for each contested pillar. It is clear that an indication on the ground would not have been conceivable for the Parker pillar, given the disappearance of its site around 1970. The location of BP 91(E) was the last pillar location along Egypt's claimed line which in 1986 could be indicated on the ground. BP 91(E) was also the final or last pillar in the series of fourteen pillars mentioned in the first sentence of paragraph 1 and cannot at the same time be considered to be the "penultimate" pillar in the context of the Compromis. In view of this situation, it cannot be assumed that a Party to the Compromis could have signed the sentence containing the words "final pillar" having the Parker pillar in mind and with the expectation that BP 91(E) would thereby be excluded beforehand as a possible choice for the location of BP 91. Such conduct would have been contradictory and not consistent with the wish, affirmed by the Parties in the preamble of the Compromis, "to resolve fully and finally" the dispute between them and "to fulfill in good faith their obligations, including their obligations under this Compromis". It was therefore not incorrect to designate it as the "final pillar" at that moment.

243. It is obvious that the words in the Annex "at the point of Ras Taba" and "on the western shore of the Gulf of Aqaba" were taken from Article 1 of the 1906 Agreement. Evidently, in 1906 they referred to the Parker pillar, not to BP 91(E). However, the essential aspect is not the fact that the words "at the point of Ras Taba on the western shore of the Gulf of Aqaba" originally were conceived for the Parker pillar and could, in the time of the Mandate, be understood in this sense only. The decisive question is whether these words, in 1986, could reasonably be understood as applying to BP 91(E). The words "at the point of Ras Taba" were circumscribed by Owen in the following way: "That is the point where the ridge north of Taba meets the sea." Wade, in his Report of 1907, wrote that the last beacons were erected at points "along the

line of east cliffs of Taba and one at the point where they strike the gulf'. It follows from these descriptions that Ras Taba was identified with the end of the cliffs lying north and east of Wadi Taba. The exact point was fixed by the Joint Commission in 1906. Also significant is what is stated in Israel's Memorial with regard to a translation of a sentence in Shoucair's *The History of Sinai* (1916) regarding Ras Taba: "This translation has been specially checked and it appears that the meaning which the original Arabic conveys is that the point [the beginning of the separating boundary] was given the name 'Ras Taba' by those involved in the establishment of the boundary there." As BP 91(E) is situated on the ridge east of Taba its location could reasonably be understood as being in conformity with the words "at the point of Ras Taba".

244. The words "on the western shore of the Gulf of Aqaba" contain two qualifications. The word "western" means that Taba is on the western, not on the eastern, shore of the Gulf. The words "on the shore" mean that the pillar was to be at a distance not far from the shore and visible from the shore. While the location of the Parker pillar undoubtedly fits this description better, the location of BP 91(E), which is situated on the cliffs and from where one has a large view over the Gulf, at a distance of approximately 170 metres from the shore, also could reasonably be understood as lying "at the point of Ras Taba on the western shore of the Gulf of Aqaba". The Tribunal therefore comes to the conclusion that Israel's plea of *non licet* cannot be admitted and that Egypt is not precluded from claiming BP 91(E).

c. Conclusion

245. On the basis of the foregoing considerations, the Tribunal decides that the boundary pillar No. 91 is at the location advanced by Egypt, BP 91(E), and marked on the ground as recorded in Appendix A of the Compromis.

C. Execution of the Award

246. The Tribunal notes that Article XII of the Compromis contains, in paragraph 4, the requirement that the Tribunal "shall decide the appropriate manner in which to formulate and execute its award".

247. The Tribunal's decisions on the formulation of the award are reflected in the award itself. So far as execution of the award is concerned, the Tribunal would observe that Article XIV of the Compromis provides as follows:

1. Egypt and Israel agree to accept as final and binding upon them the award of the Tribunal.
2. Both parties undertake to implement the award in accordance with the Treaty of Peace as quickly as possible and in good faith.

248. Egypt has in this context stated that the Parties need some very limited agreement on rebuilding of missing pillars. BP 90 is a good example as to type and style of pillars to be established.

249. Israel has proposed that the execution should be entrusted to the Liaison System set up under the Treaty of Peace.

250. The Tribunal accepts both of these proposals and therefore decides that the execution of this Award shall be entrusted to the Liaison System described in Article VII of Annex I to the Treaty of Peace between the Arab Republic of Egypt and the State of Israel. Agreed boundary pillar No. 90 may serve as an example as to type and style of pillars to be established.

DISPOSITIF

FOR THESE REASONS, AND AFTER DELIBERATION,

THE TRIBUNAL

1. *Decides* unanimously that Boundary Pillar No. 7 is situated at the location advanced by Egypt and recorded in Appendix A to the Arbitration Compromis of 11 September 1986;
2. *Decides* unanimously that Boundary Pillar No. 14 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
3. *Decides* unanimously that Boundary Pillar No. 15 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
4. *Decides* unanimously that Boundary Pillar No. 17 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
5. *Decides* unanimously that Boundary Pillar No. 27 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
6. *Decides* unanimously that Boundary Pillar No. 46 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
7. *Decides* unanimously that Boundary Pillar No. 51 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
8. *Decides* unanimously that Boundary Pillar No. 52 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
9. *Decides* unanimously that Boundary Pillar No. 56 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
10. *Decides* by four votes to one that Boundary Pillar No. 85 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
11. *Decides* by four votes to one that Boundary Pillar No. 86 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

12. *Decides* by four votes to one that Boundary Pillar No. 87 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

13. *Decides* by four votes to one that Boundary Pillar No. 88 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

14. *Decides* by four votes to one that Boundary Pillar No. 91 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

15. *Decides* unanimously that the execution of this Award shall be entrusted to the Liaison System described in Article VII of Annex I to the Treaty of Peace of 26 March 1979 between the Arab Republic of Egypt and the State of Israel.

Rendered at the Hôtel de Ville in Geneva on 29 September 1988.

Two original copies shall be given to the Agent for the Arab Republic of Egypt, two shall be given to the Agent for the State of Israel, and one shall be placed in the archive of the Tribunal.

Gunnar LAGERGREN

Pierre BELLET

Ruth LAPIDOTH

Dissenting Opinion

Hamed SULTAN

Douglas REICHERT

Dietrich SCHINDLER

Registrar

Dissenting Opinion of Prof. Ruth Lapidoth

In conformity with Article XII, paragraph 5, of the Compromis, Professor Ruth Lapidoth delivers the following Dissenting Opinion:

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Introduction

1. To my great regret, I must dissent from the conclusions of the majority and its views on many essential points, in particular with regard to the Taba area. With all due respect, I consider that the majority has sanctioned pillars erroneously erected at locations inconsistent with the lawfully recognized international boundary between Egypt and the former mandated territory of Palestine. Moreover, the majority has forced an artificial, illogical interpretation on the Compromis by asserting that two different locations, 284 metres apart, both can be considered to be the location of the final pillar of the boundary on Ras Taba.

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* *

2. Leaving aside for the moment the contents of the majority opinion, the important fact should be stressed that the Parties, Egypt and Israel, have submitted their conflict to a procedure for the peaceful settlement of disputes, as befits States that are at peace with each other and wish to fulfil their obligation under the law of nations to settle their international disputes by peaceful means.

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* *

I. *The Powers of the Tribunal*¹

3. The Arbitration Compromis restricts the powers of the Tribunal in very precise terms to a decision concerning "the location of the [14] boundary pillars of the recognized international boundary . . ." (Article II). Moreover, upon Egypt's insistence, each Party was to indicate "on the ground its position concerning the location of each boundary pillar . . ." and "[the] Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Israel or by Egypt . . ." (Annex, Article 5).

4. It is rare for the powers of an arbitral tribunal to be limited in such a way. Usually, the tribunal is empowered to establish a boundary or part thereof according to its own opinion and not necessarily in accordance with the line claimed by either of the parties.² I have found only few cases where the tribunal was limited to choosing in law between the boundaries claimed by the parties ("exclusive disjunction"), and in two of those cases the award in fact did not abide by the limitation (The Chamizal Arbitration, 1911,³ and the Northeastern Boundary of the U.S. case, 1827⁴).

5. It is even rarer for an arbitral tribunal to be asked to decide on the location of specific boundary pillars, and I have not found any such case.

6. The Tribunal's functions are so restrictively defined that nobody, in particular not Egypt which insisted on this limitation, should be surprised if the Award does not fully resolve the boundary dispute, even though the Parties have declared in the preamble to the Compromis that they "wish to resolve fully and finally" their dispute. The Party that so wished to restrict the powers of the Tribunal is fully responsible if the Tribunal is unable to settle the whole dispute.

II. *The Recognized International Boundary of the Period of the Mandate*

7. The Peace Treaty, and the Compromis in its wake, speak of "the recognized international boundary between Egypt and the former mandated territory of Palestine". Thus, the Parties, instead of delineating the boundary in terms of specified geographical locations, have referred to the boundary that existed during the Mandate. This boundary, in turn, as shown below, was based on the separating administrative line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula, agreed upon on 1st October 1906 by the Turkish Sultanate, which at that time was the sovereign power in the whole area, and the Egyptian Khedivate, which was in a vassal status with regard to

¹ The background to this arbitration and the contentions of the Parties have been presented in the first part of the majority opinion, and will not be reiterated here.

² See, e.g., the many examples quoted in A. L. W. Munkman, "Adjudication and Adjustment—International Judicial Decisions and the Settlement of Territorial and Boundary Disputes", *British Year Book of International Law*, 46th year, 1972-1973, pp. 1-116.

³ *American Journal of International Law*, Vol. 5, 1911, pp. 782-833.

⁴ Moore, *International Arbitrations*, Vol. I, p. 119.

Turkey but in fact subject to British dominance. We thus have a two-stage renvoi: the 1979 Peace Treaty contains a renvoi to the recognized mandatory boundary, and the latter in turn refers us back to the 1906 line as laid down by the Agreement and recognized during the mandatory period, as shown below.

8. The Agreement of 1st October 1906 was signed at Rafah by a Joint Turco-Egyptian Commission after a survey of the area and after long negotiations. The whole operation was undertaken due to strong pressure by Great Britain which at the time was in control of Egypt, and with a leading role played by British experts.

9. Article I of the 1906 Agreement describes the boundary line as starting "at the point of Ras Taba on the western shore of the Gulf of Akaba", and ending at the Mediterranean Sea near Rafah (these expressions will be analyzed later). Article II reports that the separating line has been indicated by a black broken line on duplicate maps to be signed and exchanged simultaneously with the Agreement. Unfortunately, the original maps have apparently disappeared. Egypt has received from Turkey and submitted to the Tribunal a map which it considers to be a copy of the original maps, but the reliability of this copy is doubtful since it does not bear the signature of the parties as foreseen in Article II, and because its depiction of the boundary in the Rafah area is manifestly erroneous (it deviates considerably from the description in the Agreement). Article III foresees that "[b]oundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line . . ." Article IV places the pillars under the protection of Turkey and Egypt while Article V lays down the procedure for the renewal of the pillars and for increasing their number if the need arises. The remaining articles (VI-VIII) deal with the preservation of ownership rights on both sides of the line, and with the right to benefit from the water situated to the west of the separating line (the provisions concerning water were necessary since the line left almost all the wells and springs under Egyptian control).

10. Soon after the signing of the Agreement, the border was demarcated on the ground by telegraph poles, which were later replaced by permanent masonry pillars. We have two detailed reports by British officials on the survey and on the erection of the telegraph poles,⁵ but very little information on the construction of the permanent pillars. No report of the Joint Commission nor any Turkish report on any of the various operations has been submitted to the Tribunal.

11. The main information concerning the masonry pillars relates to a controversial pillar erected on the shore of the Gulf of Aqaba on 31st December 1906 of which a photograph was found in the late Captain

⁵ E. B. H. Wade, with additions by B. F. E. Keeling and J. I. Craig, *A Report on the Delimitation of the Turco-Egyptian Boundary Between the Vilayet of the Hejaz and the Peninsula of Sinai (June-September 1906)*, Ministry of Finance, Egypt, Survey Department, Cairo, National Printing Department, 1907 (hereinafter "Wade Report"); Captain R. C. R. Owen, *General Report on the Proceedings of the Sinai Boundary Commission*, October 28th, 1906, Archives of the British Government (hereinafter "Owen's General Report").

Parker's personal effects by his daughter (hence the short name Parker pillar). The location of this pillar coincides neither with the location for BP 91 claimed by Egypt nor with the alternative locations claimed by Israel, and each Party relies on it to refute the claims of the other Party.

12. During the period of the Mandate the two neighbours—Egypt and Great Britain for Palestine—recognized the boundary which had been established in pursuance of the 1906 Agreement. The question upon which the present arbitration turns is: what exactly is the line recognized during the mandatory period? There are at least four possible answers:

- (a) the line defined in the 1906 Agreement;
- (b) the line demarcated by the telegraph poles in October 1906;
- (c) the line formed by the masonry pillars built in 1906-07 which replaced the telegraph poles; and
- (d) the line formed by any pillars which existed *de facto* on the ground in 1923 and which may have been erected after 1906-07.

Since neither Party claims that there is a discrepancy between the line delimited by the 1906 Agreement and the one demarcated by the telegraph poles, no distinction need be made between these lines.

13. My colleagues are of the opinion that the recognized international boundary during the mandatory period was the line formed by the masonry pillars in place during the period of the Mandate, even if some of these pillars were misplaced or constructed unilaterally after 1906-07.

14. I cannot share this view. A careful analysis of the relevant documents has led me to the conclusion that the relevant boundary is the one corresponding to the 1906 Agreement and the telegraph poles. By the various acts of recognition of the boundary during the mandatory period, the limitrophe entities, Egypt and Great Britain (for Palestine), adopted the boundary line of the 1906 Agreement, without reference to any changes on the ground which may have occurred subsequent to that Agreement. This recognition is manifested in many documents, some of them of an international character and others being in the nature of correspondence between different departments in the same country. Some emanate from the central authority (in Great Britain, in Palestine, or in Egypt) and others from another government department (mostly the one in charge of surveying). Some constitute acts of recognition of the boundary while others merely prove the existence of such recognition. The wording is not always the same. Thus, in a letter by Ahmed Ziwer Pasha, then Prime Minister and Minister of Foreign Affairs of Egypt, to Lord Lloyd, the British High Commissioner in Egypt, dated 4th February 1926, Egypt recognized the Palestine Mandate while making

toutes réserves en ce qui concerne les frontières de l'Egypte avec la Palestine, qui ne sauraient être en aucune façon affectées par la délimitation des frontières palestiniennes [which according to the Preamble to the Terms of the Mandate may be fixed later].

Ziwer Pasha did not specify what were the boundaries in question, but the British official reply of 25th June 1926 specifically refers to the "frontiers as defined in the year 1906" (letter from British High Commissioner in Egypt, Lord Lloyd, to Abdel Khaled Sarwat Pasha, then Minister for Foreign Affairs of Egypt), and apparently Egypt agreed to the contents of this reply. Ziwer Pasha had in fact invited a reply to his letter, and the result of its receipt was the identification of the 1906 line as the boundary between Egypt and the mandated territory of Palestine.

15. Other texts also refer to the boundary of mandatory Palestine *as defined in 1906*, i.e. Mr. McNeill's reply for the British Government in the House of Commons, on 16th July 1925; the letter of 7th February 1926 from Mr. N. Henderson, British Minister to Egypt, to Sir Austen Chamberlain, Secretary for Foreign Affairs; the letter dated 30th April 1926 from Mr. L. S. Amery, Secretary of State for the Colonies, to Lord Plumer, British High Commissioner for Palestine; Lord Plumer's letter of 20th May 1926 to Mr. L. S. Amery; the description in the *Geographical Handbook on Palestine and Transjordan* (1943) by the British Naval Intelligence Division; and Minute by Mr. H. Beeley, the Foreign Secretary's Adviser on Palestine Affairs, of 16th September 1945.

16. In other documents there is a clear reference to the boundary *as defined by the 1906 Agreement*, i.e. the letter dated 8th March 1932 from the Surveyor General of Egypt to the Director of Surveys, Survey of Palestine; the letter dated 28th November 1935 from the Colonial Office to Mr. M. Nurock; the letter dated 16th January 1936 from the Chief Secretary of the Government of Palestine to the Commissioner of Lands and Surveys and the reply dated 13th February 1936; the letter dated 6th February 1936 from Mr. Richards of the Survey of Egypt to Mr. H. G. Le Ray, Survey of Palestine, which speaks of "intervisible pillars placed in the ground by the Joint Commission after the agreement was signed"; the letter dated 8th January 1943 from the Director of Surveys, Survey of Palestine, Mr. H. G. Le Ray, to the Pales Press Co.; and the annex to a Foreign Office Memorandum of 4th April 1932 on Frontiers of "A" Mandated Territories. Another important document, which in fact refers to the line defined in the 1906 Agreement by using the expressions of the Agreement, although it does not mention the Agreement *expressis verbis*, is the Minutes of the 7th Meeting (6th June 1935) of the 27th Session of the Permanent Mandates Commission of the League of Nations held in June 1935 (for text of these documents, see Memorial of Israel, annexes 63-82 and Counter-Memorial of Egypt, annex 9). Moreover, in the Statistical Yearbooks of Egypt for the years 1910, 1913, 1916, 1926, 1928, 1929, and 1930 it is said that Egypt "est limitée à l'est par la ligne de démarcation arrêtée par la Commission Turco-égyptienne le premier octobre 1906" (The words "le premier octobre 1906" were added from 1913 onwards). In the 1909 Statistical Yearbook there is a reference to this boundary line and to the 1906 Agreement (despite the misprint of 1905 for 1906) in the note at the bottom of the page.

17. The most important among the above documents are the Statistical Yearbooks of Egypt, Mr. McNeill's reply in the House of Com-

mons (1925), the 1926 exchange of letters between Egypt's Minister of Foreign Affairs and the British High Commissioner in Egypt, and the 1932 Memorandum of the Foreign Office with the detailed definition of the boundaries.

18. These various documents confirm that the international boundary recognized by Egypt and the Mandatory Power was the one defined in 1906 by the 1st October Agreement and demarcated by the telegraph poles, irrespective of any later developments. This was the line commonly understood by the parties during the time of the Mandate to represent the valid and recognized boundary (cf. majority opinion, paras. 170-172). The various texts do not at all refer to the location of certain pillars on the ground. There is thus no reason to prefer pillars, or later maps plotting those pillars, over the line described in the Agreement, which is the line to which the texts specifically refer, when there are clear indications that the pillars in question have been erroneously placed, or unilaterally erected at a later date.

19. The preference for the boundary as it has been established by an agreement is in conformity with the principle of *uti possidetis iuris*, recently considered by a Chamber of the International Court of Justice in the *Burkina Faso/Mali Frontier Dispute* case (1986): "[I]ts first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis for sovereignty."⁶

20. In fact, the majority's conclusion in favour of various locations claimed by Egypt is based on several assumptions which I do not consider justified, namely, that pillars at those locations were built during 1906-07 at the site of the telegraph poles placed in pursuance of the 1906 Agreement; that this process was part of the demarcation of the 1906 line; and that in international law demarcation prevails over delimitation.

21. I cannot agree to any of these premises. There is no proof that the pillars at the locations claimed by Egypt were established in 1906-07, and since these locations are in my opinion inconsistent with the terms of the 1906 Agreement (see detailed discussion below, in paras. 90-95; 167-184), no presumption as to their establishment in 1906-07 arises.

22. Moreover, with regard to the pillar in the Taba area, 91(E), the majority itself has expressed doubt on the date of its establishment: "The first evidence of its existence appears on the 1915 British map" (para. 228). Most probably this pillar was built several years after the erection of the 1906-07 masonry pillars which replaced the telegraph poles (see below, para. 83), and thus could not have been part of the demarcation, irrespective of the question of whether this replacement action in 1906-07 was part of the original demarcation process.

23. The majority places heavy weight on the fact that the pillar at 91(E) existed on the ground when the Mandate for Palestine was established. But its physical existence in 1923 does not mean that it was built with the other masonry pillars erected in 1906-07.

⁶ *ICJ Reports 1986*, p. 554, at p. 556.

24. The second premise of the majority is, as mentioned, that the replacement of the telegraph poles by masonry pillars in 1906-07 was part of the demarcation process.

25. However, unlike my colleagues, I consider that this replacement operation was not at all part of the demarcation process and hence the location of these pillars should not be given overriding weight. The answer to the question whether the erection of permanent pillars in the wake of temporary markers is part of the process of demarcation depends on the specific agreement concluded by the parties and on the relevant circumstances: the degree of care with which the temporary markers had been established compared with the degree of care applied in the replacement operation, whether the replacement was undertaken unilaterally or bilaterally, and whether the replacement operation was properly reported.

26. In sharp contrast to the earlier operations, no official report on the erection of the masonry pillars in 1906-07 has been submitted to the Tribunal. All we know about it is contained in a few laconic references, such as a sentence in H. G. Lyons's Introduction to the Wade Report (he mentions in passing that the permanent signals "have been replaced by masonry marks"), in a private diary and set of photographs by Captain Parker, and in a short reference in Shoucair's book.⁷ This is a far cry from the detailed joint report about each pillar which should be made in a proper demarcation procedure. As Stephen B. Jones states in his most authoritative handbook on boundary-making, "[t]he most important and elaborate document prepared by a demarcation commission is its final report, sometimes called the boundary protocol". The author describes in detail all the information which such a report should include.⁸ According to Prof. Charles Rousseau, "le résultat de la démarcation . . . est consigné dans des protocoles . . . ou des procès-verbaux", and the technical "abornement" too is reported in a procès-verbal.⁹

27. There are several circumstances which support the conclusion that the parties did not consider the erection of the masonry pillars as part of the demarcation process: the telegraph poles were fixed by the members of the Joint Turko-Egyptian Commission with the help of the surveyors who had surveyed the area prior to the delimitation; the same officials and experts had also participated in the delimitation phase (negotiation and conclusion of the 1906 Agreement). At least two of those involved have written detailed reports about the whole operation, including a specific description of the erection of the poles—the difficulties encountered, how they were overcome, the location of the poles. Both of them—Mr. Wade (a surveyor-engineer) and Captain Owen—as

⁷ Naum Bey Shoucair, *Ancient and Modern History of Sinai and its Geography, with a Summary of the History of Egypt, Syria and Lebanon, Iraq and the Arabian Peninsula*, Cairo (1916), p. 615.

⁸ S. B. Jones, *Boundary-Making: A Handbook for Statesmen, Treaty Editors and Boundary Commissions*, Carnegie Endowment for International Peace, Washington, D.C., 1945, pp. 197-200. See also A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester University Press, 1967, p. 79.

⁹ Ch. Rousseau, *Droit International Public*, Vol. 3, Paris, Sirey, 1977, pp. 270-71.

well as the Director General of the Survey of Egypt, Mr. H. G. Lyons, referred to the erection of the telegraph poles as the demarcation process (Wade's Report, p. 50, and Introduction, p. 2; Owen's General Report, p. 6). Neither of these experts nor any of the Egyptian members of the Joint Commission were present at the replacement operation. Captain Parker who probably¹⁰ was present at the erection of the first masonry pillar, was not a member of the Joint Commission. Very little information, mostly inconclusive, was left on the replacement process and no official report was submitted.

28. It thus follows that the delimitation and the erection of the telegraph poles completed the process of the establishment of the boundary line. The erection of the final pillars was only to be a technical operation which should not have involved any measurements or technical expertise. In no document is it spoken of as "demarcation", and it was not recorded in an official, detailed report, as befits a proper demarcation process or "abornement".

29. The third premise of the majority concerns the relative weight of demarcation as compared with delimitation. The majority gives absolute preponderance to the demarcation relying on two articles, one by Prof. F. Münch¹¹ and the other by Prof. G. Ress,¹² in particular on the following quotation from the latter: "If the parties have considered over a long time the demarcated frontier as valid, this is an authentic interpretation of the relevant international law title" (majority opinion, para. 210). However, neither author supports an absolute preference for demarcation over delimitation. Of particular interest is Prof. G. Ress's opinion that "[p]robably demarcation . . . only shifts the burden of evidence to the party which wants to argue that the demarcation was wrong" (at p. 435).

30. Developing Prof. Ress's approach a little further, one might say that the relative weight of delimitation and demarcation depends on the circumstances of each case, i.e. the degree of precision and of detail in the delimitation agreement, the seriousness of the pre-delimitation survey, the degree of care with which the demarcation has been effected and reported,¹³ and of course whether it was undertaken unilaterally or bilaterally.

31. As stated above, several circumstances point to the conclusion that the erection of the masonry pillars in 1906-07 was not part of the demarcation (paras. 25-28). However, even if this stage had been part of the demarcation, as the majority claims, and had thus been included in the renvoi, this would only—to use Prof. Ress's approach

¹⁰ The word "probably" is intended to express some doubt since, according to N. B. Shoucair, Captain Parker left for Nakhl immediately after agreement on the shape of the boundary pillars was reached—see Naum Bey Shoucair, *op. cit.*, note 7, p. 615.

¹¹ F. Münch, "Karten im Völkerrecht", *Gedächtnisschrift für Friedrich Klein*, Munich, 1977, pp. 335-354 at p. 344.

¹² G. Ress, "The Delimitation and Demarcation of Frontiers in International Treaties and Maps", in *National and International Boundaries, Thesaurus Acroasium*, Vol. XIV, Institute of International Public Law and International Relations of Thessaloniki, 1985, pp. 395-458, at p. 437.

¹³ See notes 8 and 9, *supra*.

—shift the burden of proof to the Party that challenges the correctness of these pillars. This burden is amply discharged by several facts.

32. Our analysis of the flaws in the erection of the 1906-07 pillars centers at this stage on the Parker pillar, although neither Party has claimed it as the location for BP 91, since it is the pillar about which more information is available and since it is crucial for the decision concerning the Taba area.

33. First, this pillar was built at the wrong location since it did not conform to the criterion of intervisibility which had been laid down by the 1906 Agreement as a mandatory requirement.

34. Second, its construction was not properly reported, neither in a joint report nor even in a unilateral one.

35. Moreover, according to Article 3 of the 1906 Agreement, the boundary pillars had to be erected in the presence of the Joint Commission. But there is no record of the presence of the Egyptian members of that Commission when the Parker pillar was built. Captain Parker, who probably was present, was not a member of that Commission. There is no trace of any authority given to Captain Parker to demarcate the boundary or to deviate from the express provisions of the Agreement, whereas with regard to the earlier stages the full powers of the Egyptian Commissioners were recorded (Owen's General Report, p. 13). The only reference to any authority which Colonel Parker may have thought to have had are the words "[i]t fell to my lot to arrange the building of the pillars (150 [sic!], I think) marking the line . . ." which he used in a lecture given twenty years later (1927).¹⁴ The vague expression "it fell to my lot", coupled with the mistake concerning the number of the pillars, precludes a conclusion on the existence of a proper authorization in 1906.

36. It follows that even if the Parker pillar had been built within the framework of a demarcation process, no presumption in favour of this "demarcation" would prevail since its location does not comply with the mandatory intervisibility requirement of the 1906 Agreement, the "demarcation" of the whole line was not properly reported, and the pillar was not erected with proper authority.

37. My colleagues rely on the fact that "Turkey never made any complaint about the location of this first boundary pillar . . ." and that "Turkey, in 1909 and 1911, collaborated with Egypt in the repair and rebuilding of pillars which had become unstable . . ." (para. 231).

38. However, the lack of complaint over such a short period (1907-1914) cannot cure a defect stemming from a contradiction between the Parker pillar and a basic provision of the 1906 Agreement. Moreover, the lack of complaint is counterbalanced by two relevant facts: first, during the same period there was effectively a Turkish presence west of the Parker pillar site (see below, paras. 141-142); and second, on

¹⁴ Published in the *Journal of the Central Asian Society*, Vol. XV, 1928, p. 3, and reproduced in H. V. F. Winstone, *The Diaries of Parker Pasha*, Quartet Books, London, 1983, at p. 201.

the two Turkish maps of that period—the 1909 Turkish military map and the 1916 Turkish-German map—the boundary ends considerably to the west of that site, at the Granite Knob (see below, paras. 132-134).

39. As to the effect of the rebuilding of certain pillars jointly by Egypt and Turkey: without going into the question of the possible effect on the specific pillars which have so been rebuilt, it is clear that this collaboration could have no effect on other pillars, in particular the Parker pillar, which were not included in the joint rebuilding operation.

40. The situation in the Ras an-Naqb area is somewhat different. These locations do fulfil the requirement of intervisibility, but on the other hand they contradict the physical description of the boundary as laid down in the 1906 Agreement (as shown below in paras. 166-184). Moreover, any presumption in favour of these pillars loses its basis due to the events of the war: the old pillars erected in 1907 were most probably destroyed during World War I (see majority opinion, para. 107), in which Britain and Turkey fought on opposite sides. After Turkey's withdrawal, the new ones could only have been built without joint participation. Under these circumstances any presumption in favour of the existing pillars loses its ground.

41. It follows that the main premises of the majority opinion are not well founded: the pillar at the location claimed by Egypt for BP 91 was not built in 1906-07 and thus could not be considered part of any operation undertaken in that year; the 1906-07 erection of masonry pillars was not in the nature of demarcation; and even if, *arguendo*, it had constituted an act of demarcation, the presumption in favour of the correctness of such demarcation has been countered by the proof that the Parker pillar and the Ras an-Naqb pillars contradicted the delimitation Agreement, by the lack of a proper report, and by the absence of necessary authority.

42. In their opinion, my colleagues have expressed a preference for "the situation on the ground", relying in particular on a pronouncement of the International Court of Justice in the *Temple of Preah Vihear* case (1962)¹⁵ which sanctifies the permanence and stability of established boundaries. I wholeheartedly agree that boundaries have to be stable and permanent, but the question in our case is, which line is the relevant boundary? Is it the line that was established by the telegraph poles, or is it some other line deviating from the one prescribed by the 1906 Agreement? There can be no doubt in my mind that the stability and permanence referred to in the *Temple of Preah Vihear* case should be attributed to the *de jure* boundary, the line delimited and demarcated in 1906. This was the line recognized during the mandatory period, and this is the line to which the principle of *quieta non movere* applies.

43. In this context I again wish to refer to the *Burkina Faso/Mali Frontier Dispute* case (1986),¹⁶ where the Chamber of the International Court of Justice distinguished between the notions of *uti possidetis juris* and *uti possidetis facti*, and preferred the former.

¹⁵ *ICJ Reports* 1962, p. 34.

¹⁶ See *supra*, note 6.

44. In trying to derive some guidance from the *Temple* case, we have to remember several points on which the facts in the present case differ considerably from the background of that case. As already mentioned, during the time of the Mandate—the critical period—the parties did not refer to the boundary as it may have been on the ground or on certain maps, but they expressly referred instead to the line defined in the 1906 Agreement. Moreover, any later change to the detriment of Palestine was excluded since the mandatory Power was precluded from ceding any of the original territory of Palestine, as laid down in Article 5 of the text of the Mandate:

The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of the Government of any foreign Power.

The last phrase—“or in any way placed . . .”—excludes any loss of territory, whether by commission or omission, whether expressly or by an implied acquiescence. It follows that the mandatory authorities were not entitled to change the boundary as laid down by the 1906 Agreement. In fact they did not intend to change it, nor did they change it.

45. The circumstances in the present case differ from those in the *Temple* case on several additional points. First, the Parties to this arbitration explicitly used in their Compromis, at least with regard to the final pillar, the precise language of the 1906 Agreement, thus expressing their intention that this Agreement is the controlling factor. Second, unlike the facts in the *Temple* case, in the present one (contrary to the majority’s opinion) the maps drawn between 1906 and 1915 to a large extent support the 1906 line as understood by Israel (see below, paras. 132-134). Third, another important difference concerns the relative precision of the boundary agreement: the 1906 Turko-Egyptian Agreement was more detailed and specific in its description of the boundary than the 1904 Franco-Siamese agreement dealt with in the *Temple* case. The reason may be that with regard to the Turko-Egyptian Agreement, a proper survey had been undertaken before the signing of the Agreement, whereas the Franco-Siamese boundary was apparently not so well surveyed prior to the conclusion of the agreement. This may explain why in the *Temple* case so much weight was given to the 1907 (post-treaty) map.

46. On the question whether the principle formulated in the *Temple* case requires the continued validity of an erroneous border which has for a long time been recognized, it is interesting to refer to a 1980 judgment of the Swiss Federal Court concerning the boundary between the cantons of Valais and Ticino.¹⁷ After the building of a new road on the basis of a 1947 map, the canton of Valais claimed the map to be inaccurate and asserted that the borderline between the two cantons was shown correctly on an 1872 map. The dispute was decided by the Swiss

¹⁷ The *Nufenenpass* case, *Entscheidungen des Schweizerischen Bundesgerichts* aus dem Jahre 1980, Amtliche Sammlung, 106 Band, Ib. Teil, p. 154. For a summary in English, see *International Law Reports*, Vol. 75, 1987, pp. 114-121.

Federal Court on the basis of public international law applied by analogy, and it distinguished it from the *Temple* case:

Der Umstand, dass der Kanton Wallis weder im Zusammenhang mit der Planung und dem Bau der Nufenenstrasse noch im Verfahren der Gewährung der Bundesbeiträge Vorbehalte zur Grenzfrage angebracht hat, besitzt an sich erhebliches Gewicht. Das umstrittene Gebiet ist indessen sehr klein . . . Vor dem Strassenbau war dieses Gebiet völlig unwegsam und ohne jede wirtschaftliche Bedeutung . . . Unter diesen Umständen—die sich von denjenigen im zitierten Fall des Tempels von Preah Vihear wesentlich unterscheiden—kann dem Kanton Wallis nicht zur Last gelegt werden, dass er die Abweichung der Kartengrenze von dem nach seiner Auffassung richtigen Grenzverlauf zunächst nicht erkannte und erst nach Abschluss der Bauarbeiten die Frage der Grenzziehung aufwarf. Man würde an die Sorgfaltspflicht der Kantone bei der rechtlichen Sicherung ihrer Grenzen überhöhte Anforderungen stellen, wollte man von ihnen verlangen, in abgelegenen und unerschlossenen Gebieten jederzeit auch minime Abweichungen auf Landeskarten und anderen offiziellen Dokumenten vom realen Grenzverlauf festzustellen und entsprechende Schritte zur Wahrung des Status quo zu unternehmen (at p. 168).

This Swiss case has some interesting similarities to the present arbitration. The disputed area was relatively small, uninhabited, and without economic importance. Only when a road was built did it acquire some economic interest. Under these circumstances, the Swiss Federal Court found that Valais's legal claim should not be prejudiced by that canton's unawareness, prior to the dispute, of the discrepancy between the location of the boundary on modern maps, and the line on older ones—the line which Valais submitted to be the correct one. In the view of the Court, a different conclusion would have put too heavy a burden of alertness on the cantons. Thus the Court rejected the validity of a boundary which had been erroneously depicted for a long time.

47. In the present case too, the area in dispute is small, almost uninhabited, and did not have any economic value until it was opened to tourism as a result of the building of the road to Sharm ash-Sheikh and the establishment of the vacation facilities in the Taba area. In the critical period (the Mandate period), it was of no economic or touristic value, and did not attract any attention.

48. The probable absence of a demarcation between Valais and Ticino does not affect the relevance of that case. First, in this Arbitration there is disagreement about the demarcation, as discussed above (whether the erection of the masonry pillars is part of the demarcation process or not), and second, because, as explained earlier, even a proper demarcation only shifts the burden of proof to the party that challenges it.

49. To sum up, the Treaty of Peace refers to the boundary recognized during the British Mandate and the latter refers us to the line established by the 1906 Agreement. The majority errs in assuming that the recognized international boundary during the mandatory period was formed by the pillars that in fact existed on the ground, whether wrongly or rightly erected. Those pillars had never been "recognized" during the Mandate period. The express documentary references relating the recognition of the mandatory boundary to the 1906 Agreement or to the

1906 line establish beyond doubt the overriding dominance of the delimitation provided in the Agreement and the demarcation by the telegraph poles. It excludes giving any effect to contradicting or modifying elements which could be found on the ground or in maps. It is the legal and lawful 1906 line which deserves protection for the sake of stability and permanence.

III. *The Taba Area: Pillar Number 91*

50. Turning now to the main pillar in dispute, I shall discuss:

- (A) the description of the pillar in the basic documents;
- (B) the conditions that BP 91 has to fulfil;
- (C) Egypt's location for BP 91;
- (D) Israel's locations for BP 91; and
- (E) conclusion and the problem of *non licet*.

A. *The location of the pillar according to the basic documents*

51. This description can be found in three provisions. First, Article 1 of the 1906 Agreement states that "[t]he administrative separating line, as shown on map attached to this Agreement, begins at [the point of] Ras Taba on the western shore of the Gulf of Akaba . . ." (the words "the point of" appear in the English translation used by Owen and Wade and later published in *British and Foreign State Papers*, but they were omitted in the two recent translations prepared by the Parties during the present arbitration).

52. Second, the Compromis says, in the Annex, paragraph 2:

For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

It is most remarkable that all other boundary pillars are mentioned in the Compromis (Annex A, paragraph 1) only by numbers, but with regard to BP 91 the Parties themselves have given a detailed geographical description, no doubt inspired by the text of the 1906 Agreement, but by itself a valid expression of their intentions in 1986.

53. Third, according to the Compromis, "[t]he markings of the parties on the ground have been recorded in Appendix A" (Annex, paragraph 3). In this Appendix, Egypt marked the "Remnants", while Israel marked (a) an "Approximate Location at the Granite Knob", and (b) "Bir Taba".

B. *The conditions that BP 91 must fulfil*

54. The 1906 Agreement and the 1986 Compromis have laid down a number of conditions which the proper BP 91 has to fulfil: it has to be the final pillar of the boundary, it must be at the point of Ras Taba on the western shore of the Gulf of Aqaba, and it has to be intervisible with the preceding pillar, namely agreed BP 90. For convenience, the two first conditions will be discussed together.

- i) IT HAS TO BE THE FINAL PILLAR ON THE BOUNDARY; AND
- ii) IT MUST BE “AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA”

55. The Compromis describes BP 91 as “the final boundary pillar No. 91 . . .” (Annex, paragraph 2). In order to interpret this expression, it might be helpful to read it in its context, namely, in conjunction with paragraph 1 of the Annex. This paragraph tells us that “[a] dispute has arisen on the location of the following boundary pillars of the recognized international boundary . . .”. Since the whole dispute is defined by reference to certain boundary pillars on the recognized international boundary identified according to their number on that boundary, the expression “final boundary pillar” in paragraph 2 of the Annex can only mean the final boundary pillar of that recognized international boundary. I don’t see any contradiction, as the majority does, between the location of 91(E) being on the one hand the final one mentioned in the list of disputed locations and on the other hand the penultimate pillar of the boundary (para. 242).

56. Moreover, the fact that the pillar has to be “at the point of Ras Taba on the western shore of the Gulf of Aqaba” also shows that we are dealing with the final, ultimate pillar near the water, since this is precisely where the boundary is defined to commence according to the 1906 Agreement (see also paras. 62-64).

57. “Ras”, when mentioned in the context of a shore, means cape—a headland or a promontory. According to Dr. Y. Tony’s *Dictionary of Geographical Terms*, “ras” means “part of the land which protrudes into the sea or alluvium or a sharp tongue [a long narrow strip of land projecting into a body of water] or part of the land that continues into the sea”.¹⁸ As an example of a Ras in the same area, one can mention Ras Muhammad at the entrance to the Gulf of Aqaba. As already mentioned (para. 51), the word “point” does appear in the 1906 translation used by the Commissioners, but it does not appear in the more recent translations from the Turkish by experts for the Parties to the arbitration. However, since the word does appear in the text of the Compromis itself, the Tribunal is bound to take it into consideration.

58. In the discussion of the locations advanced by Egypt (91(E)) and by Israel (91(I)), I shall deal with the question of which one fulfils the condition of being the location of the final pillar. Here only the general problems raised by the majority will be dealt with.

59. My colleagues have expressed the opinion that “[e]vidently, in 1906 they [the words concerning the conditions of being the final pillar and at the point of Ras Taba] referred to the Parker pillar, not to BP 91(E) . . .” (para. 243). They are, nevertheless, of the opinion that in 1986, BP 91(E) could also have been designated as the “final pillar” since “[i]t is clear that an indication on the ground would not have been conceivable for the Parker pillar location . . .”, and “[t]he location of

¹⁸ Dr. Youssef Tony, *Dictionary of Geographical Terms*, 2d ed., Cairo (in Arabic).

BP 91(E) was the last pillar location along Egypt's claimed line which in 1986 could be indicated on the ground" (para. 242).

60. This conclusion is based on an erroneous assumption of facts. In 1986 there was no hindrance to indicate the Parker location on the ground. Although the cliff had been removed when the road was built, the ground below the cliff does exist and could easily have been indicated.

61. As to the condition of being "at the point of Ras Taba on the western shore of the Gulf of Aqaba", my colleagues consider that "[t]he words 'on the shore' mean that the pillar was to be at a distance not far from the shore and visible from the shore" (para. 244).

62. However, when a delimitation agreement designates a commencement of the boundary "on the shore", the plain meaning of the words is that the boundary starts on the shore, near the waterfront. The most authoritative author on boundary-making, S. B. Jones, makes a distinction between the term "coast", which may connote both shore and hinterland, and "shore", which "refers to the belt within tide range".¹⁹ Since there is only little tide in the Gulf of Aqaba, the expression "within tide range" can only mean: very close to the shore. If the Parties' intention had been to indicate a place not far from the shore, the Agreement and the Compromis would have said "near the shore" or "in the vicinity of the shore".

63. Moreover, this conclusion also follows from the wording of Article III of the 1906 Agreement:

Boundary pillars will be erected, in the presence of the Joint Commission, at inter-visible points along the separating line, from the point on the Mediterranean shore to the point *on* the shore of the Gulf of Aqaba (emphasis added).

This article too proves that the pillars have to be as close as possible to the sea itself. The description of the demarcation in the Rafah area shows that the Commissioners in fact erected the pillar close to the beach, approximately 45 metres from the water's edge. There is no reason to assume that on the Gulf of Aqaba it was farther removed.

64. According to the majority, "the words 'at the point of Ras Taba . . .' originally were conceived for the Parker pillar and could, in the time of the Mandate, be understood in this sense only" (para. 243), and "the location of the Parker pillar undoubtedly fits this description better", but they nevertheless consider that "the location of BP 91(E) . . . also could reasonably be understood as lying 'at the point of Ras Taba on the western shore of the Gulf of Aqaba'" (para. 244). However, if the Parker location fulfilled this condition, then the location of the pillar beyond it could not logically fulfil the same condition. If the majority's opinion were correct, this would mean that two pillars were erected on Ras Taba—the Parker pillar and a pillar at the location of 91(E)—a possibility which is clearly contradicted by Owen and Wade who stated that *one* pillar was erected on "Ras Taba on the Gulf of Aqaba" (Owen's General Report, p. 7; Wade's Report, pp. 53 and 65) (see also *infra*, para. 159).

¹⁹ S. B. Jones, *op. cit.*, note 8, at p. 148.

65. The said conditions by their very nature can be fulfilled only by one location, and by stating that two locations fulfilled them, the majority in fact disregarded these conditions, contrary to the provisions of the 1906 Agreement and the 1986 Compromis. (I shall later come back to this problem below in paras. 162-164.)

iii) IT HAS TO BE INTERVISIBLE WITH BP 90

66. As mentioned above, the 1906 Agreement foresaw that “[b]oundary pillars will be erected, in the presence of the Joint Commission, at intervisible points . . .”. This is a clear, straightforward provision which, contrary to the opinion expressed by the majority, imposes intervisibility as a mandatory requirement without exception. The requirement of intervisibility was included in the Agreement itself and not merely in technical recommendations to the surveyors. The auxiliary verb “will” in the Agreement means, in this context, a mandatory condition and is synonymous with “shall”.²⁰ The imposition of the requirement of intervisibility by the Agreement conforms to a general technique of good boundary demarcation.²¹ Owen’s General Report confirms that this mandatory requirement was in fact followed, since he states that “[n]inety intervisible pillars were erected on the boundary line . . .” (p. 7). The use of the past tense in the Report—“were”—shows that intervisibility was in fact achieved. Wade’s report mentions intervisibility several times (e.g., pp. 50, 53, 54, 55, 64, 65) and Shoucair also refers to it.²²

67. The element of intervisibility was so important that even during the period of the Mandate it was mentioned at least three times in the letter from the Survey of Egypt to the Survey of Palestine of 6th February 1936 (“Intervisible marks have been put in by a joint commission . . .”; “. . . the intervisible pillars placed in the ground by the joint commission after the agreement was signed . . .”; and then a professional recommendation that “boundaries should be defined as straight lines joining consecutive intervisible points . . .”). Similarly, in a letter of 8th March 1932 from the Surveyor General of the Survey of Egypt sent in reply to a question from the Survey of Palestine, it is said that “[t]he Boundary was demarcated on the ground by Pillars erected at intervisible points”.

68. Intervisibility was in fact achieved all along the line in 1906. The few minor deviations which Egypt points out exist today can easily

²⁰ See D. Rushworth in Verbatim Record (V.R.), p. 557. Since I intend to rely with regard to several important matters on the testimony of Mr. D. Rushworth, the expert witness on behalf of Israel, it is appropriate to mention at this point some of his professional credentials. He is a graduate in civil engineering from London University and has a post-graduate diploma in geodesy from Oxford University. He is a Chartered Land Surveyor. He has much experience in surveying, cartography, and demarcation, acquired partly in the British army and partly in civilian functions. His experience relates to both the United Kingdom and overseas countries, including several Arab countries.

²¹ S. B. Jones, *op. cit.*, note 8, p. 215.

²² N. B. Shoucair, *op. cit.*, note 7, p. 614.

be explained, as confirmed by Commander P. B. Beazley's Report and testimony.

69. My colleagues agree that "the Agreement does not provide for any exceptions to intervisibility" (para. 236), but they accept Egypt's contention that in the southern part of the boundary intervisibility was not complied with. The majority relies on the fact that Wade in his Report does not mention intervisibility between the last three pillars, and they consider that this silence, together with the difference in the character of the boundary in the south, point in the direction that intervisibility was dispensed with and that the Commissioners in 1906 were content to rely on the verbal description of the boundary (para. 237). Moreover, from the fact that according to Wade the Commissioners were in a hurry, my colleagues conclude that "the Commissioners did not climb the hills but remained in the Wadi and selected points on the hills which were visible from sites in the Wadi" (para. 237).

70. None of these conjectures seems warranted. As to Wade's silence on intervisibility along the last stretch: the majority too agrees that with regard to other stretches of the boundary as well he does not expressly mention that intervisibility was achieved, although in fact it certainly was adhered to. Moreover, a very careful analysis of Wade's Report on demarcation, at page 53, reveals that by implication he does mention the existence of intervisibility along the last stretch as well. He says that "I accompanied the Commissioners and assisted them generally, but as explained no technical assistance or instrumental work was required . . ." (p. 53). The words "as explained" refer us back to the preceding paragraph, where Wade describes the demarcation in the Thamilet el Radadi area: "the summits to be beaconed were within easy distance of one another and visible throughout, so that the selection of intervening points in the plain required practically no technical help." Actually Wade's words mean that the achievement of intervisibility in this area required no technical help since in practice all the Commissioners had to do was to look and to follow their sight.

71. The fact that during the last days of the erection of the telegraph poles the Commissioners proceeded rapidly, does not warrant the majority's conclusion that the Commissioners gave up intervisibility (see D. Rushworth's evidence, V.R., p. 563). In particular, I have not found any basis or hint to support the assumption that the Commissioners selected points on the hills which were intervisible with sites in the Wadi. Such action would not constitute compliance with the requirement of intervisibility: intervisibility means mutual sight between two consecutive boundary poles, not visibility between each of them and a third point. There is thus no basis for the assumption of the majority that, due to the configuration of the terrain and the fact that the Commissioners were in a hurry, they disregarded the 1906 Agreement and gave up intervisibility south of Jebel Fort.

72. Finally, it is unthinkable that an experienced surveyor like Wade and careful official like Captain Owen would give up intervisibility at an important pillar of the boundary without specifically mentioning it in their meticulous Reports (see D. Rushworth, in V.R., p. 566).

73. It follows that the considerations based on the demarcation report relied upon by the majority to dispense with the requirement of intervisibility are not convincing.

74. According to the second consideration of the majority, lack of intervisibility is irrelevant since “the Parker pillar location and the location of BP 91(E) were recognized by the States concerned as forming part of the boundary line during the critical period . . .” (para. 237).

75. Again, with all due respect, I must differ. The texts analyzed in Chapter II above (paras. 7-49) show that during the period of the Mandate the two neighbouring entities had recognized the boundary as defined by the 1906 Agreement. If the parties had intended to recognize the pillars that *de facto* existed on the ground, they could have done so, but in no text or letter is to be found a reference to the situation in the field.

76. To sum up: the 1906 Agreement and the 1986 Compromis have established three conditions which BP 91 must fulfil: it has to be the final pillar of the boundary at the southern end of the line, and logically only one location can fulfil this condition; it has to be “at the point of Ras Taba on the western shore of the Gulf of Aqaba”, and again, there is no basis whatsoever for the argument that two locations may logically be at that place; and it has to be intervisible with agreed BP 90 since intervisibility is a mandatory requirement in the 1906 Agreement, and this requirement was in fact complied with at the erection of the telegraph poles. The opinion that intervisibility is irrelevant since the Parker pillar and 91(E) were recognized by Egypt and mandated Palestine as boundary pillars is based on the erroneous premise that the recognized boundary was formed by the *de facto* pillars even in case of a contradiction with the 1906 Agreement.

C. *Egypt's location for BP 91*

77. There is no doubt that there are remnants of an old pillar-type construction at the location of 91(E) but there is no evidence that it was erected in 1906. On the contrary, the very trustworthy expert witness, Mr. D. Rushworth, has explained how this pillar was subsequently built by mistake at what was originally a mere trig point, and he based his explanation on the field sheets of the 1915 map (to be discussed below in para. 83).

78. Both Parties agree that at 91(E) physically existed a pillar during the mandatory period, but, as shown in Chapter II, this is irrelevant for the definition of the recognized boundary.

79. According to the 1906 Agreement, the line is supposed to follow “along the eastern ridge overlooking Wadi Taba . . .” (Article 1), and, according to Wade, the beacons were placed “on the eastern margin of Wadi Taba” (p. 53). But the location of 91(E) is not on the eastern margin of Wadi Taba, and it hardly overlooks the Wadi. Standing at 91(E), one can see only the southern tip of the Wadi, since 91(E) is located on the second group of cliffs, far beyond the margin of the Wadi.

80. The majority found that due to divergencies in the 1906-1915 maps, "evidence drawn from the early maps with regard to the final pillar location cannot lead to any clear conclusion" (para. 219).

81. A careful study of the maps of that period has led me to the conclusion that *not one* of the early maps confirms that the 91(E) location is on the boundary. These are the map attached to Owen's General Report, 1906; the map attached to Wade's Report, 1907; the 1909 Turkish military map; the 1907 British War Office map; the 1916 Turkish-German map; the 1906 Survey Department of Cairo map; the map included in Rushdi's book (1910-11); the map included in Hertslet's *Map of Africa by Treaty*, 3rd ed., Vol. III, No. 373, p. 1201, H. M. Stationery Office, 1909; and the 1911 Survey Department of Cairo map.

82. According to the majority opinion, "[t]he first evidence of [the] existence [of a pillar at 91(E)] is the 1915 British map, which shows a boundary pillar at the elevation of 298 feet (91 metres) conforming to BP 91(E)" (para. 228). The existence of this pillar was confirmed by later maps, by various trig lists, and by photos—the 1922 Beadnell photo as well as a photo taken by an Israeli in 1949 (para. 228).

83. However, we have heard convincing expert evidence that on the 1915 British map, a trig point was marked, by mistake, as a boundary pillar (D. Rushworth's testimony, V.R., p. 588) and perhaps later caused the erection of a boundary pillar on that spot. The expert, Mr. D. Rushworth, based his opinion on a careful study of the various field sheets made in the preparation of that map.

84. Other shortcomings which shed doubt on the reliability of the 1915 British map are the fact that it does not show the Parker pillar which probably existed *de facto* at that time, and that it misplaces the change in the direction of the boundary line which occurs at today's agreed BP 90 and shifts it into Wadi Khadra. Probably all the later maps and trig lists, as well as the actual existence of the pillar at the location of BP 91(E), have their origin in the error in the 1915 map.

85. The authority of the 1915 British map is even further reduced due to the publication soon afterwards of the Turkish-German map of 1916, which describes the boundary very differently, as running along the margin of the Wadi, at the foot of the eastern hills, and ending at the triangle which represents the astronomical station on the Granite Knob.

86. In order to be able to evaluate properly the weight of the 1915 British map and those made in its footsteps, one does not have to delve into the difficult question of the probatory value of maps in general. As Prof. F. Münch has said, "[d]ie Rolle der Karten kann sehr verschieden sein, und je nachdem kann ihr rechtlicher Gehalt von Null bis zu einem Höchstwert gehen."²³ [The role of maps can vary greatly, and depending on the circumstances, their legal weight can go from zero up to a maximum value.] As to the 1915 British map, its reliability may be questioned due to the above-mentioned mistakes (para. 84); second, it contradicts the earlier, 1906-1915 maps, which should be preferred since

²³ F. Münch, *op. cit.*, note 11, at p. 335.

they were made closer to the delimitation and demarcation operations; and third, to the extent that it deviates from the 1906 line it is irrelevant, since the boundary recognized during the critical period was the 1906 *line* as such (see above, Chapter II). Any later maps, trig points, and pillars which deviate from this line are not included in the two-stage renvoi on which the Egypt-Israel boundary is based.

87. The majority is not disturbed by any doubts or disagreement concerning the origin of the pillar at 91(E) since it is of the opinion that “at least from around 1917 and throughout the critical period until a time after 1967 there was a boundary pillar at the location of BP 91(E), . . . [and] throughout the Mandate period both Egypt and Great Britain treated it as a boundary pillar” (para. 235).

88. However, *ceterum censeo* (paras. 7-49), in my opinion the physical existence of pillars at certain locations during the critical period is not the decisive factor.

89. According to the majority, the principle of stability of boundaries supports the 91(E) location, where a pillar existed *de facto*:

The principle of the stability of boundaries, confirmed by the International Court of Justice . . . , requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error (para. 235).

The majority erroneously attributes stability to boundary *markers* whereas the principle of stability and permanence applies not to markers but to boundaries lawfully established and recognized.

90. The question arises whether the location of 91(E) fulfils the three conditions, discussed earlier (paras. 54-76), upon which the proper location of boundary pillar 91 depends.

i and ii) DOES 91(E) FULFIL THE CONDITIONS OF HAVING BEEN DURING THE CRITICAL PERIOD THE FINAL PILLAR AND AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA?

91. On this matter, I refer back to my general discussion of these two conditions (paras. 55-65). Assuming, as the majority does, the validity of *de facto* existing pillars, 91(E) cannot be considered as the final pillar: during the critical period, there was another pillar nearer to the end of the boundary—the pillar at the Parker location, and it was not impossible to mark that location on the ground in 1986. The majority’s assumption that both the Parker and the 91(E) locations can be considered as the final pillar amounts to disregarding this condition, as does the assumption, contrary to Wade’s and Owen’s Reports, that both can be considered to be on Ras Taba.

92. The majority considers that in view of certain statements by Owen and Wade, 91(E) could also fit into the description of being on Ras Taba: In Owen’s 3rd June 1906 report to Lord Cromer he describes Ras Taba as “the point where the ridge north of Taba meets the sea”; Wade mentions the erection of a telegraph pole where “the east cliffs of Wadi Taba . . . strike the gulf of Aqaba” (p. 56), and that the beacons were placed “on the eastern margin of Wadi Taba” (p. 53). Neither of these

descriptions fits 91(E), which is up on the cliffs, rather removed from the margin of the Wadi, and the cliffs do not strike the Gulf at that location.

93. According to Shoucair,²⁴ Ras Taba, on which the boundary commenced, was a small hill on the left side of Wadi Taba at ("ind" in Arabic) its mouth. This description cannot be associated with the location of 91(E) which is not on a small hill but high up, and quite remote from the mouth of the Wadi.

94. We will see later that all these descriptions far better suit the Israeli location on the Granite Knob.

iii) DOES 91(E) FULFIL THE CONDITION OF INTERVISIBILITY?

95. Certainly not, and both Parties agree on that. I have explained above (at paras. 69-75) that the majority's opinion that intervisibility was dispensed with in the southern part of the boundary and that intervisibility has become irrelevant due to the existence of non-intervisible pillars during the period of the Mandate is based on erroneous assumptions of fact and law.

96. To sum up: the remnants at 91(E) do not prove that 91(E) is the proper location for Boundary Pillar 91, since there is no proof that the pillar at 91(E) was built in 1906; on the contrary, the first proof of its existence is a map made as late as 1915. It was probably built as a consequence of an error in that map. Its factual existence during the period of the Mandate is not relevant. 91(E) is not situated on the eastern margin of Wadi Taba but on a more remote cliff, and it hardly overlooks the Wadi. Its role as a boundary pillar is contradicted by all the earlier maps. The 1915 British map and the subsequent trig lists and photos cannot endow 91(E) with validity since the markers deviate from the line prescribed in 1906 and recognized by Egypt and Great Britain. As to the principle of stability and permanence of boundaries, it applies to the 1906 *line* which was the subject of the renvoi, not to "boundary markers" which deviate from it. 91(E) is not acceptable since it was not the final pillar during the mandatory period, it was not located at the point of Ras Taba on the western shore of the Gulf of Aqaba and it completely lacks intervisibility with agreed pillar 90.

97. I wish to emphasize that my mentioning the Parker pillar as proof that 91(E) could not have been the final pillar should not be construed as any recognition of the legality or validity of this pillar. The Parker pillar simply shows that according to the criterion chosen by Egypt herself and by the majority—a criterion which I reject—91(E) could not have been the final pillar.

D. *Israel's locations for BP 91*

98. My colleagues have emphasized the lack of remnants or of other evidence showing that an actual boundary pillar had existed at the locations designated by Israel (para. 223). However, with regard to

²⁴ N. B. Shoucair, *op. cit.*, note 7, p. 62.

many pillar locations no remnants were found, a fact which in a wild and arid area ravaged by several wars should not come as a surprise. Moreover, Israel's case is based on the premise that a telegraph pole was erected at 91(I), not a masonry pillar.

99. The majority criticizes the specific location of 91(I) on the western slope of the Granite Knob: "Israel's case for the granite knob is . . . weakened by the fact that Israel's location is not on the top of the granite knob, where astronomical station B.1 was situated." Actually, the majority itself gives the answer: "Israel did not claim the top because it is not intervisible with BP 90" (para. 225). Or, in the words of the expert witness, Mr. D. Rushworth:

I would certainly regard that as a second-best solution. Obviously the place one would prefer to have it . . . would be on the top of the Granite Knob. But if, when I got there, I found that 90 was not intervisible . . . you would take the second-best solution, of putting it lower down on the Granite Knob (V.R., p. 566; see also statement by E. Lauterpacht, Q.C., at V.R., pp. 418-419).

100. In other words: the astronomical station B.1 on the Granite Knob was intervisible with A.2 at Aqaba, and the boundary poles established at present BP 87 (whether 87(E) or 87(I)), as well as at present BP 89, were intervisible with B.1, which was to be the location of the final pole (today's BP 91). When the Commissioners reached B.1, located on the Granite Knob, they must have shifted the location of 91 from the top of the Knob to its western slope, in order to ensure intervisibility between 91 and the pole immediately before it, namely today's BP 90.

101. The majority doubts that the location for 91(I) suits the physical description of the boundary (para. 224). Unfortunately neither the Agreement nor Wade and Owen have described the location of the last pillar with sufficient precision and therefore one can only try to interpret their cursory descriptions. Owen's General Report (pp. 7, 8) and Wade's Report (p. 53) say that the last pillar was erected at or on Ras Taba. As will soon be shown, the Granite Knob is on Ras Taba. Wade also speaks about placing "the beacons on the eastern margin of Wadi Taba" (p. 53) and about the erection of the remaining beacons "at suitable points on the east cliffs of Wadi Taba, and at the point where they strike the gulf of Aqaba" (p. 56). According to the Agreement, the line begins at Ras Taba, as mentioned above, "and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort".²⁵

²⁵ The majority brings two additional quotations from the reports: Owen used the expression "following along the top of the ridge north of Wadi Taba" (at p. 3), but this description is included in his analysis of the negotiations, not of the Agreement itself. However that may be, Israel's location for BP 91 is in conformity with this text since Owen speaks of the ridge *north* of Wadi Taba. The second quotation according to which "[t]he boundary-line, as finally agreed upon, runs for the most part along the watershed" (Owen, General Report, p. 10) is a general observation concerning the whole boundary and does not deal specifically with the Taba area: "no part of the boundary runs along a watershed in [this] area . . . there are lots of watersheds . . . here. Each of these ridges forms a watershed, but I don't see the line running along any of them . . . I would have thought it almost impossible to plot a line anything like the proposed lines that would stick to watersheds" (testimony by Mr. D. Rushworth, V.R., p. 653).

102. These various descriptions lead to the following common denominator: the last pillar was to be and was located at Ras Taba, and the preceding ones on the eastern ridge or east cliffs overlooking the Wadi, or on its margin. Wade's words about the location of a pillar where the east cliffs "strike the gulf of Akaba" suit the Granite Knob: it is composed of granite, like the other southern cliffs to the east of Wadi Taba and south of Wadi Khadra and in contradistinction to the hills on the west side. The Knob is part of a group or chain of lower hills, including the one on which the MFO observation post is located, that line the eastern margin of the Wadi.

103. The majority doubts whether the location of 91(I) on the Granite Knob can be considered to be the point where the east cliffs strike the Gulf. First, they mention the fact that Israel's location for BP 91 is not on the top of the Knob but on its slope (para. 225). Nevertheless, as explained earlier (para. 99), 91(I) is located on the Granite Knob, which is the eastern cliff that strikes the Gulf. Second, the majority is of the opinion that "it is questionable whether the granite knob . . . could be considered part of the eastern ridge since it is separated from it by the area on which a road and a hotel complex was built" (para. 224).

104. On the position of the Granite Knob, one has to refer again to the words of Mr. D. Rushworth, the expert witness. When asked by Mr. Lauterpacht, Q.C., what would be the terminus of the eastern ridge, he replied:

. . . you're conscious perhaps more of a wall than a ridge and that wall certainly . . . leads right down and the Granite Knob appears . . . to be almost part of that wall. In fact, it does appear to be part of that wall if you're far back (V.R., p. 561)

or elsewhere

. . . the land flows down to it through a number of minor features to finish in the Granite Knob (V.R., p. 649).

105. Although the Granite Knob is not part of the higher eastern cliffs and there is some distance between it and those cliffs, the Knob is nevertheless the place where the first range of east cliffs of the Wadi strike the Gulf. As explained by Mr. Rushworth, the Granite Knob appears to be part of the eastern cliff wall of the Wadi, irrespective of the distance that separates it from the higher cliffs.

106. The area between the lower ridge to which the Granite Knob belongs and the higher cliffs cannot be considered to be part of the Wadi, since the latter is the area of the watercourse. The difference and distinction between the Wadi itself and the area between the Granite Knob and the higher cliffs is also apparent from the flora: only in the area of the Wadi itself one can see the bushes and trees that usually grow in a Wadi, whereas in the area between the lower and the higher cliffs no such natural vegetation can be discerned.

107. Thus the line claimed by Israel leaves almost the whole Wadi in Egyptian territory, as required by Captain Owen (Owen's General Report, p. 8).

108. As mentioned, according to the 1906 Agreement the line "follows along the eastern ridge overlooking Wadi Taba to the top of

Jebel Fort''. But since the hills to the east of the southern part of the Wadi (south of its junction with Wadi Khadra) are broken and dissected,²⁶ there is practically no *ridge* in that area. Soon after these dissected heights change into a ridge, the line claimed by Israel joins that ridge. Up to this point, the boundary line runs from the Granite Knob along the eastern margin of Wadi Taba ("most of the way it is hugging the eastern side of the Wadi, the wall on the eastern side") and only for a very short distance is it actually in the Wadi bed (V.R., p. 651). At no place is it in the thalweg—a line which had been proposed by Turkey and rejected by Egypt (Owen's General Report, p. 3; majority opinion, para. 224).

109. It follows that the location of 91(E) on the Granite Knob conforms to the various geographical descriptions found in the 1906 Agreement and in the Wade and Owen Reports: it is situated where the east cliffs strike the Gulf, it leaves almost the whole Wadi under Egyptian control, and it permits the boundary line to pass on the eastern ridges close to the point where such a ridge starts.

110. Let me stress again that the Granite Knob marks the eastern boundary of Wadi Taba and overlooks considerable parts of the Wadi, whereas the Egyptian location for BP 91 is beyond the hills that flank the Wadi and it overlooks only a small part of the very last stretch of the Wadi.

111. The case for 91(I) (Granite Knob) is based on the above physical description, on the fact that this location fulfils the three conditions that the correct location for BP 91 has to fulfil, and on various evidentiary material.

i) THE LOCATION OF BP 91(I) (GRANITE KNOB) CORRESPONDS TO THE FINAL PILLAR AS REQUIRED BY THE 1986 COMPROMIS

112. Since the Granite Knob is very close to the shore, it fulfils the condition of being the final pillar.

ii) BP 91(I) (GRANITE KNOB) IS LOCATED "AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA" AS REQUIRED BY THE 1906 AGREEMENT AND BY THE 1986 COMPROMIS

113. This expression appeared in all the documents related to the 1906 delimitation and demarcation, as well as in Shoucair's book of 1916. As mentioned above (para. 57), the word "Ras", when used in relation to a shore, means a cape, promontory, or headland. A cape is:

[a] relatively extensive land area jutting seaward from a continent or large island which prominently marks a change in or interrupts notably the coastal trend.²⁷

²⁶ "... it is a very uneven wall, at times only a few feet high and running back in little gullies and other times rising almost cliff-like. That is south of Wadi Khadra. It is a very broken wall." (Rushworth, V.R., p. 649; see also V.R., p. 560.)

²⁷ *A Dictionary of Geological Terms*, American Geological Institute, New York, 1962, as quoted in Egypt's Counter-Memorial.

114. As can be seen on various large-scale maps and, in particular, on the aerial photographs of the area, the promontory on which the Granite Knob is located is the only cape in that area.²⁸ It is a piece of land that protrudes into the sea which prominently marks a change in the coastal trend. The feature of the Ras continues also under the water into the sea as can be discerned by the bare eye of the layman. On some maps this area is designated as Ras Taba and on others as Ras el-Masri. The fact that these two names refer to the same cape is well illustrated by the sketch map included in Ms. J. M. C. Plowden, *Once in Sinai* (1940), which describes her 1937 journey. On the map, reproduced on page 279 of her book, the cape is very conspicuous and it is accompanied by the words “Ras el-Misri (Taba Point)”. Probably she used the expression Taba Point instead of Ras Taba because of the sharp-pointed configuration the promontory has on her sketch.

115. The identification of Ras Taba as the cape on which the Granite Knob is located²⁹ also corresponds to the description in Shoucair’s book:²⁹

The beginning of the separating boundary was made at a small hill (Akamah saghirah) on its [the Wadi’s] left side at [“ind” in Arabic] its mouth at the Gulf which was named “Ras Taba”.

The Granite Knob is certainly a “small hill”, and the cape on which it is located is on the left side of the Wadi by its mouth at the Gulf. It fits this description much better than both 91(E) and the Parker location.

116. The map published in Rushdi Pasha’s book on *The Question of Aqaba* (1910-11) also confirms that the cape on which the Granite Knob is located bears the name of Ras Taba. On this map the triangle near the shore, i.e. the astronomical station on the Granite Knob, is surrounded by the words Ras Taba, Ras being written (in Arabic) to its right and Taba to its left.

iii) 91(I) ON THE GRANITE KNOB IS CLEARLY INTERVISIBLE WITH AGREED BP 90

117. Neither any of the Parties nor the majority has contested the existence of intervisibility between agreed BP 90 and 91(I) (Granite Knob).

118. It follows that the Granite Knob fulfils the three conditions for the correctness of BP 91: it fits the location of the final pillar on the shore, it is situated on Ras Taba, and it is intervisible with BP 90.

119. Now I shall proceed to examine the various pieces of evidence that prove that the boundary ended at the Granite Knob.

120. Of major importance is the information contained in the *Statistical Yearbook of Egypt for 1909*. In describing the boundaries of Egypt in the east, it is said that “[t]he boundary follows the line laid down in 1907 from Rafa, near El Arish, to the head of the Gulf of Aqaba

²⁸ D. Rushworth, V.R., pp. 565, 609.

²⁹ N. B. Shoucair, *op. cit.*, note 7, at p. 62.

at Taba (lat. 29°29'12" N. and long. 34°55'05" E., granite knob on the shore) . . .". This is a twofold description: the *Yearbook* mentions specifically the Granite Knob and in addition it gives the precise coordinates which correspond to Wade's coordinates for astronomical station B.1, which was located on the Granite Knob (see Wade's Report, pp. 11 and 49).

121. The majority opinion denies the probative value of this entry. First, it states that "the evidentiary value of such technical publications, designed to provide general information, is low, for such publications are not designed as authoritative statements about boundaries. They fall within the category of what could be described as encyclopaedic reference books and not administrative acts" (para. 220).

122. However, judicial precedent shows that the probative value of statistical material has been recognized. Thus, the Chairman of the tribunal that decided the *Rann of Kutch* case (1968) quoted with approval a passage from a book by Tupper on the tests to be applied in determining the status of certain territories. One of the tests is: "Is it included in Foreign or State territory in our statistical returns?"³⁰ Further on, after reviewing a long list of records, reports, statistical abstracts, and gazetteers, the Chairman observed that "special significance must be attached to those statements made by the competent British authorities in official publications . . .".³¹

123. It follows that the probatory value of statistical information depends on the authority of the publisher. The *Statistical Yearbook of Egypt for 1909* was published by the Ministry of Finance, Statistical Department, and printed at the National Printing Department in Cairo. There is thus no doubt that it is a statement by a competent authority in an official government publication. One may safely assume that the Ministry of Finance was very careful and precise in describing Egypt's boundaries since the power to levy taxes usually ends at the boundary.

124. Second, the majority opinion recalls that "that reference to the terminal point of the boundary disappeared [from the *Yearbook*] in the following years, and certainly throughout the critical period of the Mandate there is no evidence that either Egypt or Great Britain relied upon that one, isolated reference to the granite knob as evidence of the terminal point" (para. 220).

125. However, the disappearance of certain information in later editions does not show that it was erroneous. On the contrary, since the details concerning the description of *all* the boundaries of Egypt were deleted, such an interpretation would mean a disclaimer of the information concerning all those boundaries, which certainly was not intended.

126. The fact that there is no evidence that Egypt and Great Britain relied on the above entry during the mandatory period, does not detract from the persuasiveness of the information included in the *Yearbook* on the location of the boundary.

³⁰ *Reports of International Arbitral Awards*, Vol. 17, at p. 530.

³¹ *Ibid.*, pp. 551-552.

127. Lastly, according to the majority, the probatory value for 91(I) (Granite Knob) of the entry made in the *Yearbook* for 1909 is weakened by the fact that it "refers to the coordinates of the astronomical station B.1, which was on the top of the granite knob" (para. 220), whereas 91(I) is on the lower flank.

128. However, the *Yearbook* does not mention an astronomical station, nor does it speak of the *summit* of the Granite Knob. It merely mentions coordinates which correspond to those of the astronomical station (mentioned in Wade's Report, p. 49), and the "granite knob on the shore". According to Mr. D. Rushworth, in the context of an overall review that a yearbook gives, the location of 91(I) on the lower flank is reconcilable with the reference to the terminus on the Granite Knob coupled with the coordinates of astronomical station B.1 (V.R., p. 566).

129. Another proof for the location of the boundary at the Granite Knob is the fact that a cairn was situated between the Knob and the sea, probably in order to signal the vicinity of the boundary. The presence of this cairn has been shown by the photo taken around 1936 and reproduced in the volume on *Western Arabia and the Red Sea* (1946), published in the series of Geographical Handbooks prepared by the British Naval Intelligence Division during the Second World War.

130. The majority opinion claims that the photograph "does not prove that the stones formed a boundary pillar. The object is even so badly recognizable that it cannot be said what it really was" (para. 221).

131. However, the meaning of the photo emerges clearly from the description near the top of the opposite, directly facing page (p. 92) which says that:

on the long southward-projecting promontory of Taba, 5 miles south of the Palestine police-post, is an Egyptian post, on the frontier between Egypt and Palestine, which is marked by a cairn.

It follows that the stones on the photo constituted a cairn which was near the end of the boundary.

132. The location of the boundary at the Granite Knob was confirmed by several important maps, e.g.:

- (1) the map attached to Owen's General Report, 1906;
- (2) the map attached to Wade's Report, 1907;
- (3) the 1909 Turkish military map;
- (4) the 1916 Turkish-German map;
- (5) the map included in Rushdi's book (1910-11);
- (6) the map included in Hertslet's *Map of Africa by Treaty*, 3rd edition, Vol. III, No. 373, p. 1201, H.M. Stationery Office, 1909.

133. On most of these maps the boundary ends at a triangle which marks an astronomical station, i.e. either A.1 or B.1 on the Granite Knob. Due to the scale of the map it is not possible to tell positively which of the two stations the triangle represents, but since B.1 was higher up and it is the one which was in fact used during the 1906 survey and delimitation, it is highly probable that this station was designated by the triangle.

134. On the Turkish version of the 1916 Turko-German map, the line ends even to the west of the triangle.

135. According to the majority, the map evidence is not conclusive. First, it is said that “[o]n the maps attached to the Owen and Wade Reports, the boundary line ends at the eastern edge of the triangle” (para. 219). However, what counts is that the boundary ends at the triangle.

136. The majority mentions three other maps of that period on which the boundary does not end at the Granite Knob:

- (1) the 1907 British War Office map;
- (2) the 1906 Survey Department of Cairo map;
- (3) the 1911 Survey Department of Cairo map.

137. Although the location on these maps is not identical with the Granite Knob, the line still seems to run to a location far removed from 91(E). It runs to the west of the cliffs on which 91(E) is located, whereas the line claimed by Egypt, i.e. between agreed BP 90 and 91(E), is practically east of that line of cliffs.

138. Moreover, among the maps of that period (1906-1915), more weight should be given to those attached to the Owen and Wade Reports: “[t]hey were produced by the people who were on the ground and we are very clear as to exactly how they were produced . . . and they have been published . . . They seem to me to be the key maps in the whole business” (D. Rushworth, V.R., p. 613).

139. The majority opinion questions the value of the maps that support the location of the Granite Knob as the end of the boundary by pointing to the fact that these maps are drawn on a very small scale while the triangles are relatively large (para. 219). Whatever may be the impact of the smallness of the scale on other aspects of those maps, with regard to the southern end of the boundary they clearly show that the line ends at the triangle, which corresponds to the astronomical station on the Granite Knob.

140. As the majority points out, “[a]ll later maps (from 1915 on), except the 1916 Turkish-German map, show the line passing through BP 91(E) or both 91(E) and the Parker site . . .” (para. 219). But since, as explained above (paras. 7-49), the recognized boundary is the line that was established in 1906, the earlier maps made close to that date are of much greater importance than the later ones.

141. The location of the boundary at the Granite Knob has also been confirmed by the Turkish presence in the area.

142. This presence is mentioned in records of various travellers. Thus Meistermann, in the 1909 edition (repeated in 1913) of his book *Guide du Nil au Jourdain*, says that “en deçà de l’oasis [referring to the Bir and the palms] passe la nouvelle frontière de l’empire ottoman, sur laquelle veille un poste de soldats turcs, casernés dans un petit fort. La route fléchit vers l’est et contourne un petit cap, ras el Masri . . .”. Baedeker, in his 4th edition of *Palestine et Syrie* (1912), also says that “aussitôt après [after the Bir and the Palms] on franchit la frontière turco-égyptienne (postes militaires turcs). On contourne en 1h. le cap

ras el Masri . . .”. Moreover, this Turkish presence in the area is also confirmed by the *Sudan Intelligence Report* of April 1913, which says “that a Pasha with two guns has arrived in Akaba. The guns are said to have been placed in position at Taba and J. Bereio”.

143. The majority considers that these facts “are not conclusive as to where the boundary line actually ran” (para. 221).

144. However, even if these indices do not describe the precise location of the line, they prove that it could only be near the Wadi (i.e. at the Granite Knob) or in it (i.e. at Bir Taba), and definitely not at the site of 91(E) which is up on the cliffs quite remote from the mouth of the Wadi.

145. Second, the majority considers that “[a] Turkish presence in the Wadi Taba could also be explained by other grounds, such as the right under Article 6 of the 1906 Agreement for Turkish soldiers to cross over to the Egyptian side to draw water from the well at Bir Taba” (para. 221).

146. However, although Article 6 permits Turkish soldiers to “benefit by the water which remained west of the separating line”, it is not clear that in order thus to “benefit”, the soldiers were permitted to cross the line (see the telegram dated 2nd October 1906 and the letters dated 6th and 13th October from M. De C. Findlay to Sir Edward Grey and telegram of 12th September 1906 from Sir N. O’Conor to Sir Edward Grey concerning the water). In any case, it is clear that they were not permitted to cross the line when armed (Article 7 of the 1906 Agreement). When Meistermann and Baedeker spoke of “poste de soldats turcs casernés dans un petit fort” and “postes militaires turcs”, they certainly did not mean the mere presence of unarmed soldiers.

147. As for the alternative location for 91 proposed by Israel, i.e. the Bir Taba location, this alternative was based on the following considerations:

(1) Undoubtedly, there is intervisibility between this location and agreed BP 90.

(2) Several texts and descriptions specifically mention Bir Taba as the boundary (see majority opinion, para. 151).

148. Comparing the Bir Taba and the Granite Knob alternatives, the question arises which of the two corresponds better to the requirements that pillar 91 has to fulfil. Both of them may be considered as the final location near the shore, both are intervisible with agreed BP 90, and both are supported by evidence. Since the Granite Knob alternative is the one that is located on the cape of Ras Taba, I believe that it is the correct location for BP 91.

149. To sum up, the location of 91 on the western slope of the Granite Knob conforms to the description in the 1906 Agreement as well as the Wade and Owen Reports since it is on Ras Taba, it is the first eastern cliff which strikes the Gulf, and it overlooks the Wadi; it is the location for the final pillar since it is near the waterfront; it is located on the only cape or promontory in the area which bears the name Ras Taba on some maps, Ras el-Masri on others, and both names on one sketch

map; it also corresponds to the description in Shoucair's book; and it is clearly intervisible with agreed BP 90. The fact that the boundary line ends at the Granite Knob is supported by the *Statistical Yearbook of Egypt for 1909*, by the 1936 photo of a cairn in its vicinity, by many maps of the period immediately following the 1906 Agreement, and by the Turkish presence in the vicinity (described by two skilled and experienced observers and by a British Intelligence Report).

E. *Conclusion and the problem of non licet*

150. When considering the location of BP 91, several basic facts have to be remembered. First we are dealing with a two-stage renvoi which leads us to the recognized boundary of the mandatory period defined in terms of the 1906 Agreement. Whatever may be the situation under general international law, there can be no doubt that in this case the parties recognized the legal 1906 line and not any "situation on the ground".

151. If, as the majority opinion assumes, the two parties—Egypt and Great Britain—during the period of the Mandate had wished to recognize the line of the pillars actually existing in 1923 (or, perhaps, in 1926, the year in which the recognition took place), they could have expressly said so, instead of referring to the 1906 line.

152. Moreover, there is a logical flaw in the majority's opinion: if, as my colleagues assume, the pillars existing on the ground at that time, i.e. at 91(E) and at the Parker site, constituted the recognized boundary, how can such recognition be reconciled with the fact that Egypt claims not to have had any knowledge prior to the oral hearings of this Arbitration of the pillar that was at the Parker site (see, e.g., Egypt's Rejoinder, p. 34; V.R., pp. 659, 691, and 801)?

153. Turning now to the question which claim better suits the line laid down by the 1906 Agreement, it is obvious that the location of 91(I) conforms to the description in the Agreement as well as in Wade's and Owen's Reports: south of BP 90, the line runs along the eastern margin of the Wadi and ends at the place where the eastern cliffs strike the Gulf, i.e. at the Granite Knob. The Egyptian location for 91, on the other hand, is *beyond* the first group of cliffs, the line between this location and agreed BP 90 is mainly east of the hills above Wadi Taba, and 91(E) itself hardly overlooks the Wadi.

154. 91(I) (Granite Knob) is confirmed by most of the early maps, while 91(E) conforms to the post-1915 maps. However, the earlier maps are the more relevant ones since they describe the situation in the period to which the act of recognition refers.

155. The designation of the Granite Knob instead of the site of 91(E) for a boundary pillar is also in conformity with the *travaux préparatoires* surrounding the conclusion of the 1906 Agreement. Mr. M. De C. Findlay, Deputy to Lord Cromer and Acting Agent and Consul-General in Egypt at that time, mentioned in his letters of 10th July and 30th July 1906 to Sir Edward Grey, the British Foreign Secretary, that the British-Egyptian negotiators had expressed themselves to be prepared, in exchange for Turkish concessions in the northern part of the

boundary (in particular in the Kusseima area), to take into consideration Turkey's needs in the south for the protection of Aqaba (see also Owen's General Report, p. 6). Turkey's great concern in this matter was also described in Rushdi Pasha's book on *The Question of Aqaba* (1910-11). An Egyptian, viz. British, outpost on the cliff of 91(E) would certainly have constituted a danger for Aqaba and hence it is quite logical that since Turkey renounced her claim to Kusseima and Ein Kadiss, Captain Owen and his team left the cliff on which 91(E) is situated to Turkey.

156. Last but not least, in the eyes of an expert surveyor, the Granite Knob is a much better suited location of a boundary than 91(E) or the Parker location (D. Rushworth, V.R., pp. 561-565).

157. Turning now to the three conditions that BP 91 has to fulfil—intervisibility with BP 90, being the final pillar and being at the point of Ras Taba (see *supra*, paras. 54-76; 91-96; 111-118)—it is obvious that the Granite Knob fulfils them, and 91(E) does not. The majority is therefore in a dilemma. Since my colleagues have ruled that the pillars which actually existed on the ground during the period of the Mandate, whatever be their origin, have to be sanctioned, they have preferred 91(E) to the Granite Knob. But since this location does not fulfil the three conditions, the majority opinion practically disregards these conditions by using an unconvincing reasoning.

158. As to intervisibility, my colleagues consider that the situation on the ground prevails even if it contravenes a mandatory requirement expressly included in the 1906 Agreement (paras. 74-75).

159. As to the condition that BP 91 has to be the final pillar and on the point of Ras Taba, my colleagues are of the opinion that both the Parker site and 91(E) can be considered as final and on the Ras, although logically only one pillar can be the final one, and according to Wade and Owen only one pole was erected on the Ras (see also *supra*, paras. 61-65).

160. In fact, the Parker site and 91(E) are mutually exclusive with regard to the fulfilment of the two conditions of being the final pillar and at the point of Ras Taba. If the Parker pillar existed, then by no stretch of imagination could 91(E) be the final pillar and on Ras Taba.

161. On the other hand, the existence of the Parker pillar is no impediment to a finding for 91(I) on the Granite Knob since the case for this location is based on the recognition of the 1906 line by the authorities during the period of the Mandate, irrespective of any pillars which may have existed on the ground between 1923 and 1948.

162. When a Tribunal is confronted with a limited choice and none of the alternatives conforms to the law or the Compromis, it has a duty to refrain from designating a location, and it cannot artificially increase its powers or discretion by disregarding its limitations.

163. Probably the majority resorted to the above interpretation in order to avoid a situation wherein it would not have been able to give a positive decision on the disputed location of the pillar, perhaps fearing the spectre of a *non liquet* ruling. But a ruling that neither Party has proven its case is a far cry from *non liquet* and has nothing to do with it.

According to Sir Gerald Fitzmaurice, in a case “where the parties request the tribunal to decide exclusively by reference to a certain specific criterion . . . or where the question put to the tribunal directs it to such a criterion as the basis of decision . . . but where . . . the arguments of neither party find any support by reference to this particular criterion . . .”, the result would be that the tribunal cannot give a decision and such abstention would not be considered a *non liquet*.³²

164. The majority’s decision to consider that two locations fulfil the conditions of being at the location of the final pillar and of being on the shore at Ras Taba practically amounts to disregarding these conditions. The words of the Compromis do not permit the Tribunal to overlook these explicit conditions.

165. In conclusion, it is necessary to emphasize the incomplete result created by the decision of the majority. Since my colleagues have adopted a location for BP 91 which is not at the end of the boundary on the shore, the question where the line is to run from BP 91 remains open.

IV. *The Ras an-Naqb Area: Pillars 85, 86, 87*

166. In this area as well, the main disagreement between the majority’s opinion and mine concerns the relative weight of the 1906 line, on the one hand, and the situation on the ground in the critical period, on the other hand. The majority considers that there is conformity between the pillars existing *de facto* and the line established by the 1906 Agreement, and that if there had been a contradiction, the former should prevail. With all due respect, I think that there is a discrepancy between the 1906 line and the actual pillars, and that the 1906 line should be preferred since this is the one that was recognized during the period of the Mandate.

167. The disagreement concerning this discrepancy depends mainly on the identification of certain geographical features in relation to which the Agreement defines the boundary.

168. There are old pillars in the area at the locations claimed by Egypt, and on the various maps the boundary runs in accordance with Egypt’s claim.

169. With regard to this area, the Agreement defines the boundary as follows:

The . . . line . . . follows along the eastern ridge [or heights or summits—according to other translations] overlooking Wadi Taba to the top of Jebel Fort; . . . From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha . . .

Thus, the location of the boundary pillars depends on the identification of Wadi Taba, Jebel Fort, and Jebel Fathi Pasha.

170. The majority has accepted the correctness of Egypt’s claim and has expressed the opinion that this claim is not contradicted by the location of the physical features mentioned in the 1906 Agreement. According to the majority opinion, on several maps the physical features

³² Sir Gerald Fitzmaurice, “The Problem of non-*liquet*: Prolegomena to a Re-statement”, in *Mélanges offerts à Charles Rousseau*, Paris, Pedone, pp. 89-112, at p. 95.

of Jebel Fort and Jebel Fathi Pasha in relation to which the boundary is defined in the Agreement, are situated in accordance with Egypt's claim (the Wade Aqaba-Rafah sketch map of July 1906, the Wade Topographical Sketch Map of July 1906, the 1907 British War Office Map). As to the identity of Wadi Taba, it is based according to Egypt on the premise that this Wadi continues to the north under the name of Wadi Gasairiya, or that it does not stretch farther north than the bifurcation of the wadis which occurs north of agreed pillar 89 (the latter alternative has been adopted by the majority opinion).

171. I have come to the conclusion that the Israel location for these features is more in conformity with the 1906 Agreement and that it excludes the Egyptian location for the boundary.

172. As to Wadi Taba, it seems to me that the wording of the above provision of the Agreement implies, contrary to the majority's opinion, that the Wadi continues to the north, to the vicinity of Jebel Fort ("following along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort . . ."). The fact that the Wadi continues much farther north beyond the bifurcation is confirmed by Owen's "Rough Map" (sent on 3 June 1906 to Lord Cromer) on which Wadi Taba continues to the north, to the Nakhl road. Moreover, from Wade's Report too one gets the clear impression that the Wadi continues farther north: Wade mentions a delay caused by the fact that the Turkish depot at the Mufraq by an oversight had not received orders to vacate that station, and then adds: "Next morning they had left and we descended into Wadi Taba . . ." (p. 53). This sentence conveys the impression that Wadi Taba goes north to the vicinity of the Mufraq. Similarly, and perhaps even more convincingly, in his journal for 18 October, we find the following entry: "In the morning we found post vacated. Descended into Wadi Taba and set up a beacon on its east cliff at a point from which the beacon on Gebel "Fort" is visible . . ." (p. 65). This entry shows that the Wadi reaches the area of the Mufraq, and that the first pillar south of Jebel Fort was already on the cliffs of Wadi Taba. Moreover, according to Owen, even Jebel Fathi, which is located farther north than Jebel Fort, "overlooks part of Wadi Taba" (Owen's General Report, p. 6); it follows that the Wadi has to continue far north.

173. As to the question *where* is the continuation of the Wadi to the north, one has to remember that north of agreed pillar 89 the Wadi bifurcates into three tributaries, the western one named Wadi Haneikiya and the eastern one Wadi Gasairiya. On the maps, the middle one has no name on it, and it is logical that it should be the continuation (or the northern part) of Wadi Taba since it has no other name and since it merges naturally, without any break, into the southern Wadi Taba. The middle tributary perfectly suits the text of the Agreement since it has a range of mountains on its eastern side, going almost as far north as Israel's location for Jebel Fort (86(I)).

174. Egypt's definition of Wadi Taba is not convincing. If, as Egypt has claimed in its Rejoinder, Wadi Gasairiya were the northern part of Wadi Taba, then the boundary line would run to a certain extent *west* of the Wadi, whereas the 1906 Agreement provides that it should be

east of Wadi Taba. Moreover, the two Parties have agreed to add a new pillar, No. 88, on a certain hill; although they disagree on the exact location of the pillar, there is agreement about the hill on which it should be located. This hill is to the west of Wadi Gasairiya, whereas it is to the east of the middle tributary claimed by Israel to be the northern Wadi Taba.

175. As to the alternative Egyptian claim that there is no northern Wadi Taba and that it stretches only from the Gulf to the bifurcation of the three tributaries (V.R., p. 748), this claim contradicts the wording of the 1906 Agreement (which, as mentioned above, speaks of a Wadi that goes almost up to Jebel Fort), the Owen rough map, Wade's Report, and Owen's Report.

176. As to the identification of Jebel Fort: Israel's Jebel Fort (86(I)) corresponds to the description in the 1906 Agreement since it is just to the north of northern Wadi Taba, at the end of the eastern mountains overlooking the Wadi. The mountain identified by Israel as Jebel Fort, much more than the Egyptian one, looks like a fortress: it is the most dominant feature on the plain, it dominates the plateau to the north-west, and it can be seen from Aqaba. The mountain identified by Egypt as Jebel Fort, on the other hand, is in fact in the lower area, below the plateau.

177. Moreover, at the Israeli Jebel Fort there stands a cairn of stones shaped like a truncated pyramid (according to the description card for 86(I) in Appendix A to the Compromis). This could have been one of the original temporary markers which the Commissioners erected in 1906 at some places in order to mark the locations before the erection of the telegraph poles (as recorded in Wade's Report, p. 61).

178. Again, the topography of Israel's Jebel Fathi conforms more than Egypt's location with Owen's description, according to which Jebel Fathi "commands the flank of the upper part of the Nakb and Jebel Raschdi . . . and also overlooks part of Wadi Taba" (Owen's General Report, p. 6).

179. Several maps of that period describe the physical features of the two mountains—Jebel Fort and Jebel Fathi Pasha—in accordance with Israel's claim: Wade's 1907 map, the 1909 Turkish military map (only Jebel Fathi, Jebel Fort not being marked), the 1911 Survey Department of Cairo map (on this map Jebel Fort is even farther west than according to Israel's claim). With regard to the last mentioned map, the majority considers it uncertain as to which feature the words Jebel Fathi Pasha exactly refer (para. 202). The uncertainty flows from the location of those words in their transcription in Roman letters, whereas it is clear that the name in Arabic letters points to the location claimed by Israel for this mountain. Each of these maps comes from a different source, and hence their special importance. Of particular weight is the Wade 1907 map attached to his Report: it has the advantage of being made by a professional surveyor who participated as the leading expert in the relevant proceedings—the survey, the delimitation (the conclusion of the 1906 Agreement), and the demarcation. Moreover, his 1907 map was

adopted by the British Foreign Office in Hertslet's *Map of Africa by Treaty*, 3rd edition, Vol. III, p. 373.

180. As mentioned above, the Tribunal relies on three maps which allegedly confirm the Egyptian location for Jebel Fort and Jebel Fathi Pasha, two of them being early (1906) sketches by Wade. His 1907 map, however, confirms the Israeli location. It is submitted that preference should be given to the 1907 Wade Report map: it may be assumed that, unless another conclusion is justified by special circumstances, a later map made by the same surveyor is an improvement over the earlier ones and is more accurate.

181. Although according to the 1906 Agreement the boundary should go through the top of Jebel Fort and through "a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha", on the maps which support Israel's identification of these features, the boundary line does not pass through them. It appears, however, that where on a map there is a contradiction between, on the one hand, a description of physical features or topographical details inserted on the basis of a survey (in this case Wade's survey) and, on the other hand, a boundary line which may have been added later by a draughtsman, it is the physical features to which more weight should be given.³³

182. It thus follows that the Israeli locations for pillars 85, 86 and 87 are more in conformity with the physical description of the 1906 Agreement, and, after due consideration, I have come to the conclusion that this fact carries more weight than the location of the boundary line on maps and the location of the existing pillars, since the act of recognition in the period of the Mandate referred to the line established by the 1906 Agreement and not to any pillars which may contradict it. Moreover, one has to remember that the erection of the masonry pillars in 1906-07 was not part of the demarcation process (*supra*, paras. 25-28) and that apparently the pillars that existed at the time of the Mandate were not the original ones (majority opinion, para. 107; see also *supra*, para. 40).

183. As to the question whether the boundary line as traced on maps or its geographical description in the 1906 Agreement should prevail, in the present circumstances it is the geographical description which should carry more weight. If the original map which was part of the Agreement had been found, it would of course have been relevant, and any contradiction between the text and the map would have had to be resolved on the basis of the rules on interpretation of treaties. But even in such a case, probably "the description in the treaty should prevail".³⁴

184. To sum up: the Egyptian locations for pillars 85, 86, 87 conform to pillars existing on the ground and to the boundary traced on the maps. The Israeli locations, on the other hand, conform to the physical description of various geographical features by which the 1906

³³ See D. V. Sandifer, *Evidence Before International Tribunals*, revised edition, 1975, p. 236. See also Mr. Rushworth's testimony on map-making, V.R., p. 567 et seq.

³⁴ G. Ress, *op. cit.*, note 12, at p. 421.

Agreement has described the boundary. Under such circumstances, it is the geographical description which has to be preferred due to the supremacy of the Agreement.

V. *Pillar Number 88*

185. With regard to BP 88 both the factual and the legal situations are unique. BP 88 is to be a new pillar on the boundary, so there was no old pillar nor remnants thereof for the Parties to consider. The fact that the Parties asked the Tribunal to decide the location of a boundary pillar of the recognized international boundary between Egypt and the former mandated territory of Palestine at a place where no pillar previously existed amply demonstrates that the task of the Tribunal is not limited to determining where pillars existed during the period of the Mandate but rather extends to the decision on the proper location of pillars of the legal boundary. The boundary indicated on maps may have assisted the Parties in determining on which hill to place BP 88, but such map evidence was of no assistance to the Tribunal since the locations of 88(I) and 88(E) are on the same hill and the distance between them is too small (44.63 metres) to appear on the available maps. Rather, the Tribunal could only distinguish between the claimed locations on the basis of the terms of the 1906 Agreement and the way it was implemented by the 1906 Joint Commission with respect to the placement of neighbouring pillars.

186. Israel's location for BP 88 is based on the premise that the Wadi to the west of the hill on which BP 88 should stand is Wadi Taba, and we know from the Agreement that this sector of the boundary should run "along the eastern ridge overlooking Wadi Taba . . .". Thus BP 88 should be at a place where it overlooks the Wadi from the east.

187. Even though the majority does not accept the Israeli identification of Wadi Taba, it should have preferred the Israeli location for BP 88 since the nearest pillars in that region, agreed BP 89 and agreed BP 90, both also stand on the western side of the ridge, overlooking the nearby Wadi, whatever its name, from the east. It is thus logical that BP 88 too should be on the western side of the ridge. (A comparison with 87(E) in this context is not helpful since 87(E) is on top of a small peak and therefore one cannot say that it is on the eastern or on the western side. 87(I), however, is on the western side of the ridge.)

188. The majority has instead decided that "[a]s no other criterion is available, the Tribunal has to base its decision on the straight line criterion to which the parties to the 1906 Agreement repeatedly referred . . ." (para. 213), and they have applied this principle by choosing for BP 88 the location which is closest to a straight line between BP 87(E) and BP 89.

189. This reasoning is both unnecessary, as discussed above, and erroneous. There is no valid basis for the straight line criterion south of Jebel Fort because straight lines are not mentioned for this sector of the boundary in the 1906 Agreement and neither Wade nor Owen refer to such a line. In fact, south of Jebel Fort, the line formed by the telegraph poles was not straight, but changed direction at every pillar. The general

directive that the boundary line should run in an approximately straight line from Rafah on the Mediterranean to the terminus on the Gulf of Aqaba (see majority opinion, paras. 29, 32-34) cannot serve as a criterion in view of the limitation involved in the adverb "approximately", coupled with the smallness of the distance between the two claimed locations, and the configuration of the boundary in the southern sector. It should also be remembered that neither of the Parties has based its arguments with regard to BP 88 on the relevance of a straight line.

VI. *Conclusions*

190. The Tribunal has been asked to decide, in accordance with the 1979 Treaty of Peace, the 1982 Agreement, and the 1986 Compromis, the location of certain boundary pillars of the recognized international boundary of the period of the Mandate, as this constitutes the boundary between Egypt and Israel.

191. The boundary recognized by Egypt and Great Britain is the line established by the 1906 Agreement, which does not necessarily coincide with the line formed by the pillars that existed *de facto* on the ground during the critical period.

192. The 1906 line, as laid down in the Agreement and described by Wade and by Owen, confirms the location on the Granite Knob for BP 91 in the Taba area, and the locations of 85(I), 86(I), and 87(I) in the Ras an-Naqb region. The proper location for the new pillar No. 88 is at 88(I) on the ridge that overlooks the adjoining Wadi, as do the neighbouring pillars.

193. Unfortunately, however, my colleagues have preferred to locate BP 88 at 88(E) since it is closer to a straight line—a method which in my opinion is not applicable to this area. As to the other pillar locations in dispute, the majority has preferred to sanction the situation which existed *de facto* on the ground during the critical period and this has led them to adopt the location claimed by Egypt.

194. The location chosen by my colleagues in the Taba area does not fulfil a mandatory requirement of the 1906 Agreement, i.e. inter-visibility, and two conditions included in the 1986 Compromis, i.e. that it has to be the final pillar on the boundary and situated at the point of Ras Taba on the western shore of the Gulf of Aqaba.

195. With all due respect, I wish to repeat that in my opinion 91(I) (Granite Knob) is the right location for BP 91, according to the 1906 Agreement, the 1986 Compromis, the relevant maps (1906-1916), and various other pieces of evidence.

196. It is regrettable that the majority has not decided for 91(I) on the Granite Knob, which would have solved the dispute fully, but instead has decided for the location claimed by Egypt, which is not only the wrong one because it does not fulfil the criteria of the 1906 Agreement and the 1986 Compromis, but also leaves unresolved the course of the boundary line beyond 91(E).

Ruth LAPIDOTH

APPENDIX A

Arbitration Compromis

Egypt and Israel,

Reaffirming their adherence to the provisions of the Treaty of Peace of 26 March 1979, and their respect for the inviolability and sanctity of the recognized international boundary between Egypt and the former mandated territory of Palestine,

Recognizing that a dispute has arisen, as defined in Article II of this Compromis, on the location of fourteen boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine as stipulated in accordance with the Annex, which the parties wish to resolve fully and finally,

Recalling their obligation under the United Nations Charter to settle disputes by peaceful means,

Considering the conclusion and implementation of this agreement as an integral part of the process of furthering peaceful and good relations between them,

Affirming their intention to fulfill in good faith their obligations, including their obligations under this Compromis,

Recalling their obligation to settle disputes in accordance with Article VII of the Treaty of Peace,

Confirming their commitment to the provisions of the agreement of 25 April 1982, between them,

Having resolved to establish an arbitration tribunal,

Have agreed to submit the dispute to binding arbitration, in accordance with the following procedures:

Article I

1. The arbitration tribunal (hereinafter called "the Tribunal") shall be composed of the following members: Hamed Sultan, nominated by the Government of Egypt, Ruth Lapidot, nominated by the Government of Israel, Pierre Bellet, Dietrich Schindler, and Gunnar Lagergren, who shall be the President of the Tribunal.

2. Once the Tribunal has been constituted, its composition shall remain unchanged until the award has been rendered. However, in the event a member nominated by a government is or becomes unable for any reason to perform his or her duties, the original nominating government shall designate a replacement member, within 21 days of such a situation. The President shall consult with the parties in the event the President believes such a situation has arisen. Each party is entitled to inform the other party in advance of the individual it would designate in the event of such a situation occurring. In the event the President of the Tribunal or a non-national member of the Tribunal is or becomes unable for any reason to perform his or her duties, the two parties shall meet within seven days and shall endeavor to agree on a replacement within 21 days.

3. Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy had occurred. The newly appointed arbitrator may, however, require that the oral proceedings and visits be recommenced from the beginning.

Article II

The Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex.

Article III

1. Each party will be entitled to submit to the Tribunal any evidence which that party considers relevant to the question.

2. A party may, by notice in writing through the registrar, call upon the other party to make available to it any specified document or other evidence which is relevant to the question and which is, or is likely to be, in the possession or under the control of the other party.

3. At any time during the arbitral proceedings the Tribunal may call upon either party to produce additional documents or other evidence relevant to the question within such a period of time as the Tribunal shall determine. Any documents or other evidence so produced shall also be provided to the other party.

4. The Tribunal may request that a nonparty to this Compromis provide to it documents or other evidence relevant to the question. Any documents or other evidence so provided shall be transmitted simultaneously to both parties.

5. The Tribunal will review all documents and other evidence submitted to it.

Article IV

1. The participation of all Tribunal members shall be required for the award. The presence of all members shall also be required for all proceedings, deliberations and decisions other than the award except that the President may determine that the absence of not more than a single member from any proceeding, deliberation, or decision other than the award, is justified for good cause.

2. In the absence of unanimity, decisions, including the award, will be taken by a majority vote of the members.

Article V

1. The seat of the Tribunal shall be at Geneva, Switzerland.

2. The President of the Tribunal shall, with the approval of the parties, appoint a registrar who shall be located at the seat of the Tribunal. The President and the parties shall endeavor to reach agreement on the appointment of the registrar within 21 days of the entry into force of this Compromis. The registrar shall be the regular channel of communications to and from the Tribunal. The President shall serve in

such capacity until the registrar is appointed. The proceedings under this Compromis will not be delayed by the inability of the parties to agree on the appointment of a registrar.

Article VI

1. The remuneration of the members of the Tribunal shall be borne equally by both parties.
2. The general expenses of the Tribunal shall be borne equally by both parties.
3. Each party shall bear its own expenses incurred in, or for, the preparation and presentation of its case.
4. The parties shall agree upon the amount of remuneration of the members, in consultation with the President.
5. The registrar, in consultation with the President, shall keep a record of all general expenses and shall render a final accounting to the parties.
6. The Tribunal may, in consultation with the parties, engage such staff and obtain such services and equipment as may be necessary.

Article VII

1. Within 21 days of the entry into force of this Compromis, each party shall appoint its agent for the purposes of the arbitration.
2. Each party may nominate a deputy or deputies to act for its agent. The agent may be assisted by such counsel, advisors and staff as the agent deems necessary.
3. Each party shall communicate the names and addresses of its respective agent and deputy or deputies to the other party and to the Tribunal.

Article VIII

1. The Tribunal shall apply the provisions of this Compromis.
2. Within 30 days of the entry into force of this Compromis, the Tribunal shall meet.
3. The proceedings shall consist of written pleadings, oral hearings and visits, to sites which the Tribunal considers pertinent, in accordance with the following schedule:
 - (A) The written pleadings shall include the following documents:
 - (i) A memorial, which shall be submitted by each party to the Tribunal within 150 days of the first session of the Tribunal, and
 - (ii) A counter-memorial, which shall be submitted by each party to the Tribunal within 150 days of the exchange of memorials, and
 - (iii) A rejoinder, if a party, after informing the other party, notifies the registrar within 14 days of the exchange of counter-memorials of its intention to file a rejoinder. In the event of such notification by one party, the other party shall also be entitled to submit a rejoinder. The rejoinders shall be submitted to the Tribunal within 45 days of the notification.

Written pleadings shall be filed simultaneously with the registrar and then be transmitted simultaneously by the registrar to each party. Notwithstanding this provision, a party may file its pleading at the end of the time period specified, even if the other party has not done so.

The Tribunal may, if it deems it necessary, or at the request of one party, and after hearing the views of the parties, decide, for good cause, to extend the time periods for the submission of written pleadings. By agreement, the parties may exchange their written pleadings prior to the expiration of the period provided in paragraph 3 of this article.

The original of every pleading shall be signed by the agent. It shall be accompanied by a copy of the pleading, certified by the respective agent, and by 30 additional copies for communication by the registrar to the other party. It shall also be accompanied by copies, certified by the respective agent, for communication by the registrar to each of the members of the Tribunal. Any documents and maps quoted or referred to in a pleading shall, whenever possible, be annexed to the pleading. The registrar shall specify such additional copies as may be required.

After the end of the written pleadings, no additional papers or documents may be submitted, except with the permission of the Tribunal. The Tribunal shall provide the other party an opportunity to respond if it has permitted the submission of an additional paper or document.

The registrar shall file all submissions received. The registrar shall make such files available for perusal by either party on request, and shall inform the other party of such requests.

(B) The oral hearings and the visits shall be conducted in such order and in such manner as the Tribunal shall determine. The Tribunal shall endeavor to complete its visits and the oral hearings within 60 days of the completion of the submission of written pleadings.

The oral hearings and the deliberations shall be held at the seat of the Tribunal or such place as the Tribunal, with the agreement of the two parties, may determine. Each party shall be represented at the oral hearings by its agent and/or deputies and by such counsel and advisors as it may appoint.

If a party submits an affidavit to the Tribunal in support of its case, the other party shall, on request, be given an opportunity to cross-examine the deponent. Each party will be permitted to present witnesses and to cross-examine witnesses of the other party at the oral hearings.

Each party shall facilitate the visits of the Tribunal. The agent of each party, and such other individuals as the agent may determine, shall be entitled to accompany the Tribunal during the visits. Members of the Tribunal shall be accorded by each party the privileges and immunities applicable under customary international law. The Tribunal shall be accompanied by such expert, technical or other staff as it deems necessary.

(C) If the Tribunal determines that without good cause a party has failed within the prescribed time to appear or present its case at any

stage of the proceedings, the Tribunal may determine how to proceed with the arbitration process and to render its award on the merits.

(D) At the time of the rendering of the award, the award and the written pleadings shall be made public, unless otherwise agreed by the parties. The registrar shall keep a transcript of the oral hearings, and it shall be made available to the parties as soon as possible. With the agreement of the two parties, this transcript shall be made public at the time of the rendering of the award.

4. Subject to these provisions, the Tribunal shall, as the need arises and as appropriate, and after consulting with the parties, decide on any necessary supplementary procedures, taking into account international practice.

5. The Tribunal may engage experts. The Tribunal shall hear and take the views of the parties into consideration before any such engagement.

Article IX

1. A three-member chamber of the Tribunal shall explore the possibilities of a settlement of the dispute. The three members shall be the two national arbitrators and, as selected by the President of the Tribunal sometime before the submission of the suggestions, one of the two non-national arbitrators.

2. After the submission of counter-memorials, this chamber shall give thorough consideration to the suggestions made by any member of the chamber for a proposed recommendation concerning a settlement of the dispute. Suggestions based upon the memorials, the counter-memorials, and other relevant submissions shall be presented to the chamber commencing from the month immediately preceding the counter-memorials. The chamber shall thereafter consider these suggestions, and the counter-memorials, during the period after submission of the counter-memorials until the completion of the written pleadings. Any proposed recommendation concerning a settlement of the dispute which obtains the approval of the three members of the chamber will be reported as a recommendation to the parties not later than the completion of the exchange of written pleadings. The parties shall hold the report in strictest confidence.

3. The arbitration process shall terminate in the event the parties jointly inform the Tribunal in writing that they have decided to accept a recommendation of the chamber and that they have decided that the arbitration process should cease. Otherwise, the arbitration process shall continue in accordance with this Compromis.

4. All work pursuant to the above paragraphs absolutely shall not delay the arbitration process or prejudice the arbitral award, and shall be held in the strictest confidence. No position, suggestion, or recommendation, not otherwise part of the presentation of a party's case on the merits, shall be brought to the attention of the other members of the Tribunal, or be taken into account in any manner by any members of the Tribunal in reaching their arbitral decision.

Article X

The written and oral pleadings, and the decisions of the Tribunal, and all other proceedings, shall be in English.

Article XI

1. In accordance with the provisions of the agreement of 25 April 1982:

(A) Egypt and Israel agree to invite the MFO to enter Taba and maintain security therein through the establishment of an observation post in a suitable topographic location under the flag of the MFO in keeping with the established standards of the MFO. Modalities for the implementation of this paragraph have been discussed and concluded by Egypt and Israel through the liaison system before the signature of the Compromis. The interpretation and implementation of this paragraph shall not be within the jurisdiction of the Tribunal.

(B) During the interim period any temporary arrangements and/or any activities conducted shall not prejudice in any way the rights of either party or be deemed to affect the position of either party or prejudice the final outcome of the arbitration in any manner.

(C) The provisions of the interim period shall terminate upon the full implementation of the arbitral award.

2. The Tribunal shall have no authority to issue provisional measures concerning the Taba area.

Article XII

1. The Tribunal shall endeavor to render its award within 90 days of the completion of the oral hearings and visits. The award shall state the reasons upon which it is based.

2. The award shall be deemed to have been rendered when it has been presented in open session, the agents of the parties being present, or having been duly summoned to appear.

3. Two original copies of the award, signed by all members of the Tribunal, shall immediately be communicated by the President of the Tribunal to each of the agents. The award shall state the reason for the absence of the signature of any member.

4. The Tribunal shall decide the appropriate manner in which to formulate and execute its award.

5. Any member of the Tribunal shall be entitled to deliver a separate or dissenting opinion. A separate or dissenting opinion shall be considered part of the award.

6. The Tribunal shall at the joint request of the parties incorporate into its award the terms of any agreement between the parties relating to the issue.

Article XIII

1. Any dispute between the parties as to the interpretation of the award or its implementation shall be referred to the Tribunal for clarification at the request of either party within 30 days of the rendering of

the award. The parties shall agree within 21 days of the award on a date by which implementation will be completed.

2. The Tribunal shall endeavor to render such clarification within 45 days of the request, and such clarification shall become part of the award and shall not be considered a provisional measure under the provisions of Article XI (2) of this Compromis.

Article XIV

1. Egypt and Israel agree to accept as final and binding upon them the award of the Tribunal.

2. Both parties undertake to implement the award in accordance with the Treaty of Peace as quickly as possible and in good faith.

Article XV

This Compromis shall enter into force upon the exchange of instruments of ratification.

DONE at Giza on the 11th day of September 1986.

For the Government of the Arab Republic of Egypt

Nabil ELARABY
Badr HAMMAM

For the Government of the State of Israel

A. TAMIR
David KIMCHE

Witnessed by: Richard W. MURPHY
Alan J. KRECJKO

ANNEX

1. A dispute has arisen on the location of the following boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine: 7, 14, 15, 17, 27, 46, 51, 52, 56, 85, 86, 87, 88, and 91. The parties agree that boundary pillars 26 and 84 are on the straight lines between boundary pillars 25 and 27, and 83 and 85, respectively, and that the decision of the Tribunal on the locations of boundary pillars 27 and 85 will establish the locations of boundary pillars 26 and 84, respectively. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 27, the parties accept the Egyptian location of boundary pillar 26, recorded in Appendix A; and, if the Tribunal establishes the Israeli location of boundary pillar 27, the parties accept the Israeli location of boundary pillar 26, recorded in Appendix A. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 85, the parties accept the Egyptian location of boundary pillar 84, recorded in Appendix A; and if the Tribunal establishes the Israeli location of boundary pillar 85, the

parties accept the Israeli location of boundary pillar 84, recorded in Appendix A. Accordingly, the Tribunal shall not address the location of boundary pillars 26 and 84.

2. Each party has indicated on the ground its position concerning the location of each boundary pillar listed above. For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

3. The markings of the parties on the ground have been recorded in Appendix A.

4. Attached at Appendix B is the map referred to in Article II of the Treaty of Peace, which provides:

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip. The parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace.

A 1:100,000 map is included in order to permit the indication of the locations of the 14 disputed boundary pillars advanced by the parties and provides an index to Appendix A. The Tribunal is requested to refer to the general armistice agreement between Egypt and Israel dated 24 February 1949.

5. The Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A. The Tribunal also is not authorized to address the location of boundary pillars other than those specified in paragraph 1.

APPENDIX B

AGREEMENT signed and exchanged at Rafeh on (13 Shaban, 1324, 18th Ailul 1322), 1st October, 1906, between the Commissioners of the Turkish Sultanate and the Commissioners of the Egyptian Khedivate, concerning the fixing of a separating administrative line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula.

EL MIRALAI Staff Officer Ahmed Muzaffer Bey, and El Bimbashi Staff Officer Mohammed Fahmi Bey as Commissioners of the Turkish Sultanate, and Emir El Lewa Ibrahim Fathi Pasha and El Miralai R. C. R. Owen Bey as Commissioners of the Egyptian Khedivate, having been entrusted with the delimitation of the administrative separating line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula, have in the name of the Turkish Sultanate and the Egyptian Khedivate agreed as follows:

Article 1. The administrative separating line, as shown on map attached to this Agreement, begins at the point of Ras Taba on the western shore of the Gulf of Akaba and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort, from thence the separating line extends by straight lines as follows:

From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha, thence to that point which is formed by the intersection of a prolongation of this line with a perpendicular line drawn from a point 200 metres measured from the top of Jebel Fathi Pasha along the line drawn from the centre of the top of that hill to Mofrak Point (the Mofrak is the junction of the Gaza-Akaba and Nekhl-Akaba roads). From this point of intersection to the hill east of and overlooking Thamilet-el-Radadi—place where there is water—so that the Thamila (or water) remains west of the line, thence to top of Ras Radadi, marked on the above-mentioned map as (A 3), thence to top of Jebel Safra marked as (A 4), thence to top of eastern peak of Um Guf marked as (A 5), thence to that point marked as (A 7), north of Thamilet Sueilma, thence to that point marked as (A 8), on west-north-west of Jebel Semaui, thence to top of hill west-north-west of Bir Maghara (which is the well in the northern branch of the Wadi Ma Yein, leaving that well east of the separating line), from thence to (A 9), from thence to (A 9 *bis*) west of Jebel Megrach, from thence to Ras-el-Ain, marked as (A 10 *bis*), from thence to a point on Jebel Um Hawawit marked as (A 11), from thence to half distance between two pillars (which pillars are marked at (A 13)) under a tree 390 metres south-west of Bir Rafeh, it then runs in a straight line at a bearing of 280° of the magnetic north—viz., 80° to the west—to a point on a sand-hill measured 420 metres in a straight line from the above-mentioned pillars, thence in a straight line at a bearing of 334° of the magnetic north—viz., 26° to the west—to the Mediterranean Sea, passing over hill of ruins on the sea-shore.

Art. 2. The separating line mentioned in Article 1 has been indicated by a black broken line on duplicate maps (annexed to this Agreement), which shall be signed and exchanged simultaneously with the Agreement.

Art. 3. Boundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line, from the point on the Mediterranean shore to the point on the shore of the Gulf of Akaba.

Art. 4. These boundary pillars will be under the protection of the Turkish Sultanate and Egyptian Khedivate.

Art. 5. Should it be necessary in future to renew these pillars, or to increase them, each party shall send a representative for this purpose. The positions of these new pillars shall be determined by the course of the separating line as laid down in the map.

Art. 6. All tribes living on both sides shall have the right of benefiting by the water as heretofore—viz., they shall retain their ancient and former rights in this respect.

Necessary guarantees will be given to Arab tribes respecting above.

Also Turkish soldiers, native individuals and gendarmes, shall benefit by the water which remained west of the separating line.

Art. 7. Armed Turkish soldiers and armed gendarmes, will not be permitted to cross to the west of the separating line.

Art. 8. Natives and Arabs of both sides shall continue to retain the same established and ancient rights of ownership of waters, fields, and lands on both sides as formerly.

Commissioners of the Turkish Sultanate,

(Signed) Miralai Staff Officer MUZAFFER
Bimbashi Staff Officer FAHMI

Commissioners of the Egyptian Khedivate,

(Signed) Emir Lewa IBRAHIM FATHI
Miralai R. C. R. OWEN

APPENDIX C

MAP No. 1



THE EGYPT - ISRAEL ARBITRATION TRIBUNAL
ESTABLISHED IN ACCORDANCE WITH THE COMPROMIS
SIGNED 11 SEPTEMBER 1986.

APPENDIX D

