THE *ERITREA/YEMEN* ARBITRATION: Landmark Progress In The Acquisition Of Territorial Sovereignty and Equitable Maritime Boundary Delimitation

Barbara Kwiatkowska

INTRODUCTORY REMARKS

The Eritrea/Yemen case counts among the more important cases in the history of international adjudication and arbitration…

The *Eritrea/Yemen* case, which counts among the more important cases in the history of international adjudication and arbitration, was settled by means of two Awards rendered unanimously by the Five-Member Arbitral Tribunal, namely the *Territorial Sovereignty and Scope of the Dispute* Award (Phase I) of 9 October 1998 and the *Maritime Delimitation* Award (Phase II) of 17 December 1999.[1]

The Awards were rendered pursuant to an Arbitration Agreement between the Government of the State of Eritrea and the Government of the Republic of Yemen (hereinafter "the Parties") of 3 October 1996.[2] The Agreement was preceded by Eritrea/Yemen Paris Agreement on Principles of 21 May 1996, which was witnessed by the Governments of France, Ethiopia and Egypt, and a concurrent Joint Statement of the Parties, which emphasised their desire to settle the dispute and "*to allow the re-establishment and development of a trustful and lasting cooperation between the two countries*", contributing to the stability and peace of the region.[3] The location of the disputed islands, islets, rocks and low-tide elevations in the southern Red Sea, partly along the shipping lanes connecting to strategically critical Strait of Bab el-Mandeb ("*Gate of Lament*") and on the southern approaches to the Suez Canal, raised concern about a possible threat to international navigation.[4] The hostilities that ended in December 1995 with Eritrean forces occupying Greater Hanish Island, and Yemeni forces occupying Zuqar, threatened to become an Arab/African conflict, possibly with a recurring Arab/Israeli dimension.[5] Since May 1998, the Eritrean/Yemeni dispute has been paralleled by military clashes over the Yemeni/Saudi Arabian land and sea borders[6] and by a protracted Eritrean/Ethiopian border crisis.[7]

The importance of the *Eritrea/Yemen* case has been matched by the membership of the Arbitral Tribunal. In conformity with the Arbitration Agreement (Article 1), Eritrea appointed as Arbitrators two Members of the International Court of Justice (ICJ), current President Stephen M. Schwebel and Judge Rosalyn Higgins, and Yemen appointed two leading international counsel, Mr Keith Highet and Dr Ahmed Sadek El-Kosheri. Following the agreement of the Parties to this effect, on 14 January 1997 the four Arbitrators appointed the Former President of the ICJ, Sir Robert Y. Jennings, as President of the Tribunal. Sir Robert and Dr El-Kosheri have also served as Judges *ad hoc* (for Britain and Libya respectively) in the pending *Lockerbie* cases. The appointment of ICJ Judges to the *Eritrea/Yemen* Tribunal reflects a longstanding tradition of Members of the World Court acting as Arbitrators in inter-State and other arbitrations; a tradition that has proved to be a valuable means of enhancing the quality and consistency of international jurisprudence.[8] Having been duly constituted, the *Eritrea/Yemen* Arbitral Tribunal appointed as Registrar Mr. P.J. Hans Jonkman, Secretary-General of the Permanent Court of Arbitration (PCA), and as Secretary Mrs Bette E. Shifman, and fixed the location of the Tribunal's Registry at the PCA International Bureau, The Hague (Peace Palace).[9] In the course of Phase II, Mr. Tjaco T. van den Hout and Mrs Phylis Hamilton became the new PCA Secretary-General and the First Secretary respectively. The place of arbitration was London.

Under their Arbitration Agreement (Article 2), Eritrea and Yemen requested the Tribunal to rule in two stages. In the first stage, the Tribunal was requested to decide issues of 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, as well as to decide the scope of the dispute on the basis of the respective positions of the Parties. The Tribunal's Award (Phase I) was followed by the Treaty Establishing the Joint Yemeni-Eritrean Committee for Bilateral Cooperation of 16 October 1998, which testified to restoration of the friendly relations of the Parties.[10] As a result of resumption of military hostilities in the Eritrean/Ethiopian border war,[11] Eritrea, by means of its Application of 16 February 1999, has initiated proceedings in the ICJ in a dispute with Ethiopia concerning the alleged violation (in the week of 8 February) of the premises and of the staff of Eritrea's diplomatic mission in Addis Ababa.[12] Meanwhile, the second stage of the *Eritrea/Yemen* dispute was settled by the 1999 Award (Phase II), which delimited international Red Sea boundary between the two states, taking into account territorial settlement achieved in the first stage of arbitration, the 1982 UN Convention on the Law of the Sea and other pertinent factors.

The Award resolved the dispute "on the basis of international law and the long-term fraternal interests of both peoples and countries."

On the day of its delivery, the Award was received by the Foreign Minister of Eritrea, Haile Woldense, and the Ambassador to London from Yemen, Dr. Hussein Abdullah El-Amri. In its Press Statement of 20 December 1999, circulated as a document of the United Nations Security Council, the Ministry of Foreign Affairs of Eritrea expressed its gratitude to the French Government for the crucial role played in confidence-building in the early days of the dispute and in conclusion of the Arbitration Agreement.[13] It also expressed appreciation to the British Government and the ICJ for facilitating the *Eritrea/Yemen* proceedings and commended the Award for the manner in which it resolved the dispute "*on the basis of international law and the long-term fraternal interests of both peoples and countries*".[14] In addition, at his press conference held in Asmara on 21 December 1999, Foreign Minister Woldense stressed that "*the legal settlement of the dispute will not only pave the way for a harmonious relationship between the littoral states of the Red Sea, but also opens a new window of opportunity for the consolidation of peace and stability in the region and the creation of a zone of peace, development and mutual benefit*".[15] Similarly, the Vice-Minister of Foreign Affairs of Yemen, Abdulla Mohammed Al-Saidi, confirmed on his part that the Award "*represents a culmination of a great diplomatic effort and an important historic development in political and diplomatic relations between two neighbouring countries*" and "*a way that should be followed for resolving Arab, regional and international disputes.*"[16] The respective Statements of Eritrea and Yemen reiterated their commitments to fully comply with and to implement the two Awards.[17]

THE 1998 TERRITORIAL SOVEREIGNTY AND SCOPE OF THE DISPUTE AWARD

A masterpiece of legal draftsmanship…

The substantial, 528-paragraph *Territorial Sovereignty* Award (Phase I) is a masterpiece of legal draftsmanship,[18] which reflects the extensive documentary and archival material pleaded in the *Eritrea/Yemen* case.[19] The Award is consistent with the 1928 *USA v. Netherlands Island of Palmas (Miangas)* Award of the sole Arbitrator Max Huber, at the time President of the Permanent Court of International Justice,[20] the 1933 *Denmark v. Norway Legal Status of Eastern Greenland* Judgment[21] and other decisions, admirably appraised by Sir Robert Jennings in his major work on the acquisition of territorial sovereignty.[22] The 1998 *Eritrea/Yemen* Award is structured along eleven Chapters dealing with:

- Setting up of the Arbitration and the Arguments of the Parties (Chapter I);
- The Scope of the Dispute (Chapter II);
- Some Particular Features of this Case (Chapter III);
- Historic Title and Other Historical Considerations (Chapter IV);
- The Legal History and Principal Treaties and Other Legal Instruments Involved, Question of State Succession (Chapter V);

- Red Sea Lighthouses (Chapter VI);
- Evidence of the Display of Functions of State and Governmental Authority (Chapter VII);
- Maps (Chapter VIII);
- Petroleum Agreements and Activities (Chapter IX);
- Conclusions (Chapter X); and
- *Dispositif* (Chapter XI).

In the last two operative paragraphs 527 and 528 of the Award, the territorial sovereignty over the disputed Red Sea islands was decided as follows:

In the last two operative paragraphs 527 and 528 of the Award, the territorial sovereignty over the disputed Red Sea islands was decided.

527. Accordingly, the Tribunal, taking into account the foregoing considerations and reasons, unanimously finds in the present case that:

i. the islands, islets, 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, islets, 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, islets, 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 Zuquar 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.

528. 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.

While the brevity of this commentary prevents us from doing justice to the complexity of considerations and reasons which led the Tribunal to the foregoing conclusions, it may be noted that Eritrea based its claim to the islands on a chain of title extending over more that 100 years, and on principles of effective occupation, and Yemen, in turn, based its claim on original, historic, or traditional Yemeni title. Both parties submitted extensive cartographic evidence, but Eritrea relegated it to a limited role, believing that maps do not constitute direct evidence of sovereignty or of a chain of title.

After having reviewed the respective arguments of the parties on territorial sovereignty and on the relevance of petroleum agreements and activities (Chapter I), the Arbitral Tribunal turned to the issue whether the scope of the dispute involved, as Eritrea contended, all the respective Red Sea islands or, as Yemen claimed, only islands of the Hanish Group (Chapter II). The Tribunal preferred the Eritrean view and accordingly decided to make an Award on sovereignty over all the islands, islets, rocks and low-tide elevations with respect to which the Parties have put forward conflicting claims.

It is at this point that the Arbitral Tribunal set out its observations on some particular features of the *Eritrea/Yemen* case (Chapter III). A striking difference between the Parties was that while Yemen traced the dispute back to medieval times, well before the establishment of the Ottoman Empire, Eritrea traced its own title through an historical succession from the Italian colonial period as well as through the post-World War II period of its federation as part of the ancient country of Ethiopia. Accordingly, the Tribunal noted that it had been presented with a large volume of archival and other evidence of the establishment of a legal title through the accumulated examples of claims, possession or use or, in the case of Yemen, through consolidation, continuity and confirmation of an alleged *'ancient title'* over the disputed islands, straddling what has been, since the opening of the Suez Canal in 1869, one of the most important and busiest seaways in the world.[23] Since apart from the context of the scope of the dispute,[24] neither of Parties had sought to employ a *'critical date'* argument, the Tribunal followed the 1966 *Argentina v. Chile Frontier (Rio Palena)* Award and "*examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates*".[25] As regards the principle of *uti possidetis*, relied upon by Yemen and contested by Eritrea, the Tribunal found the sources (internal memoranda) provided by the Parties to be based *upon "informed speculation*", appearing insufficient as the basis for a legal presumption of that principle, whose application at the time and place pleaded by Yemen (1918, the Middle East) the Tribunal did not accept. In the context of the Tribunal's task in the first stage of the *Eritrea/Yemen* case, the Award gives an important exposition of the meaning of historic title in international law and the applicability of equity or equitable principles to the issues of territorial sovereignty.[26]

Neither Party succeeded in persuading the Tribunal of the actual existence of titles as a source of territorial sovereignty over the disputed Red Sea islands...

Given its mandate under the Arbitration Agreement (Article 2) and the paramount importance attached to *'ancient title'* by Yemen, the Award reflects careful attention of the Tribunal both to the arguments relating to ancient titles and reversion thereof proposed by Yemen and arguments relating to longstanding attribution of the Mohabbakahs to the colony of Eritrea and to the early establishment of titles by Italy pronounced by Eritrea (Chapter IV). Due attention was also given by the Tribunal to the principal treaties, including the 1923 Lausanne Treaty of Peace (Article 16), and other legal instruments as well as questions of state succession (Chapters V and X, first section)[27] and the Red Sea lighthouses (Chapter VI).[28] However, neither Party succeeded in persuading the Tribunal of the actual existence of titles as a source of territorial sovereignty over the disputed Red Sea islands; neither on the basis of an ancient title in the case of Yemen, nor of title by succession in the case of Eritrea. The Award stresses that, "*given the waterless and uninhabitable nature of these islands and islets and rocks, and the intermittent and kaleidoscopically changing*

political situations and interests, this conclusion is hardly surprising."[29] It is important to note that the Award squarely rejects the existence of a principle of reversion of a newly independent State to the ancient title to territory, which Yemen had claimed.[30]

It was the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal's decisions.

The remaining part of the Award (amounting to half of its length) deals with contentions of the Parties concerning the demonstration of use, presence, display of governmental authority and other ways of showing possession (*effectivités*) which may gradually consolidate into title (Chapters VII-IX and X, second section). A notable result of the analysis of the respective governmental activities drawn in the *Eritrea/Yemen* Award is, as indeed was the case with the 1953 *United Kingdom/France Minquiers and Ecrehos* Judgment, that it was the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal's decisions.[31] The voluminous factual evidence, which was put before the Tribunal by Eritrea and Yemen with the view to showing the establishment of territorial sovereignty "*by the continuous and peaceful display of the functions of State within a given region*",[32] was classified by the Tribunal into:

- evidence of intention to claim the islands, as by showing public claims to sovereignty over the islands and by legislative acts seeking to regulate activity on the islands;

- evidence of activities relating to the waters, including licensing of activities in the waters off the islands, fishing vessel arrests, licensing of tourist activity, granting of permission to cruise around or to land on the islands, publication of Notices to Mariners or Pilotage Instructions relating to the waters of the islands, search and rescue operations, maintenance of Naval and Coast Guard Patrols, environmental protection, fishing activity by private persons, and other acts concerning incidents at sea;

- evidence of activities on the islands, including landing parties on the islands, establishment of military posts, construction and maintenance of facilities, exercise of criminal or civil jurisdiction, construction or maintenance of lighthouses, granting of oil concessions, maintenance of limited settlements, overflight and miscellaneous activities (Chapter VII).

In view of the multiple uses and the relevance of maps to the dispute and the significant attention devoted to the legal implications of petroleum agreements and activities of both Parties, these two topics are dealt with separately by the *Eritrea/Yemen* Award (Chapters VIII and IX). In addition, the Tribunal found it necessary to take account of the geographical factor that the majority of the disputed islands, islets and rocks form an archipelago extending across a relatively narrow sea between the opposite coasts of the Parties (Chapter X). Accordingly, the Tribunal gave a certain weight to the presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the State on the opposite coast has been able to demonstrate a better title.[33] Influence of this presumption could, in Tribunal's view, be seen at work in the legal history of these islands.

Since the different subgroups of islands had, at least to an important extent, separate legal histories, the Arbitral Tribunal felt bound to decide the question of sovereignty with respect to these subgroups separately. At the same time, it rejected the applicability of "*the principle of natural or geophysical unity*" relied upon by Yemen in relation to the Hanish Group as encompassing the entire island chain, including the Haycocks and the Mohabbakahs.[34]

The Tribunal confirmed its earlier finding that there was no evidence that the Mohabbakahs Islands were part of an original historic title held by Yemen and that,

even if it were the case that only the Assab Bay islands were passed to Eritrea by Italy in 1947, no serious claims to the Mohabbakahs had been advanced by Yemen since that time, until the events leading up to the present arbitration.[35] Whatever the history, the Tribunal found that in the absence of any clear title to the islands being shown by Yemen, the Mohabbakahs must today be regarded as Eritrean for reason of their location within 12 miles of Eritrea's coast.[36] Although the High Islet lies barely beyond 12 miles (12.72 miles), it was included into the Mohabbakahs on the basis of the unity theory and the Islet's appurtenance to the African coast.[37]

Similarly, the Tribunal was not persuaded by a peculiar legal history of the Haycock Islands (bound up with the history of the Red Sea lighthouses), relying instead on the geographical argument of their proximity to the Eritrean coast and in accord with the general opinion that islands off a coast belong to the coastal state, unless another, superior title can be established, which Yemen had failed to do.[38] The evidence pertaining to petroleum agreements provided additional support for the Tribunal's decision that the Haycocks are subject to the territorial sovereignty of Eritrea.[39] The South West Rocks were also attributed by the Tribunal to Eritrea on the ground that in the light of their history, it seemed reasonable that the islands should be treated in the same manner as the Mohabbakahs and the Haycocks administered from the African coast.[40]

The remaining disputed islands, islets, rocks, and low-tide elevations, i.e., the Zuqar-Hanish Group[41] as well as the Jabal al-Tayr Island and the Zubayr Group[42] were determined by the Tribunal to be subject to the territorial sovereignty of Yemen. The Tribunal found that the Zuqar-Hanish Group was a particularly difficult group to decide on because, given their location in the central part of the Red Sea, the appurtenance factor was bound to be less helpful, and because any expectation of a definite answer from the Group's earlier legal history, notwithstanding its importance for an understanding of the claims of both Parties, was bound to be disappointed. With respect to a plethora of maps, the Tribunal was of the opinion that Yemen had a marginally better case in that, looked at in their totality, the maps did suggest a certain widespread repute that these islands appertain to Yemen.[43]

With a view to making a firm decision about Zuqar and Hanish Islands, the Tribunal had looked at events in the last decade before the 1996 Agreement of Arbitration, including at the Red Sea lighthouses (being evidence of some form of Yemeni presence in the islands), the history of naval patrols and the logbooks (providing no compelling case for either Party), and the petroleum agreements (failing to establish evidence of sovereignty),[44] as well as at various recent instances of the *effectivités*.[45] With respect to the island of Jabal al-Tayr and the Zubayr Group, which are not only relatively isolated, but also are not proximate to either coast, the Tribunal had again to weigh the relative merits of the Parties' evidence of the exercise of governmental authority in the context of both groups having been lighthouse islands and in view of the relevant petroleum agreements.[46] Although there was sparse evidence on either side of actual or persistent activities on and around these islands, the Tribunal was of the opinion that given their isolated location and inhospitable character, little evidence was sufficient.[47]

Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law.

After examination of all relevant historical, factual and legal considerations, the Arbitral Tribunal found that, on balance, and with the greatest respect for the claims of both Parties, the weight of the evidence supported Yemen's assertions to sovereignty over the Zuqar-Hanish Group[48] and the Jabal al-Tayr Island and the Zubayr Group.[49] The Award stresses an awareness of the Tribunal that: "*Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law.*"[50] Moreover, appreciation of regional legal traditions was necessary to render an Award meeting objectives articulated in the

1996 Joint Statement.[51] Given traditional operation, as the evidence presented to the Tribunal amply testified, of the fishing regime around the islands concerned, the sovereignty found to lie with Yemen was determined as entailing the perpetuation of this regional fishing regime, including free access and enjoyment for the fishermen of both Parties.[52]

The 169-paragraph *Eritrea/Yemen Maritime Delimitation* Award (Phase II) provides a notable instance of application of the modern law of maritime boundary delimitation, as developed in the equitable jurisprudence of the International Court of Justice and arbitral tribunals.[53] The Award is structured along Introduction and six Chapters dealing with:

- Proceedings in the Delimitation Stage of the Arbitration (Introduction);
- The Arguments of the Parties (Chapter I);
- The General Question of Fishing in the Red Sea (Chapter II);
- Petroleum Agreements and Median Lines (Chapter III);
- The Traditional Fishing Regime (Chapter IV);
- The Delimitation of the International Maritime Boundary (Chapter V); and
- *Dispositif* (Chapter VI).

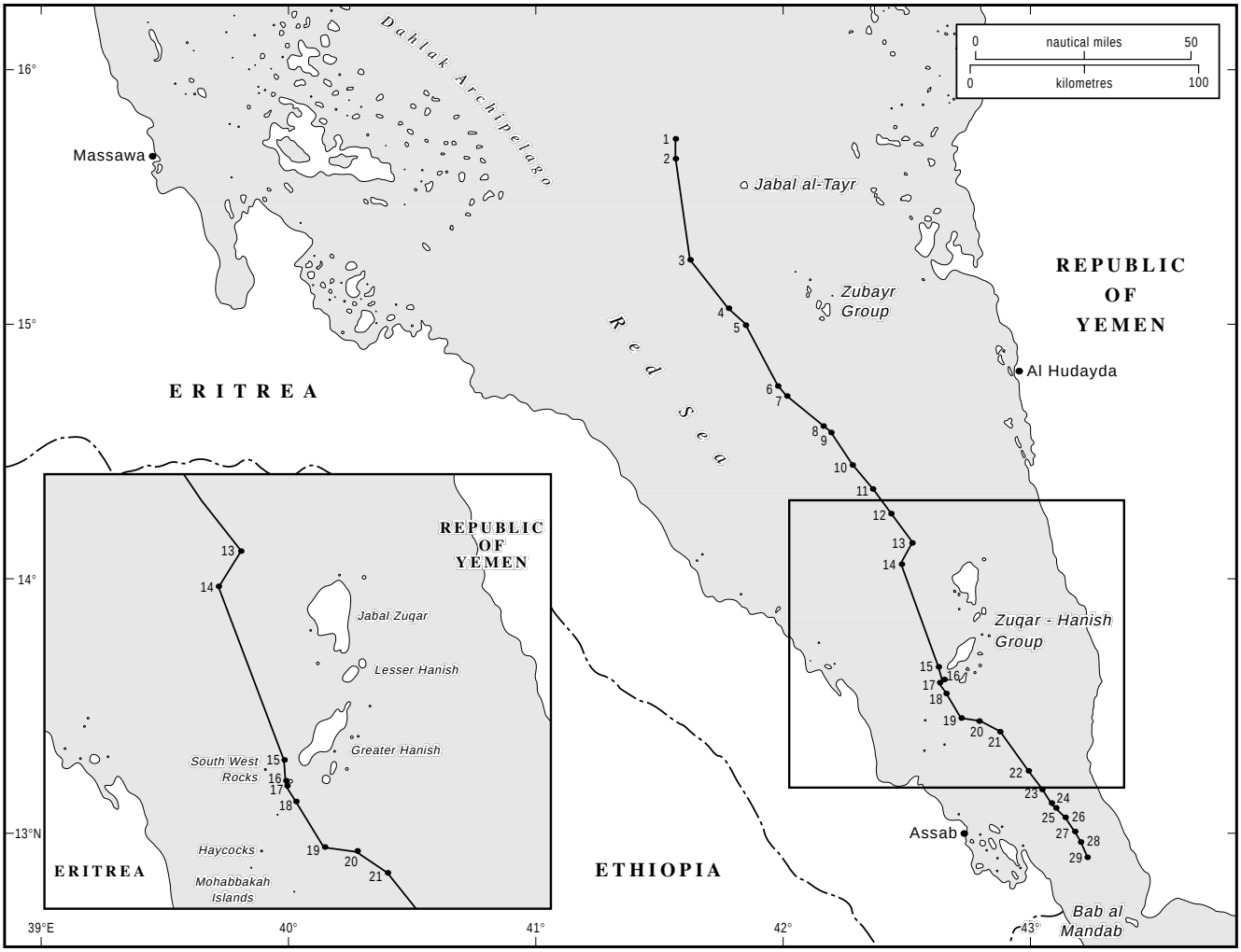
The Delimitation of The Eritrea/Yemen International Maritime Boundary

A Single All-Purpose Equidistant (Median) Line

In accordance with its mandate under the Arbitration Agreement (Article 2(3)), the *Eritrea/Yemen* Arbitral Tribunal effected the delimitation of the international maritime boundary between the two states by means of a single all-purpose boundary between their territorial seas (TS) and the 200-mile exclusive economic zone and the continental shelves (EEZ/CS). In the last operative paragraph 169 of the Award, this boundary was unanimously defined by a series of geodetic lines, joining 29 points, which were specified in degrees, minutes and seconds of the geographic latitude and longitude, based on the World Geodetic System 1984 (WGS 84), as assisted by a technical expert designated by the Tribunal.[54] The lines and the numbers of the turning points are, as the Arbitration Agreement requested, shown for purpose of illustration only in Charts 3 and 4 in the map section of the Award, (see map).

The Tribunal's boundary substantiates the governing role of equidistance as the equitable boundary between the opposite states under both Article 15 (TS) and Articles 74/83 (EEZ/CS) of the 1982 UN Law of the Sea Convention[55] and adjustment of that boundary by the factors pertaining to baselines, islands, the immediate neighbourhood of a main international shipping line and interests of any third states (Saudi Arabia and Djibouti). While the 1999 Award confirmed the significance and further defined the holding of the 1998 Award concerning perpetuation of the traditional fishing regime in the region referred to further below, the fisheries factors were of no effect on the actual course of the Tribunal's boundary line.

A single equidistant (median) line, drawn by the Arbitral Tribunal after careful consideration of all the cogent and skilful arguments advanced by the Parties, differs in some respects both from median line proposed by Yemen and from the two versions of the median (including *'historic'*) line claimed (in combination with "*the joint resource area boxes*" of the mid-sea disputed islands) by Eritrea.[56] The proposed lines followed different courses and did not coincide, except in the narrow waters of the southernmost portion of the line. Eritrea sought certain support for its "*historic median line*" – to be drawn without according the mid-sea islands influence on the course of that line – in the finding of the 1998 *Territorial Sovereignty* Award that the offshore petroleum contracts "*lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties*."[57] The Tribunal admitted that the 1998 Award's examination of petroleum arrangements did show repeated reference to a median line between the coasts of Yemen and Eritrea. But this was not



the same as saying that the maritime boundary now to be drawn should be drawn throughout its length entirely without regard to the islands whose sovereignty has been determined.[58] Since the concession lines were drawn without regard to uninhabited, volcanic islands when their sovereignty was indeterminate, the Tribunal considered that those lines could hardly be taken as governing once that sovereignty has been determined.

The Arbitral Tribunal drew its single all-purpose equidistant (median) boundary line as far as practicable between the opposite mainland coastlines, while giving careful consideration to the presence of the respective islands. For the purpose of measurement of this equidistance in accordance with definition laid down in Article 15 of the 1982 Convention, the Tribunal preferred the Eritrean argument of measuring it from normal baselines defined in Article 5 by means of the low-water line.[59] The Tribunal paid due attention to navigational considerations, as referred to in the preamble of the Arbitration Agreement expressing conciousness of Eritrea and Yemen of "*their responsibilities towards the international community as regards the maintenance of international peace and security as well as the safeguard of the freedom of navigation in a particularly sensitive region of the world*", and as already articulated in the 1998 Award.[60]

The international single maritime boundary was constructed by the Tribunal:

- from its northern stretch between turning points 1 and 13, where the boundary divides the Yemeni and the Eritrean EEZ/CS[61] and is entirely a mainland-coastal equidistant (median) line;

- through the middle stretch between turning points 13 and 20, where the boundary also involves the TS delimitation and gives minimal effect to the Zuqar-Hanish Group;

- to the southern sector from turning point 20, where the boundary turns south-eastwards to rejoin the mainland-coastline median line.

The Northern Stretch of the Boundary Line

In the northern sector, the Tribunal decided that the western basepoints of its boundary line to be employed on the Eritrean coast should be on the low-water line of certain of the outer Dahlak Group, comprising a "*carpet*" of some 350 islands and islets, which both Parties were agreed are an integral part of Eritrea's mainland coast, as well as Mojeidi and an unnamed islet east of Dahret Segala. [62] The use of the small uninhabited Negileh Rock (of the Dahlaks) proposed by Eritrea as a basepoint was rejected, in pursuance of Articles 6 and 7(4) of the 1982 Convention, on account of its being a low-tide reef.[63]

With respect to the small single island of Jabal al-Tayr and the group of islands called Zubayr, which were attributed by the 1998 Award to the sovereignty of Yemen, the equidistance proposed by Yemen allowed all these islands full effect, while Eritrea claimed the mainland coastal median line allowing them no effect.[64] In view of the "*barren and inhospitable nature*" of those islands, not constituting a part of Yemen's mainland coast, the Tribunal shared Eritrea's view that they should have no effect upon computing the international boundary line.[65] Consequently, the Tribunal used as the basepoints for this part of the coast of Yemen several of another "*carpet*" of islands and islets, which are the beginning of a large island cluster off the coast of Saudi Arabia, including in particular the westernmost extremity of the inhabited and important Kamaran Island, the satellite islets immediately south of Kamaran, as well as the islets of Uqban and Kutama to the north of Kamaran.[66]

The Middle Stretch of the Boundary Line

The Tribunal considered that at turning point 13, where its mainland-coastal equidistant (median) line approached the area of possible influence of the islands of the Zuqar-Hanish Group which were determined by the 1998 Award to be subject to the territorial sovereignty of Yemen, some decisions had to be made as to how to deal with this situation.[67]

The Tribunal first decided the question of this middle stretch of the boundary in the narrow seas between the south-west extremity of Yemen's Hanish Group on the one hand and the islands of the Mohabbakahs, High Island, the Haycocks and the South West Rocks, attributed to the sovereignty of Eritrea on the other.[68] Since Yemeni Zuqar-Hanish Islands generated territorial seas which overlapped with those generated by the Eritrean Haycocks and South West Rocks, the question of the TS delimitation was added in this part of the boundary to that of the EEZ/CS delimitation. The Tribunal rejected the suggestion of Yemen of giving no effect to those Eritrean islands and leaving them isolated and enclaved outside the Eritrean TS. Apart from "*the obvious impracticality of establishing limited enclaves around islands and navigational hazards in the immediate neighbourhood of a main international shipping lane*", the Tribunal shared the view of Eritrea that since under Article 121(2) of the 1982 Convention every (high-tide) island is capable of generating a 12-mile TS, a chain of islands (including the Eritrean islands out to the South West Rocks) which are less than 24 miles apart can generate a continuous band of territorial sea.[69] Accordingly, the Tribunal's equidistant (median) line was determined pursuant to the Convention's Article 15 as cutting through the area of overlap of the territorial seas of the Parties.

The Tribunal's equidistant (median) line was determined pursuant to the Convention's Article 15 as cutting through the area of overlap of the territorial seas of the Parties.

The Tribunal then turned to the part of the middle stretch of its boundary between turning points 13 and 15, which part was to connect the mainland-coastal equidistant (median) line of the northern stretch and the Article 15 boundary line specified

above.[70] While respecting the territorial seas generated by the islands of the Zuqar-Hanish Group, the Tribunal computed a geodetic line joining point 13 with point 14, making the necessary southwestwards excursion to join the median line delimiting the overlapping territorial seas, and drew another geodetic line (near to the putative boundary of Yemeni TS in this area) joining points 14 and 15, where the boundary became the Article 15 median.

The Southern Stretch of the Boundary Line

In the southern stretch of a narrow sea having only a few islets and approaching the Bab el-Mandeb, the Tribunal drew a geodetic line which connects turning points 20 and 21, the latter being the intersection of the extended overlapping TS median line and the mainland-coastline median line.[71] As the Bay of Assab is Eritrean internal waters, the controlling basepoints of the boundary line were located seaward of this bay.

Interests of Third States: Northern and Southern End Points of the Boundary Line

Since the Arbitral Tribunal had under the Arbitration Agreement neither competence nor authority to decide on any boundaries between either of the two Parties and neighbouring states, it found it necessary to terminate either end of the Eritrea/ Yemen single maritime boundary in such a way as to avoid trespassing upon an area where other claims might fall to be considered.[72] Consequently, the Tribunal was cautious to halt the progress of the boundary line at its northern end point 1 and southern end point 29, which it considered to be well short of where the boundary might be disputed by any third state, in particular by The Kingdom of Saudi Arabia and Djibouti respectively.

As regards the northern terminal point 1, in its Letter to the Tribunal's Registrar of 31 August 1997, Saudi Arabia expressly pointed out that its boundaries with Yemen were indeed disputed, reserved its position, and suggested that the Tribunal should restrict its decisions to areas "*that do not extend north of the latitude of the most northern point on Jabal al-Tayr.*"[73] While Eritrea had no objection to this Saudi Arabian proposal, Yemen wished the determination to extend to the limit of its so-called northern sector.[74]

At the southern end point 29, Djibouti made no representation to the Tribunal, which nevertheless determined the matter *proprio motu.* As the boundary line approached Bab el-Mandeb, it could be complicated by the possible influence of the Perim Island. Therefore, the Tribunal stopped the boundary line short of the place where any such influence would begin to take effect.[75]

The Test of Proportionality

In accordance with the modern law of maritime delimitation as developed by the International Court of Justice and arbitral tribunals and as argued in the *Eritrea/Yemen* case strenuously and ingeniously by both Parties, the Tribunal relied on the test of "*a reasonable degree of proportionality*" with a view of determining the equitableness of its single equidistant (median) boundary line arrived at by means specified above.[76] The Tribunal was satisfied that its boundary met the test of proportionality, calculated, through its expert in geodesy, on the basis of the ratio of the Eritrea/Yemen's coastal length (measured by reference to their general direction) of 1:1.31 and the ratio of their water areas of 1:1.09.

Mineral Resources Straddling the Boundary Line

The Arbitral Tribunal found itself not to be in a position to accede to Eritrea's request that it determine that "*The Eritrean people's historic use of resources in the mid-sea islands includes ... mineral extraction.*"[77] It is therefore appreciable that with respect to mineral resources which may be discovered that straddle the Eritrea/Yemen international maritime boundary or that lie in its vicinity, the Tribunal in any event considered that the Parties are bound to inform and consult one another and to give every consideration to the shared or joint or unitised exploitation of any such resources.[78]

Perpetuation of the Traditional Fishing Regime in the Region

Along with delimitation of the Eritrea/Yemen international maritime boundary, a notable virtue of the 1999 Award (Phase II), commended in all Statements made by the Parties upon its delivery,[79] is confirmation of the significance and further definition of the conclusions of the 1998 Award (Phase I) concerning "*the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen*", around the islands of Jabal al-Tayr, the Zubayr Group and the Zuqar-Hanish Group, which were attributed to the sovereignty of Yemen.[80] This solution was devised in the 1998 Award in application of Islamic tradition of territorial sovereignty construed as distinct from the corresponding Western ideas,[81] and as antedating "*the relatively modern, European-derived, concepts of exclusionary sovereignty.*"[82] The solution had its precedent in the underlying role of fishing interests in the *United Kingdom/France Minquiers and Ecrehos* case where, however, the Parties themselves took initiative of separating fishery issues into a bilateral treaty and of arguing the sovereignty question more purely on its merits.[83]

The Tribunal gave the fisheries matters its careful consideration in three Chapters of the 1999 Award…

The holding of the 1998 Award on "*the perpetuation of the traditional fishing regime in the region*" was of a twofold impact in the second stage of the *Eritrea/Yemen* proceedings. In particular, it raised the question of the precise substantive content and practical implications of this solution on the one hand, and it inclined the Parties to rely on fisheries factors as non-geographical circumstances relevant to maritime boundary delimitation on the other. To Eritrea's question how this traditional fishing regime might be pleaded in the second stage, the Tribunal's President Sir Robert Jennings replied that it was "*for Eritrea itself to determine the contents of its written pleadings for that stage.*"[84] Consequently, Eritrea, which believed that "*if this regime is to be perpetuated, the Parties must know what it is and where it holds away in a technically precise manner*", and which characterised this regime "*as a sort of servitude internationale falling short of territorial sovereignty*",[85] proposed fulfilment of that regime by means of "*the joint resource area boxes*" of the mid-sea disputed islands.[86]

The coupling by Eritrea of the traditional fishing regime and the maritime boundary delimitation was in contradistinction to the views of Yemen that the holding in question constituted *res judicata* without prejudice to the maritime boundary, that the Tribunal had not made any finding that there should be joint resource zones, that there had traditionally been no significant Eritrean fishing in the vicinity of the islands concerned, and that the framework created by the 1994 and 1998 Eritrea/Yemen Agreements obviated any need further to take into account the traditional fishing regime in the maritime boundary delimitation.[87] On its part, Eritrea found these Yemen's submissions as conveying the misleading impression that in a follow-up to the 1998 Award, the Parties agreed arrangements to protect or preserve Eritrea's traditional rights in the waters around the mid-sea islands.[88]

In view of the voluminous fisheries evidence which was submitted by the Parties and formed the subject of their strong and differing views, the Tribunal gave the fisheries matters its careful consideration in three Chapters of the 1999 Award, namely Chapter I on The Arguments of the Parties referred to above, Chapter II on The General Question of Fishing in the Red Sea and Chapter IV on The Traditional Fishing Regime.[89] In the second of those Chapters, the Tribunal found on the whole the evidence advanced by the Parties as being to a very large extent "*contradictory and confusing*", and as not providing any ground, whether related to the historical practice of fishing in general, to matters of asserted economic dependence on fishing, to the location of fishing grounds, or to the patterns of fish consumption by the populations, for accepting, or rejecting, the arguments of either Party on the boundary line proposed by itself or by the other Party.[90] The Award notes that neither Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its

nationals or detrimental effects on fishing communities and economic dislocation of its nationals.[91]

Moreover, the whole point of the Tribunal's 1998 holding on "*the perpetuation of the traditional fishing regime*" was that "*such traditional fishing activity has already been adjudged by the Tribunal to be important to each Party and to their nationals on both sides of the Red Sea*", and precisely because of this importance, the fishing practices of the Parties were now not germane to the task of equitable maritime boundary delimitation.[92] Nevertheless, in Chapter IV of the 1999 Award, the Tribunal found it appropriate to respond to the diverse submissions advanced by the Parties, as they were entitled to do, by providing an important clarification of the substantive content of this holding as follows:

> *The traditional fishing regime is not an entitlement in common to resources nor is it a shared right in them. Rather, it entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty, the Tribunal attributed to Yemen. This is to be understood as including diving, carried out by artisanal means, for shells and pearls. Equally, these fishermen remain entitled freely to use these islands for those purposes traditionally associated with such artisanal fishing, the use of the islands for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of repairs*.[93]

Whereas the Tribunal received no evidence that the extraction of guano, or mineral extraction more generally, formed part of this traditional fishing regime that has existed and continues to exist today,[94] it found the specific findings on artisanal fishing, as not extending to large-scale industrial fishing, nor to fishing by nationals of thirds states in the Red Sea, whether small-scale or industrial, made in the 1995 FAO Fisheries Infrastructure Development Project Report (concerning fishing in Eritrean waters) to be of general application in the region.[95]

In order that the entitlements of "*both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands*", as defined by the Tribunal, be real and not merely theoretical, the 1999 Award further clarifies that the traditional regime has also recognised "*certain associated rights*". These rights, which are "*an integral element of the traditional regime*", apply:

- firstly, to free passage for artisanal fishermen that has traditionally existed not only between Eritrea and the islands, but also between the islands and the Yemen coast; and

- secondly, to the entitlement to enter the relevant ports, and to sell and market the fish there.[96]

With respect to the right of free passage, the 1999 Award specifies that: "*There must be free access to and from the islands concerned, including unimpeded passage through waters in which, by virtue of its sovereignty over the islands, Yemen is entitled to exclude all third Parties or subject their presence to licence, just as it may do in respect of Eritrean industrial fishing*."[97] And with respect to the right to enter ports, the Award notes that as it follows from the 1994 Eritrea/Yemen Memorandum identifying the centres of fish marketing on each coast, Eritrean artisanal fishermen fishing around the islands awarded to Yemen have had free access to the Yemeni ports of Maydi, Khoba, Hodeidah, Khokha and Mocha, while Yemeni artisanal fishermen fishing around the islands have had an entitlement to unimpeded transit to and access to the Eritrean ports of Assab, Tio, Dahlak and Massawa.[98] Nationals of the one country are entitled to sell on equal terms and without any discrimination in the ports of the other, and within the fishing markets themselves, the traditional non-

discriminatory treatment, so far as cleaning, storing and marketing is concerned, is to be continued. The traditional recourse by artisanal fishermen to the *acquil* system to resolve their disputes *inter se* is to be also maintained and preserved.[99]

The traditional fishing regime is not limited to the territorial waters of the islands concerned, nor is it by its very nature qualified by the maritime zones provided for in the 1982 Law of the Sea Convention, but it operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports, to the extent and in the manner specified above.[100] Accordingly, the Tribunal found this regime as not depending, either for its existence or for its protection, upon the drawing of the Eritrea/Yemen international maritime boundary.[101] And *vice versa*, nor was the drawing of this boundary conditioned by the holding of the 1998 Award concerning the regime in question.

The Tribunal considered that whereas no further joint *agreement is legally necessary* for *"the* perpetuation of the traditional fishing regime in the region" based on mutual freedoms and an absence of unilaterally imposed conditions, Yemen and Eritrea are, of course, free to make mutually agreed regulations for the protection of this regime.[102] Should they decide that the intended cooperation exemplified by the 1994 Memorandum of Understanding and the 1998 Agreement can usefully underpin the traditional regime, they may use some of the possibilities within these instruments, of which the 1994 Memorandum has a particular pertinence.[103] In so far as environmental considerations may in the future require regulation, the Tribunal was of the view that any administrative measures impacting upon the traditional fishing regime shall be taken by Yemen only with the agreement of Eritrea and, so far as access through Eritrean waters to Eritrean ports is concerned, *vice versa*.[104] The important framework for consultation of environmental issues could be found in the 1982 UNEP Jeddah Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment and its Emergencies Protocol, which, however, were not ratified by Ethiopia, nor so far by Eritrea.[105] Another regional framework, in which maritime authorities of both Eritrea and Yemen (along with those of Ethiopia and 16 other states) do participate is provided by the 1998 Memorandum of Understanding on Port State Control for the Indian Ocean Region.[106]

CONCLUDING REMARKS

The two *Eritrea/Yemen* Awards provide a notable instance of the role of dispute settlement by an international court on the basis of law. The Awards unanimously resolved the disputed territorial sovereignty over the Red Sea islands and the delimitation of international maritime boundary, to satisfaction of both Parties and to the benefit of the consolidation of peace and security in one of the strategically most sensitive regions of the world.[107]

The 1998 Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute Award (Phase I) is a milestone in the development of principles and rules of international law governing the acquisition of territorial sovereignty.

The 1998 *Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute* Award (Phase I) is a milestone in the development of principles and rules of international law governing the acquisition of territorial sovereignty. The Award confirms the pre-eminence of evidence of actual and effective occupation as a source of title to territory over claims of historic title, as developed by the jurisprudence of the ICJ and other courts and tribunals. It sustains a low standard for what would constitute actual occupation as it relates to unsettled or inhospitable territory. The Award also is significant in its exposition of the modern concept of *effectivités*, which is now considerably expanded in the endeavour to show what Charles de Visscher called "*a gradual consolidation of title*",[108] and which relies on the relatively recent history of presence and display of governmental authority and other ways of showing possession.

The 1999 *Eritrea/Yemen Maritime Delimitation* Award (Phase II) is a landmark decision substantiating the mutually reinforcing relationship[109] between the jurisprudence of the ICJ and that of arbitral tribunals concerning application and

The 1999 Eritrea/Yemen Maritime Delimitation Award (Phase II) is a landmark decision substantiating the mutually reinforcing relationship between the jurisprudence of the ICJ and that of arbitral tribunals...

development of the modern law of equitable maritime boundary delimitation, rightly characterised by President Stephen M. Schwebel as being "*more plastic than formed*".[110] The Award marks a notable progress in the accommodation of the operation of equity *infra legem* with by now crystallized principles and rules of the law of the sea, as codified and progressively developed in the 1982 UN Law of the Sea Convention. It confirms prominence of a single all-purpose maritime boundary and the governing role of equidistance (median line) as the equitable boundary between the opposite states. Thereby, the *Eritrea/Yemen* Award reaffirms pronouncements of the 1993 *Denmark v. Norway (Jan Mayen)* Judgment on uniformity of the effects of the treaty and customary law of equitable maritime delimitation in the case of opposite coasts.[111] The 1999 Award also substantiates the critical roles played in achieving the equitable result by considerations pertaining to baselines (normal and straight), islands, reefs and low-tide elevations, navigational factors and interests of third states, as well as by the principle of proportionality in terms of an *a posteriori* test of the equitableness of a result arrived at by other means.

Although the resource related factors did not ultimately influence the actual course of the Eritrea/Yemen single boundary line, the Tribunal's respective holdings importantly reappraise the international legal regime governing common mineral deposits on the one hand,[112] and the role of fisheries factors in equitable maritime boundary delimitation on the other. After liberal application of the *Canada/USA Gulf of Maine* exception of "*catastrophic repercussions*" by the *Denmark v. Norway (Jan Mayen)* Judgment with regard to fisheries factors, the 1999 *Eritrea Yemen* Award marks in particular a detour to more restrictive treatment of this exception, as originally effected in the *Gulf of Maine* Judgment.[113]

The fisheries factors were, moreover, taken by the Tribunal into special account as an inherent part of its resolution of the issue of territorial sovereignty in terms of the operative holding of the 1998 *Eritrea/Yemen* Award concerning *"the perpetuation of the traditional fishing regime*" around the islands which were attributed to the sovereignty of Yemen. The implementation by Eritrea and Yemen of this regime, of which substantive content was defined in the 1999 Award as applying to artisanal fishing and as involving the right of free passage and other associated rights, may provide an interesting evidence how do the Islamic concepts of territorial sovereignty differ in practice from the corresponding Western ideas.[114]

Barbara Kwiatkowska is Professor of International Law and Deputy Director of the Netherlands Institute for the Law of the Sea (NILOS) at the Faculty of Law, University of Utrecht, The Netherlands.

Notes

1 For both Awards, Arbitration Agreement and all other relevant texts, see the PCA's Internet address [http://www.pca-cpa.org]. For the 1998 Award, see also 114 ILR (1999). In accordance with the Arbitration Agreement (Article 16(2)), the Tribunal's President deposited copies of both Awards with the United Nations Secretary-General, the OAU Secretary-General and the Arab League Secretary-General.

2 The Yemen Arab Republic (YAR) and the People's Democratic Republic of Yemen (PDRY) were formally united in the State of Yemen on 22 May 1990. All treaties concluded between either the YAR or the PDRY and other States and international organisations which were in force on 22 May 1990 remained in effect from that date. In its Declaration made upon signing the 1982 UN Law of the Sea Convention on 10 December 1982, Yemen (YAR) confirmed "*its national sovereignty over all the islands in the Red Sea and the Indian Ocean which have been its dependencies since the period when the Yemen and the Arab countries were under Turkish administration.*" In its Declaration made upon ratifying the Convention on 21 July 1987, Yemen (PDRY) expressed its preference of effecting maritime delimitation of both its mainland and its islands by means of the equidistance. See *UN Law of the Sea Bulletin:* 20 and 46 (1994 No.25).

The State of Eritrea became legally independent from the State of Ethiopia in 1993. As of 31 July 1999, Eritrea (and likewise now landlocked Ethiopia) did

not ratify either the 1982 UN Law of the Sea Convention or the 1994 Part XI Agreement. See *id.* 4 (1999 No.40). See *infra* notes 55 and 59.

3 Originally, Egyptian mediation began on 23 December 1995 and continued during Ethiopia's efforts, whereas the French mediation effort was suggested by UN Secretary-General Boutros Boutros Ghali in late December that year. See *Report of the Secretary-General on the Work of the Organization,* UN Doc. A/51/1, 20 August 1996, para.766 at 108.

4 See the Final Communiqué of the Arab League Summit Conference of 23 June 1996, in 35 ILM 1,280, 1,286-7 (1996), welcoming the 1996 Eritrea/Yemen Agreement on Principles as positively reflecting on the "*stability of international navigation in the Red Sea*." Cf. remarks of S. Rosenne, *An International Law Miscellany*, Chapter 27: The Strait of Tiran, 723, 725-30 (1993), on the conflict that resulted from occupation by Egypt in the end of 1949, as part of its blockade of the Gulf of Aqaba, of the islands of Tiran and Sanafir (of possibly Saudi Arabian sovereignty) at the entrance to the Strait of Tiran and the Gulf of Aqaba.

5 Cf. V.L. Forbes, The Geopolitics of Islands: Zuqar and Hanish Archipelagoes, and Press Release No.1 of Zuqar-Hanish Commission, 9 *Indian Ocean Review* 8-11 (1995/March 1996 No.1); D.J. Dzurek, Eritrea-Yemen Dispute Over the Hanish Islands, 4 *IBRU Boundary and Security Bulletin* :70-77 (1996, No.1); Dzurek, The Hanish Islands Dispute, 1 *Eritrean Studies Review:* 133-52 (1996, No.2); J.-L. Peninou, Veillée d'armes en mer Rouge, *Le Monde Diplomatique:* 24 (Juin 1996).

6 See V.L. Forbes, The Yemen Border Dispute, 7 *Indian Ocean Review:* 16-19 (March 1995, No.4); and 6 *IBRU Boundary and Security Bulletin* 22-23 (1998, No.2). See also 1987 Declaration of Yemen, *supra* note 2. After the 1974 Saudi Arabia/Sudan Joint Development Zone Agreement referred to *infra* note 74, the second maritime boundary in the Red Sea was effected by means of Israel/Jordan Maritime Boundary (Gulf of Aqaba) Agreement of 18 January 1996. See J.I. Charney and L.M. Alexander, *International Maritime Boundaries,* Vol.III, 2,456-61 (1998).

7 See J.-L. Péninou, The Ethiopian-Eritrean Border Conflict, 6 *IBRU Boundary and Security Bulletin* 46-50 (1998, No.2); Statement of the Foreign Ministers of the Five Permanent Members of the Security Council, UN Doc. S/1998/890, para.9 *in fine*, and Statements on the New Ethiopian Map, UN Docs S/1998/956, 977 and 998.

8 See S. Rosenne, *The Law and Practice of the International Court, 1920-1996* 413-14 n.95 (Third Edition, 1997); and Rosenne, The *Jaffa-Jerusalem Railway* Arbitration (1922), 28 *Israel Yearbook on Human Rights:* 239, 251, n.26 (1999).

For Biographies of President Stephen M. Schwebel and Judge Rosalyn Higgins, see the Court's Internet address [http://www.icj-cij.org], *ICJ Yearbook 1996-1997:* 20-21 and 38-40 (No.51); and for that of Judge *ad hoc* Ahmed Sadek El-Kosheri, see *id.*: 59-60. For Biography of then President Sir Robert Y. Jennings, see *ICJ Yearbook 1991-1992:* 19-20 (No.46). Judge Schwebel was subsequently also elected the President of the *Southern Bluefin Tuna* Arbitral Tribunal. See B. Kwiatkowska, *Southern Bluefin Tuna* Report: 94 AJIL (2000, in press).

9 Cf. *97th and 98th Annual Reports of the Permanent Court of Arbitration* 11, 33 (1997), and 11, 35 (1998).

10 See 1999 Award, para.86. The 1998 Yemen/Eritrea Treaty is reproduced in Annex III of that Award. Cf. main text accompanying *infra* note 87.

11 See UN Docs S/1999/32 and S/RES/1227 (1999); K. Vick, War Erupts Along Border of Ethiopia and Eritrea, *International Herald Tribune* (IHT) of 8 February 1999: 2; Battles Erupt on a 3d Front Between Ethiopia and Eritrea, IHT of 9 February 1999: 2; A.B. Pour, Ethipie-Erythrée, *Le Monde* of 11 February 1999: 3; Addis Ababa Rules Out Border War Cease-Fire, IHT of 11 February 1999: 7; K. Vick, Ethiopians Claim Victory In Border War With Eritrea, IHT of 1 March 1999: 8; UN Docs S/1999/247, 250, 258-260, 304, 696, 731, 762, 789, 794 and 857. Cf. *supra* note 7.

12 *ICJ Communiqué* No.99/4, 16 February 1999 [http://www.icj-cij.org]. Since Eritrea's Application provided an instance of the *forum prorogatum*, it was not entered into the Court's General List, and unless and until Ethiopia has given its consent to the Court's jurisdiction, the Court cannot take any action in these proceedings.

13 Press Release Issued on 20 December 1999 by the Ministry of Foreign Affairs of Eritrea, Tribunal Decides Maritime Boundary Between Eritrea and Yemen in the Red Sea to Constitute Median From Coastlines, UN Doc. S/1999/1265.

[14] *Id*., at 3. See also *Communiqué* of Embassy of Eritrea in Washington D.C. of 20 December 1999 [http://www.africanews.org/...ea/stories/19991220/19991220_feat2.html]. On the Oral Hearings held at the Foreign and Commonwealth Office in London on 26 January-6 February and 6-8 July 1998, see 1998 Award, paras 8-11; and on those held in the ICJ Great Hall of Justice in the Peace Palace on 5-16 July 1999, see 1999 Award, para.7.

[15] *Communiqué* on Hanish Resolution of Eritrean News Agency of 22 December 1999 [http://www.africanews.org/...ea/stories/19991222/19991222_feat1.html].

[16] Border Verdict [http://www.y.net.ye/yementimes/99/iss51/front.htm] and Interview with Minister Al-Saidi [http://www.y.net.ye/yementimes/99/iss51/intrview.htm].

[17] See Statements quoted *supra* notes 13-16, as further referred to *infra* notes 79 and 107.

[18] Cf. B. Kwiatkowska, Award of the Arbitral Tribunal in the First Stage of the *Eritrea/Yemen* Proceedings, 14 *International Journal of Marine and Coastal Law* (IJMCL): 125-36 (1999); P. Hamilton *et al*. eds, *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution:* 3, 26-7 [J.G. Merrills], 196-7 [Summary] (1999); N.S.M. Antunes, The *Eritrea/Yemen* Arbitration: First Stage - The Law of Title to Territory Reaverred, 48 *International and Comparative Law Quarterly* (ICLQ) 362-86 (1999); W.M. Reisman, Case Report on the 1998 *Eritrea/Yemen* Award (Phase I), 93 AJIL 668-82 (1999).

[19] See 1998 Award, para.440 n.25, noting that each Party submitted over twenty volumes of documentary annexes, as well as extensive map atlases; para.456; and paras 91-94 and 97-99 addressing the issue of evidentiary value of internal memoranda from foreign archives. Maps are examined in the Award's Chapter VIII and para.490 of Chapter X (Conclusions). Yemen submitted as many as 120 and Eritrea 60 maps. The majority of documents were submitted in their original language, and the *Eritrea/Yemen* Tribunal has relied on translations provided by the Parties.

The sheer volume of written and oral pleadings seems comparable to that in the *Libya/Chad Territorial Dispute* case. Cf. S.M. Schwebel, Fifty Years of the World Court: A Critical Appraisal, in *Are International Institutions Doing Their Job?, Proceedings of the 90th ASIL Annual Meeting, Washington D.C., 27-30 March 1996* 339, 345-6 (1997).

For appraisal of the evidentiary value of maps, see the *Botswana/Namibia Kasikili/Sedudu Island* Judgment, paras 81-87, delivered under the Court's Presidency by Judge Stephen M. Schwebel, as summarised in *ICJ Communiqués* Nos 99/53 and 53bis, 13 December 1999 [http://www.icj-cij.org].

[20] 2 UNRIAA 829; 22 AJIL 867 (1928). Cf. 1998 *Eritrea/Yemen* Award, para.104 n.7.

[21] PCIJ Series A/B 1933, No.53, 22.

[22] R.Y. Jennings, *The Acquisition of Territory in International Law* (1963). Generally, on importance of judicial consistency, see Statements by the ICJ President Stephen M. Schwebel to the 53rd and the 54th United Nations General Assembly, UN Doc. A/53/PV.44, 27 October 1998, and UN Doc. A/54/PV.39, 26 October 1999, summarized in *ICJ Communiqués* No.98/33 and No.99/46 [http://www.icj-cij.org].

[23] 1998 Award, para.93.

[24] 1998 Award, paras 86-88.

[25] 1998 Award, para.95, citing *Argentina v. Chile* Award, 16 UNRIAA 111,115; 38 ILR 16, 20 (1969). Cf. Reisman, *supra* note 18, at 677-8.

[26] 1998 Award, paras 108-113, rejecting the proposition that "*the international law governing land territory and the international law governing maritime boundaries are not only different but also discrete, and bear no juridical relevance to each other*", but stressing that in the present first stage, there can be no question of even "*prefiguring*" (as Yemen put it), much less drawing, any maritime boundary line.

[27] The principal instruments included: Agreements of 1883, 1887 and 1888 between Italy and Eritrean leaders, 1911 Treaty of Da'an, 1918 Armistice of Mudros, 1920 Sèvres Treaty of Peace, 1923 Lausanne Treaty of Peace and 1927 Rome Conversations, 1938 Anglo/Italian Agreement on Certain Areas in the Middle East, and 1947 Treaty of Peace with Italy.

[28] The principal treaties included: 1930 Convention on Maintenance of Certain Lights, which did not enter into force, and 1962 International Agreement on Maintenance of Certain Lights in the Red Sea, which expired in March 1990.

[29] 1998 Award, para.449. On the nature of the disputed islands, see also paras 93, 124, 239, 497 *in fine*, 503 and 523. Evidence of activities in the waters off the islands and on their land is examined in Chapters VII-IX of the Award. For size and location of the respective islands, see also Dzurek, Eritrea/Yemen Dispute, *supra* note 5, Table at 77.

[30] 1998 Award, paras 114, 125 and 441-449. Cf. Reisman, *supra* note 18, at 681.

[31] 1998 Award, para.450, citing ICJ Reports 1953, 47. Cf. *infra* note 83.

[32] 1998 Award, para.451, citing the *Palmas* Award, *supra* note 20. See also 1998 *Eritrea/Yemen* Award, para.452, citing the *Eastern Greenland* pronouncement, *supra* note 21, that *"[I]t is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make a superior claim*".

[33] 1998 Award, para.458. For justification of Tribunal's reliance on this factor, see paras 453-457.

[34] 1998 Award, paras 459-466 and 470. On Yemen's claim, see also paras 35 and 76.

[35] 1998 Award, para.471.

[36] 1998 Award, para.472, citing D.W. Bowett, *The Legal Regime of Islands in International Law* 48 (1978) in favour of presumption that islands within territorial sea are under the same sovereignty as the mainland nearby, as enshrined in the 1923 Lausanne Treaty (Article 6); and paras 473-474. See also operative para.527(i) quoted above.

[37] 1998 Award, para.475.

[38] 1998 Award, paras 476-480.

[39] 1998 Award, paras 481-482. See also operative para.527(ii) quoted above.

[40] 1998 Award, paras 483-484. See also operative para.527(iii) quoted above.

[41] 1998 Award, paras 485-508.

[42] 1998 Award, paras 509-524.

[43] 1998 Award, para.490.

[44] 1998 Award, paras 491-502.

[45] 1998 Award, paras 503-507.

[46] 1998 Award, paras 509-522.

[47] 1998 Award, para.523.

[48] 1998 Award, para.508 and operative para.527(iv) quoted above.

[49] 1998 Award, para. 524 and operative para.527(v) quoted above.

[50] 1998 Award, para.525. Cf. paras 126-132.

[51] See main text accompanying *supra* note 3.

[52] 1998 Award, para.526 and operative para.527(vi) quoted above; and main text accompanying *infra* notes 79-106.

[53] For recent appraisal, see B. Kwiatkowska, The International Court of Justice and Equitable Maritime Boundary Delimitation, in *International Law and The Hague's 750th Anniversary* 61-72 (1999).

[54] 1999 Award, paras 5 and 168.

[55] 1999 Award, paras 13, 23-24, 51, 116, 124-125, 131-133 and 158, citing (para.13) the *North Sea Continental Shelf* Judgment, ICJ Reports 1969, 36, para.57. For important reaffirmation to this effect in the *Libya/Malta Continental Shelf (Merits)* and *Denmark v. Norway Maritime Delimitation* Judgments, which both involved the opposite coasts, see ICJ Reports 1985, 47, para.62, and 1993, 60, para.50.

Although Eritrea did not ratify the 1982 Law of the Sea Convention (*supra* note 2), it accepted under the Arbitration Agreement (Article 2(3)) the application of the provisions of the Convention, including those which incorporate the relevant elements of customary law, that were relevant to settlement in the Phase II. See 1999 Award, para.130. Eritrea has so far only claimed the 12-mile TS, pursuant to Maritime Proclamation No.137 of 25 September 1953, as Amended in 1956, originally issued by Ethiopia, in *The Law of the Sea - National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* 122-3 (United Nations 1995). On Eritrea's Proclamation No.7 (from the *Gazette of Eritrean Laws* of 15 September 1991) providing for the adoption of the Ethiopian 1953/56 Proclamation, see *Oceans and the Law of the Sea - Report of the Secretary-General*, UN Doc. A/52/487, para.63 (1997),

reprinted in B. Kwiatkowska Editor-in-Chief, *International Organizations and the Law of the Sea Documentary Yearbook*, Vol.13-1997, at 27-8 (1999). Yemen, on its part, has claimed the 12-mile TS under its Presidential Resolution No.17 of 30 April 1967, and subsequently - the 12-mile TS, 24-mile contiguous zone, 200-mile EEZ and the continental shelf up to 200 miles or the outer edge of the continental margin, pursuant to its Act No.45 on the Territorial Sea Sea, Exclusive Economic Zone, Continental Shelf and Other Marine Areas of 17 December 1977, in *The Law of the Sea* (1995), at 419-22.

56 On Yemen's median line, see 1999 Award, paras 12-21, 40, 60, 80 and on Eritrea's line, see paras 22-38, 42, 59, 79. See also the Tribunal's comments in paras 113-128; and *infra* notes 84-91. The Yemeni line was plotted with WGS 84 coordinates of the turning points, while Eritrea provided the coordinates of the basepoints only in answer to a question from the Tribunal. See Award, paras 11, 121, 141 and Annex II. On Yemen's preference of using the equidistance in delimitation of all its maritime spaces with adjacent or opposite states, see its 1977 Act No.45 (Article 17), *supra* note 55, as confirmed by its 1982 and 1987 Declarations, *supra* note 2.

57 1998 Award, para.438, and 1999 Award, paras 75-82 and 132.

58 1999 Award, para.83.

59 1999 Award, paras 133-135. Eritrea preferred this definition over the high-tide line applicable by virtue of its 1953/56 Maritime Proclamation No.137 (Article 6(f)), referred to *supra* note 55 and relied upon by Yemen, Award, paras 14, 16, 134, 142 and 154. For the 1977 Act No.45 of Yemen, providing for measurement of its TS from the straight baselines or from the low-water line (Article 4), see *supra* note 55. See also *infra* note 62.

60 See main text accompanying *supra* notes 4 and 23 and *infra* notes 69, 71, 75, 96-97 and 100. The concern not to affect the status of the high seas or obstruct navigation is also articulated in the 1974 Saudi Arabia/Sudan Joint Development Zone Agreement referred to *infra* note 74. On protests of the United States against navigational claims made by Yemen under its 1967 Resolution No.17 and 1977 Act No.45 (*supra* note 55) and its 1982 and 1987 Declarations (*supra* note 2), see J.A. Roach and R.W. Smith, *United Stated Responses to Excessive Maritime Claims:* 20, 24, 26, 168 n.9, 260-67, 272-74 (1996); and on the US protest specifically against claims concerning the Strait Bab el-Mandeb, see 298-99, and Map 28 at 295. On significance of navigational factors, see B. Kwiatkowska, Economic and Environmental Considerations in Maritime Boundary Delimitations, in Charney and Alexander, *supra* note 6, Vol.I, at 75, 96-100, and Table at 111-13 (1993).

61 1999 Award, paras 23, 116 and 131.

62 1999 Award, paras 14, 43, 114, 118, 138-146 and 166. The Tribunal relied upon straight baseline system applicable to the Dahlaks in accordance with the 1953/56 Ethiopian Proclamation, *supra* note 55, and Article 7 of the 1982 Convention. While Table of Claims to Maritime Zones, *UN Law of the Sea Bulletin* 42 n.12 (1999 No.39), specifies that Eritrea claims "*archipelagic status*" for the Dahlac Archipelago, the 1999 Award notes (in para.142) that the reality or validity or definition of "*somewhat unusual straight baseline system*" said to be existing for the Dahlaks "*is hardly a matter that the Tribunal is called upon to decide.*" Since both Parties were agreed that Dahlaks "*are an integral part of Eritrea'a mainland coast*" (Award, para.118), it seems that they do not exemplify archipelagic enclosure around outlying archipelagos, such as those effected by Denmark (the Faeroes), Ecuador (the Galapagos), Norway (Spitzbergen), Spain (the Canaries), Australia (Houtman Abrolhos and Furneaux Islands) or India (Andaman and Nicobar Islands), in contravention of the rule codified in the 1982 Convention that archipelagic straight baselines can only be drawn by the archipelagic states (Article 46-47).

63 1999 Award, paras 143-145.

64 1999 Award, paras 15, 115, 121. On sovereignty over those islands attributed by the 1998 Award to Yemen, see *supra* notes 42, 46, 47, 49 and 52.

65 1999 Award, paras 138 and 147-148.

66 1999 Award, paras 138 and 149-151.

67 1999 Award, paras 122-123 and 152-153. On sovereignty over those islands attributed by the 1998 Award to Yemen, see *supra* notes 41, 43-45, 48 and 52.

[68] 1999 Award, paras 16-17, 21-26, 124-125 and 154-159. On sovereignty over those islands attributed by the 1998 Award to Eritrea, see *supra* notes 34-40.

[69] 1999 Award, paras 24-26, 41, 124-125, 128 and 155.

[70] 1999 Award, paras 160-162.

[71] 1999 Award, paras 18, 43, 126-127 and 163.

[72] 1999 Award, paras 44-46, 136, 164 and 167. For the latest instance of third state intervention in the practice of the ICJ, see an Order of 21 October 1999, in which the Court, Presided over by Judge Stephen M. Schwebel, authorised Equatorial Guinea to intervene in the *Cameroon v. Nigeria Land and Maritime Boundary (Merits)* case as non-party in pursuance of Article 62 of the Statute. See *ICJ Communiqués* No.99/35, 30 June, and No.99/44, 22 October 1999 [http://www.icj-cij.org].

[73] 1999 Award, para.44.

[74] *Id.* and para.12. See also para.149 (*supra* note 66) and paras 39 and 167 (*infra* note 76); and main text accompanying *supra* note 6.

Note that further north extends the Joint Development Zone established in the middle of the Red Sea (and bounded by the 1,000-metre isobath) under the Saudi Arabia/Sudan Agreement of 16 May 1974. See V.L. Forbes, *The Maritime Boundaries of the Indian Ocean Region:* 114-16, including Figure 5.3, and 174-5: Map 10 (Singapore University Press 1995).

[75] 1999 Award, paras 45-46, noting Eritrea's concern with Yemeni claimed line "*slashing*" the main shipping channel and causing that channel to be in Yemen's territorial waters. For location of the Perim Island in the context of hypothetical equidistance in the Bab el-Mandeb Strait, see Roach and Smith, Map 28, referred to *supra* note 60.

[76] 1999 Award, paras 20, 39-43, 117 and 165-168 and jurisprudence quoted therein.

[77] 1999 Award, paras 86, 96, 104 and Annex II: Yemen's Answer to Question Put by Judge Stephen M. Schwebel on 13 July 1999, in which Yemen maintained that the application of equitable principles to maritime delimitation did not encompass the creation or modalities of "*joint resource zones*" around Yemeni islands in the manner requested by Eritrea. Cf. *infra* notes 87 and 94.

[78] 1999 Award, paras 84-87, citing, *inter alia*, the *North Sea* Judgment, ICJ Reports 1969, 54, para.101(D)(2), as reaffirmed by the *Libya/Malta (Merits)* Judgment, ICJ Reports 1985, 41, para.50; the *North Sea* Separate Opinion of Judge Philip C. Jessup, ICJ Reports 1969, 81-83; and Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, 2 IBRU Maritime Briefing (1999 No.5). Cf. Questions of Judge Shigeru Oda and Judge Stephen M. Schwebel of 9 October 1981, in the *Tunisia/Libya* Pleadings, Vol.V, 246, and Replies by Libya of 21 October 1981, at 503-4; Kwiatkowska, *supra* note 60, at 86-96, and Table at 111-13; D.M. Ong, Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law, 93 AJIL: 771-804 (1999).

On the 1974 Saudi Arabia/Sudan Agreement, see *supra* note 74; and on the YAR/PDRY Aden Agreement on the Exploration of the Joint Area Between the Two Sectors of Yemen (along their common boundary in the regions of Maarib and Shabwah) of 19 November 1988, see W.T. Onorato, Joint Development in the International Petroleum Sector: The Yemeni Variant, 39 ICLQ: 653-62 (1990).

[79] See Statements of Eritrea and Yemen referred to *supra* notes 13-17.

[80] 1998 Award, operative para.527(vi) and paras 525-526, referred to *supra* notes 50-52, as reaffirmed by the 1999 Award, paras 62-69 and 87-112 discussed *infra*.

[81] 1998 Award, para.525 (*supra* note 50), as reaffirmed by 1999 Award, paras 85, 92-95. Cf. A.S. El-Kosheri, The Interrelation Between Worldwide Arbitral Culture and the Islamic Traditions (para.9), A Paper presented at the PCA Centenary Conference 1899-1999, Great Hall of Justice - Peace Palace, The Hague, 17 May 1999, commending the Tribunal's finding and remarking that: "*The traditional fishing regime of free access and enjoyment for the fishermen of both countries as decided by the Tribunal is in harmony with the Islamic concept of free entitlement to benefit from the wealth that God gave to the humanity as whole, in order to meet the nutrition needs for livelihood among poor and industrious people*."

[82] 1999 Award, para.85. Cf. Statement of President Stephen M. Schwebel to the 54th UNGA, *supra* note 22, noting that the international legal order is no longer *"Euro-*

centred." Note that remark contained in *Oceans and the Law of the Sea - Report of the Secretary-General*, UN Doc. A/53/456, para.164 (1998), *reprinted in* Kwiatkowska, *supra* note 55, Vol.14-1998 (2000, in press), that by this solution the Tribunal "*restricted the sovereignty over the groups of islands awarded to Yemen*", is therefore incorrect.

83 See *supra* note 31; S. Rosenne, *The World Court: What It Is and How It Works* 179-80 (1995); B. Kwiatkowska, The International Court of Justice and the Law of the Sea - Some Reflections, 11 IJMCL: 491, 513 (1996).

84 1999 Award, paras 3 and 89.

85 1999 Award, paras 27 and 38, citing 1998 Award, para.126 (*supra* note 50).

86 1999 Award, paras 27-28, 32-35 (*supra* note 56) and 89.

87 1999 Award, paras 29, 36-37, 90, 110-111 and Annex II: Yemen's Answers to Questions Put by Judge Stephen M. Schwebel on 13 July and by the Tribunal on 16 July 1999. On the 1998 Agreement, see also *supra* note 10; and on the 1994 Eritrea/Yemen Memorandum of Understanding on Cooperation in the Areas of Maritime Fishing, Trade, Investment and Transportation, signed by Yemen's Minister of Fish Wealth and Eritrea's Minister of Marine Wealth, see also 1999 Award, para.107. Cf. main text accompanying *infra* notes 98 and 103.

88 1999 Award, para.30.

89 1999 Award, paras 20, 27-38 (Chapter I), paras 47-74 (Chapter II) and paras 87-112 (Chapter IV).

90 1999 Award, paras 61 and 72.

91 *Id*. and paras 50-51 and 59-60, citing (para.50) the test of "*economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage*", which was incorporated in Articles 7(5) and 47(6) of the 1982 Convention from the *Anglo/Norwegian Fisheries* Judgment, ICJ Reports 1951, 133. Cf. *infra* note 93. See also exception of "*catastrophic repercussions*" established in the *Canada/USA Gulf of Maine Area* Judgment, ICJ Reports 1984, 342, para.237; as reaffirmed by the *Libya/Malta (Merits)* Judgment, ICJ Reports 1985, 41, para.50, as well as the 1985 *Guinea/Guinea Bissau Delimitation of the Maritime Boundary*, paras 121-123, and the 1992 *Canada/France Delimitation of Maritime Areas*, paras 83-84, Awards; and as relied upon by the *Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 71-2, paras 75-76, criticized in Separate Opinion of Judge Schwebel, 118-20 (who was a Member of the *Gulf of Maine* Chamber).

92 1999 Award, paras 62-69 and 73-74.

93 1999 Award, para.103. See also 1998 Award, para.357, characterising such activities on the part of nationals of both Yemen and of Eritrea (and Ethiopia) in terms of the *Anglo/Norwegian Fisheries* test of "*economic interests peculiar to a region*" referred to *supra* note 91.

94 1999 Award, para.104 (*supra* note 77).

95 1999 Award, paras 105-106.

96 1999 Award, para.107.

97 *Id.* On US protests against Yemen's navigational claims, see *supra* note 60.

98 1999 Award, para.107. On importance of the port of Massawa in the fisheries development, see Eritrea: The Start of a Renaissance? *The ACP/EU Courier* 72-3 (November-December 1996 No.160).

99 1999 Award, para.107 and 1998 Award, paras 337-340, noting that the rules applied in the *aq'il* system are essentially "*elements of private justice derived from and applicable to the conduct of the trade of fishing. They are a lex pescatoria maintained on a regional basis by those participating in fishing.*"

100 1999 Award, para.109.

101 1999 Award, para.110.

102 1999 Award, paras 108 and 111.

103 1999 Award, para.111. In its Answer to Question Put by the Tribunal on 16 July 1999, Yemen quoted Paragraph 1 of the 1994 Memorandum, providing that both Eritrea and Yemen shall permit their fishermen, without limiting their numbers, to fish in the TSs, the contiguous zones and the EEZs of the two countries in the Red Sea (with the exception of the internal waters). Cf. *supra* note 87.

104 1999 Award, para.108.

[105] For the texts of these instruments, which both entered into force on 20 August 1985 (when they were also ratified by Yemen), see 9 *Environmental Policy and Law* (EPL): 56-60 (1982) and 10 EPL 28-29 (1983); and for the UNEP Plan, see 9 EPL: 60-62 (1982), and *Action Plan for the Conservation of the Marine Environment and Coastal Areas of the Red Sea and Gulf of Aden, UNEP Regional Seas Reports and Studies* No.81 (1986). Cf. *Yearbook of International Cooperation on Environment and Development 1999/2000:* 152 (Fridtjof Nansen 1999).

[106] See Doc. IOPM 2/8, Appendix 6, Annex 1 (1998). For further information, see the IMO's website [http://www.imo.org; E-mail: info@imo.org].

[107] See the main text accompanying *supra* notes 3-7, 10 and 13-17. On due consideration given by the Arbitral Tribunal to strategically critical navigational interests in the region, see the main text accompanying *supra* notes 23, 60, 69, 71, 75, 96-97 and 100.

[108] 1998 Award, para.451.

[109] See the main text accompanying *supra* note 8; Kwiatkowska, *supra* note 53, at 62; and J.I. Charney, Is International Law Threatened by Multiple International Tribunals? 271 RCADI 104, 318-20 (1999).

[110] *Gulf of Maine* Separate Opinion of Judge Schwebel, ICJ Reports 1984, 353, 357, as reaffirmed in the *Libya/Malta (Merits)* Dissenting Opinion of Judge Schwebel, ICJ Reports 1985, 187. See also Plenary Address by President Stephen M. Schwebel, The Contribution of the International Court of Justice to the Development of International Law, in *International Law, supra* note 53, 405, at 411, remarking that: "*Whether the salience of equitable considerations in maritime delimitation is sound in law is a matter of controversy. But what is beyond controversy is the influential role played by the Court.*"

[111] See *supra* note 55; and the *Denmark v. Norway (Jan Mayen)* Judgment, asserting that the equidistance/special circumstances rule of the 1958 UN Continental Shelf Convention (Article 6) "*produces much the same result*" as an equitable principles/relevant circumstances rule of the customary law, and that likewise the requirements of the 1982 Convention (Articles 74/83 and by analogy, Article 15) reflect those of customary law. See ICJ Reports 1993, 58-9, paras 46-48, and 62-3, paras 55-56, citing (paras 46 and 56) the 1977 *Anglo/French Delimitation of the Continental Shelf* Decision, paras 70 and 148.

[112] See *supra* note 78.

[113] See the main text accompanying *supra* notes 91-92.

[114] See the main text accompanying *supra* notes 81-83.