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**THE *ERITREA/YEMEN* ARBITRATION: LANDMARK PROGRESS IN
THE ACQUISITION OF TERRITORIAL SOVEREIGNTY
AND EQUITABLE MARITIME BOUNDARY DELIMITATION**

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ABSTRACT

The Five-Member *Eritrea/Yemen* Arbitral Tribunal - comprising Judges Sir Robert Jennings (President), Stephen M. Schwebel, Rosalyn Higgins, Ahmed S. El-Kosheri and Keith Highet - unanimously resolved in its two masterly Awards the disputed territorial sovereignty over the Red Sea islands (Phase I - 1998) and the delimitation of international maritime boundary (Phase II - 1999) in one of strategically most sensitive regions of the world.

The article surveys landmark progress marked by each of the Awards in the development of principles and rules of international law in the respective subject matters of the Awards. While due attention is paid to the consistency of the Awards with the preceding decisions of the International Court of Justice and arbitral tribunals concerning acquisition of territorial sovereignty and equitable

maritime delimitation, distinct features - such as rejection by the 1998 Award of the existence of a principle of reversion of a newly independent state to the ancient title to territory - are also examined. The analysis of the 1999 Award focuses on the complex decision-making process which led the Arbitral Tribunal to equitable delimitation of the Eritrea/Yemen international maritime boundary by means of a single all-purpose boundary. The resultant line substantiates the governing role of equidistance between the opposite states and its adjustment by the factors pertaining to baselines, islands, reefs, low-tide elevations, strategic navigational concerns and interests of the third states concerned. The Tribunal also importantly reappraised the role of resource related factors and the principle of proportionality. Fisheries factors formed part of resolution of the territorial sovereignty in the 1998 Award, as further defined in the 1999 Award and as implemented through the subsequent cooperation of the parties. The article takes account of the multiple impacts of both *Eritrea/Yemen* Awards on the 2001 *Qatar v. Bahrain (Merits)* and the 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Judgments as well as on the peaceful resolution of the *Eritrea/Ethiopia Boundary* dispute within the United Nations framework in 2002-2004.

1. Introductory Remarks

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

¹For both *Eritrea/Yemen* Awards, Arbitration Agreement and all other relevant texts, see the PCA's Internet address [<http://www.pca-cpa.org>]; 114 *International Law Reports* (ILR) 1 and 119 ILR 417; 40 *International Legal Materials* (ILM) 900, 983 (2001); *United Nations Reports of International Arbitral Awards* (UNRIAA) XXII, 211, 335; Yemen Gateway, linking at 2-3 to all the texts and related comments [<http://www.al-bab.com/yemen/pol/int.htm>]. 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. The Awards were summarized in *Oceans and the Law of the Sea - Reports of the Secretary-General*, UN Docs A/53/456, 26-27 (1998), A/54/429, 88 (1999), A/55/61, 47 (2000); and *UN Law of the Sea Bulletin* 77-79 (2001 No.44).

For Constitutive Act of the African Union, Lome, 11 July 2000 (in force: 26 May 2001) which superseded the Charter of the Organization of African Union (OAU), see [<http://www.africa-union.org>]; 41 ILM 1029 (2002).

The Awards were preceded by the 1988 *Egypt/Israel Taba Beachfront Boundary* Award, 80 ILR 226, and were followed by the United Nations *Eritrea/Ethiopia Boundary* Commission, *infra* notes 19-21. In the neighbouring Arabian/Persian Gulf region, three preceding arbitrations led to the 1951 *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi* Award, ILR 144 (1951), the 1981 *Dubai/Sharjah Boundary* Award, 91 ILR 543, and the 1993 *United Nations Iraq/Kuwait Boundary* Report and S/RES/833 of 23 May, 32 ILM 1425 (1993), which were followed by the 2001 *Qatar v. Bahrain (Merits)* Judgment, *infra* note 18.

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 emphasized 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 the strategically critical Strait of Bab el-Mandeb ("Gate of Lament") and the southern approaches to the Suez Canal, raised 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

²The 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 organizations 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 (1833 UNTS 397; 21 ILM 1261 (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 38 (1994 No.25). YAR's Declaration was objected to on 8 November 1986 by Ethiopia, *id.* 46, stating that this declaration could not "in any way affect Ethiopia's sovereignty over all the islands in the Red Sea forming part of its national territory".

The State of Eritrea became legally independent from the State of Ethiopia on 27 April 1993. Cf. the 2002 *Eritrea/Ethiopia Boundary Decision*, *infra* note 21, paras 2.11-2.12, and Appendix A, para.A32. As of 31 July 2001, 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.* 3 (2002 No.47). See *infra* notes 64 and 71.

³Originally, 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.

⁴See the Final Communiqué of the Arab League Summit Conference of 23 June 1996, in 35 ILM 1280, 1286-7 (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.

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 borders⁶ 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), then President Stephen M. Schwebel and Judge Rosalyn Higgins, and Yemen appointed two of the 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

⁵Cf. 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).

⁶See 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, 2456-61 (1998).

⁷See 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.

⁸See S. Rosenne, *The Law and Practice of the International Court, 1920-1996* 413-14 n.95 (Third Edition, 1997), and 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 1998-1999* 22-23 and 41-43 (No.53); and for that of Judge *ad hoc* Ahmed Sadek El-Kosheri, see *id.*, 59; and *ICJ Yearbook 1999-2000* 38-39, 49-50, 69-70 (No.54). For Biography of then President Sir Robert Y. Jennings, see *ICJ Yearbook 1991-1992* 19-20 (No.46), and for his current Biography as Judge *ad hoc*, see *ICJ Yearbook 1999-2000*, *supra*, at 53-54. On Manley O. Hudson Medal awarded to Sir Robert, Dame Rosalyn and Judge Schwebel in 1993, 1998 and 2000, see [<http://www.asil.org/awards.htm>]; and on Miami University's *honoris causa* awarded to Judge Schwebel in 2002, see [<http://www.miami.edu/veritas/may2002/frontpage.html>]. On the Law Offices established by Judge

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

Schwebel at Sidley Austin Brown on 21 May 2002, see [<http://www.sidley.com/news/pub.asp?pubid=948105212002>].

Judge Schwebel was also elected as the President of the *Southern Bluefin Tuna* Arbitral Tribunal which rendered its Award on 4 August 2000 [<http://www.worldbank.org/icsid>], *reprinted in* 39 ILM 1359 (2000); 119 ILR 508. Cf. S.M. Schwebel, *The Southern Bluefin Tuna Case*, in N.Ando *et al.* eds, *Liber Amicorum Judge Shigeru Oda* 743-748 (2002); *Oceans and the Law of the Sea - Report of the Secretary-General*, UN Doc. A/56/58, 80-81 (2001); B. Kwiatkowska, *The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases*, 15 *International Journal of Marine and Coastal Law* (IJMCL) 1, 30-31 (2000), and *The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Annex VII Arbitral Tribunal*, 16 IJMCL 239-294 (2001) [<http://www.wkap.nl/oasis.htm/357926>], available as updated at [<http://www.law.uu.nl/nilos>], Publications; 95 AJIL 162-171 (2001). Similarly, the *France/Netherlands* Arbitral Tribunal comprised ICJ Judges Guillaume and Kooymans, Presided over by K. Skubiszewski of Iran-US Claims Tribunal [<http://www.pca-cpa.org>], while the United Nations *Eritrea/Ethiopia Boundary Commission* (PCA) comprises Judges Schwebel, Lauterpacht (President), Ajibola, Watts and Reisman. Cf. *infra* notes 20-21.

⁹Cf. 97th, 98th, 99th and 100th PCA Annual Reports 11, 33 (1997), 11, 35 (1998), 15, 47 (1999), and 40 (2000) [<http://www.pca-cpa.org>]. Generally, on the role of the PCA as the Registry, see Sir Robert Jennings, *The Differences Between Conducting a Case in the ICJ and in an ad hoc Arbitration Tribunal - an Inside View*, in *Liber Amicorum Judge Shigeru Oda*, *supra* note 8, at 893, 905-909.

¹⁰See 1999 Award, paras 29, 90 and 111. The 1998 Yemen/Eritrea Treaty is reproduced in Annex III of that Award. See also U.S. Department of State Press Statement of 19 October 1998 [<http://secretary.state.gov/www/briefings/statements/1998/ps981019c.html>], linked at Yemen Gateway, *supra* note 1, at 3; and the main text accompanying *infra* note 100.

¹¹See 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, *Ethiopie-Erythrée*, *Le Monde* of 11 February 1999, 3; *Addis Ababa Rules Out Border War Cease-Fire*, IHT of 11

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.

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

February 1999, 7; K. Vick, *Ethiopians Claim Victory In Border War With Eritrea*, IHT of 1 March 1999, 8; S/1999/247, 250, 258-260, 696, 731, 762, 789, 794, 857; S/2000/389, 413, 421, 422, 430, 435, 437, 568. Cf. *supra* note 7 and *infra* notes 19-21.

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.

¹³Press 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]. On the UN *Eritrea/Ethiopia Border Commission*, see *infra* notes 19-21.

¹⁶Border Verdict [<http://www.y.net.ye/yementimes/99/iss51/front.htm>] and Interview with

Statements of Eritrea and Yemen reiterated their commitments to fully comply with and to implement the two Awards.¹⁷

The two *Eritrea/Yemen* Awards were heavily relied upon in the *Qatar v. Bahrain Maritime Delimitation and Territorial Questions* proceedings, which were completed by the delivery by the ICJ of its Judgment on 16 March 2001.¹⁸ The successful resolution of the *Eritrea/Yemen* case has also been of positive influence on the parallel Eritrea/Ethiopia border hostilities which were ceased as a result of deployment of the United Nations Mission in those two states.¹⁹ Subsequently, the Algiers Peace Agreement of 12 December 2000 (Article 4) provided for the establishment of United Nations *Eritrea/Ethiopia Boundary* Commission, which was mandated to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (of 1900, 1902 and 1908)

Minister Al-Saidi [<http://www.y.net.ye/yementimes/99/iss51/intrview.htm>]. See also UN Doc. A/56/473, 8 (Yemen), 15 October 2001. On the *Panama v. Yemen Chaisiri Reefer 2* case, which was instituted by Panama on 3 July 2001 under Article 292 of the Law of the Sea Convention, and which was discontinued on 13 July as a result of release by Yemen of the detained vessel, see *ITLOS/Press* Nos 51/52, 5 and 16 July 2001 [<http://www.itlos.org>].

¹⁷See Statements quoted *supra* notes 13-16, as further referred to *infra* notes 91 and 121.

¹⁸ICJ Reports 2001, 40, *reprinted in* 40 ILM 847 (2001), as summarized in *ICJ Press Release* No.2001/9 and 9bis, 16 March 2001; *UN Law of the Sea Bulletin* 87-88 (2001 No.46); Statement of President Gilbert Guillaume of that date and his Statement to the 56th United Nations General Assembly, 30 October 2001, at 2, *ICJ Press Release* No.2001/31, 31 October 2001 and *ICJ Yearbook 2001-2002* 308-312 (No.56) [<http://www.icj-cij.org>]. The Court determined Zubarah, Janan Island (including Hadd Janan) and Fasht ad Dibal to be subject to sovereignty of Qatar, while the Hawar Islands and Qit'at Jaradah were attributed to Bahrain, and it also effected (as did the 1999 *Eritrea/Yemen* Award) maritime delimitation by means of a single all-purpose (adjusted) equidistance.

Cf. B. Kwiatkowska, The *Qatar v. Bahrain Maritime Delimitation and Territorial Questions* Case, 33 *Ocean Development and International Law* (ODIL) 227-262 (2002) and (BWP 2002) [<http://www.bwp-bookcenter.com>], also discussing the preceding 1994 and 1995 *Qatar v. Bahrain (Jurisdiction and Admissibility)* Judgments; T. Yoshifumi, Reflections on the Concept of Proportionality in the Law of Maritime Delimitation, 16 *IJMCL* 433, 452-453, 457-459 (2001); J.R. Crook, The 2000 Judicial Activity of the International Court of Justice, 95 *AJIL* 685, 688 (2001); G. Plant, The *Qatar v. Bahrain (Merits)* Judgment, 96 *AJIL* 198-210 (2002); J.R. Crook, The 2001 Judicial Activity of the International Court of Justice, *id.*, at 397, 398-400; M. Evans, The *Qatar v. Bahrain* Case, 51 *International and Comparative Law Quarterly* (ICLQ) 709-718 (2002); M.G. Kohen, Les questions territoriales dans l'arrêt de la C.I.J. du 16 mars 2001, 106 *Revue Générale de Droit International Public* (RGDIP) 295-328 (2002); A.P. Palomar, La qualification juridique des formations maritimes dans l'affaire *Qatar/Bahreïn*, *id.*, at 329-356; G. Ziccardi Capaldo, 2 *Yearbook of International Law and Jurisprudence* (YILJ) 285-309 (2002).

¹⁹See *supra* notes 7 and 11-12; UN Docs S/2000/610, 612, 619, 643, 676 and 793, S/PRST/2000/22 and S/RES/1312 of 31 July 2000, establishing the United Nations Mission in Ethiopia and Eritrea (UNMEE).

and applicable international law.²⁰ The Commission, comprising Judges Stephen M. Schwebel and Bola Ajibola, Sir Arthur Watts and W. Michael Reisman, presided over by Sir Elihu Lauterpacht, held the oral hearings on 10-21 December 2001 and delimited the three-sector international boundary in the milestone *Eritrea/Ethiopia Boundary (Merits)* Decision rendered on 13 April 2002, followed by the demarcation phase throughout 2004.²¹

²⁰See UN Docs S/2000/811, 1183 (Algiers Agreement) and 1194 (UN Secretary-General's Letter to the President of the Security Council), S/RES/1320 of 15 September 2000, UNGA Resolution 55/237 of 23 December 2000, S/2001/39, S/2001/45 and S/2001/1194 (UN Secretary-General's Progress Reports); *Report of the UN Secretary-General on the Work of the Organization*, UN Docs A/56/1, para.53 (2001); S/2002/205 (UN Secretary-General's Progress Report) and S/2002/245 (Report of the Security Council Mission). For the text of Algiers Peace Agreement, see also 2138 UNTS 85, 93; 40 ILM 260 (2001).

²¹The UN *Eritrea/Ethiopia* Commission adopted its own Rules of Procedure, the UN Cartographer serves as its Secretary and its Registry is located at the PCA. See *100th PCA Annual Report*, para.35 (2000) and *101st PCA Annual Report*, paras 32-34 (2001). For Biography of Judge Schwebel, see *supra* note 8, and for those of Sir Elihu and Judge Ajibola, see *ICJ Yearbook 1999-2000*, *supra* note 8, at 61-62 and 70-72.

The Commission's *Eritrea/Ethiopia Boundary (Merits)* Decision on delimitation of 13 April 2002 [S/2002/423; 41 ILM 1057 (2002)] has been followed by demarcation arrangements, paralleled by the *Eritrea/Ethiopia Boundary (Interpretation)* Decision of 24 June which dismissed Ethiopia's Request for Interpretation of the former Decision, as well as by the *Eritrea/Ethiopia (Interim Measures)* and *(Demarcation)* Orders of 17 July [S/2002/853], the *Eritrea/Ethiopia* Determinations of 7 November 2002, Observations of 21 March 2003 [S/2003/257/Add.1; 42 ILM 1010 (2003)] and Decision of 7 July 2003 [S/2003/752]. Copies of all the Commission's Decisions were deposited with the Secretaries General of the African Union (formerly OAU, *supra* note 1) and the United Nations. For the texts and related UN Statements, see websites of the United Nations [<http://www.un.org/NewLinks/eebcarbitration/>] and the PCA [<http://www.pca-cpa.org>]. See also UN S/RES/1398 of 15 March 2002; A/57/1, para.39 (2002); S/2002/744, S/2002/977 and S/2002/1393; S/RES/1430 and S/RES/1434 of 14 August and 6 September 2002, and S/RES/1466 of 14 March 2003; S/2003/257 and Add.1, available at the above websites; ACP-EU Joint Parliamentary Assembly Resolution on Situation in East Africa of 3 April 2003, paras B-C, 1-3 [www.biddho.com/portal/article3338.html]; Presidential Statement of 17 July 2003 [<http://www.un.org/News/Press/docs/2003/sc7817.doc.htm>]; UN Docs S/2003/665 & Add.1, S/2003/858; S/RES/1507 of 12 September 2003, S/2003/1186; EU CFSP Declaration of 12 September 2003, Press 279 [<http://ue.eu.int/pesc/default.asp?lang=en>] and 19 December 2003 [www.irinnews.org/report.asp?ReportID=38518&SelectRegion=Horn_of_Africa&SelectCountry=ERITREA-ETHIOPIA]; S/2004/116 & 180; S/RES/1531 of 12 March 2004 which extended the UNMEE until 15 September 2004 to facilitate the implementation of the *Eritrea/Ethiopia Boundary* Decision [www.un.org/Docs/sc/], [www.pca-cpa.org] and [www.un.org/Depts/dpko/unmee/unmeeN.htm].

For current news on the related events, see [<http://www.meskerem.net>], for related articles, see [www.globalpolicy.org/security/issues/ethindex.htm] and for texts of colonial treaties, see

2. The 1998 Territorial Sovereignty and Scope of the Dispute Award

The substantial, 528-paragraph *Territorial Sovereignty Award* (Phase I) is a masterpiece of legal draftsmanship,²² which reflects the extensive documentary and archival material pleaded in the *Eritrea/Yemen* case.²³ The Award is consistent with the 1928 *USA v. Netherlands Island of*

[www.geocities.com/CollegePark/Quad/6460/hf/98_6/index.html].

Cf. Interview with Judge Stephen M. Schwebel of 10 January 2001 on The International Law and the World Court, *Harvard International Review* [www.npwj.org/pressmon/20010110_HIR.shtml]; B. Simma and D.-E. Khan, Peaceful Settlement of Boundary Disputes under the Auspices of the OAU and the United Nations: The Case of the Frontier Dispute Between Eritrea and Ethiopia, in *Liber Amicorum Judge Shigeru Oda*, *supra* note 8, at 1179-1196; Ph. Weckel, Décisions du 13 avril et 24 juin 2002, 106 RGDIP 695, 705 (2002); *infra* notes 23, 31, 74, 87, 96, 121, 129 and 132.

²²Cf. B. Kwiatkowska, Award of the Arbitral Tribunal in the First Stage of the *Eritrea/Yemen* Proceedings, 14 IJMCL 125-136 (1999); J.P. Dobelle et J.M. Favre, Le différend entre l'Erythrie et le Yémen: La Sentence Arbitrale du 9 octobre 1998, 44 *Annuaire Français de Droit International* (AFDI) 337-355 (1998); P. Hamilton *et al.* eds, *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution* 3, 26-27 [J.G. Merrills], 196-197 [Summary] (1999); N.S.M. Antunes, The *Eritrea/Yemen* Arbitration: First Stage - The Law of Title to Territory Reaverred, 48 ICLQ 362-386 (1999); W.M. Reisman, Case Report on the 1998 *Eritrea/Yemen* Award (Phase I), 93 AJIL 668-682 (1999); A.S. Millet, *Erythrae/Yemen* - Court Permanent d'Arbitrage: Sentence du 9 octobre 1998, 103 RGDIP 189-192 (1999); G. Distefano, La Sentence Arbitrale du octobre 1998 dans l'affaire du différend insulaire entre le Yémen et l'Erythrie, *id.* 851-890; B. Kwiatkowska, The *Eritrea/Yemen* Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation, 32 ODIL 1-25 (2001). See also Dr. Jean Allain, American University in Cairo, Course on International Law in the Middle East, Week 11 [<http://www.aucegypt.edu/schools/huss/pols/JAllain572.htm>].

²³See 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. See also *infra* note 51.

The sheer volume of written and oral pleadings seems comparable to that in the *Libya/Chad Territorial Dispute* case, ICJ Reports 1994, 6. 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, delivered under the Court's Presidency by Judge Stephen M. Schwebel, ICJ Reports 1999, 1096-1100, paras 81-87, *reprinted in* 39 ILM 310 (2000), as summarized in *ICJ*

Palmas (Miangas) Award of the sole Arbitrator Max Huber, at the time President of the Permanent Court of International Justice,²⁴ the 1933 *Denmark v. Norway Legal Status of Eastern Greenland Judgment*²⁵ and other decisions, admirably appraised by Sir Robert Jennings in his major work on the acquisition of territorial sovereignty.²⁶ The 1998 *Eritrea/Yemen* Award is structured along eleven Chapters dealing with:

- * The 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);

Communiqués Nos 99/53 and 53bis, 13 December 1999 [<http://www.icj-cij.org>]; P.H.F. Bekker, Recent Developments at the World Court, *ASIL Newsletter*, January-February 2000, at 1, 3. For reaffirmation of the *Botswana/Namibia* holdings, see 2002 *Eritrea/Ethiopia Boundary Decision*, *supra* note 21, para.3.25, and *Indonesia/Malaysia Sovereignty over Pulau Ligitan and Pulau Sipadan (Merits)* Judgment, para.88, ICJ Reports 2002, 625; ICJ Press Release No.2002/39, 17 December 2002; D.A. Colson, 97 AJIL 398-406 (2003). On treatment of an abundance of maps, see also the 2002 *Eritrea/Ethiopia* Decision, paras 3.17-3.28, and Chapters IV-VI, covering the central (1900 Treaty), the western (1902 Treaty) and the eastern (1908 Treaty) sectors of the Eritrea/Ethiopia boundary, as well as Appendices A and C; *infra* note 74.

For interesting analogies drawn between the *Botswana/Namibia* Judgment and the 1998/1999 *Eritrea/Yemen* Awards, see Ph. Weckel, Arrêt du 13 décembre 1999, 104 RGDIP 241-248, esp. 241-243 (2000); P. Tavernier, Observations sur le droit intertemporel dans l'affaire de *L'Ile de Kasikili/Sedudu (Botswana/Namibie)*, *id.* 429-444; A. Perry: World Court Awards Island to Botswana, 8 IBRU *Boundary and Security Bulletin* (2000 No.2).

For reliance on the *Eritrea/Yemen* holdings related to maps, see the *Qatar v. Bahrain (Merits)* Oral Hearings, CR 2000/7, 17, 24 (Counsel Bundy, 31 May 2000), CR 2000/14, 10, 15 (Counsel Sir Elihu Lauterpacht, 13 June), CR 2000/18, 7-8 (Bundy, 21 June 2000). For reliance on the *Eritrea/Ethiopia* holdings, see *Indonesia/Malaysia (Merits)* Oral Hearings, CR 2002/29, 42-43 (Counsel Malintoppi, 4 June 2002) [<http://www.icj-cij.org>].

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

²⁵PCIJ Series A/B 1933, No.53, 22.

²⁶R.Y. Jennings, *The Acquisition of Territory in International Law* (1963). See also J.G. Merrills, The International Court of Justice and the Adjudication of Territorial and Boundary Disputes, 13 *Leiden Journal of International Law* (LJIL) 873-901 (2000). 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>]; reprinted in ICJ *Yearbooks*, *supra* note 8, 1998-1999, at 316-323 (No.53), and 1999-2000, at 282-288 (No.54). Cf. *Cameroon v. Nigeria Land and Maritime Boundary (Preliminary Objections)* Judgment, ICJ Reports 1998, 292, para.28; and *infra* note 123.

- * 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:

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 article 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 than 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.²⁷ Since apart from the context of the scope of the dispute,²⁸ 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".²⁹ 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.³⁰ In the context of the Tribunal's task in the first stage of the

²⁷ 1998 Award, para.93.

²⁸ 1998 Award, paras 86-88, rejecting Yemeni contention of "the critical date" being that of the 1996 Agreement on Principles.

²⁹ 1998 Award, para.95, citing *Argentina v. Chile* Award, 16 UNRIAA 111,115; 38 ILR 16, 20 (1969). Cf. Reisman, *supra* note 22, at 677-678.

³⁰ 1998 Award, paras 94-100. For reliance on the Award's holdings on internal (private and confidential) memoranda, see Special Rapporteur V. Rodriguez Cedenio, Fourth Report on Unilateral Acts of States, paras 148 and 154 (Article b), UN Doc.A/CN.4/519, 30 May 2001; *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Oral Hearings, CR 2002/18, Counsel

Eritrea/Yemen case, the Award gives an important exposition of the meaning of historic title in international law and the applicability of equity *infra legem* (or equitable principles) as much to the issues of territorial sovereignty as to those of maritime boundary delimitation.³¹

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)³² and the Red Sea lighthouses (Chapter VI).³³ However, neither Party succeeded in

Sir Ian Brownlie, para.109 (14 March 2002) [<http://www.icj-cij.org>].

Note that reliance of the 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, on the validity of the 1939 decision of Great Britain with respect to attributing sovereignty over the Hawars and Janan Island (to Bahrain and Qatar respectively) made it unnecessary for the Court to rule on the applicability - contended by Bahrain and contested by Qatar - of the principle of *uti possidetis, effectivités* and other issues pertaining to the acquisition of territorial sovereignty. However, it is noteworthy that in view of rejection of the *uti possidetis* principle by the *Eritrea/Yemen* Award, both majority and minority Judges rejected applicability of this principle to the Hawar Islands. See *Qatar v. Bahrain (Merits)* Separate Opinions of Judge Kooymans, paras 17-26, 30, and Judge Al-Khasawneh, paras 7-12, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 16-17, 51, 213-216, and Dissenting Opinion of Judge *ad hoc* Torres Bernardez (designated by Qatar), paras 244, 428. On inapplicability of the *uti possidetis*, see also Sir Elihu Lauterpacht, Judge Stephen M. Schwebel, Shabtai Rosenne and Francisco Orrego Vicuna, *Joint Legal Opinion on Guatemala's Territorial Claim to Belize*, paras 192-198, 219 and Annex II (January 2002) [<http://www.belize-guatemala.gov.bz/>] and [<http://www.centralamericaweekly.net/180/english/inter.html>].

³¹1998 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. The applicability of equity to both territorial and delimitation issues was reaffirmed in the 2001 *Qatar v. Bahrain (Merits)* Judgments, *supra* note 18, through attribution - in the process of maritime boundary delimitation - of sovereignty over Qit'at Jaradah (paras 191-209) and Fasht ad Dibal (para.220) to Bahrain and Qatar respectively. See also Lauterpacht, Schwebel, Rosenne and Orrego Vicuna, *Joint Legal Opinion on Guatemala's Territorial Claim to Belize*, *supra* note 30, paras 164-165, 222, Annex II, paras 28, 30; 2002 UN *Eritrea/Ethiopia Boundary Decision*, *supra* note 21, paras 3.14-3.15; *Indonesia/Malaysia (Merits)* Oral Hearings, CR 2002/31, 20 (Counsel Cot, 7 June 2002) [<http://www.icj-cij.org>].

³²The 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

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. And 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".³⁴ 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.³⁵

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 is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal's decisions.³⁶ 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",³⁷ was classified by the Tribunal into:

* evidence of intention to claim the islands, as by showing public claims to sovereignty over

Certain Areas in the Middle East, and 1947 Treaty of Peace with Italy.

³³The 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.

³⁴1998 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.

³⁵1998 Award, paras 114, 125 and 441-449. Cf. Marques Antunes, *supra* note 22, at 367-369; Reisman, *supra* note 22, at 681.

³⁶1998 Award, para.450, citing *Minquiers and Ecrehos* Judgment, ICJ Reports 1953, 47. Cf. *infra* note 95. For reaffirmation of this *Minquiers and Ecrehos* holding, see also the *Western Sahara* Advisory Opinion, ICJ Reports 1975, 43, para.93; *El Salvador/Honduras; Nicaragua Intervening Land, Island and Maritime Frontier Dispute* Judgment, ICJ Reports 1992, 564-565. For reliance on this *Eritrea/Yemen* holding, see *Qatar v. Bahrain (Merits)* Oral Hearings, CR 2000/11, 23-25 (Counsel Sir Elihu Lauterpacht, 8 June 2000) [<http://www.icj-cij.org>].

³⁷1998 Award, para.451, citing the *Palmas* Award, *supra* note 24. See also 1998 *Eritrea/Yemen* Award, para.452, citing the *Eastern Greenland* pronouncement, *supra* note 25, 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"; as subsequently also reaffirmed by the 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, para.198; and 2002 *Indonesia/Malaysia (Merits)* Judgment, *supra* note 23, para.134.

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,³⁸ 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,³⁹ 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

³⁸For reliance by Botswana on its establishment of the Chobe National Park on the disputed Kasikili/Sedudu Island, see 1999 *Botswana/Namibia* Judgment, *supra* note 23, paras 12, 76 and 102-103. For reliance by Bahrain on its creation in 1996 of a wildlife preserve on part of the main island of Hawar, see 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, para.104; Oral Hearings, CR 2000/11, 23-25 (Counsel Sir Elihu Lauterpacht, 8 June 2000). For endorsement by the Court of reliance by Malaysia on Sipadan and Ligitan having been declared native reserves for the collection of turtle eggs and Sipadan - also a bird sanctuary, see *Indonesia/Malaysia (Merits)* Judgment, *supra* note 23, paras 14, 98, 128, 130, 132-133, 140, 143-145, Declaration of Judge Oda, Dissenting Opinion of Judge *ad hoc* Franck, paras 17-21, 33; Oral Hearings, CR 2002/27, 19-20 (Agent Wirajuda, 3 June), CR 2002/29, 13-15 (Counsel Bundy, 4 June), 24-30, 33-35 (Counsel Pellet), CR 2002/30, 20-21, 23-26 (Co-Agent Ariffin, 6 June), 28-29 (Counsel Lauterpacht), 54-55 (Counsel Crawford), CR 2002/31, 42-43 (7 June), CR 2002/32, 16-18 (Lauterpacht), CR 2002/34, 27 (Pellet, 10 June 2002) [<http://www.icj-cij.org>]. See also holdings on Belize-Guatemala-Honduras Ecological Park, in 2002 *Belize/Guatemala* Territorial and Maritime Differendum OAS Facilitators' Proposals, B-paras 1, 12, C, D and Annex A [<http://www.belize-guatemala.gov.bz/>]; and Niger's "W" Park under the 1971 Ramsar Convention [<http://whc.unesco.org/sites/749.htm>], [www.ramsar.org/profiles_niger.htm] in *Benin/Niger Frontier Dispute* case [www.icj-cij.org].

³⁹See also 1998 Award, paras 478, 483, 485, 491-492, 510, 513-514, 516, and *infra* note 55. Cf. 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, para.197, holding that: "The construction of navigational aids ... can be legally relevant in the case of very small islands". Thereby, the Court reversed the corresponding 1953 *Minquiers and Ecrehos* holding, *supra* note 36, at 66, 69, 70, 71, which was based on the 1909 *Norway v. Sweden Grisbadarna Maritime Frontier* Award, 9 UNRIAA 155. For notable reaffirmation of this reversal, see 2002 *Indonesia/Malaysia (Merits)* Judgment, *supra* note 23, para.147; also paras 132, 146, 148, Dissenting Opinion of Judge *ad hoc* Franck, paras 18, 21. On the central role played by Horsburgh Light in the new *Malaysia/Singapore Pedra Branca* case, see G. Kent and M.J. Valencia, *Marine Policy in Southeast Asia* 93 (1985); *Pedra Branca* Dispute Goes to ICJ, 6 February 2003 [<http://www.channelnewsasia.com/can/pedrabranca/>] & [www.mfa.gov.sg/press/transcript.html] and *ICJ Press Releases* Nos 2003/22 and 28 of 24 July and 9 September; ICJ Reports 2003, 146.

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 VIII⁴⁰ 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.⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴ Although the High Islet lies barely

⁴⁰See *supra* note 23.

⁴¹1998 Award, para.458. For justification of Tribunal's reliance on this factor, see paras 453-457.

⁴²1998 Award, paras 459-466 and 470. On the "portico doctrine" recognized as "as a means of attributing sovereignty over offshore features which fell within the attraction of the mainland", see para.463, citing D.P. O'Connell, *The International Law of the Sea* 185 (1982). On Yemen's claim, see also paras 35 and 76. For reliance on the Award's findings related to the "portico doctrine", see *Qatar v. Bahrain (Merits)* Oral Hearings, CR 2000/6, 47 (Counsel Sir Ian Sinclair, 30 May 2000).

⁴³1998 Award, para.471.

⁴⁴1998 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; and *supra* note 41. On critical role of this presumption in the 1870 *UK/Portugal Bulama* Award of the US President [No.85/Stuyt], see G. Gidel, *Le Droit International Public de la Mer*, Tome III, 691-2 (1934). Implication to this effect in the *Anglo/Norwegian Fisheries* Judgment, ICJ Reports 1951, 128, was relied upon in *Minquiers and Ecrehos* Pleadings, Vol.I, 424 (UK Reply). Cf. the concept of area constituting "organic" or "individualized" whole, in 1904 *Brazil/UK Guiana Boundary* Award of King Victor Emmanuel III [RIAA XI, 21-22; No.180/Stuyt]; *Anglo/Norwegian Fisheries* Pleadings, Vol.I, 73 (UK Memorial, para.100) and Vol.II, 508-509 (UK Reply, para.209).

For Qatar's reliance on the *Eritrea/Yemen* Award's holdings in this respect, as contested by Bahrain in reliance on the 1929 *Palmas* Award, *supra* note 24, see *Qatar v. Bahrain (Merits)* Oral

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.⁴⁵

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 on 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.⁴⁶ 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.⁴⁷ 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.⁴⁸

The remaining disputed islands, islets, rocks, and low-tide elevations, i.e., the Zuqar-Hanish Group⁴⁹ as well as the Jabal al-Tayr Island and the Zubayr Group⁵⁰ 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 the plethora of maps, the Tribunal was of the opinion that Yemen had a marginally better

Hearings, CR 2000/6, 47-48 (Counsel Sir Ian Sinclair, 30 May 2000), CR 2000/11, 19, 29-30 (Counsel Sir Elihu Lauterpacht, 8 June), CR 2000/15, 45-46 (Counsel Weil, 14 June), CR 2000/18, 20-22 (Sinclair, 21 June), CR 2000/22, 17 (Lauterpacht, 28 June 2000); 2001 Judgment, *supra* note 18, paras 99-100, Separate Opinions of Judges Kooymans, paras 64-66, and Al-Khasawneh, para.20, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 60, 137-143, 205 and Map 4, Dissenting Opinion of Judge *ad hoc* Torres Bernardez (designated by Qatar), paras 243-251, 349, 536 [<http://www.icj-cij.org>]. The presumption of proximity found reflection in the Court's decision that the low-tide elevation of Fasht ad Dibal is subject to the sovereignty of Qatar, within whose TS it is located. See Judgment, para.220. Cf. Kwiatkowska, *The Qatar v. Bahrain Case*, *supra* note 18, at 234, 238 and 246; Palomar, *supra* note 18, at 343-344.

For Belize's reliance on these 1998 *Eritrea/Yemen* holdings, see Lauterpacht, Schwebel, Rosenne and Orrego Vicuna, *Joint Legal Opinion on Guatemala's Territorial Claim to Belize*, *supra* note 30, paras 3, 13, 109, 113, 179-186, 224-225, and 2002 *Belize/Guatemala* OAS Facilitators' Proposals, *supra* note 38.

The principle of proximity might have also been an inarticulate premise of the awarding by the 2002 *Indonesia/Malaysia (Merits)* Judgment, *supra* note 23, of sovereignty over Pulau Sipadan and Pulau Ligitan to Malaysia.

⁴⁵ 1998 Award, para.475.

⁴⁶ 1998 Award, paras 476-480.

⁴⁷ 1998 Award, paras 481-482. See also operative para.527(ii) quoted above.

⁴⁸ 1998 Award, paras 483-484. See also operative para.527(iii) quoted above.

⁴⁹ 1998 Award, paras 485-508.

⁵⁰ 1998 Award, paras 509-524.

case in that, looked at their totality, the maps suggested a certain widespread understanding that the islands appertained to Yemen.⁵¹

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),⁵² as well as at various recent instances of the *effectivités*.⁵³ 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.⁵⁴ 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.⁵⁵

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 Group⁵⁶ and the Jabal al-Tayr Island and the Zubayr Group.⁵⁷ 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".⁵⁸ Moreover, appreciation of regional legal traditions was necessary to render an Award meeting objectives articulated in the 1996 Joint Statement.⁵⁹ Given traditional operation - as the evidence presented to the Tribunal amply testified - of the fishing

⁵¹ 1998 Award, para.490.

⁵² 1998 Award, paras 491-502.

⁵³ 1998 Award, paras 503-507.

⁵⁴ 1998 Award, paras 509-522.

⁵⁵ 1998 Award, para.523. Cf. *supra* note 37; and 2001 *Qatar v. Bahrain (Merits)* Declaration of Judge Rosalyn Higgins (who was a member of the *Eritrea/Yemen* Tribunal), *supra* note 18, observing that *effectivités* related to the Hawar Islands were no sparser than those on which the title has been founded in other cases and were sufficient to displace any presumption of title by the coastal state. Similarly, Judges Kooymans (paras 71-79) and Al-Khasawneh (paras 20-24) found in their Separate Opinions that the limited scope of the Hawars related *effectivités* presented by Bahrain had to be deemed to prevail over Qatar's potential title, since there was not even a vestige of display of authority by that state. See also 2001 Judgment, para.197, endorsing Bahrain's *effectivités* with respect to tiny Qit'at Jaradah island, and *supra* note 39; and treatment of *effectivités* in the 2002 *Indonesia/Malaysia (Merits)* Judgment, *supra* note 23, paras 127-149, Declaration of Judge Oda, Dissenting Opinion of Judge *ad hoc* Franck.

⁵⁶ 1998 Award, para.508 and operative para.527(iv) quoted above.

⁵⁷ 1998 Award, para. 524 and operative para.527(v) quoted above.

⁵⁸ 1998 Award, para.525. Cf. paras 126-132.

⁵⁹ See main text accompanying *supra* note 3.

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.⁶⁰

3. The 1999 Maritime Delimitation Award

The 169-paragraph *Eritrea/Yemen Maritime Delimitation Award* (Phase II)⁶¹ provides a notable instance of application of the modern law of maritime boundary delimitation, as developed in the magnificent equitable jurisprudence of the International Court of Justice and arbitral tribunals.⁶² 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).

3.1. The Delimitation of the Eritrea/Yemen International Maritime Boundary

⁶⁰1998 Award, para.526 and operative para.527(vi) quoted above; and main text accompanying *infra* notes 91-119 and 129.

⁶¹See *supra* note 1. Cf. Ph. Weckel, Cour Permanente d'Arbitrage: Sentence du 17 decembre 1999, 104 RGDIP 511-514 (2000); W.M. Reisman, The 1999 *Eritrea/Yemen Award* (Phase II), 94 AJIL 721-736 (2000); Kwiatkowska, The *Eritrea/Yemen Arbitration*, *supra* note 22, at 7-17; Yoshifumi, *supra* note 18, at 449-452, 457-459; G. Distefano, La sentence arbitrale du 17 decembre 1999 sur la delimitation des frontieres maritimes entre l'Erythree et le Yemen: Quelques observations complementaires, 46 AFDI 255 -284 (2000); T. Yoshifumi, Reflections on the *Eritrea/Yemen Arbitration* of 17 December 1999 (Second Phase), 48 *Netherlands International Law Review* 197-225 (2001); M.D. Evans, The Maritime Delimitation Between Eritrea and Yemen, 14 LJIL 141-170 (2001).

⁶²For recent appraisal, see Plenary Address by President Stephen M. Schwebel, The Contribution of the International Court of Justice to the Development of International Law, in *International Law and The Hague's 750th Anniversary* 405, 409-411 (1999); and B. Kwiatkowska, The International Court of Justice and Equitable Maritime Boundary Delimitation, *id.*, at 61-72; *summarized in* 45 AFDI 1028 (1999); and *infra* note 124. For in-depth survey of equitable jurisprudence of the Court and Arbitral Tribunals, see B. Kwiatkowska, *Decisions of the World Court Relevant to the UN Convention on the Law of the Sea - A Reference Guide* (2002) [http://www.brill.nl/product_id20709.htm] and [<http://www.law.uu.nl/nilos>], Publications - Online Papers.

3.1.1. 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 in the two main stages (of drawing provisional boundary and its adjustment) by means of a single all-purpose boundary between their territorial seas (TS) and the 200-mile exclusive economic zones and the continental shelves (EEZ/CS).⁶³ It is noteworthy that although Eritrea neither claimed the EEZ nor ratified the 1982 UN Law of the Sea Convention, 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.⁶⁴ In the last operative paragraph 169 of the Award, a single 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.⁶⁵ The lines and the numbers of the turning points are - as the Arbitration Agreement requested -

⁶³The delimitation by a single boundary was also involved in the 1984 *Canada/USA Gulf of Maine Area* Judgment, 1985 *Guinea/Guinea-Bissau Maritime Boundary* and 1989 *Guinea-Bissau/Senegal Maritime Boundary* Awards, 1991 *Guinea-Bissau v. Senegal Arbitral Award of 31 July 1989* Judgment, 1992 *El Salvador/Honduras; Nicaragua Intervening* Judgment, 1992 *Canada/France (St. Pierre et Miquelon)* Award, 1993 *Denmark v. Norway (Jan Mayen)* Judgment, 1993 *UN Iraq/Kuwait* Report (*supra* note 1), 2001 *Qatar v. Bahrain (Merits)* Judgment (*supra* note 18), 2002 *Newfoundland and Labrador/Nova Scotia (Phase II)* Award (*infra* note 66) and *Cameroon v. Nigeria; Equatorial Guinea Intervening Land and Maritime Boundary (Merits)* Judgment, ICJ Reports 2002, 303, *reprinted in* 42 ILM (2003, in press), paras 38, 214, 226, 247, 268-307, 325.IV, Separate Opinion of Judge *ad hoc* Mbaye, paras 127-137. The Court has, moreover, been requested to determine the boundary by means of a single line in the recently instituted *Nicaragua v. Honduras Maritime Delimitation in the Caribbean Sea* and the *Nicaragua v. Colombia Territorial and Maritime Dispute* cases [<http://www.icj-cij.org>].

⁶⁴See 1999 Award, para.130, and *supra* note 2. 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), *supra*, at 419-22.

⁶⁵1999 Award, paras 5 and 168.

shown for purpose of illustration only in Charts 3 and 4 in the map section of the Award.

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 Convention⁶⁶ and adjustment of that boundary by the factors pertaining to baselines, islands, the immediate neighbourhood of a main international shipping line and interests of third states (Saudi Arabia and Djibouti). The Award strikes by its avoidance of otherwise frequent confusion of the two distinct concepts of the relevant coasts for purposes of delimitation and giving a full, partial or no effect to islands in delimitation. The role of the rocks principle of Article 121(3) was not articulated in the Tribunal's decision-making process.⁶⁷ 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.⁶⁸ 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".⁶⁹ 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

⁶⁶1999 Award, paras 13, 23-24, 51, 116, 124-125, 131-133 and 158, citing (para.13) of the *North Sea Continental Shelf* Judgment, ICJ Reports 1969, 36, para.57. For important reaffirmation to this effect in the preceding *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. See also 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, paras 175-176, 217, 224-233 and 240, which expressly refer to Article 15, but not to Articles 74/83; 2002 *Newfoundland and Labrador/Nova Scotia (Phase II)* Award, paras 2.27 and 5.2 [<http://www.boundary-dispute.ca>]; and *infra* note 125; 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening Merits*) Judgment, *supra* note 63, paras 285-289.

⁶⁷But see *infra* notes 76-77.

⁶⁸On 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 97-104. 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 64, as confirmed by its 1982 and 1987 Declarations, *supra* note 2.

⁶⁹1998 Award, para.438, and 1999 Award, paras 75-82 and 132. See also *infra* notes 89-90.

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.⁷⁰ 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.⁷¹ The Tribunal paid due attention to navigational considerations, as referred to in the preamble of the Arbitration Agreement expressing consciousness 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.⁷²

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/CS⁷³ 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,

⁷⁰1999 Award, para.83.

⁷¹1999 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 64 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 64. See also *infra* note 74.

For reliance on the Award's holding (para.133) on Article 5, see *Qatar v. Bahrain (Merits)* Oral Hearings, CR 2000/6, 41 (Counsel Sir Ian Sinclair, 30 May 2000); 2001 Judgment, *supra* note 18, para.184.

⁷²See main text accompanying *supra* notes 4 and 27 and *infra* notes 81, 83, 87, 109-110 and 113. 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 86. 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 64) and its 1982 and 1987 Declarations (*supra* note 2), see J.A. Roach and R.W. Smith, *United States 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).

⁷³1999 Award, paras 23, 116 and 131.

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

3.1.2. 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 shall be on the low-water line of certain of the outer Dahlak Group, comprising "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.⁷⁴ 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.⁷⁵

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.⁷⁶ In view of "barren and inhospitable nature" of those islands,

⁷⁴1999 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 64, 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's 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).

See also Eritrea/Hardman Resources MOU on Dahlac (Massawa Block) Oil Exploration of 5 January 2004 with Map [www.rigzone.com/news/article.asp?a_id=10237].

On implementation of Article 16 and corresponding Articles 47(8)-(9), 76(9), 75/84 and 134(3) of the UN Law of the Sea Convention, see 2001 *Qatar v. Bahrain (Merits)* Judgments, *supra* note 18, para.177; Oral Hearings, CR 2000/14, 44 (Counsel Reisman, 13 June 2000); 2002 *Belize/Guatemala* OAS Facilitators' Proposals, *supra* note 38, B-paras 4, 6. For authoritative interpretation of "disclaimers" placed on the UN maps, see 2002 UN *Eritrea/Ethiopia Boundary* Decision, *supra* note 21, paras 3.26-3.28 and Appendix A, paras A26-A32.

⁷⁵1999 Award, paras 143-145. For reliance thereupon, see *Qatar v. Bahrain (Merits)* Oral Hearings, CR 2000/15, 53 (Counsel Weil, 14 June 2000). Note emphasis in the 2001 Judgment, *supra* note 18, para.212, on necessarily restrictive application of the method of straight baselines due to its forming an exception to the method of normal baselines (*supra* note 71).

⁷⁶1999 Award, paras 15, 115, 121.

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.⁷⁷ 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.⁷⁸

3.1.3. 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.⁷⁹

The Tribunal first decided the question of this middle stretch of the boundary from points 15 to 20, 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.⁸⁰ 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 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

⁷⁷ 1999 Award, paras 138 and 147-148. On sovereignty over those islands attributed by the 1998 Award to Yemen, see *supra* notes 50, 54, 55, 57 and 60; and on their nature, see also *supra* note 42. The rocks principle of Article 121(3) could have formed an unarticulated premise of giving by the Tribunal of no effect to al-Tayr and Zubayr Islands. It could have also formed such a premise in giving by the 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, of no effect to tiny, uninhabited island of Qit'at Jaradah (paras 179, 209, 215, 219-222) and to the maritime feature of Fasht al Jarim (paras 246-249). On the important role played by Article 121(3) in the *Denmark v. Norway (Jan Mayen)* Judgment, see Separate Opinion of Judge Schwebel, ICJ Reports 1993, at 126-127.

Cf. 2002 *Indonesia/Malaysia (Merits)* Declaration of Judge Oda, *supra* note 23, implying that the two islets awarded by the Court to Malaysia may perhaps be disregarded in the future maritime boundary delimitation due to their possible nature of "rocks".

⁷⁸ 1999 Award, paras 138 and 149-151.

⁷⁹ 1999 Award, paras 122-123 and 152-153. On sovereignty over those islands attributed by the 1998 Award to Yemen, see *supra* notes 49, 51-53, 56 and 58.

⁸⁰ 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 42-48.

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.⁸¹ 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 and as allowing each of them about 2,5-mile TS.

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.⁸² 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.

3.1.4. 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.⁸³ As the Bay of Assab is Eritrean internal waters, the controlling basepoints of the boundary line were located seaward of this bay.

3.1.5. 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.⁸⁴

⁸¹1999 Award, paras 24-26, 41, 124-125, 128 and 155. Note that by contrast, the single boundary determined by the 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, did not parallel shipping line leading to Hormuz Strait, but was located to the south of that line.

⁸²1999 Award, paras 160-162.

⁸³1999 Award, paras 18, 43, 126-127 and 163.

⁸⁴1999 Award, paras 44-46, 136, 164 and 167. For the latest instance of granting a third state intervention, see *Cameroon v. Nigeria (Intervention)* Order, in which the Court, Presided over by Judge Stephen M. Schwebel, authorized 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>];

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 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".⁸⁵ 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.⁸⁶

ICJ Reports 1999, 1029, *reprinted in* 38 ILM 112 (2000). See also the Court's treatment of the eighth Nigeria's objection in the 1998 *Cameroon v. Nigeria (Preliminary Objections)* Judgment, *supra* note 26, at 322-325, and operative para.118(2) at 326; and the 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Judgment, *supra* note 63, paras 15, 18, 28-30, 226-238, 241, 243-245, 269, 277-278, 284, 291-292, 307, Declaration of Judge Herczegh, Separate Opinion of Judge *ad hoc* Mbaye, paras 132-136, Dissenting Opinion of Judge *ad hoc* Ajibola, para.172. Cf. Merrills, *supra* note 26, at 880-881; Ph.Weckel, Ordonnance du 21 octobre 1999, 104 RGDIP 248-250 (2000).

On dismissal of Philippines' Application for permission to intervene by the *Indonesia/Malaysia (Intervention)* Judgment, *ICJ Press Releases* No.2001/7, 15 March, Nos 2001/13 and 2001/18 of 22 May and 29 June, Nos 2001/26 and 2001/28 and 28bis of 19 and 23 October 2001, ICJ Reports 2001, 575, see Crook, The 2001 Judicial Activity, *supra* note 18, at 403-404; J.G. Merrills, 51 ICLQ 718-722 (2002); Ph. Weckel, 106 RGDIP 175-177 (2002).

On President Schwebel's longstanding appreciation of the right of third states to intervene, see remarks by Judge Peter H. Kooymans, Two Remarkable Men Have Left the International Court of Justice, 13 LJIL 341, 347-349 (2000) [<http://www.wkap.nl/oasis.htm/273987>]. For reliance on Judge Schwebel's *Tunisia/Libya (Intervention)* Separate Opinion, ICJ Reports 1981, 35-40, and *Libya/Malta (Intervention)* Dissenting Opinion, ICJ Reports 1984, 131-147, see 1984 *Libya/Malta (Intervention)* Separate Opinion of Judge *ad hoc* Jimenez de Arechaga, *supra*, at 64, para.28; *Gulf of Fonseca (Intervention)* Oral Hearings, C 4/CR 90/1, 28 [Agent Argüello, 5 June 1990], 34 [Counsel Brownlie], C 4/CR 90/5, 12 [Argüello, 8 June 1990]; 2001 *Indonesia/Malaysia (Intervention)* Dissenting Opinion of Judge Oda, para.7, Separate Opinion of Judge *ad hoc* Weeramantry, paras 19 and 27; 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Declaration of Judge Herczegh, *supra*.

⁸⁵ 1999 Award, para.44.

⁸⁶ *Id.* and para.12. See also para.149 (*supra* note 78) and paras 39 and 167 (*infra* note 88); 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).

On Saudi Arabia/Yemen Treaty of Jeddah of 12 June 2000, *UN Law of the Sea Bulletin* 64-67 (2002 No.49), establishing the entire maritime and land boundary stretching from the tripoint of

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.⁸⁷

3.1.6. 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.⁸⁸ 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 Yemen to Eritrea coastal lengths (measured by reference to their general direction) of 1:1.31 and the ratio of their water areas of 1:1.09.

the Yemeni-Omani-Saudi land boundaries in the east to the tripoint of the Yemeni-Eritrean-Saudi maritime boundary in the Red Sea, see A.H. Al-Enazy, "The International Boundary Treaty" (Treaty of Jeddah), 96 AJIL 161-173 (2002). For the Treaty's text and related maps and comments, see also Yemen Gateway [www.al-bab.com/yemen/pol/int.htm] and Yemen Rejects Saudi Wall of 2 February 2004 [www.arabicnews.com/ansub/Daily/Day/040202/200402 0212.html]. On interests of Saudi Arabia in regard of Bahrain and Qatar in the neighbouring Persian Gulf region, see 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, paras 221-222, 250 and Sketch-Map No.7.

⁸⁷1999 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 72. On Yemen's preliminary proposal, endorsed by Eritrea and Djibouti, to establish new and amended traffic separation schemes in the southern Red Sea within the framework of the 1982 UNEP Jeddah PERSGA Convention (*infra* note 118), see UN Doc.IMO NAV 46/16, at 8, 11 August 2000.

For reliance on these 1999 *Eritrea/Yemen* holdings in the 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Judgment, *supra* note 63, para.228; Oral Hearings, see CR 2002/21, 39 (Counsel Colson, 18 March), CR 2002/22, 47 (Counsel Mendelson, 19 March 2002), CR 2002/23, 19 (Counsel Abi-Saab) [http://www.icj-cij.org].

On interests of Djibouti in regard of the ending point (Point 41) of the eastern sector (1908 Treaty) of the Eritrea/Ethiopia boundary, see the 2002 UN *Eritrea/Ethiopia Boundary Decision*, *supra* note 21, paras 2.19 and 6.1-6.34, especially para.6.16.

⁸⁸1999 Award, paras 20, 39-43, 117 and 165-168 and jurisprudence quoted therein. Cf. Yoshifumi, *supra* note 18, at 449-452. See also 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, para.243; 2002 *Newfoundland and Labrador/Nova Scotia (Phase II)* Award, *supra* note 66, paras 1.28, 2.34, 4.11/24, 5.14/19; 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Judgment, *supra* note 63, paras 271-273, 278, 291 and 300-301.

3.1.7. 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".⁸⁹ 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.⁹⁰

⁸⁹1999 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. *supra* notes 69-70, 74 and *infra* notes 100, 107.

For reliance on these 1999 *Eritrea/Yemen* holdings, see the 2002 *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Judgment, *supra* note 63, para.304; Oral Hearings, CR 2002/7, 20 (Co-Agent Kamto, 26 February), CR 2002/9, 46 (Counsel Brownlie, 1 March), CR 2002/12, 64 (Counsel Crawford, 6 March), CR 2002/17, 23-24, 27-28 (Deputy Agent Pellet, 12 March), CR 2002/20, 56 (Crawford, 15 March 2002) [<http://www.icj-cij.org>]; 2002 *Newfoundland and Labrador/Nova Scotia (Phase II)* Award, *supra* note 66, paras 3.4/23 and 5.11; *Indonesia/Malaysia (Merits)* Oral Hearings, CR 2002/27, 24 (Agent Wirajuda, 3 June), CR 2002/29, 50, 59-63 (Counsel Pellet, 4 June), CR 2002/32, 33-34 (Counsel Crawford, 7 June), CR 2002/34, 34-36 (Pellet, 10 June 2002) [<http://www.icj-cij.org>]. Cf. 2002 *Indonesia/Malaysia (Merits)* Judgment, *supra* note 23, paras 31, 78-79, 123, 128, Declaration of Judge Oda, Dissenting Opinion of Judge *ad hoc* Franck, paras 20, 35.

⁹⁰1999 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; 2002 *Belize/Guatemala* OAS Facilitators' Proposals, *supra* note 38, B-para.9(c); Kwiatkowska, *supra* note 72, 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); and D.M. Ong, The New Timor Sea Arrangement 2001, 17 *IJMCL* 79-122 (2002), discussing these 1999 *Eritrea/Yemen* holdings at 90.

On the 1974 Saudi Arabia/Sudan Agreement, see *supra* note 86; 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).

3.2. 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,⁹¹ 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.⁹² This solution was devised in the 1998 Award in application of Islamic tradition of territorial sovereignty construed as distinct from the corresponding Western ideas,⁹³ and as antedating "the relatively modern, European-derived, concepts of exclusionary sovereignty".⁹⁴ 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.⁹⁵ Moreover, navigational and other rights have been pronounced upon by

⁹¹ See Statements of Eritrea and Yemen referred to *supra* notes 13-17.

⁹² 1998 Award, operative para.527(vi) and paras 525-526, referred to *supra* notes 58-60, as reaffirmed by the 1999 Award, paras 62-69 and 87-112 discussed *infra*.

⁹³ 1998 Award, para.525 (*supra* note 58), as reaffirmed by 1999 Award, paras 85, 92-95. Cf. A.S. El-Koshari, The Interrelation Between Worldwide Arbitral Culture and the Islamic Traditions (para.9), in *The Centennial of the First International Peace Conference 1899-1999* (2000), 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".

⁹⁴ 1999 Award, para.85. Cf. Statement of President Stephen M. Schwebel to the 54th UNGA, *supra* note 26, noting that the international legal order is no longer "Euro-centred". Cf. also UN Docs A/53/456, para.164 (1998), noting that by this solution the Tribunal "restricted the sovereignty over the groups of islands awarded to Yemen", and A/55/61, paras 258-264, esp. 262 (2000), both referred to *supra* note 1; *Indonesia/Malaysia (Merits)* Oral Hearings, CR 2002/27, 40 (Counsel Pellet, 3 June 2002) [<http://www.icj-cij.org>]; Distefano, *supra* note 61, at 272-284; S. Rosenne, The Perplexities of Modern International Law - General Course, 291 *Collected Courses* 44 (2001), noting that the role of the Islamic legal concepts was earlier exposed in the 1975 *Western Sahara* Advisory Opinion, *supra* note 36, at 41, paras 87-88, and that the Court came close thereto in the 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, para.236.

⁹⁵ See *supra* note 36; 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); Kwiatkowska, *Decisions of the World Court*, *supra* note 62, at 128-130.

the ICJ in the context of the respective territorial issues in the 1992 *El Salvador/Honduras; Nicaragua Intervening*, the 1999 *Botswana/Namibia Kasikili/Sedudu* and the 2001 *Qatar v. Bahrain (Merits)* Judgments as well as the 2002 UN *Eritrea/Ethiopia Boundary Decision* and *Belize/Guatemala OAS Facilitators' Proposals*.⁹⁶

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".⁹⁷ Consequently, Eritrea, which believed that "if this regime is to be perpetuated, the Parties must know what it is and where it holds sway in a technically precise manner", and which characterized this regime "as a sort of *servitude internationale* falling short of territorial sovereignty",⁹⁸ proposed fulfilment of that regime by means of "the joint resource area boxes" of the mid-sea disputed islands.⁹⁹ 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.¹⁰⁰ 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 had agreed upon arrangements to protect or preserve

On 2000 UK/France Agreement on Fisheries in the Bay of Granville, which superseded the 1951 Minquiers and Ecrehos Agreement, see J.-F. Dobelle, *Les accords franco-britanniques relatifs à la Baie de Granville du 4 juillet 2000*, 46 AFDI 524-547 (2000).

⁹⁶1992 *El Salvador/Honduras* Judgment, *supra* note 36, at 379, 590, 592-593, 605 and 616 (operative para.432(1)); 1993 UN *Iraq/Kuwait Boundary Report*, *supra* note 1, paras 96-97; 1999 *Botswana/Namibia* Judgment, *supra* note 23, paras 101-103; 2001 *Qatar v. Bahrain (Merits)* Judgment, *supra* note 18, para.223 and operative para.252(2)(b); 2002 UN *Eritrea/Ethiopia Boundary Decision*, *supra* note 21, para.7.3 *in fine*; 2002 *Belize/Guatemala OAS Facilitators' Proposals*, *supra* note 38, B-paras 1, 5, 8-10, 12, C, D and Annex A.

⁹⁷1999 Award, paras 3 and 89.

⁹⁸1999 Award, paras 27 and 38, citing 1998 Award, para.126 (*supra* note 58).

⁹⁹1999 Award, paras 27-28, 32-35 (*supra* note 68) and 89.

¹⁰⁰1999 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 111 and 116.

Eritrea's traditional rights in the waters around the mid-sea islands.¹⁰¹

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.¹⁰² 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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ 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

¹⁰¹ 1999 Award, para.30.

¹⁰² 1999 Award, paras 20, 27-38 (Chapter I), paras 47-74 (Chapter II) and paras 87-112 (Chapter IV).

¹⁰³ 1999 Award, paras 61 and 72.

¹⁰⁴ *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 128. 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 applied by the *Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 71-72, paras 75-76, criticized in Separate Opinion of Judge Schwebel, 118-120 (who was a Member of the *Gulf of Maine* Chamber), whose views were supported by the 2002 *Newfoundland and Labrador/Nova Scotia (Phase II)* Award, *supra* note 66, para.3.20 n.124. Cf. B. Kwiatkowska, *Equitable Maritime Boundary Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond*, 28 ODIL 91, 105-107 (1997); Rosenne, *General Course*, *supra* note 94, at 327-331.

¹⁰⁵ 1999 Award, paras 62-69 and 73-74.

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.¹⁰⁶

Whereas the Tribunal has received no evidence that the extraction of guano, or mineral extraction more generally, forms part of this traditional fishing regime that has existed and continues to exist today,¹⁰⁷ it found the specific findings on artisanal fishing - as not extending to large-scale industrial fishing, nor to fishing by nationals of third 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.¹⁰⁸

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 recognized "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.¹⁰⁹

¹⁰⁶1999 Award, para.103. See also 1998 Award, para.357, characterizing 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 104.

¹⁰⁷1999 Award, para.104 (*supra* note 89).

¹⁰⁸1999 Award, paras 105-106. On fisheries components of the United Nations Programme for Further Implementation of the Agenda 21 in the Years 1997-2002 and Beyond, including sectoral theme of Oceans and Seas, see UN General Assembly Resolutions 54/31 and 54/32 of 24 November 1999; *Reports of the UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, First Meeting, New York, 30 May-2 June 2000, Second Meeting, New York, 7-11 May 2001, Third Meeting, New York, 8-15 April 2002 and Fourth Meeting, New York, 2-6 June 2003*, UN Docs A/55/274 (2000), A/56/121 (2001) and A/57/80 (2002); UN Doc. A/55/61, *supra* note 1, at 24-28; and UN Doc. A/58/95 (2003); UN General Assembly Resolutions 55/7 and 55/8 of 30 October 2000, and 56/12 and 56/13 of 28 November 2001; Declaration and Plan of Implementation of the Johannesburg World Summit on Sustainable Development (WSSD) of 4 September 2002, paras 29(g) and 30(h) [<http://www.iisd.ca/wssd/portal.html>], UN Docs A/CONF.199/20 (2002) and UNGA Resolutions 57/141 and 57/253 (2002) and 58/218 (2003).

¹⁰⁹1999 Award, para.107.

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".¹¹⁰ 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.¹¹¹ 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.¹¹²

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.¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ In so far as

¹¹⁰ *Id.* On US protests against Yemen's navigational claims, see *supra* note 72.

¹¹¹ 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). For overview of all Eritrea's ports, see [<http://www.ports.com/>].

¹¹² 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".

¹¹³ 1999 Award, para.109.

¹¹⁴ 1999 Award, para.110.

¹¹⁵ 1999 Award, paras 108 and 111.

¹¹⁶ 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

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*.¹¹⁷ 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 (PERSGA Convention) and its Emergencies Protocol, which, however, were not ratified by Ethiopia, nor so far by Eritrea.¹¹⁸ 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.¹¹⁹

4. 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, including the 1982 UN Law of the Sea Convention as being generally declaratory of customary international law and as forming an inherent part of the United Nations Programme for Further Implementation of the UNCED Agenda 21 (Chapter 17) in the Years 1997-2002 and Beyond.¹²⁰ 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 strategically most sensitive regions of the world.¹²¹

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 exception of the internal waters). Cf. *supra* note 100; *infra* notes 129-131.

¹¹⁷ 1999 Award, para.108.

¹¹⁸ 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). See also *supra* note 87; *Yearbook of International Cooperation on Environment and Development 2003/2004* 181 (Fridtjof Nansen 1999); *Progress Report on UNEP Regional Seas Programme*, UN Doc. UNEP/GC.21/INF/6 (2000); *Oceans and the Law of the Sea - Report of the Secretary-General*, UN Doc. A/57/57, paras 112, 479-480 (2002) [www.un.org/Depts/los/]; and [<http://www.unep.ch/seas/>].

¹¹⁹ See Doc. IOPM 2/8, Appendix 6, Annex 1 (1998), and UN Doc. IMO FSI 8/12, para.6, 3 November 1999. For further information, see the IMO's website [<http://www.imo.org>]; E-mail: info@imo.org].

¹²⁰ See *supra* note 108.

¹²¹ 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 27, 72, 81, 83, 87, 109-110 and 113. On the subsequently established UN *Eritrea/Ethiopia* Boundary Commission, see *supra* notes 19-21.

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",¹²² and which relies on the relatively recent history of presence and display of governmental authority and other ways of showing possession. At the same time, the Award provides a valuable guidance for application of presumption of proximity, according to which islands and low-tide elevations within and beyond the territorial sea are under the same sovereignty as the mainland nearby, unless superior title can be established.

The 1999 *Eritrea/Yemen Maritime Delimitation* Award (Phase II) is a landmark decision substantiating the mutually reinforcing relationship¹²³ between the jurisprudence of the ICJ and that of arbitral tribunals concerning application and development of the modern law of equitable maritime boundary delimitation, which was rightly characterized by President Stephen M. Schwebel as being "more plastic than formed".¹²⁴ 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 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.¹²⁵ The 1999 Award substantiates the critical roles played

¹²²1998 Award, para.451.

¹²³See the main text accompanying *supra* note 8; Kwiatkowska, *supra* note 62, at 62; J.I. Charney, Is International Law Threatened by Multiple International Tribunals? 271 RCADI 104, 318-20 (1999); and *supra* note 26. For in-depth survey, based on President Schwebel's concept of an "intrinsic" authority of jurisprudence of the Court as the principal judicial organ of the United Nations, see Kwiatkowska, *Decisions of the World Court*, *supra* note 62.

¹²⁴*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 Schwebel, *supra* note 62, 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".

¹²⁵See *supra* note 66; 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*

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. The Tribunal's treatment of islands, islets, rocks and low-tide elevations confirms that their definition and entitlement granted or denied to these maritime features depend on the degree to which they distort an equidistant line and other factors (such as comparison of coastal lengths abutting on the claim area), rather than on their legal status *per se*.¹²⁶

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,¹²⁷ 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.¹²⁸

The fisheries factors were, moreover, taken by the Tribunal into a 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, provide an interesting evidence on practical implementation of the Islamic concept of territorial sovereignty.¹²⁹ Following conclusion of the 2001 Eritrea/Yemen Agreements for Cooperation in Air and Sea Transport (including investment and trade), Yemeni Minister of Justice Al-Sayyid Abdallah Qasim discussed with Eritrean Foreign Minister Ali Said Abdallah in Eritrea on 27 March 2002 ways of implementing these Agreements.¹³⁰ During Minister Qasim's preceding meeting that day with President of Eritrea, Isayas Afewerki, a message which was read from President of

Shelf Decision, paras 70 and 148.

¹²⁶Cf. 1999 Award, para.117. For rough categorization based on the predominant geographical factors, as relied upon in the extensive state practice and international jurisprudence, see D.W. Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in Charney and Alexander, *supra* note 6, Vol.I, at 131-147 (1993); P. Weil, *Les hauts-fonds découvrants dans la délimitation maritime*, in *Liber Amicorum Judge Shigeru Oda*, *supra* note 8, at 307-321; Palomar, *supra* note 18.

¹²⁷See *supra* note 90.

¹²⁸See the main text accompanying *supra* notes 104-105.

¹²⁹Cf. remarks of Weckel, *supra* note 23, at 243, on similarity of this *Eritrea/Yemen* approach to that adopted in the 1999 *Botswana/Namibia* Judgment, *supra* note 23; and the main text accompanying *supra* notes 93-96.

¹³⁰See Eritrea: President Isayas Receives Message from Yemeni Counterpart, BBC Monitoring Service, 29 March 2002 [<http://globalarchive.ft.com/globalarchive/article.html?id=020329004725&query=eritrea>].

Yemen, Ali Abdallah Saleh, and President Isayas' statement, both emphasized the need of further enhancing bilateral cooperation of their countries, including with a view to implement "the traditional fishing regime" in pursuance of the *Eritrea/Yemen* Awards. The subsequent visit of Eritrean Minister of Justice Fuzia Hashem to Yemen on 8-10 May 2002 reaffirmed the need of continuation of efforts to this effect, while in 2003 the land and maritime areas of Eritrea and Yemen - along with such areas of Djibouti, Ethiopia, Kenya, Somalia and Sudan - have been covered by the U.S. Combined Joint Task Force-Horn of Africa (CJTF-HOA) headquartered in Camp Lemonier (Djibouti).¹³¹

The two *Eritrea/Yemen* Awards have been of pronounced impact on the *Qatar v. Bahrain* (*Merits*) case, coupled with their positive influence on the peaceful resolution of the *Eritrea/Ethiopia* Boundary dispute,¹³² and are undoubtedly to continue to provide a valuable model for successful settlement of disputes in the two interlinked major areas of the acquisition of territorial sovereignty and maritime boundary delimitation in the future.¹³³

¹³¹See Eritrean Official Replies to False Report by Yemeni Paper, 15 April 2002 [<http://shaebia.org/wwwboard/messages/186.html>]; and Eritrea-Yemen Disagree over Red Sea Fishing, 13-19 May 2002 [<http://www.yementimes.com/02/iss20/In.htm>]. See also Yemen/Oman Maritime Boundary Treaty of 15 December 2003 [www.arabicnews.com/ansub/Daily/Day/031215/2003121538.html]. On Yemeni/U.S. relations, see *id.* and Yemen Gateway, *supra* note 1, at 3; on the use by Israel of the Eritrean ports of Massawa and Assab, see *The Jerusalem Report* of 8 April 2002 [http://dehai.org/archives/dehai_news_archive/0448.html]; U.S./Eritrea Military Ties of 4 July 2002 [www.irannews.org/report.asp?ReportID=28639&SelectRegion=Horn_of_Africa&SelectCountry=ERITREA]; Israel Expands Its Nuclear Threat, *Washington Report* of December 2003 [www.wrmea.com/archives/December_2003/0312012.html].

On the U.S. CJTF-HOA Counter-Terrorism Mission, see Defend America, 12 April 2003 [<http://defendamerica.gov/articles/apr2003/a041203b.html>]; *Mount Whitney* to Return June 13 [http://www.flagshipnews.com/current/jun122003_1.shtml]; CJTF-HOA Peacekeeping Operations, 13 August 2003 [http://www.dehai.org/archives/dehai_news_archive/0183.html]; Military Stalks Terrorists in Africa/HOA, *Washington Times* of 31 December 2003 [<http://washingtontimes.com/world/20031231-083517-2847r.htm>] and 14 January 2004 [<http://washingtontimes.com/world/20040114-083318-4723r.htm>] and [<http://washingtontimes.com/world/20040114-083320-4962r.htm>]; Eritrea/Yemen Talks of 15 January [www.shabait.com/articles/publish/article_1427.html]; Eritrea/Sudan Talks of 18 January 2004 [www.sudantribune.com/article.php3?id_article=1518]; Terrorism in the Horn of Africa, U.S. Institute of Peace, Special Report 113 [www.usip.org/pubs/specialreports/sr113.html]; current news of U.S. Marine Expeditionary Units (MEU) [<http://www.usmc.mil/>] and U.S. Department of State [<http://usinfo.state.gov/regional/af/>], [<http://www.state.gov/p/af/>] and [<http://www.whitehouse.gov/infocus/africa/>].

¹³²See *supra* notes 19-21, 23, 31, 87, 96, 121 and 129.

¹³³On guidance drawn from the *Eritrea/Yemen* Awards in Lauterpacht, Schwebel, Rosenne and Orrego Vicuna, *Joint Legal Opinion on Guatemala's Territorial Claim to Belize*, see *supra* notes 30, 31 and 44.