

## Tribunal Determines Sovereignty over Red Sea Islands

The Arbitration Tribunal set up by Eritrea and Yemen to resolve the dispute between the two countries over island sovereignty and maritime boundaries in the southern Red Sea announced its Award in the first stage of the proceedings – territorial sovereignty and the scope of the dispute – on 9<sup>th</sup> October. The tribunal awarded sovereignty over the Zuqar-Hanish group, the Zubayr group and Jabal al-Yayr to Yemen, and sovereignty over the Mohabbakah Islands, the Haycock Islands and South West Rocks to Eritrea. The sovereignty awarded to Yemen is subject to the perpetuation of the traditional fishing in the region, including free access to the islands awarded to Yemen for the fishermen of both countries. Both governments expressed their willingness to abide by the award, although Yemen is clearly happier with the outcome than Eritrea. Not only was Yemen awarded sovereignty over the island at the heart of the dispute – Greater Hanish, on which there was a military confrontation in December 1995 – but it gained the majority of the islands in the southern Red Sea whose sovereignty was open to question. The features awarded to Eritrea are all very small and appear to be of little value in themselves, although they may well prove significant in terms of maritime boundary delimitation, to which the Tribunal will now turn its attention.

The Award was made pursuant to an Arbitration Agreement between the countries signed on 3 October 1986. The Tribunal is composed of five arbitrators, two chosen by Eritrea (Judge Stephen Schwebel and Judge Rosalyn Higgins), two by Yemen (Dr Ahmed Sadek El-Kosheri and Mr Keith Highet), and one chosen by both Parties (Professor Sir Robert Jennings, who was subsequently appointed as President of the Tribunal). Article 2 of the Arbitration Agreement set out the framework for the Tribunal's work:

1. *The Tribunal is requested to provide rulings in accordance with international law, in two stages.*
2. *The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.*
3. *The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.*

Following the completion of the first stage of the arbitration, the Parties now have six months to prepare their memorials for the second stage dealing with maritime boundaries.

The 142-page text of the Award was released by the Permanent Court of Arbitration in the Hague shortly before this issue of the *Boundary and Security Bulletin* went to press.<sup>1</sup> A detailed analysis of the Award will be published in a future issue, but the key elements of the first stage of the arbitration are as follows:

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<sup>1</sup> By the time this article appears, the text of the Award may be available on the Court's World Wide Web site at <http://www.law.cornell.edu/icj/pca/>.

### *The Scope of the Dispute*

The Parties disagreed over the scope of the dispute. Yemen contended that the “*Northern Islands*” of Jabal al-Tayr and the Zubayr group were never in dispute and were not reflected in Eritrea’s position until the Parties’ Memorials were filed in September 1997. However, the Tribunal disagreed and decided that the dispute consisted of all the islands and islets over which the Parties had put forward conflicting claims, which included the Northern Islands, the Haycocks and the Mohabbakahs, in addition to the Zuqar-Hanish group.

### *The Tribunal’s conclusions on the question of territorial sovereignty*

In its Award, the Tribunal discusses six main aspects of the case as presented by the Parties. These are:

1. Historic title and other historical considerations;
2. The legal history and principal treaties and other legal instruments involved, together with questions of State succession;
3. Red Sea lighthouses;
4. Evidences of the display of functions of State and governmental authority;
5. Maps; and,
6. Petroleum agreements and activities.

A footnote in the Award notes the “*sheer volume of written pleadings and evidence received...in the first phase of the arbitral proceedings.*” Each Party submitted over twenty volumes of documentary annexes plus “*extensive*” map atlases, and the transcripts of the oral proceedings produced more than a thousand additional pages of material for the Tribunal to consider. However, while congratulating the Parties on the quality of their presentations, the Tribunal found that much of the evidence provided by the two sides was inconclusive, particularly with regard to historic title, an issue on which both Parties – but especially Yemen – had placed great emphasis. Instead, it was “*the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions.*”

The Tribunal decided that different subgroups of islands had different legal histories, and that sovereignty over each subgroup should be determined separately.

For the **Mohabbakah Islands**, which the Tribunal describes as “*little more than navigational hazards*”, in the absence of a convincing alternative claim to title by Yemen the fact that all of the islands apart from High Islet lie within twelve miles of the Eritrean coast (i.e. within Eritrea’s territorial sea) was sufficient reason for the Tribunal to award the group to Eritrea.

The proximity of the **Haycock Islands** to the African coast was also a key factor in the decision to award the islands to Eritrea. Eritrea’s arguments relating to succession derived from the Italian colony of Eritrea – which even the British government recognised as probably having jurisdiction over the islands – appears to have had some influence on the Tribunal’s decision, although it notes that there are “*difficult juridical problems with this theory of succession.*” Despite the fact that the name **South West Rocks** seems to establish a geographical link to the Zuqar-Hanish group, the Tribunal decided that historically they were more closely linked with the Mohabbakahs and Haycocks, and therefore awarded them to Eritrea.

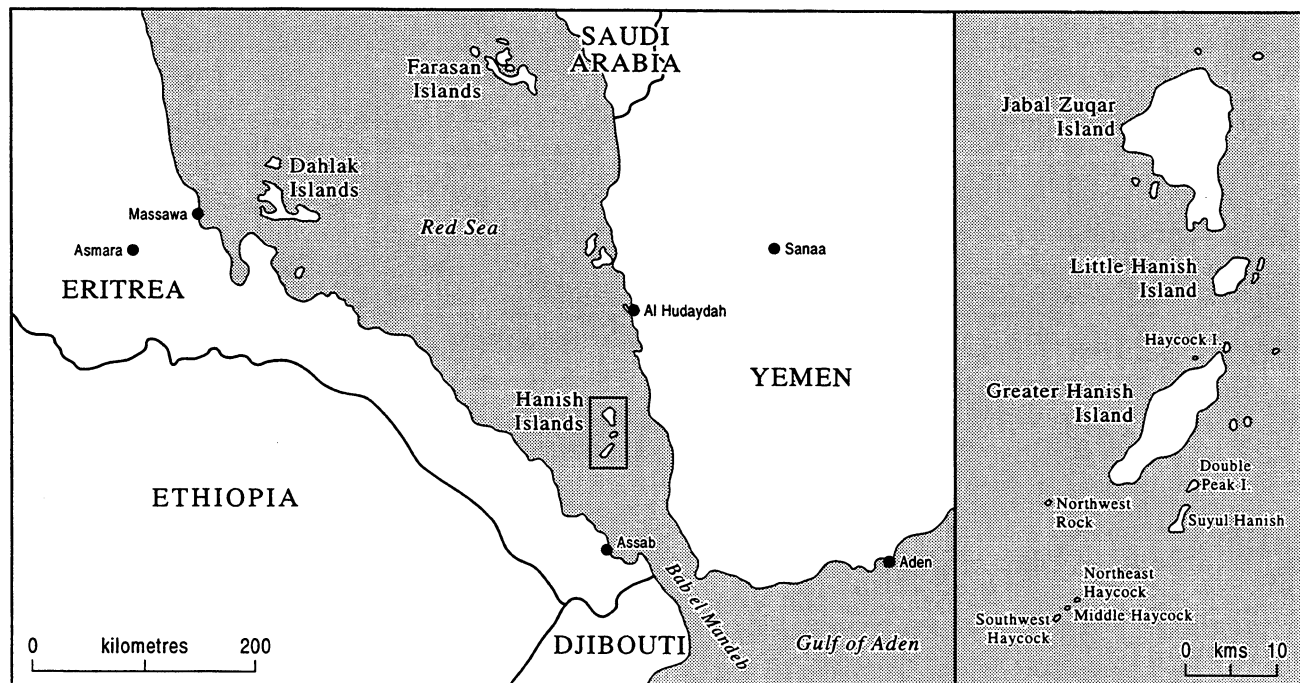
The **Zuqar-Hanish** subgroup was not only the most sensitive group for the Parties, but it also proved to be the most difficult group for the Tribunal in terms of determining sovereignty. Unlike the other groups, it does not lie clearly on one side of a median line between the two coasts; in fact, such a line would cut right through Greater Hanish island, so “*the appurtenance factor*” did not really apply.

Furthermore, neither Yemen's claim to an ancient title to the group nor Eritrea's claim to a historic title through succession was felt to be convincing, although Yemen's claim that the islands fell under the jurisdiction of the Arabian coast during Ottoman rule appears to have had some effect on the decision. However, in making its decision the Tribunal relied primarily on evidence of the exercise of the functions of state authority in the islands. This criterion clearly favoured Yemen with regard to Zuqar island, and marginally tilted the balance in Yemen's favour with regard to the Hanish Islands.

For the isolated **Jabal al-Tayr** and the **Zubayr** group, neither Party was able to produce much in the way of evidence of the exercise of the functions of state and governmental authority. The decision to award sovereignty to Yemen appears to have been based on three factors: firstly, the fact that the islands all lie "well eastward" of a coastal median line; secondly, the 1989 decision of an international conference on the future of lighthouses in the southern Red Sea to accept Yemen's offer to take on responsibility for the maintenance of the light Jabal al-Tayr (as well as Abu Ali in the Zuqar-Hanish group); and finally, the fact that Yemen awarded petroleum exploration licenses encompassing the Zubayr group and the territorial sea of Jabal al-Tayr in both the 1970s and 1980s, while Eritrea's petroleum blocks (awarded in 1995 and 1997) only extend up to what appears to be an approximate median line between the mainland coasts.

The decision to allow free access for Eritrean fishermen to all the islands awarded to Yemen is a creative and sensitive touch on the part of the Tribunal. Not only does it slightly sweeten the otherwise bitter pill that Eritrea is being asked to swallow, it is also designed to contribute one of the main aims of the arbitration process as set out in the Joint Statement signed by the Parties in May 1996, namely "the re-establishment and the development of a trustful and lasting cooperation between the two countries." Time will tell whether this can be achieved in practice but the initial response of the two sides to the Award are encouraging.

*Martin Pratt*



The full Dispositif of the Award reads as follows:

THE TRIBUNAL,

taking into account the foregoing considerations and reasons,

UNANIMOUSLY FINDS IN THE PRESENT CASE THAT

- i. the islands, islet, rocks, and low-tide elevations forming the Mohabbakah islands, including but not limited to Sayal Islet, Harbi Islet, Flat Islet and High Islet are subject to the territorial sovereignty of Eritrea;
- ii. the islands, islet, rocks, and low-tide elevations forming the Haycock Islands, including, but not limited to, North East Haycock, Middle Haycock, and South West Haycock, are subject to the territorial sovereignty of Eritrea;
- iii. the South West Rocks are subject to the territorial sovereignty of Eritrea;
- iv. the islands, islet, rocks, and low-tide elevations of the Zuqar-Hanish group, including, but not limited to, Three Foot Rock, Parkin Rock, Rocky Islets, Pin Rock, Suyul Hanish, Mid Islet, Double Peak Island, Round Island, North Round Island, Quoin Island (13°43'N, 42°48'E), Chor Rock, Greater Hanish, Peaky Islet, Mushajirah, Addar Ail Islets, Haycock Island (13°47'N, 42°47'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Low Island (13°52'N, 42°49'E) including the unnamed islets and rocks close north, east and south, Lesser Hanish including the unnamed islets and rocks close north east, Tongue Island and the unnamed islet close south, Near Island and the unnamed islet close south east, Shark Island, Jabal Zuqar Island, High Island, and the Abu Ali Islands (including Quoin Island (14°05'N, 42°49'E) and Pile Island) are subject to the territorial sovereignty of Yemen;
- v. the island of Jabal al-Tayr, and the islands, islets, rocks and low-tide elevations forming the Zubayr group, including, but not limited to, Quoin Island (15°12'N, 42°03'E), Haycock Island (15°10'N, 42°07'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Rugged Island, Table Peak Island, Saddle Island and the unnamed islet close north west, Low Island (15°06'N, 42°06'E) and the unnamed rock close east, Middle Reef, Saba Island, Connected Island, East Rocks, Shoe Rock, Jabal Zubayr Island, and Centre Peak Island are subject to the territorial sovereignty of Yemen; and
- vi. the sovereignty found to lie with Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.

Further, whereas Article 12.1(b) of the Arbitration Agreement provides that the Awards shall include the time period for their execution, the Tribunal directs that this Award should be executed within ninety days from the date hereunder.

Done at London this 9<sup>th</sup> day of October, 1998