

## THE ROLE OF ARBITRATION IN POLITICAL SETTLEMENT: TABA AND THE EGYPT/ISRAEL TREATY OF PEACE

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In June 1985, my then boss, Secretary of State George P. Shultz, asked me to lead an effort by the United States to assist the governments of Egypt and Israel to resolve their international border at Taba. The Egypt/Israel Treaty of Peace, signed on March 26, 1979, provided that Israel would withdraw to the “recognized international boundary” between Egypt and Mandated Palestine.<sup>1</sup> Israel’s withdrawal was completed on April 25, 1982 except for nine small areas where the location of fourteen boundary pillars remained in dispute, running from the west of Eilat down to Wadi Taba’s beach at the Gulf of Aqaba.<sup>2</sup>

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1. Treaty of Peace Between the State of Israel and the Arab Republic of Egypt, Isr.-Egypt, arts. I, II, Mar. 26, 1979, 1138 U.N.T.S. 59 [hereinafter Egypt/Israel Treaty of Peace].

2. *Id.* art. I; Haihua Ding & Eric S. Koenig, *Arbitral Decision: Boundary Dispute Concerning the Taba Area*, 83 AM. J. INT’L L. 590, 591 (1989); Eli Lauterpacht, *The Taba Case: Some Recollections and Reflections*, 23 ISR. L. REV. 443, 443 (1989); Honorable Abraham D. Sofaer, Legal Adviser, U.S. Dep’t. of State, Statement on Taba (Feb. 26, 1989) (on file with the Hoover Institution Library & Archives).

The Treaty provided that the parties should resolve these unsettled issues through conciliation or arbitration.<sup>3</sup>

The disputed pillars were in desolate areas, except for about 500 meters along the beach where the five-star Aviya Sonesta Hotel had been built in the 1980s by an Israeli entrepreneur, Elias Papoushado, and to its south where a beach club and pub, owned by another Israeli, “Rafi” Nelson, were located. The hotel was fancy and bourgeois; the beach club had nude bathing.

Many articles concerning the Taba arbitration have been published since the Tribunal issued its Award on September 29, 1988.<sup>4</sup> They follow a familiar pattern. They note that the two States agreed to arbitrate on September 11, 1986 before a tribunal of five arbitrators: Professor Hamid Sultan and Professor Ruth Lapidoth, nominated by Egypt and Israel respectively; Judge Pierre Bellet, former Premier President of France’s Cour de Cassation; Professor Dietrich Schindler of the University of Zurich; and Judge Gunnar Lagergren of Sweden as Chair.<sup>5</sup> They then describe the issues involved, the arguments made, the Tribunal’s rulings,<sup>6</sup> and the fact that Israel withdrew from the Taba area on March 15, 1989.<sup>7</sup>

The Parties authorized the Tribunal to choose between their positions regarding fourteen pillars, including Pillar No. 91, located somewhere near the shore.<sup>8</sup> Both Parties agreed that the “permanent boundary” between Egypt and Israel is “the

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3. Egypt/Israel Treaty of Peace, *supra* note 1, art. VII.

4. *E.g.*, Ding & Koenig, *supra* note 2; Ruth Lapidoth, *Some Reflections on the Taba Award*, 35 GERMAN Y.B. INT’L L. 224 (1992); Lauterpacht, *supra* note 2; Prosper Weil, *Some Observations on the Arbitral Award in the Taba Case*, 23 ISR. L. REV. 1 (1989).

5. *E.g.*, Ding & Koenig, *supra* note 2, at 590-91 & n.2; Lapidoth, *supra* note 4, at 224 n.1; Lauterpacht, *supra* note 2, at 449; Weil, *supra* note 4, at 2.

6. For the most detailed, and most critical, analysis, see Lauterpacht, *supra* note 2, at 448, 450-51, 454-58. *But see* D.W. Bowett, *The Taba Award of 29 September 1988*, 23 ISR. L. REV. 429, 434-42 (1989) (commending the Tribunal for disregarding the arguments and evidence that Professor Lauterpacht believes it should have considered in greater depth). This article makes no effort to evaluate the Tribunal’s legal conclusions.

7. *E.g.*, Ding & Koenig, *supra* note 2, at 595; Carla S. Copeland, *The Use of Arbitration to Settle Territorial Disputes*, 67 FORDHAM L. REV. 3073, 3084 (1999).

8. Case Concerning the Location of Boundary Markers in Taba Between Egypt and Israel, Arbitration Compromis, 20 R.I.A.A. 1, app. A, annex (1988).

recognized international boundary between Egypt and the former mandated territory of Palestine.”<sup>9</sup> The Tribunal decided that the “critical” period for determining the boundary was during the Mandate and thereafter.<sup>10</sup> Based on pictures and other evidence, the Tribunal concluded that, while not “intervisible,” the pillar identified by Egypt as Pillar 91 and the “Parker pillar,” both to the north of the hotel, were closer to the boundary recognized during that period than the “intervisible” options presented by Israel, both to the south of the hotel.<sup>11</sup> The Tribunal refused to consider evidence Israel introduced that the proper boundary was where it should have been located in 1906, when Egypt and the Ottoman Empire agreed on a border between Egypt and Palestine in the form of “intervisible” pillars, and which Britain had informed Egypt in 1926 it did not intend to alter.<sup>12</sup>

Israel also contended that the point chosen by the Tribunal could not be the place of the “final pillar” identified in the *compromis*, as it was not “at the point of Ras Taba on the western shore of the Gulf of Aqaba.”<sup>13</sup> That observation was factually correct, but the Tribunal disregarded that requirement, concluding that it should rule in favor of the line closest to that sought to be determined, rather than leaving the dispute unresolved.<sup>14</sup> As for the other disputed pillar points, the Tribunal, on the basis of drawing straight lines, awarded nine to Egypt and four to Israel.<sup>15</sup> Professor Lapidoth dissented on the

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9. Egypt/Israel Treaty of Peace, *supra* note 1, art. II.

10. *Case Concerning the Location of Boundary Markers in Taba*, 20 R.I.A.A. ¶ 172.

11. *Case Concerning the Location of Boundary Markers in Taba*, 20 R.I.A.A. ¶¶ 230-33, 237; Bowett, *supra* note 6, at 434-35, 438; Lauterpacht, *supra* note 2, at 463.

12. Ding & Koenig, *supra* note 2, at 592; Lauterpacht, *supra* note 2, at 444-45, 447, 464-65.

13. *Case Concerning the Location of Boundary Markers in Taba*, 20 R.I.A.A. ¶ 214.

14. *Case Concerning the Location of Boundary Markers in Taba*, 20 R.I.A.A. ¶¶ 241-45. A critical analysis of the two fundamental determinations by the Tribunal—that its job was to identify the boundary that existed in the Mandatory Period, and its resolve to avoid not being able to decide the case—are evaluated by Prosper Weil, who concludes that the Tribunal was determined in the end to avoid failing to fulfill what it regarded as “its mission.” Weil, *supra* note 4, at 1-2, 25.

15. *Case Concerning the Location of Boundary Markers in Taba*, 20 R.I.A.A. ¶¶ 182-245; Ding & Koenig, *supra* note 2, at 594.

ground that the 1906 Agreement should control, and that only the points proposed by Israel for the final pillar were intervisible with the neighboring pillar; she also supported Israel's proposed location of pillars at Ras el Naqb.<sup>16</sup> Some commentators noted that the ruling faced fierce opposition within Israel and that Egypt might be forced to return to the Tribunal to secure implementation.<sup>17</sup> But in general the articles recount that, after the Tribunal's ruling, the parties negotiated some issues and Israel withdrew.<sup>18</sup>

The message conveyed by these articles is that the dispute over Taba was resolved through a "successful" arbitration.<sup>19</sup> This conclusion is accurate in that the arbitration was a critical element in achieving the ultimate objective of settling the border. But the arbitration was actually only one part of a substantial effort that enabled diplomacy to prevail.

By June 1985, when I first became involved in the Taba dispute, over six years had passed since the Treaty was signed, and over three years since Israel's withdrawal from Sinai. Yet the parties were nowhere close even to drafting a *compromis* to resolve their differences through arbitration. That step required intensive negotiation over some eighteen months to accomplish.

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16. *Case Concerning the Location of Boundary Markers in Taba*, Dissenting Opinion of Prof. Ruth Lapidoth, 20 R.I.A.A. 69, ¶¶ 42-48, 149.

17. *E.g.*, Bowett, *supra* note 6, at 440 (explaining that after Egypt was awarded the pillar, there was a risk Israel would suspend their withdrawal, which almost resulted in Egypt's return to the Tribunal to express dissatisfaction); Edward Cod, *Egypt Wins Arbitration in Dispute With Egypt*, WASH. POST (Sept. 30, 1988), <https://www.washingtonpost.com/archive/politics/1988/09/30/egypt-wins-arbitration-in-dispute-with-israel/3f7cd0b4-b820-4347-8f90-3c20849007d3/> [<http://perma.cc/CY37-TFF9>].

18. *E.g.*, Bowett, *supra* note 6, at 440; Alan Cowell, *Israel Gives Disputed Resort to Egypt*, N.Y. TIMES (Mar. 16, 1989), <http://www.nytimes.com/1989/03/16/world/israel-gives-disputed-resort-to-egypt.html> [<http://perma.cc/3BD8-C3LW>]; Doug Struck, *Natural Site for Peace Talks Carries a Legacy of Reduced Expectations*, BALT. SUN (Jan. 13, 1994), [http://articles.baltimoresun.com/1994-01-13/news/1994013112\\_1\\_hotel-in-taba-egypt-israel](http://articles.baltimoresun.com/1994-01-13/news/1994013112_1_hotel-in-taba-egypt-israel) [<http://perma.cc/7LEW-VH2R>].

19. Copeland, *supra* note 7, at 3081; Yitzhak Rabi & Howard Rosenberg, *Egypt is Awarded Taba in Final Arbitration*, JEWISH TELEGRAPH (Sept. 30, 1988), <http://www.jta.org/1988/09/30/archive/egypt-is-awarded-taba-in-final-arbitration> [<http://perma.cc/34EM-XHDT>]. Eli Lauterpacht, who acted as Israel's lead counsel in the arbitration, concluded: "The eventual resolution of the problem by arbitration represents an important addition to the list of successful contributions that the process of impartial legal settlement has made to the settlement of international disputes." Lauterpacht, *supra* note 2, at 443.

The arbitration itself took some two years to complete, and keeping that process on track posed challenges. While the Parties did implement the Award, they did so only after five months of intense negotiations, successfully concluded only after the settlement of the seemingly unrelated dispute over the murder of seven Israelis by a crazed Egyptian border guard at Ras Burqa.

#### ACHIEVING THE *COMPROMIS*

By June 1985, Taba had become a major irritant in Egypt/Israel relations. Israel had withdrawn from most of Lebanon, but Egypt refused to return its ambassador unless the border at Taba was resolved.<sup>20</sup> My partner in this effort was Alan Kreczko, then Assistant Legal Adviser for Near Eastern Affairs. He knew the issues and the party representatives, and he had the wisdom and wit to contribute indispensably to our eventual success. We drafted a *compromis* as a discussion document, with dozens of bracketed items, and then set about removing brackets through a series of meetings in Egypt, Israel, and Washington, D.C.

We called a joint session only after months of work and quickly realized that nothing would be resolved if the Parties were together in the same room. My shuttling began, first from room to room, and ultimately from country to country. We were forced to negotiate virtually every aspect of the *compromis*. The Parties, even when making minor concessions, continuously invoked the dispiriting principle (which plagues Middle East peace negotiations even today) that “Nothing is agreed until everything is agreed.” We ploughed ahead regardless, removing brackets, and cultivating trust and good personal relations on both sides.

Getting to know the Egyptian and Israeli players was essential for success. Egypt had a professional team under

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20. Jonathan Broder, *Shamir Denies Deal on Disputed Land*, CHI. TRIB., Sept. 19, 1985, at 16; *Israel Withdraws Army from More of Lebanon*, HARTFORD COURANT, Apr. 30, 1985, at AB6; see also Gideon Rafael, *In the Mideast, A Cold Peace*, N.Y. TIMES, Apr. 17, 1984, at A23 (opining that Egypt should return its ambassador in order to improve relations).

Foreign Minister Esmat Abdel-Meguid, a sophisticated and enlightened former businessman; in charge politically was Deputy Foreign Minister Osama el-Baz, a brilliant policy analyst and Mubarak insider who shared my love of jazz. Nabil el-Araby, then Foreign Ministry Legal Advisor and later an ICJ judge and Secretary General of the Arab League, was in charge of the legal team; he was an exceptionally able, tough negotiator, who distrusted Israel but could be relied on to bring about sensible results.<sup>21</sup> I also regularly met with Egypt's ambassadors in Washington.

The Israeli side was more complicated. In 1984, Israel's two main parties, Labor and Likud, agreed to share power after an indecisive election.<sup>22</sup> While this meant that we had to convince at least some of the leaders of both parties to bring about any result, that challenge was preferable to having either group in opposition. Shimon Peres, eager to get the Taba issue behind him, was Prime Minister from 1984 to 1986, and Yitzhak Shamir, who regarded Egypt as insincere in its dealings with Israel, served as Prime Minister from 1986 to 1988.<sup>23</sup> Other key members of the Cabinet included the heavyweights of Israel's political elite: Moshe Arens, Yitzhak Rabin, and Ariel Sharon. Israel's negotiating team was led by its Foreign Ministry's Legal Advisor, Robbie Sabel, an exceptional international lawyer who worked to achieve the best possible result for Israel consistent with maintaining good relations with Egypt.<sup>24</sup> The Foreign

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21. *Al-Sisi Praises El-Araby's Efforts in the Arab League*, DAILY NEWS EGYPT (June 28, 2016), <http://www.dailynewsegypt.com/2016/06/28/483662al-sisi-praises-el-arabys-efforts-in-the-arab-league/> [<http://perma.cc/ZVG3-2PHB>]; Al-Masry Al-Youm, *Former Arab League Secretary Esmat Abdel Meguid dies at 91*, EGYPT INDEP. (Dec. 22, 2013, 6:19 PM), <http://www.egyptindependent.com/news/former-arab-league-secretary-esmat-abdel-meguid-dies-91> [<http://perma.cc/98FT-3338>]; James Hershberg, *An Egyptian Envoy Met With Israeli Prime Minister Shimon*, UNITED PRESS INT'L (Feb. 27, 1985), <http://www.upi.com/Archives/1985/02/27/An-Egyptian-envoy-met-with-Israeli-Prime-Minister-Shimon/2604478328400/> [<http://perma.cc/5L7T-47HR>].

22. *Israeli Accord Reported: Peres, Shamir Agree to Share Power for 4 Years*, Radio Says, HARTFORD COURANT, Aug. 31, 1984, at A1B.

23. Alexander Zvielli, *From the Underground to the Political Spotlight*, JERUSALEM POST (June 30, 2012), <http://www.jpost.com/Features/In-Thespotlight/From-the-underground-to-the-political-spotlight> [<http://perma.cc/BE8E-S39D>].

24. *Rabin Is Said to Have Met with Palestinian Leaders*, THE SUN, June 20, 1988, at 2A.

Ministry's Director Generals at the time, Avraham Tamir followed by Reuven Merhav, were positive and effective at getting problems solved.

The bitterness over Taba stemmed, on Egypt's side, from the belief that Israel was disregarding the border that had existed for decades. For Nabil el-Araby, the "recognized" border was the border long treated as authoritative, reflected by pillars that Israel had apparently removed; Israel, he felt, should have accepted that fact instead of digging into history to justify a purely legalistic position. That pillars at Taba had been removed was widely known. Avraham Tamir, a retired Israeli Major General, told me at a dinner early in the process that he had witnessed General Sharon ordering the Parker pillar destroyed in the process of building a road. Egypt relied on such evidence as part of its case, as well as on the remnants of another pillar.<sup>25</sup>

From Israel's point of view, whether pillars were missing was unimportant if they had been erected in the wrong place to start with. More fundamentally, Israeli leaders were frustrated that, while Egypt had promised a "real" peace, it had delivered a "cold" one. No significant Egypt-to-Israel tourism existed, and little did two-way commerce.<sup>26</sup> When I later visited Sharon to try to convince him to support the Taba withdrawal, even after Prime Minister Shamir had agreed, he was cordial but determined to vote "No." He gave me a book of grotesquely anti-Semitic cartoons from Egyptian newspapers. He felt Mubarak could and should have done more to curb such venomous material. Shamir more than once told me that he had been at Sharm el-Sheikh when the Egyptian and Israel flags flew together after the Peace Treaty was completed, and that Sadat had promised the two countries would have "real" peace. "It never was real," he said. "We gave them back the entire Sinai and they are insisting on getting a tiny piece of what was desert until some Jews built a hotel and other facilities there."

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25. For an extraordinarily detailed analysis of the possible frauds alleged to have taken place with regard to both the missing pillars, see W. MICHAEL REISMAN & CHRISTINA SKINNER, *FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS* ch. 7 (2014).

26. Alan Cowell, *The Reality of '89 Chills the Vision of '79: To Egypt, Peace Pact Is a Stigma on Its Arab Soul*, N.Y. TIMES, Mar. 19, 1989, at 1; Rafael, *supra* note 20.

Dr. Boutros Ghali, Minister of State for Foreign Affairs, expressed the Egyptian position in calling this Israeli argument a “sophisticated diplomatic tactic” that amounted to saying that Egypt was getting back hundreds of kilometers of beaches, “so why not voluntarily give up a mere 500 meters of beach to Israel as a gesture of peace and neighborliness?” No “gifts or commissions can be paid,” he insisted, with the national soil. These conflicting views permeated the atmosphere, and neither side had much interest in making gestures.

We pressed both parties to compromise their positions, and by late 1986 they had reached agreement on everything necessary to begin the arbitration except who would be the fifth arbitrator.<sup>27</sup> We considered the names of virtually every distinguished arbitrator in Europe, and we tried every process we knew to force a decision with which both sides could live. We had run out of ideas when, suddenly, the parties announced agreement on Judge Lagergren, who was eminently qualified.<sup>28</sup> I was told, however, that Israel accepted him because he happened to be related to Raoul Wallenberg, who saved many Jews from Nazi extermination before disappearing in Soviet custody.

Even after all the work was done to complete the *compromis*, it took a final push from Vice President George H.W. Bush, on a trip to Egypt, to get the parties to sign.<sup>29</sup> The Vice President was greatly respected, knew all the players, and conveyed U.S.

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27. Lauterpacht notes that “the United States played an active role” in the selection of the Tribunal and in drafting the *compromis*, and “placed Israel under pressure to accept certain solutions which Israel would have preferred not to accept” and to which, with the benefit of hindsight, Israel’s “hesitation . . . was undoubtedly justified.” Lauterpacht, *supra* note 2, at 449. He noted, however, that “the adjustment of its views on these matters represented important concessions made for the purpose of furthering the process of peaceful settlement of the dispute. If concessions had not been made even in the formulation of the *Compromis*, there would have been no *compromis* and no arbitration; and the Taba problem would have remained unresolved indefinitely—an irritant in relations between the two sides.” *Id.* at 449-50. In fact, both sides made significant concessions, not just Israel, and Israel agreed to Judge Lagergren entirely on its own accord.

28. Tamar Levy, *Swedish Jurist Picked as Third Man on the Taba Panel*, DAILY NEWS BULL., (Jewish Telegraphic Agency, New York, N.Y.), Oct. 7, 1986, at 3.

29. G. Jefferson Price III, *Bush Hopes to Resolve Egypt-Israel Border Dispute*, BALTIMORE SUN, July 29, 1986, at 2A.

positions effectively. Whenever he traveled abroad, he would ask Administration officials how he might be helpful, and the State Foreign Service Officers were eager to draw up talking points for him to use. Foreign States like to “deliver” something to high-level U.S. leaders on such visits.

#### KEEPING THE ARBITRATION ON TRACK

Once the arbitration was underway, the U.S. team initially assumed we could simply wait for the Tribunal to issue its decision. The Parties enlisted our help, however, in attempting to negotiate a solution. Egypt offered significant concessions on access, compensation, and management if Israel agreed to give up any claim to sovereignty. But Israeli leaders found giving up Taba ultimately more difficult politically than losing it.<sup>30</sup> The *compromis* provided that three members of the Tribunal should attempt to work out a settlement of the dispute; those efforts failed as well.<sup>31</sup>

A particularly able Israeli diplomat helped the United States avoid a serious mistake in the midst of the arbitral process. The Egyptian team at one point asked the United States, as witness to the Peace Treaty, to provide the Tribunal its view on the location of the border at Taba. I examined U.S. diplomatic records and talked to officials involved at Camp David and found that the evidence supported Egypt’s position that the border was assumed by all to be where it had been from at least the 1920s to 1967. Zbigniew Brzezinski was particularly emphatic in this regard, at a lunch at which we discussed the issue. This historical record had limited significance to the arbitration, however, since Israel based its claim on the premise that the 1906 Agreement should control the border’s location, wherever the pillars may in fact have later been placed.<sup>32</sup>

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30. Daniel Williams & Michael Ross, *Most of Disputed Taba Awarded to Egypt*, L.A. TIMES, Sept. 30, 1988, at B6; see Robbie Sabel, *The Attempts to Negotiate a Compromise Solution to the Taba Dispute*, 14 BAR ILAN L. STUD. 507 (1998) (in Hebrew).

31. Case Concerning the Location of Boundary Markers in Taba Between Egypt and Israel, Arbitration Compromis, 20 R.I.A.A. 1, app. A, art. IX (1988). D.W. Bowett calls this a “highly unusual” provision, and expressed his hope that “future arbitration agreements will use it.” Bowett, *supra* note 6, at 429.

32. Bowett, *supra* note 6, at 431-33.

Israel strongly opposed the idea of the United States appearing at the hearing to present its views. The Israeli Cabinet sent former Israeli Ambassador to the United States, Simcha Dinitz, to Washington, D.C. to urge us to refrain from participating. Dinitz was persuasive and pointed out, among other things, that our involvement might lead some members of the Israeli Cabinet to disregard the Tribunal's decision. Secretary Shultz was convinced we should stay neutral. He sent me to Geneva to explain to the Egyptian team that, since Israel was not contesting pillar locations during the Mandate, we would risk undermining our effectiveness as mediator for no material advantage. Dinitz helped keep us from making a serious mistake.

During this period, opponents of the U.S. effort on Taba (and of the mission I led to secure Israeli cooperation in prosecuting Jonathan Pollard), found a way to attack me personally. On May 20, 1988, the Washington Post published a story that quoted an Israeli Department of Antiquities official accusing me of having exported ancient coins from Israel without a license and insisting that I should get licenses for the coins I had exported.<sup>33</sup> The story noted that Israeli sources suggested that I had been targeted for advocating that Israel return Taba to Egypt.<sup>34</sup> I had in fact taken coins from Israel without a license, many times, over a period of at least ten years, because no one had ever told me an export license was required. As the Israeli officials behind this story knew, I had shown the coins I bought in Israel to the Chief Curator of Numismatics at the Israel Museum before exporting them, who from time to time would ask me to donate a particular coin to the Museum's collection but never suggested I needed a license. I called the former head of the Israel Antiquities Authority, Avraham Biran, by then Chief Archeologist at the Hebrew Union College in Jerusalem, to ask his advice. He said that I could prove my good faith by offering to bring back the coins I had exported and apply for licenses to take them back. I agreed, and offered to bring to

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33. David B. Ottaway, *Israel Accuses Sofaer of Illegally Taking Coins: State Dept. Aide Calls Charge 'Ridiculous'*, WASH. POST, May 20, 1988, at A28.

34. *Id.*

Israel all my coins, not just those I could recall having collected there. After all that fuss, the Israel Antiquities Authority declined my offer and the attack on me ended.

#### IMPLEMENTING THE AWARD

The Award's implementation was far from just a matter of setting new pillars and drawing lines. Just before the Award issued, some Israeli officials and the Sonesta Hotel owner said publicly they would oppose implementation of the Award unless the hotel was left on the Israeli side of the line.<sup>35</sup> Rafi Ochman, then Mayor of the nearby city Eilat, told the *New York Times*: "If Egypt says the line should be drawn so that they get the hotel as well, we will not give up . . . And then the matter will go into arbitration for another five years, maybe longer."<sup>36</sup> Rafi Nelson, owner of the pub and beach club, predicted: "It's not going to take just another five years. Maybe it'll take another 15."<sup>37</sup> Eli Papoushado, owner of the Sonesta, claimed he had no idea Egypt would assert ownership of the land when he built what he described as his "\$200 million" hotel in the 1980s and that, even after the tribunal decision, "we still have a long, long way to go."<sup>38</sup>

More generally, the problem of getting the Award implemented was perceived to stem from a shift in the Prime Minister's office from Peres to Shamir, the latter having criticized the agreement to arbitrate.<sup>39</sup> The issue became part of an impending election, scheduled for November 1. Shamir warned publicly that the Tribunal decision was not "the final word," and that the border to the Gulf still had to be determined. The Mayor of Eilat was concerned that Egyptian control of Taba would pose a competitive challenge, especially if Egypt opened a

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35. Joel Brinkley, *Israeli Parties Clash on Ruling Over Enclave*, N.Y. TIMES, Sept. 30, 1988, at A11.

36. Joel Brinkley, *In Battle Over Beach, It's Time to Draw the Line*, N.Y. TIMES, Sept. 26, 1988, at A4.

37. *Id.*

38. *Id.*

39. Edward Cody, *Egypt Wins Arbitration in Dispute With Israel*, WASH. POST, Sept. 30, 1988, at A18; Williams & Ross, *supra* note 30.

casino.<sup>40</sup>

The United States announced its position at the State Department's briefing on September 29, 1988.<sup>41</sup> We reported that the United States had "participated actively in the negotiations leading up to the arbitration," and urged the parties "to implement the decision fully, expeditiously, and in good faith."<sup>42</sup> We stressed the opportunity to use "the practical implementation of the award in a way that will facilitate tourism, enhance economic cooperation, and preserve Taba's potential as a bridge for the growth of solid bilateral relations."<sup>43</sup>

We arranged a meeting of the parties in Giza to discuss implementation. For the first time, a political appointee led the Israeli delegation: an Egyptian-born Jew, fluent in Arabic. He had no diplomatic experience, but I hoped that giving him a role in which he could engage with fellow Egyptians in Arabic could help the process. I was wrong. He was eager and exuded confidence. But he chose to announce to the press the day before our meeting that Egypt could have a "flag" over Taba but otherwise Israel would insist on full control.<sup>44</sup>

When we arrived at our meeting place in Giza, el-Araby pulled me aside and showed me the article describing this statement. "Did you see this?" he asked. I tried to brush it off, noting that Israel had come "to work on withdrawal." El-Araby pointed to a crowd of reporters that had gathered outside the meeting room. "They are waiting to see what Egypt does in light of the Israeli statement. We are leaving." I was stunned and disappointed. But even then I understood that it was impossible for the Egyptian delegation to even sit down with the Israelis until the statement was withdrawn. The meeting was cancelled. The Israeli Foreign Ministry professionals were upset they had

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40. Stephen Franklin, *Surf's Up for New Owners of Disputed Beach*, CHI. TRIB., Mar. 14, 1989, at 6.

41. Press Briefing, U.S. State Dep't (Sept. 29, 1988) (on file with the Hoover Institution Library & Archives).

42. *Id.*

43. *Id.*

44. See *Israel Lets Egypt Fly Flag Over Taba*, HARTFORD COURANT, Jan. 30, 1989, at A6D (reporting that Israel agreed to allow Egypt to raise its flag over Taba in a symbolic concession).

been placed under the leadership of a diplomatic novice.

We prepared a strategy to deal with each element of the deadlock on implementation. But what helped us most in turning the situation around was our ability to settle an important but unrelated claim. On October 3, 1985, Mohammed Abdel Khater, an Egyptian border guard, fired his machine gun at a group of Israelis in bathing suits at Ras Burqa, on the Sinai coast, as they walked up a sand dune into a restricted area.<sup>45</sup> He killed seven Israelis, including four children and two women, one of whom was Anita Griffel.<sup>46</sup> Mrs. Griffel had thrown herself over her daughter, Tali, an American citizen, who was wounded but not seriously.<sup>47</sup> Anita Griffel and others bled to death because the Egyptian guards at the site refused to allow the Israelis to call for medical assistance, which was available.<sup>48</sup>

Tali Griffel was an American citizen, so it became the State Department's responsibility to espouse her claim against the Egyptian government. Washington D.C. is a small place, and when Tali moved there to live with her father she attended the same school as some of my children. My wife, Marian, met Tali and her Israeli-American father, Andy, by chance. She suggested to Andy that he should consider hiring a close friend and neighbor of ours, Leonard Garment, as Tali's attorney. Len had served as White House Counsel under Nixon and as Daniel Moynihan's aide at the United Nations.<sup>49</sup> He was widely respected in Washington D.C. by leaders of both parties, and had a rare combination of human warmth and great political savvy. As Chairman of Moynihan's Judicial Screening Committee in New York he had recommended my appointment to the federal district court, and he had supported my

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45. LEONARD GARMENT, *CRAZY RHYTHM* 375 (1997).

46. *A Weekend of Tragedies: Berserk Egyptian Cop Kills 7 Israeli Tourists in Sinai*, JEWISH TELEGRAPHIC AGENCY (Oct. 7, 1985), <http://www.jta.org/1985/10/07/archive/a-weekend-of-tragedies-berserk-egyptian-cop-kills-7-israeli-tourists-in-sinai-3-other-israelis-fou> [<http://perma.cc/T7AY-PH6L>].

47. GARMENT, *supra* note 45, at 375-76.

48. *Id.*

49. Godfrey Hodgson, *Leonard Garment Obituary*, THE GUARDIAN (July 23, 2013), <https://www.theguardian.com/world/2013/jul/23/leonard-garment/> [<http://perma.cc/RFD7-DV2K>].

appointment as Legal Adviser.

Marian took Andy over to meet Len at his home. After a couple of meetings, Len became Tali's attorney. He was deeply moved by Tali's tragic loss of her mother and the trauma she had suffered, and took on the job with the creativity and persistence that characterized all he did. Meanwhile, Israel's Foreign Ministry concluded that they would be better off having me as United States Legal Adviser represent all the Ras Burqa victims' families, since at least one American was involved. They asked me to take on the job of negotiating compensation for all the families, and I agreed.

The Egyptian government was in a difficult position. El-Araby agreed to put the Ras Burqa claims before the relevant court, and to accept liability. However, the government was unwilling to support proposing that the court award foreigners, particularly Israelis, higher compensation than Egyptians would obtain for the same injury.<sup>50</sup> We knew the claimants would not be satisfied with the small amounts the Egyptian court was likely to award. Realizing that I might get pulled into a bazaar-like process, I asked Robbie Sabel to get demands from the victims' families in advance. I then went to work on finding money to satisfy the total required to meet 100 percent of the demands, a sum that became clear after the Egyptian court issued its meager awards.

Len Garment helped by convincing one of his famous clients, Marc Rich, who was living in Switzerland under a U.S. tax indictment, to contribute a considerable amount.<sup>51</sup> After months

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50. An interview of President Mubarak by an Israeli reporter illustrates this problem, which was raised at the same time Egypt and Israel were obliged to implement the Tribunal Award in Taba. The reporter (Avrekh) asked: "Are the reparations to the Ra's al-Burqa' victims apt to be disappointing?" Mubarak: "I cannot say. Our courts are doing their work, and we cannot interfere in a legal process." Avrekh: "What if the court decides on an insufficient amount?" Mubarak: "You tell me: If that happened in your country, and a court determined (an amount), what could you do?" Avrekh: "I myself can do nothing. You, however, as president, can perhaps decide on a sum over and above the one decided by the court." Mubarak: "When the court makes a decision, I will try to consider the matter. I can promise nothing until then." Yedi'ot Aharonot, *Mubarak Interviewed on Taba, Other Issues*, FOREIGN BROADCAST INFO. SERV. NEAR EAST & SOUTH ASIA, FBIS-NES-88-205, Oct. 21, 1988.

51. For Garment's own description of his role, see GARMENT, *supra* note 45, at

of effort, including many high-level interventions, Osama el-Baz steered me to an Egyptian, Ibrahim Kamel, whom he described as a “patriotic businessman.” Soon thereafter, United States Ambassador to Egypt Frank Wisner and I walked out of a meeting with Kamel with the check we needed to close the deal.

Prime Minister Shamir seldom expressed pleasure about anything, but he was genuinely pleased when I advised him in person, along with United States Ambassador William Brown, that we had the funds to compensate all the claimants. I also gave the Prime Minister a postage stamp I had bought from an American dealer that Iran had issued in honor of the Ras Burqa killer, proclaiming him an Islamic hero. Shamir appreciated this concrete evidence of the depth of the Iranian Government’s depravity. The greatest impact on him, though, came from Foreign Minister Meguid’s unilateral decision to call every victim’s family to express his sympathy over their loss—a class act that paid big diplomatic dividends.<sup>52</sup>

Shamir was in a good mood, so I told him a joke my Israeli friends had told me the night before our meeting: Israel was willing to give Egypt Taba, but only if Egypt also took Gaza. Ambassador Brown and even Shamir’s note taker laughed, but not Shamir. “No, I think we’ll keep it,” he said; but he agreed then and there that Israel would withdraw from Taba.

I went to Egypt to convince the government to give me four weeks to get the non-border issues settled. El-Araby was furious at what he considered Israel’s bad faith. I assured him that once the access and facilities issues were settled, we would get agreement on the border and withdrawal. El-Araby was unmoved. But Osama El-Baz accepted my assurance. I went back to Israel and secured their agreement to focus on access, facilities, and arrangements. A written agreement between the parties to accomplish the Taba withdrawal within 60 days was signed in Rome and announced on November 29, 1988.<sup>53</sup>

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367-77.

52. Abraham D. Sofaer, *Ten Years After Camp David, New Reasons for Celebration*, WALL ST. J., Mar. 29, 1989, at A14.

53. See *Interview with Dr. Abd al-Majid, Foreign Minister*, FOREIGN BROADCAST INFO. SERV. NEAR EAST & SOUTH ASIA, FBIS-NES-88-240, Dec. 10, 1988, at 16 (reporting that Abd al-Majid acknowledged that the Taba ruling will be implemented within 60

The pressure on Egypt by its press and other anti-Israel elements was intense. Boutros Ghali declared that Israel was engaging in “diplomatic extortion.” Foreign Minister Meguid, however, handled the problem with calm and finesse, calling for patience in what he felt confident was a winning cause.<sup>54</sup>

The State Department assigned me a small plane to shuttle back and forth during this last, crucial stage. On February 2, 1989, I was in Israel with talking points advising the Israeli negotiators that, from the U.S. view, Israel had no right to delay its withdrawal to coerce favorable terms from Egypt. Israel was entitled to a brief period of diligent, good faith negotiations on all issues related to Taba, including liberal terms of access and payment for the fair value of all facilities taken over by Egypt. But Egypt was right that “no linkage exists between withdrawal and the other issues,” and that Egypt could not be required to negotiate issues unrelated to Taba.<sup>55</sup> We had Egypt’s agreement to address the collateral issues in a liberal manner, and we warned Israel that if it remained unwilling to withdraw we would join Egypt in advancing all available options. Israel knew, of course, that no real options existed beyond international embarrassment. But they also knew, as I told them, that “Taba is not worth the dangers it poses to the GOI/GOE relationship.”<sup>56</sup>

The next day, February 3, Foreign Ministers Moshe Arens and Meguid talked by phone. Arens assured Meguid that Israel would comply with the Tribunal’s ruling.<sup>57</sup> On February 4, the parties, along with Ambassador Wisner, initialed an agreement to extend the negotiating period another 30 days to February 28. A trilateral meeting was set for February 26 at Taba to finalize the terms of withdrawal. Two committees were put to work, one

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days of the signing of the Rome agreement).

54. *Interview by Izzat al-Sa’dani with Ismat Abd al-Majid, Foreign Minister*, FOREIGN BROADCAST INFO. SERV. NEAR EAST & SOUTH ASIA, FBIS-NES-88-240, Dec. 10, 1988.

55. Honorable Abraham D. Sofaer, Legal Adviser, U.S. Dep’t. of State, *Talking Points: Taba 2* (Feb. 2, 1989) (on file with the Hoover Institution Library & Archives).

56. *Id.* at 4.

57. *Interview by Shlomo Ganor with Moshe Arens, Foreign Minister*, FOREIGN BROADCAST INFO. SERV. NEAR EAST & SOUTH ASIA, FBIS-NES-88-023, Feb. 6, 1989.

on the issue of access to the Taba area, and the other on transfer and management of tourist facilities. The latter was under the leadership of Minister of Tourism and Civil Aviation Fouad Sultan, who not only was a savvy businessman, but also had access to the hard currency needed to buy the hotel, since he ran Egypt's national airline.<sup>58</sup> On February 5, Foreign Minister Arens confirmed that he had spoken to Minister Meguid, that the "misunderstanding" on the resumption of talks had been overcome, that Taba would be returned after certain tourism related matters were settled, and that he hoped that this would lead to better relations with Egypt.<sup>59</sup>

By February 17, we had made considerable progress on a number of issues but were working frantically to complete some complicated deals, including agreements on the prices for the hotel and beach club. Egypt had offered \$33.7 million and \$1 million respectively for the two properties. Based on a proper economic analysis at Minister Sultan's insistence, Egypt ultimately agreed on \$37 million for the hotel and \$1.15 million for Rafi Nelson's complex. Sultan called me in frustration during the night before the agreements were to be signed, complaining that the hotel's lawyers had drafted a wholly inadequate contract of sale. I stayed up most of the night helping the Parties to write one, and ended up serving as Escrow for the funds for both payments.

We solved Israel's initially unreasonable demands for liberal access by reminding them that Egyptians would get the same access to Taba that Israelis received. Israel then agreed some security measures were necessary, though no visas would be required, which was the rule for Israelis with regard to travel from Israel to the rest of the Sinai. Israel initially sought \$1.1 million in infrastructure improvements, including the road and palm trees leading to the hotel. Minister Sultan scornfully dismissed the request, which was withdrawn. At the same time, Israel graciously agreed to continue power, water, and phone

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58. Steven Morris, *Mideast Tensions Headache for Travel Firms*, CHI. TRIB., Oct. 12, 1990, at 1; Tony Walker, *Fanciers of the Sphinx Staying Home*, BOS. SUNDAY GLOBE, Dec. 29, 1985, at 77-78.

59. *Interview by Shlomo Ganor with Moshe Arens*, *supra* note 57.

services as long as Egypt wanted the services.

The final border was fought over until February 25, right down to a matter of inches. The Parties realized that the very last portion of the border would extend into the Gulf, which could someday mean ownership of valuable marine and energy resources. One of the lawyers on my staff, who had worked for days narrowing the Parties' differences, went out with the Parties on February 24 and put an end to their arguments by stamping his (big) foot on the ground in between the very close points the Parties were seeking to establish. We prepared a detailed scenario paper for the signing ceremony, and for all subsequent steps through withdrawal. We were determined to minimize the chances and consequences of any misunderstanding.

We met with the Parties in the ballroom of the Sonesta Hotel on February 26, as scheduled. The Parties signed the agreements we had prepared, and the negotiation was at last over.<sup>60</sup> I read a statement describing what had taken place since 1979 and giving "ultimate credit" to the Parties: "Without their willingness to deal directly and unconditionally with each other, without their determination to preserve the Treaty of Peace and to accept the necessary compromises, no agreement could have been possible."<sup>61</sup> Israel withdrew as promised on March 15.<sup>62</sup> Egypt returned its Ambassador to Israel.<sup>63</sup> Unfortunately, not much else happened to improve the relationship. An agreement to allow Papoushado to continue to manage the hotel under an incentive arrangement was terminated after a short period of intense bickering.

#### REFLECTIONS ON ARBITRATION IN DIPLOMACY

The Taba arbitration was an important contribution to peace between Egypt and Israel, resulting in the return of the Egyptian Ambassador to Israel, and contributing to the law

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60. Sofaer, *supra* note 52.

61. Sofaer, *supra* note 2.

62. Sofaer, *supra* note 52.

63. Jonathan Broder, *Egypt Renews Diplomatic Link to Israel*, CHI. TRIB., Sept. 12, 1986, at 3.

concerning the resolution of disputed international borders. Securing an agreement between the Parties to arbitrate, formalized by signing the *compromis*, had earlier led to the Alexandria Summit between President Mubarak and Prime Minister Peres, where the two leaders cited that outcome as demonstrating that direct dialog and negotiations are the *sine qua non* for progress.

Most significantly, the arbitration served the essential purpose of enabling Israel to advance legal arguments that its political leaders were unwilling to give up voluntarily. As Eli Lauterpacht observed:

Those charged with making political decisions within the State are understandably reluctant irreversibly to abandon territory or enter into compromises when the legal considerations placed before them are often uncertain or finely balanced. In such circumstances litigation—even unsuccessful litigation—may well be the only way of bringing the diverse views within the State to share a common understanding that the claim cannot be wholly sustained or even sustained at all.<sup>64</sup>

While the arbitration played an indispensable part in resolving the Taba dispute, the full story shows how much more complicated it was to secure a complete and lasting outcome than simply getting the parties to arbitrate. Arbitration has a future in resolving international disputes—even perhaps concerning certain, limited aspects of the Middle East peace process. But in general the role of arbitration in international relations will be limited to construing and enforcing agreements already reached by political leaders.

Arbitration is a limited tool in diplomacy because to be effective, adjudicated solutions need to be genuinely consensual. International arbitration is inherently a consensual mechanism. A State that genuinely consents to arbitrate an issue should be held to its agreement. But international lawyers and diplomats sometimes try to use arbitration to resolve disputes that States have not genuinely agreed to arbitrate. Such efforts diminish the potential utility and reputation of arbitration. They are

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64. Lauterpacht, *supra* note 2, at 465-66.

likely not only to be futile in terms of altering State conduct, but also to lead States to limit their willingness to agree in advance to arbitrate differences under treaties or other submissions.

The Taba negotiation also conveys significant lessons for effective diplomacy beyond those related to the potential utility of arbitration. Most important is the fact that resolving even relatively limited controversies can contribute to peace and progress. Insisting on complete or “global” deals can be a formula for failure, unrealized expectations, and the deterioration of relations, including violence. For example, President Clinton and Prime Minister Barak insisted on a final and complete agreement at Camp David II, despite knowing that Camp David I succeeded only because Presidents Carter and Sadat and Prime Minister Begin went ahead with the Egypt/Israel Treaty of Peace even after having failed to resolve the Palestinian issue. The Second Intifada followed Camp David II. “Peace in Pieces” is not just jargon; it is a reflection of the harsh reality that, however clear the proper outcome of international standoffs may seem to U.S. policy makers, political leaders of affected States or groups can only go as far on particular issues at a given time as *they* believe circumstances allow.

I am well aware that both Israel and the Palestinians have in recent years insisted on settling all the key issues that exist between them at once, but the United States should push back hard against this position instead of accepting it. This was most recently again made obvious by Secretary of State Kerry’s ineffective effort to achieve an “agreement in principle” on all the contentious peace-related issues between Israel and the Palestinians in nine months.<sup>65</sup> To paraphrase Shimon Peres during Camp David II: “Be careful in seeking all or nothing, since nothing may come of it.”

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65. William Booth & Ruth Eglash, *Kerry’s Nine-Month Quest for Middle East Peace Ends in Failure*, WASH. POST (Apr. 29, 2014), [https://www.washingtonpost.com/world/middle\\_east/kerrys-nine-month-quest-for-middle-east-peace-ends-in-failure/2014/04/29/56521cd6-cfd7-11e3-a714-be7e7f142085\\_story.html](https://www.washingtonpost.com/world/middle_east/kerrys-nine-month-quest-for-middle-east-peace-ends-in-failure/2014/04/29/56521cd6-cfd7-11e3-a714-be7e7f142085_story.html) [http://perma.cc/PK55-TA8H]; Michael R. Gordon, *Kerry Says Goal is Mideast Peace Deal Within 9 Months*, N.Y. TIMES (July 30, 2013), <http://www.nytimes.com/2013/07/31/world/middleeast/kerry-says-goal-is-mideast-peace-deal-within-9-months.html> [http://perma.cc/7BT6-K32X].

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The tragedy at Ras Burqa provided another lesson worth mentioning. Initially, it set back our effort to resolve Taba. But sometimes a second problem can help in solving the first. I learned during my years at State to check in with the desk officer for any country with which I had an issue to resolve, not just for his or her advice, but also to find out what other issues we had with that country to use in negotiating solutions.

In sum, truly consensual arbitration has important roles to play in international affairs. But as the back-story of Taba illustrates, the key to maintaining peace and security is effective, multi-dimensional diplomacy. Arbitration is a tool in that process, sometimes even indispensable, but seldom if ever sufficient in itself.