IN THE MATTER OF AN ARBITRATION
PURSUANT TO AN AGREEMENT TO ARBITRATE
DATED 3 OCTOBER 1996

B E T W E E N :

THE GOVERNMENT OF THE STATE OF ERITREA

-and-

THE GOVERNMENT OF THE REPUBLIC OF YEMEN

AWARD OF THE ARBITRAL TRIBUNAL IN THE SECOND STAGE OF THE PROCEEDINGS (MARITIME DELIMITATION)

The Arbitral Tribunal:

Professor Sir Robert Y. Jennings, President
Judge Stephen M. Schwebel
Dr. Ahmed Sadek El-Kosheri
Mr. Keith Highet
Judge Rosalyn Higgins

Representatives of the Government of the State of Eritrea:

His Excellency, Haile Weldensae, Agent
His Excellency, Haile Saleh Meky
Professor Lea Brilmayer and Mr. Jan Paulsson, Co-Agents

Representatives of the Government of the Republic of Yemen:

His Excellency, Dr. Abdulkarim Al-Eryani, Agent
His Excellency, Mr. Abdullah Ahmad Ghanim, Mr. Hussein Al-Hubaishi,
Mr. Abdulwahid Al-Zandani and Mr. Rodman R. Bundy, Co-Agents

AWARD

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INTRODUCTION – Proceedings in the Delimitation Stage of the Arbitration

1. This Award in the Second Stage of the Arbitration is rendered pursuant to an Arbitration Agreement dated 3 October 1996 (the "Arbitration Agreement"), between the Government of the State of Eritrea ("Eritrea") and the Government of the Republic of Yemen ("Yemen") (hereinafter "the Parties").

2. The Arbitration Agreement, which appears as Annex 1 on page 51, was preceded by an "Agreement on Principles" done at Paris on 21 May 1996, which was signed by Eritrea and Yemen and witnessed by the Governments of the French Republic, the Federal Democratic Republic of Ethiopia and the Arab Republic of Egypt. The Agreement on Principles provided that the Tribunal should decide questions of territorial sovereignty and to that end the Tribunal rendered an Award in the First Stage finding the sovereignty of the disputed islands in the Red Sea to belong either to Eritrea or to Yemen. (See Award in the First Stage, Chapter XI – Dispositif, paragraphs 527-528.)

3. In a correspondence concerning the Written Pleadings for the Second Stage, and including requests for an extension of the time allowed, a question was raised by Eritrea relating to the Traditional Fishing Regime and how it might be pleaded and argued in the Second Stage of the Arbitration. The President's reply was: "the Tribunal is of the view that it is for Eritrea itself to determine the contents of its written pleadings for that stage". This is referred to in Chapter IV below.

4. Pursuant to the time table set forth in the Arbitration Agreement, the Parties filed written Memorials in the Second Stage on 9 March 1999 and Counter-Memorials on 9 June 1999. On 25 May 1999, Mr. Tjaco van den Hout, Secretary-General of the Permanent Court of Arbitration, succeeded as Registrar Mr. Hans Jonkman, who had retired. Pursuant to Article 7(2) of the Arbitration Agreement, Ms. Phyllis Pieper Hamilton, First Secretary of the Permanent Court of Arbitration, served as Secretary to the Tribunal.

5. Prior to the Hearings in the Second Stage of the Arbitration, after consultation with the Parties, the Tribunal as contemplated by Article 7(4) of the Arbitration Agreement sought assistance with the calculations of the maritime boundaries and the technical preparation of the corresponding chart. On 8 July 1999, pursuant to Article 7(4) the Tribunal communicated an Order to the Parties designating Ms. Ieltje Anna Elema, geodetic engineer, Head of the Geodesy and Tides Department of the Hydrographic Service of the Royal Netherlands Navy, as its expert in geodesy.

6. Article 2 of the Arbitration Agreement provides that:

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

7. Pursuant to the time table set forth in the Arbitration Agreement for the various stages of the Arbitration, and with the consent of the Parties regarding the venue, the Oral Proceedings in the second stage of the Arbitration were held 5-16 July 1999 in the Great Hall of Justice in the Peace Palace in The Hague. By agreement between the Parties, Yemen began the Oral Proceedings.

8. The Tribunal's task was greatly facilitated by the excellence of the oral presentations on both sides.

9. During the Oral Arguments, pursuant to Article 8(3) of the Arbitration Agreement authorizing the Tribunal to request the Parties' written views on the elucidation of any aspect of the matters before the Tribunal, counsel were asked to respond to various questions. On 13 August 1999 the Parties submitted written responses to questions put to them by the Tribunal on 13 and 16 July. The Tribunal's questions and the answers provided by the Parties are set out in Annex 2 on page 61.

CHAPTER I – The Arguments of the Parties

Introduction

10. The purpose of the present Chapter is to summarise what the Tribunal understands to have been the main arguments of the Parties. For the Tribunal's reasons for acceptance or rejection or modification of those arguments, it may be necessary to turn to later Chapters. In this Chapter describing the arguments of the Parties, it will be convenient in general to follow the order agreed by them for the Oral Presentations and so put first the arguments of Yemen followed by the arguments of Eritrea.

11. It may be said at once that both Parties claimed a form of median international boundary line, although their respective claimed median lines follow very different courses and do not coincide. They do, however, follow similar courses in the narrow waters of the southernmost portion of the line. Eritrea's median line is equidistant between the mainland coasts, but its historic median line takes into account Eritrea's islands (but not the Yemen mid-sea islands); the Yemen line is equidistant between the Eritrean coast (including certain selected points on the Dahlak islands) and the coasts of all the Yemen islands. The Yemen line was plotted with WGS 84 coordinates of the turning points; the Eritrean line was not, although, in answer to a question from the Tribunal, the coordinates of the base points were provided. The rival claimed lines are reproduced on the Charts (Eritrea's Maps 3 and 7 and Yemen's Map 12.1) to be found in the map section at the back.

Yemen's Proposed Boundary Line

12. The Yemen claimed line was described in three sectors divided by lines of latitude: 16°N; 14°25 N; and 13°20 N. So there was (i) a northern sector between the Yemen islands of Jabal al-Tayr and the Jabal al-Zubayr group on the one hand, and the Eritrean Dahlak islands on the other; (ii) a central sector between the Zuqar-Hanish group of Yemen and the opposite mainland coast of Eritrea together with the Mohabbakahs, the Haycocks and South West Rocks; and (iii) a southern sector between the respective mainland coasts of Yemen and Eritrea south of the Zuqar-Hanish group. These sectors were fixed by the latitude of the controlling base points of the Yemen line. Thus, for instance, 14°25 N was the point on the line where the controlling base points changed from the points on the islet Centre Peak in the Zubayr group to the base points on the coast of Zuqar.

13. Yemen began its argument with the general understanding, as endorsed by the International Court of Justice in the *North Sea Continental Shelf* cases,[1] that a median line normally produces an equitable result when applied between opposite coasts. Therefore, argued Yemen, a major preliminary task for the Tribunal was to decide which were the coasts to be used as baselines.

14. In the northern sector, the proposed Yemen line assumed that the Dahlak islands, a closely knit group of some 350 islands and islets, the largest of them having a considerable population, should be recognised as being part of the Eritrean mainland coast and the waters within them as internal waters. It followed that the easternmost islets of that group might be used as base points of the median line. Yemen used the high water line as baseline on these islands.

15. Yemen proposed that the eastern base points of the line should be found on the low-water line of the western coast of the lone mid-sea island of Jabal al-Tayr and on the western coasts of the mid-sea group of Jabal al-Zubayr. Yemen argued that these islands should be used as base points because they were as important, or even more important, than the very small uninhabited outer islets of the Dahlak group. In this way, said Yemen, there would be a "balance" in the treatment of island base points on the west and the east coasts, arguing that in this northern area "each Party possesses islands of a comparable size, producing similar coastal facades lying at similar distances from their respective mainlands".

16. In the central sector the Yemen claimed line proceeded through the narrow waters between the Hanish group of islands and the Eritrean mainland coast. (This part of the boundary line area was called the "central" one by Yemen but sometimes called the "southern" one by Eritrea.) The Yemen line was a line of equidistance between the high-water line on the Eritrean mainland coast and the low-water line on the westernmost coasts of Yemen's Hanish Island group.

17. Yemen suggested that the "small Eritrean islets in between" the Eritrean mainland coast and the larger Yemen islands were inappropriate for a delimitation role. Thus, the computing and the drawing of Yemen's boundary line ignored both the South West Rocks and the three Haycocks (which had been found in the Award on Sovereignty to belong to Eritrea) as being no more than small rocks whose only importance was that they were navigational hazards. The Eritrean sovereignty over these islets was, however, recognised by placing them in limited enclaves.

[1] I.C.J. Reports 1969, p. 36, para. 57.

18. In Yemen's "southern sector", the line entered a narrow sea which had few islets and was relatively free from complicating mid-sea islands or islets, and the line became a simple median between the opposite mainland coasts. By using the islands of Fatuma, Derchos and Ras Mukwar as base points it did, however, recognise that the Bay of Assab was an area of Eritrean internal waters. Yemen added the comment that:

> This method of delimitation has been selected in order to accord the islands in the Southern Sector the same treatment as the islands in the Northern Islands Sector.

19. Summing up the three sectors, Yemen observed that, in accordance with the applicable legal principles, the appropriate delimitation would be achieved by a median line between the relevant coasts. There was no justification for any adjustment of this line on the basis of equitable principles. This median line delimitation between the relevant coasts was the only equitable solution compatible with the purpose of this arbitration.

20. Yemen also addressed other relevant factors. There was the factor of proportionality and this, together with Eritrea's argument under the same heading, is dealt with below. There was also discussion of certain "non-geographical relevant circumstances", the first one being "dependency of the fishing communities in Yemen upon Red Sea fishing". This is a matter upon which both Parties held strong and differing views, which are described and considered in Chapter II below.

21. The other of these relevant circumstances maintained by Yemen was "the element of security of the coastal State". This, according to Yemen, "connotes nothing more exciting than non-encroachment". It was chiefly in the narrow waters between the Hanish group of islands and the Eritrean coast that the question of security or non-encroachment arose. According to Yemen, this concern is automatically addressed by the application of the principle of equidistance which was intended to effect equality of treatment.

Eritrea's Proposed Boundary Line

22. Eritrea asserted that there was a legal flaw in the Yemen argument for its claimed line. This criticism illuminated some of the basic ideas underlying Eritrea's own claimed line.

23. Eritrea pointed with some insistence to what it regarded as a fundamental contradiction in the Yemen argument. In the northern part of the line, where the question of the influence upon it of the northern mid-sea islands arose, the

maritime boundary was between the respective continental shelves and exclusive economic zones (hereinafter EEZ). These two boundaries, of continental shelf and of EEZ, are governed by Articles 74 and 83 of the United Nations Convention on the Law of the Sea. In neither of these two articles is there even a mention of equidistance; there is, however, a clear requirement that a delimitation of these areas should "achieve an equitable solution". Nevertheless, for these very areas, Yemen insisted upon an equidistance line having included as base points for it the coasts of its small northern mid-sea islets.

24. In contrast, Eritrea contended in oral argument that, in the narrow seas between the Hanish group of islands and the Eritrean mainland coast, there was an area involving distances less than 24 miles[2] and which was therefore all territorial sea to which Article 15 of the Convention "is going to be most directly applicable in the more southern reaches of the delimitation area in question, the area round the Zuqar and Hanish Islands. The reason for that, of course, is that the distances there are smaller. What that means is that in the area around the Zuqar and Hanish islands there is a basic rule of equidistance."

25. This would favour a median line that takes full account of South West Rocks and the Haycocks, which in the Award on Sovereignty were found to belong to Eritrea. Applying Article 15, moreover, there could be no question of enclaves of these islands.

26. Eritrea also objected that Yemen's proposed enclaves would in practice mean that there was no access corridor for Eritrea through the surrounding Yemen territorial sea. Thus, both the Eritrean South West Rocks and the Haycocks would be "completely isolated". Eritrea objected to the enclave solution because Eritrea claimed this would have put the western main shipping channel, "between the Haycock Island and South West Rocks", into Yemen territorial waters while the eastern main channel, which goes east of Zuqar, was already in undisputed Yemen territorial waters. Thus, Yemen's proposal would result in "inclusion of both of the main shipping channels within what would be Yemen's territorial waters if Yemen's proposed delimitation were accepted".

27. Eritrea's own proposed solution of the delimitation problem was in two parts. There was the proposed international boundary, and there was the proposal for certain delimited "boxes" of the mid-sea islands, the purpose of which was to delimit the areas which Eritrea claimed to be "joint resource areas". This delimitation of "the shared maritime zones around the islands" was distinguished from recognition of "the exclusive waters of Yemen, to the east, and the exclusive

[2] Throughout this Award the use of "miles" refers to nautical miles.

waters of Eritrea, to the west". These ideas represented Eritrea's understanding of what in its view was meant by the reservation in the Award on Sovereignty of the traditional fishing regime, and what was needed to ensure the fulfilment of that regime. Of this Eritrea said, "if this regime is to be perpetuated, the Parties must know what it is and where it holds sway in a technically precise manner".

28. It is to be noted that the "exclusive" Eritrean waters on the west included not merely the territorial sea but also all the waters west of the mid-sea islands and west of the historic median line. These two Eritrean proposals – the two versions of the median line and the joint resource area boxes – belonged together because they were both essential parts of the Eritrean proposal as a whole. Thus, Eritrea's "historic median line" was – although with some variations to be noted later – one drawn as a median between the mainland coasts and ignoring the existence of the mid-sea islands of Yemen, but taking into account the islands of Eritrea. (There are precedents for this kind of boundary line in the petroleum agreements discussed in Chapter III.) Eritrea's "resource box system" provided the essential elements of a complex solution for the problem of these islands. The boxes were offered in a variety of shapes and sizes (see Eritrea's Maps 4 and 7). These "joint resource boxes" seem to have been advanced by Eritrea as a flexible set of suggestions. Its main concern was the reasonable one that it wanted to be able to tell its fishermen precisely where they might fish.

29. The coupling in the Eritrean pleadings of the two questions – the nature of the traditional fishing regime and the delimitation of the international boundary – is in contradistinction to Yemen's arguments. Yemen had expressed the view that "the traditional fishing regime should not have any impact on the delimitation of the maritime boundaries between the two Parties in the Second Stage". Yemen, in answer to a question from the Tribunal, also expressed the view that "Article 13, paragraph 3 of the Arbitration Agreement (see Annex 1) and the framework created by the 1994 and 1998 Agreements obviated any need further to take into account the traditional fishing regime in the delimitation of the maritime boundary". (The two Agreements of 1994 and 1998 are reproduced in Annex 3 to this Award.)

30. Eritrea replied to this letter from Yemen on 24 August saying that:

> Yemen's submission conveys the impression that the two States have conducted discussions since October 1998 which have resulted in arrangements for the implementation of Eritrea's traditional rights. No such discussions have taken place on this subject and no arrangements have been made to protect or preserve Eritrea's traditional rights in the waters around the mid-sea islands.

Arguments about Historic Rights and Sovereignty

31. Sovereignty over the disputed islands was the subject of the First Stage of this Arbitration. The Arbitration Agreement enjoins the Tribunal in this Second Stage to take into account "the opinion it will have formed on questions of territorial sovereignty". It is not surprising, therefore, that both Parties raised some interesting questions in this Second Stage about the nature of sovereignty and its relation to the question of delimitation and, not least, to the question of the traditional fishing regime.

32. Eritrea was moved to return to the history of the formerly disputed islands and especially to the period of Italian influence and presence. From these and some other considerations was precipitated the view urged upon the Tribunal that Yemen's "recently acquired" sovereignty over islands made them of less importance as factors to be taken into consideration for the purposes of the delimitation. This approach was expressed in these words:

> Eritrea also considers that the [mid-sea] islands come within the category of small uninhabited islands of recently acquired sovereignty and near the median line that should be recognised by the Tribunal to possess diminished maritime zones.

33. The Eritrean Prayer for Relief took this idea even further when it said in Article 4 that:

> The outer borders of the maritime zones of the islands in which these shared rights exist shall be defined as extending:
> A. on the western side of the Red Sea, to the median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this arbitration in accordance with Article 121 of the United Nations Convention on the Law of the Sea; and
> B. on the eastern side of the Red Sea, as far as the twelve mile limit of Yemen's territorial sea.

34. Continuing the same theme Article 5 of the Prayer for Relief provided:

> 5. The waters beyond the shared area of the mid-sea islands shall be divided in accordance with a median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this Arbitration in accordance with Article 121 of the United Nations Convention on the Law of the Sea.

35. Eritrea felt, therefore, able to urge that "Eritrea possesses historic title to all waters to the west of the historic median line, drawn by reference to the historically owned islands". This idea, it will be noted, yielded a rather different historic median line from the one drawn between the mainland coasts.

36. Yemen's reply was that Yemen's title to the formerly disputed islands was not created by the adjudication in the Award on Sovereignty, but that the adjudication was rather a confirmation of an already existing title; and, that "in arbitrations the issue of title is determined both prospectively and retroactively". These considerations led to some discussion of the effect of a critical date.

37. Yemen was also concerned that Eritrea's proposed joint resource zones were founded upon a supposition that the sovereignty awarded to Yemen in the First Stage was a sovereignty "only limited or conditional". This seems to be partly a war of words. All sovereignty is "limited" by international law. Eritrea can hardly be suggesting that Yemen's sovereignty over the islands is "conditional" in the legal sense according to which failure to observe the condition might act as a cesser of the sovereignty.

38. Eritrea, however, responded by pointing to paragraph 126 of the Award on Sovereignty which speaks of the traditional fishing regime as having, by historical consolidation, established rights for both Parties "as a sort of *'servitude internationale'* falling short of territorial sovereignty". Other aspects of these arguments are discussed in Chapter IV below.

Proportionality

39. This factor was argued strenuously and ingeniously by both Parties. Both relied upon the statement in the *North Sea* cases that a delimitation should take into account "a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline".[3] Both were in agreement with the warning in the *Anglo-French Arbitration* case[4] that this is a test of equitableness and not a method of delimitation, and that what had to be avoided was a manifest disproportionality resulting from the line selected. So there was little between the Parties as to principle but there was strong disagreement about the measurement of the length of their respective coasts and

[3] I.C.J. Reports 1969, p. 57, para. 101.

[4] 18 ILM 60; 54 ILR 6.

the significance of that measurement when it was made. The measurement is a matter on which several views are possible when Eritrea's coast extends also to be opposite to Yemen's neighbouring State, the Kingdom of Saudi Arabia; with which the maritime boundary remains undelimited.

40. The Yemen position was that proportionality is a factor to be taken into account in testing the equitableness of a delimitation already effected by other means. In relation in particular to the line to be drawn in the central sector, Yemen suggested that the relative lengths of the coasts overall were not significant because (i) in the restricted seas between the Yemen islands and the Eritrean coast any modifications of the median line would involve the principle of non-encroachment; (ii) further, in the central sector, given the general configuration of the coasts, equal division alone guarantees an equitable result; (iii) equal division is reinforced by the principle of non-encroachment; (iv) the relevant coasts for this delimitation are the Eritrean coast and the Yemen islands; (v) State practice supported the median line; and (vi) proportionality cannot be applied in the context of overlapping territorial sea.

41. The Eritrean reply to this was to question whether the Yemen claimed line in the central sector really was the median line envisaged in Article 15 of the Convention; and Eritrea suggested that it was not so, because it ignored the low-water line base points of the Eritrean islands of South West Rocks and the Haycocks.

42. It is not possible here to describe the many variations to be found in the pleadings on the theme of the method of measurements to be employed, or the discussions of the ambiguities of "oppositeness", although the Tribunal has examined them all. Suffice it to say that whereas Yemen calculated that its own claimed line neatly divided the sea areas into almost equal areas, which according to Yemen's measurements of the length of the coasts was the correct proportion, Eritrea found, in a final choice of one of its several different methods of calculation, that its own historic median line between the mainland coasts would produce respective areas favouring Eritrea by a proportion of 3 to 2, which again was said to reflect accurately the proportion of the lengths of coast according to Eritrea's method of measuring them.

43. It should be mentioned that Eritrea was particularly concerned that, in calculating the areas resulting from the delimitation, account should not be taken of the internal waters within the Dahlaks or the bays along its coast, including the Bay of Assab.

The Northern and Southern Extremities of the Boundary Line

44. There also arose a question about where to stop the boundary at its northern and southern ends, considering that in these areas it might prejudice other boundary disputes with neighbouring countries. The Kingdom of Saudi Arabia indeed had written to the Registrar of the Tribunal on 31 August 1997 pointing out that its boundaries with Yemen were disputed, reserving its position, and suggesting 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 island". Yemen for its part wished the determination to extend to the latitude of 16°N, which is the limit of its so-called northern sector. Eritrea on the other hand stated that it had "no objection" to the Saudi Arabian proposal.

45. At the southern end, the third States concerned have not made representations to the Tribunal, but the matter will nevertheless have to be determined. Eritrea was most concerned here about the arrow with which Yemen terminated its claimed line, as this arrow, according to Eritrea, pointed in such a direction as to "slash" the main shipping channel and cause it to be in Yemen territorial waters. Yemen had also used an arrow to terminate the northern end of its line and there was some discussion and debate from both sides about the propriety or otherwise of these arrows.

46. At the southern end of the line, as it approaches the Bab-al-Mandab, there is the complication of the possible effect upon the course of the boundary line of the Island of Perim. This question might clearly involve the views of Djibouti. It follows that the Tribunal's line should stop short of the place where any influence upon it of Perim Island would begin to take effect. The Tribunal has taken into consideration these positions variously expressed and has reached its own conclusions, as more fully detailed in Chapter V below.

* % * % *

The submissions of Yemen and the Prayer for Relief of Eritrea appear below.

Submissions of Yemen

On the basis of the facts and legal considerations presented in Yemen's pleadings; and

Rejecting all contrary submissions presented in Eritrea's "Prayer for Relief", and

In view of the provisions of Article 2(3) of the Arbitration Agreement;

The Republic of Yemen, respectfully requests the Tribunal to adjudge and declare:

1. That the maritime boundary between the Parties is a median line, every point of which is equidistant from the relevant base points on the coasts of the Parties as identified in Chapters 8 through 10 of Yemen's Memorial, appropriate account being taken to the islets and rocks comprising South West Rocks, the Haycocks and the Mohabbakahs;

2. That the course of the delimitation, including the coordinates of the turning points on the boundary line established on the basis of the World Geodetic System 1984 (WGS 84), are those that appear in Chapter 12 to Yemen's Memorial.

Eritrea's Prayer for Relief

(Paragraph 274, Memorial of the State of Eritrea)

Article 2, paragraph 3, of the Arbitration Agreement requires the Tribunal to issue an award delimiting the maritime boundaries between the Parties in a technically precise manner. In order that such precision shall be achieved, the State of Eritrea respectfully requests the Tribunal to render an award providing as follows:

1. The Eritrean people's historic use of resources in the mid-sea islands includes fishing, trading, shell and pearl diving, guano and mineral extraction, and all associated activities on land including drying fish, drawing water, religious and burial practices, and building and occupying shelters for sleep and refuge;

2. The right to such usage, to be shared with the Republic of Yemen, extends to all of the land areas and maritime zones of the mid-sea islands;

3. The right to such usage shall be preserved intact in perpetuity, as it has existed in the past, without interference through the imposition of new regulations, burdens, curtailments or any other infringements or limitations of any kind whatsoever, except those agreed upon by Eritrea and Yemen as expressed in a written agreement between them;

4. The outer borders of the maritime zones of the islands in which these shared rights exist shall be defined as extending:

A. on the western side of the Red Sea, to the median line drawn between the two coasts, which shall include the islands historically owned by either State prior to the decade preceding commencement of this arbitration in accordance with Article 121 of the United Nations Convention on the Law of the Sea; and

B. on the eastern side of the Red Sea, as far as the twelve mile limit of Yemen's territorial sea.

5. The waters beyond the shared area of the mid-sea islands shall be divided in accordance with a median line drawn between two coasts, which shall include the islands historically owned by either State prior to the decade

preceding commencement of this Arbitration in accordance with Article 121 of the United Nations Convention on the Law of the Sea;

6. The two Parties are directed to negotiate the modalities for shared usage of the mid-sea islands and their waters in accordance with the following terms:

   A. Immediately following the Tribunal's rendering of an award in the second Phase, the Parties shall commence negotiations, in good faith, with a view toward concluding an agreement describing the ways in which nationals of both Parties may use the resources of the mid-sea islands and their maritime zones, as those zones are described in the Award of the Tribunal, and detailing a mechanism of binding dispute resolution to settle any and all disputes arising out of the interpretation or application of the agreement;

   B. The Parties shall submit this agreement to the Tribunal for its review and approval no later than six months after the date the Tribunal renders its award in the second Phase;

   C. The Tribunal shall determine whether the agreement is in accord with its award in the second Phase, and in particular whether it faithfully preserves the traditional rights of the two Parties to usage of the resources of the mid-sea islands;

   D. If the Tribunal determines that the agreement is not satisfactory according to the criteria described in the preceding paragraph, or if the Parties fail to submit an agreement, the Tribunal shall issue an award that either describes such modalities or else appoints the water between the two Parties equally. The Tribunal may request submissions from the Parties on this point.

   E. If the Tribunal finds that the agreement (or a revised agreement) is satisfactory, according to the criteria set forth above, it shall communicate its approval to the Parties, endorse the agreement as its own award and further direct the Parties to execute the agreement in the form of a binding treaty to be deposited with the Secretary-General of the United Nations;

7. The Tribunal shall remain seized of the dispute between the Parties until such time as the agreement regarding shared usage of the mid-sea islands

has been received for deposit by the Secretary-General of the United Nations.

CHAPTER II – The General Question of Fishing in the Red Sea

47. This chapter will first deal with the evidence and arguments advanced by the Parties concerning the general question of fishing in the Red Sea. It will then set forth the Tribunal's conclusions on these arguments and evidence.

The Evidence and Arguments of the Parties

48. Each Party made much of fishing, including both the past history and the present situation, and as related not only to its own nationals but also the practices of the nationals of the other Party. The evidence advanced by the Parties and the arguments made by them can essentially be broken down into five subjects. These are: (1) fishing in general; (2) the location of fishing areas; (3) the economic dependency of the Parties on fishing; (4) consumption of fish by the populations of the Parties; and (5) the effect of fishing practices on the lines of delimitation proposed by the Parties.

49. The arguments of each Party were advanced essentially in order to demonstrate that the delimitation line proposed by that Party would not alter the existing situation and historical practices, that it would not have a catastrophic effect on local fishermen or on the local or national economy of the other Party or a negative effect on the regional diet of the population of the other Party and, conversely, that the delimitation line proposed by the other Party would indeed alter the existing situation and historical practice, would have a catastrophic or at least a severely adverse effect on the local fishermen or on the first Party's regional economy, and would also have a negative effect on the diet of the population of the first Party.

50. These elements were introduced directly and indirectly by each side against the general background of the "catastrophic" and "long usage" tests originated in the *Anglo-Norwegian Fisheries Case* of 1951 – and as brought forward in the provisions *inter alia* of Article 7, paragraph 5 of the 1982 United Nations Convention on the Law of the Sea.

51. They also found an echo in the "equitable solution" called for by paragraph 1 of Articles 74 and 83 of the Convention, it being assumed that no "solution" could be equitable which would be inconsistent with long usage, which would present a clear and present danger of a catastrophic result on the local economy of one of the Parties, or which would fail to take into account the need to minimise detrimental effects on fishing communities, and the economic dislocation, of States whose nationals have habitually fished in the relevant area.

Fishing in General

52. The position taken by Eritrea was as follows. The historical record demonstrated that the Eritrean fishing industry was substantial before the civil war in Ethiopia and had been, second only to Egypt, the most important regional fishing economy. Since the end of the civil war and independence, serious efforts were underway to reestablish the Eritrean fishing economy. It was, therefore, a mistake to consider that the Eritrean fisheries were – as Yemen argued – to a large extent dependent on Eritrean freshwater fisheries; in fact these have had no importance. On the other hand, the Yemen fishing industry was substantially based on its Indian Ocean fisheries and did not rely significantly on the Red Sea. Although Yemen's fishing industry in the Red Sea is much less significant than Yemen has claimed, it is nonetheless well established and in no event dependent for protection on the particular delimitation line proposed by Yemen.

53. Yemen argued that Yemeni nationals have long dominated fishing activities in the Red Sea; the Yemen traditional fishing activities – conducted in small boats, whether *sambouks* or *houris* – had been of much greater significance in the past than those of Eritrea, whose fishing activities had largely been concentrated on fishing close inshore along the Eritrean coastline and in and among the Dahlaks. Moreover, Hodeidah in Yemen was the most active market for fisheries production from Eritrean and Yemeni fishermen alike.

Economic Dependency on Fishing

54. The position of Eritrea was that considerable efforts had been made since the close of the war to reorganise and build up the Eritrean fishing industry – including efforts sponsored by the UNDP and FAO – and that the prospects for significant future development of the Eritrean fisheries were both promising and important. Although Eritrea did not claim present economic dependency on fishing, it did make the point that the existing fisheries practices of its nationals should not be restricted or curtailed by the delimitation to be decided by the Tribunal. As to Yemen, Eritrea asserted not only that the Yemen's Red Sea fisheries presence was far less important than Yemen had claimed, but also that most fish landed in Hodeidah were brought there by Eritrean fishermen.

55. On the other hand, Yemen argued that its fishermen have always depended on the Red Sea fisheries as their fishing grounds and that this fishing activity had long constituted an important part of Yemen's overall national economy and been a dominant part of the regional economy of the Tihama region along the Red Sea coast. Yemen claimed that Eritrea had no basis for arguing that it possessed any substantial dependency on fishing, fisheries, fish, or fish consumption, and that most of Eritrea's concerns as manifested by documentary evidence submitted to

the Tribunal in both Stages of the Arbitration had concerned proposals and projects for the development of future fishing activity and fisheries resources of Eritrea that did not now exist or were not now utilised.

Location of Fishing Areas

56. The arguments of Eritrea were to the following effect: at present, fishing in the Red Sea was by and large dominated by Eritrean artisanal fishermen who caught their fish around the Dahlaks, along the Eritrean coast, around the Mohabbakahs, the Haycocks, and South West Rocks, and in the waters around the Zuqar-Hanish group of "mid-sea islands". (As noted above, Eritrea denied that any part of its fish catch depended on inland Eritrean fisheries such as in lakes and reservoirs.) As to Yemen, Eritrea claimed that Yemeni fishermen had hardly, if at all, relied on the deep-water fishing grounds to the west of the mid-sea islands and around the Mohabbakahs, the Haycocks, and South West Rocks; there was little evidence of any Yemeni nationals' activity west of the Zuqar-Hanish group; and Yemen had failed to prove that a single gram of fish consumed in Yemen was taken from those waters.

57. For its part, Yemen argued that its artisanal and traditional fishermen had long fished in the waters around Jabal al-Tayr and the Zubayr group, in the waters around the Zuqar-Hanish group, and in the deep waters west of Greater Hanish and around the Mohabbakahs, the Haycocks, and South West Rocks. Supporting these assertions was evidence produced in the form of witness statements in the First Stage of the Arbitration in which individual Yemeni fishermen indicated that they had fished in the waters in question for a long time. As to the other Party, Yemen again asserted that Eritrea's fishing activities were confined to waters of the Dahlak archipelago and the inshore waters along the Eritrean coast and did not to any substantial extent impinge on waters surrounding the islands at issue in the First Stage of the Arbitration – including the deep waters west of Greater Hanish and around the Mohabbakahs, the Haycocks, and South West Rocks.

Consumption of Fish by the Population

58. Eritrea argued that the Eritrean coastal population consumed far more fish than Yemen claimed and that, in addition, efforts were taking place to increase the popularity and availability of fresh fish for human consumption by its general population. It further asserted that the Yemeni population's dependence on fresh fish from the Red Sea as a food source had been greatly exaggerated by Yemen's pleadings, and that the Yemeni population of the Tihama – and *a fortiori* the population of Yemen as a whole – did not rely to any significant extent on fresh fish as a food. For its part, Yemen maintained that its population, particularly in

the coastal areas such as the Tihama, consumed substantial quantities of fish and that – by contrast – Eritrean fish consumption was negligible.

Effect on Lines of Delimitation Proposed by the Parties

59. The Eritrean position was that the Tribunal's indication of a line of delimitation such as the "historic median line" suggested by Eritrea would respect the historic practice of the Parties, would not displace or adversely affect Yemen's fishing activity, and would be an equitable result for both Parties. In Eritrea's view, however, the Yemen proposed "median line" would deprive Eritrean fishermen of valuable fishery areas east of the mid-sea islands, and would award to Yemen areas to the west of the mid-sea islands and around the Mohabbakahs, the Haycocks, and South West Rocks – where Eritrean fishermen had long been plying their trade and where Yemeni nationals had never engaged in substantial fisheries activity. To that extent Eritrea argued that the proposed Yemen delimitation line would be inequitable and would deprive Eritrean fishermen of an important resource.

60. On the other side, Yemen maintained that the median line proposed by it would correctly reflect historical practices, would not give Yemen anything it did not have before, would respect existing rights, would not "penalise" existing or past Eritrean fishing activity, and would constitute an equitable result. As far as the Eritrean proposed "historic median line" was concerned, it would encroach on Yemen's traditional fishing grounds without justification, would deprive Yemeni fishermen of deep water fisheries west of the mid-sea islands, and would give a corresponding windfall to Eritrea.

* % * % *

The Tribunal's Conclusions on the Evidence

61. The purposes of the arguments and evidence of the Parties were several, but were essentially directed to establishing that the delimitation advanced by each Party would respect existing historical practices, would not have a catastrophic effect on local fishermen or population, would not have a generally negative effect on the economy (or future plans) of the other Party, and would not have a deleterious effect on the diet and health of the population of the other Party. By the same token, each Party asserted or implied that the line of delimitation advanced by the other would have precisely the converse effect. The evidence advanced by the Parties has to a very large extent been contradictory and confusing.

On the basis of the arguments and evidence advanced before it the Tribunal reaches the following conclusions.

As to Fishing in General

62. Fishing in general is an important activity for both sides of the Red Sea coast. This was recognised in the Award on Sovereignty of the Tribunal. It is not necessary and probably misleading to seek to determine the precise extent of its importance at any particular time, but the plain fact appears to be that – as the Tribunal stated in paragraph 526 of its Award on Sovereignty – "the traditional fishing regime in the region . . . has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group".

63. Moreover, the whole point of the Tribunal's holding in paragraph vi of its Dispositif in the Award on Sovereignty – that this traditional fishing regime shall be perpetuated so as to include "free access and enjoyment for the fishermen of both Eritrea and Yemen" – is 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. It thus suffices to say that fishing, fishermen, and fisheries are, and remain, of importance to each Party in the present case. Precisely because of this significance of paragraph 526 of the Award on Sovereignty and paragraph vi of its Dispositif, the fishing practices of the Parties from time to time are not germane to the task of arriving at a line of delimitation.

As to Economic Dependency on Fishing

64. It is not possible or necessary for the Tribunal to reach a conclusion that either Eritrea or Yemen is economically dependent on fishing to such an extent as to suggest any particular line of delimitation. The evidence before the Tribunal suggests that fishing activity and income appear to form an important part of Yemen's economic activity – particularly of the Tihama region – and that revitalisation and development of the Eritrean fishing industry is a priority objective of the Government of Eritrea and has received significant attention since Eritrean independence.

As to Location of Fishing Areas

65. The evidence advanced in both Stages of the Arbitration included evidence that many fishermen from Eritrea tended largely to fish in and around the Dahlak archipelago and on inshore waters along the Eritrean coastline, but it also appears that some Eritrean fishermen used the waters in and around the Hanish and Zuqar Islands as well as the deep waters to the west of the mid-sea islands and around

the Mohabbakahs, the Haycocks, and South West Rocks. This conclusion was adumbrated by the Tribunal's concern for maintenance of the traditional fishing regime "in the region" as a whole, "including free access and enjoyment for the fishermen of both Eritrea and Yemen" (Award on Sovereignty, Dispositif, paragraph 527, subparagraph vi).

66. There is abundant historical data indicating that fishermen from both the eastern and western coasts of the Red Sea freely undertook activities, including fishing and selling their catch on the local markets, regardless of their national political affiliation or their place of habitual domicile.[5]

67. This information concerning the social and economic conditions affecting the lives of the people on both sides of the Red Sea also reflects deeply-rooted and common social and legal traditions that had prevailed for centuries among these populations, each of which was under the direct or indirect rule of the Ottoman Empire until the latter part of the XIXth Century.

68. The evidence before the Tribunal further appears to establish that over the years Yemeni fishermen have operated as far north as the Dahlak archipelago and Jabal al-Tayr and the Zubayr group, and as far west as the Mohabbakahs, the Haycocks, and South West Rocks. Again, this conclusion is implicit in the Tribunal's concern for maintenance of the traditional fishing regime "in the *region*" as a whole.

69. On a subject not unrelated to fishing areas, it should be noted that the evidence is quite clear that Eritrean fishermen as well as Yemeni also appear to have enjoyed free and open access to the major fish market at Hodeidah on the Yemen side of the Red Sea without impediment by reason of their nationality. (This element was again taken into account by the Tribunal in its Award on Sovereignty, Dispositif, paragraph 527, subparagraph vi.)

As to Consumption of Fish by the Population

70. The evidence concerning fish consumption advanced by each Party was presumably aimed at establishing that the Tribunal's adoption of the line of delimitation proposed by the other Party would constitute a serious dietary or health threat to the population of the first Party. However, the evidence on this matter is conflicting and uncertain. It is difficult if not impossible to draw any

[5] See footnotes 9 and 11 to paragraphs 121 and 128 respectively of the Award on Sovereignty.

generalised conclusions from the welter of alleged facts advanced by the Parties in this connection.

71. The Tribunal can readily conclude, without having to weigh intangible and elusive points of proof or without having to indulge in nice calculations of nutritional theory, that fish as a present and future potential resource is important for the general and local populations of each Party on each side of the Red Sea. The Tribunal can also conclude, as a matter of common sense and judicial notice, that interest in and development of fish as a food source is an important and meritorious objective. Based on these two conclusions, however, the Tribunal can find no significant reason on these grounds for accepting – or rejecting – the arguments of either Party as to the *line of delimitation* proposed by itself or by the other Party.

Concerning the Effect on Lines of Delimitation Proposed by the Parties

72. Based on the foregoing, the Tribunal finds no significant reason on any other grounds concerning fishing – whether related to the historical practice of fishing in general, to matters of asserted economic dependency 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 line of delimitation proposed by itself or by the other Party. 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.[6]

73. For these reasons, it is not possible for the Tribunal to accept or reject the line of delimitation proposed by either Party on fisheries grounds. Nor can the Tribunal find any relevant effect on the legal reasons supporting its own selection of a delimitation line arising from its consideration of the general past fishing practice of either Party or the potential deprivation of fishing areas or access to fishing resources, or arising from nutritional or other grounds.

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[6] *Cf.* Article 70, paragraph 5 of the United Nations Convention on the Law of the Sea: "Developed geographically disadvantaged States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same sub-region or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone."

* % * % *

74. For the above reasons, the evidence and arguments advanced by the Parties in the matter of fishing and fisheries could have no significant effect on the Tribunal's determination of the delimitation that would be appropriate under international law in order to produce an equitable solution between the Parties.

CHAPTER III – Petroleum Agreements and Median Lines

75. In the matter of the pertinence and probative force for this Stage of the proceedings of petroleum contracts and concessions entered into by Yemen and by Ethiopia or Eritrea, the Parties exhibited a reversal of roles.

76. In the First Stage, Yemen laid great weight on oil contracts and concessions concluded by it. It introduced into evidence a number of such oil agreements and maps illustrating them, many of which were prepared by Petroconsultants S.A. of Geneva. Since some of these arrangements embodied western boundaries to the east of which lay some of the islands in dispute, Yemen argued that these arrangements demonstrated that both Yemen and the contracting oil companies were of the view that Yemen enjoyed sovereignty over those disputed islands. It contended that, where a State enters into a concession covering a specified area, it holds itself out as having sovereignty over that area; and that, where a foreign oil company enters into that concession, and expends resources in pursuance of it, it does so because it accepts and acts in reliance upon the sovereignty of that State. Yemen emphasised that not only were some of its petroleum contracts of a geographical extent that encompassed the disputed islands; it was also significant, it claimed, that none of the oil contracts and concessions concluded by Ethiopia or Eritrea did so. As the Award on Sovereignty summarised: "Yemen contended that the pattern of Yemen's offshore concessions, unprotested by Ethiopia and Eritrea, taken together with the pattern of Ethiopian concessions, confirmed Yemen's sovereign claims to the disputed Islands, acceptance of and investment on the basis of that sovereignty by oil companies, and acquiescence by Ethiopia and Eritrea." (paragraph 390.)

77. In the First Stage, Eritrea in contrast argued that conclusion by a State of an oil contract or concession with a foreign oil company was not evidence of title but, at most, a mere claim. Such arrangements lacked probative force unless activities in pursuance of them took place. Nevertheless Eritrea countered Yemen's argument by introducing evidence of a concession concluded by Ethiopia which covered part or all of Greater and Lesser Hanish Islands. Neither Eritrea nor Yemen attached importance to the fact that a number of the petroleum arrangements concluded by Yemen and Ethiopia or Eritrea extended to a median line between their respective coastlines.

78. In its Award on Sovereignty, the Tribunal concluded:

> 437. The offshore petroleum contracts entered into by Yemen, and by Ethiopia and Eritrea, fail to establish or significantly strengthen the claims of either party to sovereignty over the disputed islands.

438. Those contracts however 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.

79. In the Second Stage of these Proceedings, Eritrea placed great emphasis upon paragraph 438, and other passages of the Award, that found that various petroleum arrangements indicate limits drawn along a median line, and contended that the Tribunal's Award provided support for the "historic median line" which it now advanced as the maritime boundary line between Eritrea and Yemen. Eritrea stressed that, in several petroleum contracts concluded by Yemen, the contractual area extended from the mainland coast of Yemen in the east to the median line of the Red Sea, drawn without regard to base points on the disputed islands. It observed that a contract concluded by it, and another concluded by Yemen, ran through Greater Hanish along a median line. It pointed out that one of Yemen's concession contracts contains a median line, marked "Ethiopia" to the west and "Yemen" to the east. It maintained that maps prepared by Petroconsultants, introduced and relied upon by Yemen in the First Stage, and showing concession boundaries running along a median line between the coasts of Yemen and Eritrea, cannot now be discounted by Yemen because it introduced them for another purpose. Eritrea acknowledged that the contracts and conduct of Yemen and of Ethiopia and Eritrea are not tantamount to mutual acceptance of a median maritime boundary or even of a *modus vivendi* line. But it contended that they nevertheless provide a persuasive basis for taking an "historic median line" to divide the waters of the Red Sea, to be drawn without according the "mid-sea" disputed islands influence on the course of that line.

80. Yemen for its part contended that, while it introduced the Petroconsultants maps as evidence of Yemen's sovereignty over the disputed islands, it did so not to show maritime boundaries; that the Petroconsultants maps contain "mistakes"; and that these and other maps introduced in the First Stage contain disclaimers about lines affecting or prejudicing the contracting government's sovereign rights. Yemen emphasised the Tribunal's holding that the concessions were "issued with commercial considerations in mind and without particular regard to the existence of the Islands". (Award on Sovereignty, paragraph 412.)

81. It should be noted that, in the course of making its holdings on sovereignty over the disputed islands, the Tribunal held that the petroleum contracts do "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".

82. At this juncture, however, the Tribunal acts in the light of the dispositive provisions of paragraph 527 of its Award. Which islands are subject to the

territorial sovereignty of Eritrea, and which are subject to the territorial sovereignty of Yemen, has been determined. In delimiting the maritime boundaries of the Parties, the Tribunal is required in this Second Stage of the proceedings to take into account, *inter alia*, the opinion that it formed on the question of territorial sovereignty.

83. As is set out in other passages of this Award, the Tribunal has taken as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains. The Award on Sovereignty's examination of petroleum arrangements does show, as just indicated, repeated reference to a median line between the coasts of Yemen and Eritrea. To that extent, Eritrea's position in this Stage of the proceedings is sustained by those references. But that is 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; nor is it to say that that boundary should track Eritrea's claimed "historic median line". The concession lines were drawn without regard to uninhabited, volcanic islands when their sovereignty was indeterminate. Those lines can hardly be taken as governing once that sovereignty has been determined. While initial weight is to be given to the mainland coasts and their island fringes, some weight is to be or may be accorded to the islands, certainly in respect of their territorial waters. What weight, and why and how, are questions addressed below.

84. In respect of petroleum arrangements and a maritime boundary between the Parties in the Red Sea, the Tribunal recalls the conclusion of the International Court of Justice in its Judgment in the *North Sea Continental Shelf* cases,[7] that delimitation of States' areas of continental shelf may lead to "an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit." Judge Jessup in his separate opinion in that case referred to a seminal article by William T. Onorato[8] and cited examples of such cooperation; and in the last thirty years there has grown up a significant body of cooperative State practice in the exploitation of resources that straddle maritime boundaries. The papers in a volume published by The British Institute

[7] I.C.J. Reports 1969, p. 52.

[8] *Apportionment of an International Petroleum Deposit*, 17 ICLQ 85 (1958).

of International and Comparative Law summarise and analyse this practice,[9] as does a more recent study by Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to the Maritime Boundary Delimitations*, International Boundaries Research Unit, 1999.[10]

85. That practice has particular pertinence in the current case. The Red Sea is not to be compared to the great oceans. Yemen and Eritrea face one another across a relatively narrow compass. Their peoples have had a long and largely beneficent history of intermingling, a history not limited to the free movement of fishermen but embracing a wider trade, and a common rule as well as a common religion. These relations long antedate the relatively modern, European-derived, concepts of exclusionary sovereignty. While oil and gas in commercial quantities have not to date been found beneath the waters of the Red Sea that lie between Eritrea and Yemen, it is possible that either or both may be.

86. In paragraph 1 of its Prayer for Relief, Eritrea requests the Tribunal to determine that "The Eritrean people's historic use of resources in the mid-sea islands includes . . . mineral extraction". For reasons explained in paragraph 104 of this Award, the Tribunal is not in a position to accede to this request. However, it is of the view that, having regard to the maritime boundary established by this Award, the Parties are bound to inform one another and to consult one another on any oil and gas and other mineral resources that may be discovered that straddle the single maritime boundary between them or that lie in its immediate vicinity. Moreover, the historical connections between the peoples concerned, and the friendly relations of the Parties that have been restored since the Tribunal's rendering of its Award on Sovereignty, together with the body of State practice in the exploitation of resources that straddle maritime boundaries, import that Eritrea and Yemen should give every consideration to the shared or joint or unitised exploitation of any such resources.

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[9] Edited by Hazel Fox, *Joint Development of Offshore Oil and Gas* (1990) by R.R. Churchill, Kamal Hossein, Isa Huneidi, Masahiro Miyoshi, Ian Townsend-Gault, Anastasia Strati, H. Burmester, Clive R. Symmons, Thomas H. Walde, Brenda Barrett, P. Birnie and A.D. Read.

[10] See also, I.F.I. Shihata and W.T. Onorato, *Joint Development of International Petroleum Resources in Undefined and Disputed Areas*, International Conference of the LAWASIA Energy Centre, Kuala Lumpur, 1992.

CHAPTER IV – The Traditional Fishing Regime

87. In paragraph 526 of its Award on Territorial Sovereignty and Scope of the Dispute the Tribunal found:

> In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.

88. Immediately after, in paragraph vi of its Dispositif, The Tribunal determined that:

> the sovereignty found to lie within 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.

89. Eritrea has taken the view that these findings entail the establishment of joint resource zones, which the Tribunal should delimit in its Award in the Second Stage. Eritrea, in its Prayer for Relief, also urged the Tribunal to direct the Parties to negotiate so as to achieve certain results it regards as required by paragraph 527(vi) of the Dispositif in the Award on Sovereignty, and to take certain other powers in relation thereto. To fail to do so, contended Eritrea, would be *infra petita*. Eritrea further contended that the final paragraph of the letter of 9 November 1998 from the President of the Tribunal to the counsel and co-agent for Eritrea left Eritrea full liberty so to submit during this Stage of the Arbitration. Some of the elements contained in Eritrea's Prayer for Relief were not pursued in oral argument; there the main plea was that the Court specify with precision what was entailed by its finding as to the traditional fishing regime and where that regime lay within the Red Sea. However, the Prayer for Relief, unamended, was said by Eritrea to represent its final submissions.

90. Yemen took the view that it was clear from paragraph 526 of the Award on Sovereignty that it was for it, Yemen, in the exercise of its sovereignty, to ensure the preservation of the traditional fishing regime; that, while the 1994 and 1998 Agreements might prove to be useful vehicles for that exercise in sovereignty, there was no question of Yemen's sovereignty having been made conditional and thus no agreement with Eritrea was necessary for the administrative measures that

might relate to this regime; that the Tribunal had not made any finding that there should be joint or common resource zones; that the Tribunal's finding that Yemen's sovereignty entailed the perpetuation of the traditional fishing regime was a finding in favour of the fishermen of Eritrea and Yemen, not of the State of Eritrea; that Article 3(1) of the Agreement on Principles and Article 2(3) of the Arbitration Agreement meant that it would be *ultra vires* for the Tribunal to respond favourably to Eritrea's Prayer for Relief; and that the President's letter of 9 November 1998 indeed showed that the Prayer for Relief was irregular. Further, Yemen contended that there had traditionally been no significant Eritrean fishing in the vicinity of the islands.

91. The details of the positions taken by Eritrea and Yemen is recalled above at paragraphs 48-60.

92. The Tribunal recalls that it based this aspect of its Award on Sovereignty on a respect for regional legal traditions. The abundant literature on the historical realities which characterised the lives of the populations on both the eastern and western coasts was noted in the award of the Arbitral Tribunal in the First Stage of the Proceedings, paragraph 121, footnote 9 and paragraph 128, footnote 11. This well-established factual situation reflected deeply rooted common legal traditions which prevailed during several centuries among the populations of both coasts of the Red Sea, which were until the latter part of the nineteenth century under the direct or indirect rule of the Ottoman Empire. The basic Islamic concept by virtue of which all humans are "stewards of God" on earth, with an inherent right to sustain their nutritional needs through fishing from coast to coast with free access to fish on either side and to trade the surplus, remained vivid in the collective mind of Dankhalis and Yemenites alike.

93. Although the immediate beneficiaries of this legal concept were and are the fishermen themselves, it applies equally to States in their mutual relations. As a leading scholar has observed: "Islam is not merely a religion but also a political community (*umma*) endowed with a system of law designed both to protect the collective interest of its subjects and to regulate their relations with the outside world".[11]

94. The sovereignty that the Tribunal has awarded to Yemen over Jabal al-Tayr, the Zubayr group and the Zuqar-Hanish group is not of course a "conditional" sovereignty, but a sovereignty nevertheless that respects and embraces and is subject to the Islamic legal concepts of the region. As it has been aptly put, "in today's world, it remains true that the fundamental moralistic general principles

[11] Khadduri, *Encyclopedia of Public International Law*, volume 6, page 227.

of the *Quran* and the *Sunna* may validly be invoked for the consolidation and support of positive international law rules in their progressive development towards the goal of achieving justice and promoting the human dignity of all mankind".[12]

95. The Tribunal's Award on Sovereignty was not based on any assessment of volume, absolute or relative, of Yemeni or Eritrean fishing in the region of the islands. What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto. Further, the finding on the traditional fishing regime was made in the context of the Award on Sovereignty precisely because classical western territorial sovereignty would have been understood as allowing the power in the sovereign state to exclude fishermen of a different nationality from its waters. Title over Jabal al-Tayr and the Zubayr group and over the Zuqar-Hanish group was found by the Tribunal to be indeterminate until recently. Moreover, these islands lay at some distance from the mainland coasts of the Parties. Their location meant that they were put to a special use by the fishermen as way stations and as places of shelter, and not just, or perhaps even mainly, as fishing grounds. These special factors constituted a local tradition entitled to the respect and protection of the law.

96. It is clear that the Arbitration Agreement does not authorise the Tribunal to respond affirmatively to paragraphs 6 and 7 of Eritrea's Prayer for Relief. Nor, indeed, would it have been able so to do even if the arbitration had been conducted within the framework of a single stage or phase, as originally envisaged by Article 3(1) of the Agreement on Principles.

97. However, Eritrea is entitled to submit to the Tribunal that its finding as to the traditional fishing regime has implications for the delimiting of maritime boundaries in the Second Stage; and the Tribunal is at liberty to respond to such submissions.

98. Indeed, it is bound to do so, because it is not otherwise in a position to respond to the submissions made by Yemen as well as by Eritrea in this Second Stage. It cannot be the case that the division of the Arbitration into two stages meant that the Parties may continue to debate whether the substantive content of the Tribunal's findings on the traditional fishing regime has any relevance to the task of delimitation, but that the Tribunal must remain silent. Such formalism was never the objective of the agreement of both Parties to divide the Arbitration into two Stages.

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[12] *Encyclopedia of Public International Law*, volume 7, page 229.

99. Of course, in making its Award on Sovereignty the Tribunal did not "prefigure" or anticipate the maritime delimitation that it is now called upon to make in the Second Stage, after full pleadings by the Parties. Beyond that the Tribunal is not to be artificially constrained in what it may respond to by the procedural structures agreed for the Arbitration. The two-stage mechanism is not to be read either as forbidding Parties to make the arguments they wish, when they wish; nor as limiting their entitlement to seek to protect what they perceive as their substantive rights.

100. Article 15 of the Arbitration Agreement (the meaning of which is otherwise not readily intelligible) lends support to this view. Paragraph 2 speaks of the Arbitration Agreement as "implementing the procedural aspects" of the Agreement on Principles. And Paragraph 1 provides that:

> Nothing in this Arbitration Agreement can be interpreted as being detrimental to the legal positions or to the rights of each Party with respect to the questions submitted to the Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations and grounds on which those decisions are based.

101. As the Tribunal has indicated in its Award on Sovereignty, the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen. It is to be preserved for their benefit. This does not mean, however, that Eritrea may not act on behalf of its nationals, whether through diplomatic contacts with Yemen or through submissions to this Tribunal. There is no reason to import into the Red Sea the western legal fiction – which is in any event losing its importance – whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. That legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose) in a world in which individuals had no opportunities to advance their own rights. It was never meant to be the case however that, were a right to be held by an individual, neither the individual nor his State should have access to international redress.

102. The Tribunal accordingly now responds to the diverse submissions advanced in this Stage by the Parties, both as to the substantive content of the traditional fishing regime referred to in paragraphs 526 and 527(vi) of its Award on Sovereignty and as to any implications for its task in this stage of the Arbitration. The correct answer is indeed to be gleaned from the pages of that Award itself. Attention may in particular be drawn to paragraphs 102, 126-128, 340, 353-357 and 526.

103. 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.

104. In paragraph 1 of the Prayer for Relief, Eritrea asks the Tribunal to determine that "The Eritrean people's historic use of resources in the mid-sea islands includes guano and mineral extraction . . .". In the pleadings before the Tribunal Eritrea referred specifically in this context to guano extraction which had been licensed by Italy. Guano extraction is not to be assimilated to mineral extraction more generally. Further, as the Award on Sovereignty made clear, Eritrea's rights today are not derived from a claimed continuity from rights once held by Italy. The traditional fishing regime covers those entitlements that all the fishermen have exercised continuously through the ages. The Tribunal has received no evidence that the extraction of guano, or mineral extraction more generally, forms part of the traditional fishing regime that has existed and continues to exist today.

105. The FAO Fisheries Infrastructure Development Project Report of 1995 was a report on fishing in Eritrean waters. However, its findings on artisanal fishing would be of general application in this region. The 1995 Report makes clear that both the artisanal vessels and their gear are simple. The vessels are usually canoes fitted with small outboard engines, slightly larger vessels (9-12 m) fitted with 40-75 hp engines, or fishing *sambuks* with inboard engines. Dugout canoes and small rafts (*ramas*) are also in use.[13] Hand lines, gill nets and long lines are used. In its Report on Fishing in Eritrean waters, the FAO study states that this artisanal fishing gear, which varies according to the boat and the fish, is "simple and efficient".[14]

106. However, the term "artisanal" is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. "Artisanal fishing" is used in contrast to "industrial fishing". It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in

[13] FAO 24/95 ADB-ERI.4, 27 February 1995, at paragraphs 2.19 and 3.44.

[14] *Ibid.*, paragraph 2.20.

the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States in the Red Sea, whether small-scale or industrial.

107. In order that the entitlements be real and not merely theoretical, the traditional regime has also recognised certain associated rights. 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. This free passage for artisanal fishermen has traditionally existed not only between Eritrea and the islands, but also between the islands and the Yemen coast. The entitlement to enter the relevant ports, and to sell and market the fish there, is an integral element of the traditional regime. The 1994 Memorandum of Understanding between the State of Eritrea and the Republic of Yemen for Cooperation in the Areas of Maritime Fishing, Trade, Investment, and Transportation usefully identifies the centres of fish marketing on each coast. Eritrean artisanal fisherman fishing around the islands awarded to Yemen have had free access to Maydi, Khoba, Hodeidah, Khokha and Mocha on the Yemen coast, just as Yemeni artisanal fishermen fishing around the islands have had an entitlement to unimpeded transit to and access to Assab, Tio, Dahlak and Massawa on the Eritrean coast. Nationals of the one country have an entitlement to sell on equal terms and without any discrimination in the ports of the other. 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 fisherman to the *acquil* system to resolve their disputes *inter se* is to be also maintained and preserved.

108. Yemen and Eritrea are, of course, free to make mutually agreed regulations for the protection of this traditional fishing regime. Insofar as environmental considerations may in the future require regulation, any administrative measures impacting upon these traditional rights 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.

109. The traditional fishing regime is not limited to the territorial waters of specified islands; nor are its limits to be drawn by reference to claimed past patterns of fishing. It is, as Yemen itself observes in its Answers to the Tribunal's Questions, Annex 2, page 63, a "regime that has existed for the benefit of the fishermen of both countries throughout the region". By its very nature it is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea, the law chosen by the Parties to be applicable to this task in this Second Stage of the Arbitration. The traditional fishing regime 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 in paragraph 107 above.

110. Accordingly, it does not depend, either for its existence or for its protection, upon the drawing of an international boundary by this Tribunal. This much was indeed acknowledged by Yemen in its Answers to the Tribunal's Questions, when it observed that "the holdings of the Tribunal in the first Award with respect to the traditional fishing regime constitute *res judicata* without prejudice to the maritime boundary that the Tribunal decides on in the second stage of the proceedings" (Annex 2, page 63). Yemen informed the Tribunal that it was "fully committed to apply and implement the Award in all its aspects, including with respect to the perpetuation of the traditional fishing regime for the fishermen of both Eritrea and Yemen". Nor is the drawing of the maritime boundary conditioned by the findings, in the Award on Sovereignty, of such a regime.

111. As the Tribunal has explained above, no further joint agreement is legally necessary for the perpetuation of a regime based on mutual freedoms and an absence of unilaterally imposed conditions. However, should Eritrea and Yemen decide that the intended cooperation exemplified by the 1994 Memorandum of Understanding and the 1998 Agreement can usefully underpin the traditional regime, they may choose to use some of the possibilities within these instruments. The subject matter of the 1994 instrument has a particular pertinence. (Moreover, it is the understanding of the Tribunal that the Parties did not jointly intend to deprive fishermen of their rights under this traditional regime if they failed to submit a fishing licence to the other Party within three months from the date of the signing of the Memorandum of Understanding.)

112. The Tribunal has responded to the pleadings that both Parties have made, as they were entitled to do, in this phase of the proceedings. Its answer indicates how its Award on Sovereignty is to be understood in relation to the matters that the Parties have now raised before it.

CHAPTER V – The Delimitation of the International Boundary

The Tribunal's Comments on the Arguments of the Parties

113. Since, as it will appear below, the international maritime boundary line decided upon by the Tribunal differs in some respects from both the one claimed by Yemen and the one, or the ones, claimed by Eritrea, it is right first to explain briefly where and why the boundaries claimed by the Parties have not been endorsed in this Award. This will now be done taking generally first the Yemen claim and then the Eritrean claim, as this was the order in which the Parties agreed to argue in the Oral Proceedings of this Second Stage of this Arbitration.

114. Yemen claimed one single international boundary line for all purposes. The single line it claimed was described as a "median line", because Yemen treated the westward-facing coasts of all of its islands as relevant coasts for purposes of the delimitation. For the Eritrean coast, Yemen used base points on the mainland coast of Eritrea and thus ignored the Eritrean mid-sea islands for the purpose of delimitation of the boundary. Yemen also claimed that its line can properly be described as a coastal median line. For Yemen the relevant coasts included not only the islands over which it has been awarded sovereignty, but also of certain among the Dahlak islands; thus Yemen, like Eritrea, was prepared to treat the Dahlaks as being part of the Eritrean coast, and so used base points on the islets forming the outer fringe of the group. When on the other hand Eritrea spoke of what it called "the coastal median line", it meant the median line between what in the Eritrean view represented the *mainland* coasts of both Parties. At the same time Eritrea claimed a historic median line using only its own islands as base points, and thus ignoring those of Yemen. These variations produced different claimed median lines. See Eritrea's Maps 3 and 7, and Yemen's Map 12.1. See also Charts 1 and 2 showing the base points as provided by Eritrea.

115. It is in what Yemen called the northern sector of the boundary line where this difference caused the greatest divergence, actually of several nautical miles, between the lines claimed by the Parties because of the question of how much "effect" on the line should be given to the Yemen northern islands, namely the small sole mid-sea island of Jabal al-Tayr and the mid-sea groups of islands and islets called Zubayr. Yemen allowed them full effect on the line; Eritrea's line allowed them none.

116. In considering this marked divergence of view it is well to recollect that the boundary line in its northern stretch – including indeed both the opposing claimed lines – are boundaries between the Yemen and the Eritrean continental shelves and EEZ; and are therefore governed by Articles 74 and 83 of the 1982 Convention. In any event there has to be room for differences of opinion about

the interpretation of articles which, in a last minute endeavour at the Third United Nations Conference on the Law of the Sea to get agreement on a very controversial matter, were consciously designed to decide as little as possible. It is clear, however, that both Articles envisage an equitable result.

117. This requirement of an equitable result directly raises the question of the effect to be allowed to mid-sea islands which, by virtue of their mid-sea position, and if allowed full effect, can obviously produce a disproportionate effect – or indeed a reasonable and proportionate effect – all depending on their size, importance and like considerations in the general geographical context.

118. Yemen understood this problem very clearly. Its argument was that, although these mid-sea islands and islets are small and uninhabitable (these questions figured prominently in the First Stage of this Arbitration), those considerations were nicely matched, or "balanced", by the complementary smallness and lack of importance of the outer islets of the Dahlak group which were the base points on the Eritrean side of the boundary. However, the situation of these Dahlak islets is very different from that of the mid-sea islands. The Dahlak outer islets are part of a much larger group of islands which both Parties were agreed are an integral part of the Eritrean mainland coast. Consequently, between these islets and the mainland, the sea is Eritrean internal waters. The Tribunal had therefore, as will be seen below, no difficulty in rejecting this "balancing" argument of Yemen, as it does not compare like with like.

119. In its assessment of the equities of the "effect" to be given to these northern islands and islets, the Tribunal decided not to accept the Yemen plea that they be allowed a full, or at least some, effect on the median line. This decision was confirmed by the result that, in any event, these mid-sea islands would enjoy an entire territorial sea of the normal 12 miles – even on their western side.

120. One practical result of the Yemen balancing argument regarding the northern mid-sea islands is that Yemen did not argue in the alternative about possible base points on the islands fringing the Yemen *mainland* coast – which islands could much more cogently be said to balance the Dahlaks.

121. The Eritrean argument concerning this northern stretch of the line was relatively simple: it argued strongly against the Yemen balancing suggestions, and here asked for the mainland coastal median line. At first, it was not clear what were the base points used by Eritrea. However, in answer to a question from the Tribunal, Eritrea did produce two complete sets of base points for the Eritrean coast and also a set for the Yemen coast. (See Charts 1 and 2.)

122. The latitude of 14°25 N – where the Yemen northern sector becomes the Yemen central sector – results from another factor on which the Parties differ. This line of latitude is not chosen at random by Yemen. It is the point at which the Yemen median line is no longer controlled by Zubayr as a base point but enters under the control of the north-western point of the island of Zuqar. The Eritrean lines, for indeed there are two of them, continue southwards, ignoring the possible effect of the Zuqar – Hanish group. The "historic" median line (Map 3) cuts through Zuqar, and the coastal median line cuts through the island of Greater Hanish (Map 7).

123. The Tribunal did not find it easy to resolve this divergence of method, but finally the Tribunal decided to continue its line as a mainland coastal line until the presence of Yemen's Zuqar-Hanish group compels a diversion westwards. (The Tribunal's line, as will appear below, is neither the Yemen line nor yet the Eritrean line.)

124. In support of its enclave solution for certain of the Eritrean islands, Yemen entered upon an assessment of the relative size and importance of the Eritrean islands generally, as if they were islands whose influence on the boundary line falls to be assessed, not as being possibly in an area of overlapping territorial sea, but as if they were to be assessed solely by reference to Articles 74 and 83 of the Convention. This approach enabled Yemen to argue that these Eritrean "navigational hazards" were insignificant even when compared with the Yemen Zuqar-Hanish group; and that accordingly the South West Rocks and the Haycocks ought to be enclaved and the boundary line taken onto the Eritrean side of them, thus leaving the two enclaves isolated on the Yemen side of the boundary line.

125. The Tribunal, as will appear below, has had little difficulty in preferring the Eritrean argument, which brings into play Article 15. This solution also has the advantage of avoiding the need for awkward enclaves in the vicinity of a major international shipping route.

126. The Yemen "southern sector" began at the line of latitude 13°20 N. Again, this is not an arbitrary choice. It was the point at which Yemen's median line, which had hitherto been controlled by Suyul Hanish, first came under the control of the nearest point on the mainland coast of Yemen. The Yemen line then continued throughout the southern sector as a coastal median line.

127. In the main part of this southern sector, therefore, there were only differences of detail between the Yemen and Eritrean lines because there were no mid-sea islands to complicate the problem. There was indeed the large complication of the Bay of Assab and of its off-lying islands, but here Yemen rightly assumed that this bay

is integral to the Eritrean coast and is internal waters, and that the controlling base points would therefore be on the low-water line of the outer coastal islands.

128. In the course of its passage from the overlapping territorial seas areas to the relatively simple stretch between parallel coasts of the southern sector, the Yemen line was again a median line controlled by the Yemen islands as well as by the Eritrean mainland coast. However, the line preferred by the Tribunal, mindful of the simplicity desirable in the neighbourhood of a main shipping lane, is one that would mark this passage directly and independently of the Yemen and Eritrean islands. It is not easy to trace the Eritrean median line in this area because of the complication of its box system for the traditional fishing areas. Indeed, this review of the Parties' arguments and the Tribunal's view of them does somewhat scant justice to the complicated and carefully researched Eritrean scheme for delimitation of the traditional fishing areas, but this matter has been dealt with in Chapter IV.

This chapter will now turn to describe the boundary line determined by the Tribunal.

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The Boundary Line Determined by the Tribunal

129. The task of the Tribunal in the present Stage of this Arbitration is defined by Article 2 of the Arbitration Agreement, and is to "result in an award delimiting the maritime boundaries". The term "boundaries" is here used, it is reasonable to assume, in its normal and ordinary meaning of denoting an international maritime boundary between the two State Parties to the Arbitration; and not in the sense of what is usually called a maritime "limit", such as the outer limit of a territorial sea or a contiguous zone; although there might be places where these limits happen to coincide with or be modified by the international boundary.

130. Article 2 also provides that, in determining the maritime boundaries, the Tribunal is to take "into account the opinion it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor". The reasons for taking account of the Award on Sovereignty are clear enough and both Parties have agreed in their pleadings that, in the Second Stage, there can be no question of attempting to reopen the decisions made in the First Award. The requirement to take into account the United Nations Convention on the Law of the Sea of 1982 is important because Eritrea has not become a party to that Convention but has in the Arbitration Agreement thus accepted the application of provisions of the Convention that are found to be relevant to the present stage. There is no reference in the Arbitration Agreement to the

customary law of the sea, but many of the relevant elements of customary law are incorporated in the provisions of the Convention. "Any other pertinent factors" is a broad concept, and doubtless includes various factors that are generally recognised as being relevant to the process of delimitation such as proportionality, non-encroachment, the presence of islands, and any other factors that might affect the equities of the particular situation.

131. It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention, and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts. Indeed both Parties to the present case have claimed a boundary constructed on the equidistance method, although based on different points of departure and resulting in very different lines.

132. The Tribunal has decided, after careful consideration of all the cogent and skilful arguments put before them by both Parties, that the international boundary shall be a single all-purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines. This solution is not only in accord with practice and precedent in the like situations but is also one that is already familiar to both Parties. As the Tribunal had occasion to observe in its Award on Sovereignty (paragraph 438), the offshore petroleum contracts entered into by Yemen, and by Ethiopia and by Eritrea, "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". In the present stage the Tribunal has to determine a boundary not merely for the purposes of petroleum concessions and agreements, but a single international boundary for all purposes. For such a boundary the presence of islands requires careful consideration of their possible effect upon the boundary line; and this is done in the explanation which follows. Even so it will be found that the final solution is that the international maritime boundary line remains for the greater part a median line between the mainland coasts of the Parties.

133. The median line is in any event some sort of coastal line by its very definition, for it is defined as a line "every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured" (Article 15 of the Convention), although the same definition will be found in many maritime boundary treaties and also in expert writings. The "normal" baseline of the territorial sea as stated in Article 5 of the Convention – and this again accords with long practice and with the well established customary rule of the law of the sea – is "the low-water line along the coast as marked on

large scale charts officially recognised by the coastal State". There do arise some questions about what is to be regarded as the "coast" for these purposes, especially where islands are involved; and these questions, on which the Parties differ markedly, require decisions by the Tribunal.

134. First, it is necessary to deal with a complication that arises in the present case concerning this general rule of measuring from the low-water line. The domestic legislative definition of the territorial sea of Eritrea is still the 1953 enactment by Ethiopia which fixed Ethiopia's territorial waters as "extending from the extremity of the seaboard at maximum annual high tide". This was done even though an Ethiopian customs enactment of 1952 had provided for a customs zone measured from the "the mean low-water mark at neap tides". The Yemen claim was that, in view of this 1953 legislation, the Tribunal should measure the median line boundary from the high-water line instead of the low-water line along the Eritrean coast (and indeed Yemen's median line does).

135. In this matter the Tribunal prefers the Eritrean argument that the use of the low-water line is laid down by a general international rule in the Convention's Article 5, and that both Parties have agreed that the Tribunal is to take into account the provisions of the Convention in deciding the present case. The median line boundary will, therefore, be measured from the low-water line, shown on the officially recognised charts for both Eritrea and Yemen, in accordance with the provision in Article 5 of the Convention. The officially recognised charts used by the Tribunal are BA (British Admiralty) Charts; those Charts use as a Chart Datum approximately the level of the Lowest Astronomical Tide. These Charts were among those relied on by the Parties in the present Stage of the Proceedings.

Northern and Southern Extremities of the Boundary Line

136. There is also a problem relating to both the northern and the southern extremities of the international boundary line. The Tribunal has the competence and the authority according to the Arbitration Agreement to decide the maritime boundary between the two Parties. But it has neither competence nor authority to decide on any of the boundaries between either of the two Parties and neighbouring States. It will therefore be necessary to terminate either end of the boundary line in such a way as to avoid trespassing upon an area where other claims might fall to be considered. It is, however, clearly necessary to consider the choices of the base points controlling the median line first, and then to look at the cautionary termination matter when the line to be thus terminated at its northern and southern ends has been produced.

137. The construction of the international single boundary decided upon by the Tribunal, working generally from the north to the south, will now be described.

The Northernmost Stretch of the Boundary Line

138. In this stretch, where the two lines claimed respectively by Eritrea and Yemen differed so markedly in their courses, there were three main problems: what to do about the Dahlak islands on the Eritrean side; what to do about the lone mid-sea island of Jabal al-Tayr and the mid-sea island group of Jabal al-Zubayr; and what to do about the cluster of islands and rocks off the northern coast of Yemen. These three questions will now be considered in that order.

The Dahlaks

139. This tightly knit group of islands and islets, or "carpet" of islands and islets as Eritrea preferred to call it, of which the larger islands have a considerable population, is a typical example of a group of islands that forms an integral part of the general coastal configuration. It seems in practice always to have been treated as such. It follows that the waters inside the island system will be internal or national waters and that the baseline of the territorial sea will be found somewhere at the external fringe of the island system.

140. A problem that arises here, however, is that the Dahlak fringe of coastal islands is also suitable for the application not of the "normal baseline" of the territorial sea, but of the "straight baselines" described in Article 7 of the Convention (as there distinguished from the "normal" baseline described in Article 5). The straight baseline system is there described as "the method of straight baselines joining appropriate points". Yemen appears to have little difficulty in agreeing that the Dahlaks form an appropriate situation for the establishment of a straight baseline system.

141. Eritrea for its part claimed that it has such a system already established. In answer to a question from the Tribunal, Eritrea did give the coordinates for the base points on the Eritrea side for both versions of its claimed "median line". But these base points in the region of the Dahlaks appear to have been located on a line touching two or perhaps three of the outer islands and the Negileh Rock (for which see below paragraphs 146-147) and then continuing in a more or less straight line out to sea in a south-easterly direction. This scheme is probably part of the "quadrilateral" straight baseline system to which Eritrea referred in argument.

142. The reality or validity or definition of this somewhat unusual straight baseline system said to be existing for the Dahlaks is hardly a matter that the Tribunal is called upon to decide. The Tribunal does however have to decide on the base points which are to control the course of the international boundary line. In

plotting its own claimed median line boundary, Yemen has employed as its western base points the high-water line of the small outer islets of Segala, Dahret Segala, Zauber and Aucan. These islets could reasonably be included in a straight baseline system of the ordinary and familiar kind.

143. Eritrea, however, has in particular suggested a feature called the "Negileh Rock" which lies further out than these larger but still small and uninhabited islets. Yemen objected to the use of this feature by reason of the fact that on the BA Chart 171 this feature is shown to be a reef and moreover one which appears not to be above water at any state of the tide. A reef that is not also a low-tide elevation appears to be out of the question as a base point, because Article 6 of the Convention (which is headed "Reefs") provides:

> In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

144. This difficulty about the Negileh Rock is reinforced if there is indeed a straight baseline system in existence for the Dahlaks, for paragraph 4 of Article 7 provides:

> 4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses of similar installations which are permanently above sea level have been built on them or in instances where the drawing of straight baselines to and from such elevations has received general international recognition.

145. Although Eritrea is not a party to the Convention; nevertheless it has agreed to its application in the present case; and since Eritrea claims the existence of a straight baseline system, that claim seems to foreclose any right to employ a reef that is not proud of the water at low-tide as a baseline of the territorial sea.

146. As will appear more particularly below, the Tribunal has decided that the western base points to be employed on this part of the Eritrean coast shall be on the low-water line of certain of the outer Dahlak islets, Mojeidi and an unnamed islet east of Dahret Segala.

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Next, it is necessary to decide on the treatment of the mid-sea islands of al-Tayr and Zubayr, for on this decision depends the question of whether it will be necessary to consider base points on the coast of Yemen.

Jabal al-Tayr and the Zubayr Group

147. Yemen employed both the small single island of al-Tayr and the group of islands called al-Zubayr as controlling base points, so that the Yemen-claimed median line boundary is "median" only in the area of sea west of these islands. These islands do not constitute a part of Yemen's mainland coast. Moreover, their barren and inhospitable nature and their position well out to sea, which have already been described in the Award on Sovereignty, mean that they should not be taken into consideration in computing the boundary line between Yemen and Eritrea.

148. For these reasons, the Tribunal has decided that both the single island of al-Tayr and the island group of al-Zubayr should have no effect upon the median line international boundary.

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Base Points on the Coast of Yemen

149. Since Jabal al-Tayr and the Zubayr group are not to influence the drawing of the median line boundary, it is necessary to decide upon the base points to be used for this part of the coast of Yemen. For here again there is, if not a carpet, at least a considerable scattering of islands and islets which are the beginning of a large area of coastal islands and reefs which, extending northward, ultimately form part of a large island cluster or system off the coast of Saudi Arabia.

150. There is also the relatively large, inhabited and important island of Kamaran off this part of the Yemen coast. This island, together with the large promontory of the mainland to the south of it, forms an important bay and there can be no doubt that these features are integral to the coast of Yemen and part of it and should therefore control the median line. One significant controlling base point is therefore on the westernmost extremity of Kamaran. It seems reasonable also to use as base points the very small islands immediately south of Kamaran and west of the promontory headland mentioned above.

151. The question remains as to the islands to the north of Kamaran. The relatively large islet of Tiqfash, and the smaller islands of Kutama and Uqban further west, all appear to be part of an intricate system of islands, islets and reefs which guard this part of the coast. This is indeed, in the view of the Tribunal, a "fringe system" of the kind contemplated by Article 7 of the Convention, even though Yemen does not appear to have claimed it as such. Indeed the Tribunal does not have the advantage of any views of Yemen about this part of its coast because it chose to

deploy its arguments differently. It is however the view of the Tribunal that it is right to use as median line base points not only Kamaran and its satellite islets which appear in the Yemen Map 12.1, but also the islets to the northwest named Uqban and Kutama.

152. The above decisions having been made, it is now possible to compute and plot the northern stretch of the boundary line between turning points 1 and 13 (the list of the coordinates of the turning points is given below; see also the illustrative Charts 3 and 4). For this entire part of the line, the boundary should be a mainland-coastal median, or equidistance, line.

153. At turning point number 13, however, a simple mainland/coastal median line approaches the area of possible influence of the islands of the Zuqar-Hanish group, and clearly some decisions have to be made as to how to deal with this situation.

The Middle Stretch of the Boundary Line

154. It will be convenient for obvious reasons if the Tribunal first decides the question of the boundary in the narrow seas between the south-west extremity of the Hanish group on the one hand and the Eritrean islands of the Mohabbakahs, High Island, the Haycocks and the South West Rocks on the other. In this part of the boundary there is added to the boundary problem of delimiting continental shelves and EEZ the question of delimiting an area of overlapping territorial seas. This comes about because Zuqar and Hanish, attributed to the sovereignty of Yemen, both generate territorial seas which overlap with those generated by the Haycocks and South West Rocks, attributed to the sovereignty of Eritrea. It would appear from Yemen Map 12.1 that Yemen assumed that Eritrea is entitled only to a strictly 12 mile territorial sea extending from the Eritrean base points chosen by Yemen along the high-water line on the Eritrean coast; the outcome would be, according to Yemen, that the Haycocks and South West Rocks are thus left isolated outside and beyond the Eritrean territorial sea proper.

155. This proposition is questionable, quite apart from the obvious impracticality of establishing limited enclaves around islands and navigational hazards in the immediate neighbourhood of a main international shipping lane. There is no doubt that an island, however small, and even rocks provided they are indeed islands proud of the water at high-tide, are capable of generating a territorial sea of up to 12 miles (Article 121.2 of the Convention). It follows that a chain of islands which are less than 24 miles apart can generate a continuous band of territorial sea. This is the situation of the Eritrean islands out to, and including, the South West Rocks.

156. The point that the Yemen suggestion omits to take into account is that the effect of what has been referred to as "leap-frogging" the Eritrean islands and islets in this area is to extend the mainland coast territorial sea beyond the limit of 12 miles from the mainland coast. According to Article 3 of the Convention, the territorial sea extends "up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention". This is permissible because each island, however small or unimportant of itself, creates a further low-water baseline from which the coastal territorial sea is to be measured. This "leap-frogging" point was invoked strongly in support of Eritrea's claims to sovereignty. This reasoning was not accepted by the Tribunal in its Award on Sovereignty, it nonetheless has relevance in the present context.

157. If any further reason were needed to reject the Yemen suggestion of enclaving the Eritrean islands in this area beyond a limit of 12 miles from the high-water line of the mainland coast, it may be found in the principle of non-encroachment which was described by Judge Lachs in the *Guinea/Guinea-Bissau* Award[15] in the following terms:

> As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its right to development or put its security at risk.

158. It will be seen that the international boundary line must therefore lie somewhere in a belt of sea no more than four or five miles wide. Once it is established that there is an area of Eritrean mainland coast territorial sea, potentially extending beyond the South West Rocks and the Haycock group of islands on the one hand and overlapping the territorial sea generated by the Yemen islands of the Hanish group on the other, the situation suggests a median line boundary. Under Article 15 of the Convention the normal methods for drawing an equidistant median line could be varied if reason of historic title or other special circumstance were to indicate otherwise. However, the Tribunal has considered these reasons and circumstances and finds no variance necessary.

159. Further bearing in mind its overall task of delimitation, the Tribunal also finds this line to be an entirely equitable one. The decision of the Tribunal is therefore that the median line is the international boundary line where it cuts through the area of overlap of the respective territorial seas of the Parties.

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[15] 25 ILM 251.

There remains, however, the part of the boundary line which is to connect the mainland coastal median line and the line delimiting the overlapping territorial seas. To the description of this line the Award now turns.

The Boundary Line Which Connects Turning Point 13 and Turning Point 15

160. If the mainland coastal median were continued south of turning point 13, it would cut first the territorial sea of Zuqar and then the territorial sea of Hanish, and then cut through the land territory of the island of Hanish. It must therefore divert to the west round the Zuqar-Hanish group, also respecting the territorial seas of these islands if they are to be regarded as generating a territorial sea. That they ought be regarded as having a territorial sea seems reasonable.

161. Various possibilities were considered by the Tribunal. If therefore the international boundary is, after turning point 13 where it meets a 12 mile territorial sea extending from the island of Zuqar, to be diverted in order to respect that area of territorial sea, it could trace the sinuosities of the Zuqar territorial sea boundary until it has to turn southward again in order to join the Article 15 boundary. The Tribunal has decided, however, that it would be better that the line here should be a geodetic line joining point 13 with point 14, making the necessary southwestwards excursion to join the territorial sea median line described above. Moreover, the Tribunal's task is, as mentioned above, to determine the maritime boundary; this does not include setting the limits of the territorial seas.

162. From turning point 14, again with a simple line in view, the southward excursion of the international boundary is a geodetic line joining points 14 and 15 where it becomes the Article 15 median. This boundary decided upon by the Tribunal between turning points 14 and 15 is also very near to the putative boundary of a Yemen territorial sea in this area, but makes for a neater and more convenient international boundary.

The Southern Part of the International Boundary Line

163. From turning point 20, which is the southernmost turning point on the overlapping territorial seas median line, the boundary needs to turn generally south-eastwards to rejoin the mainland coast median line. This it does through a geodetic line which connects turning point 20 and point 21, the latter being the intersection of the extended overlapping territorial seas median line and the coastal median line. Thence the international boundary line resumes as a median line controlled by the two mainland coasts. The Bay of Assab is internal waters, so the controlling base points of the boundary line are seaward of this bay.

The Northern and Southern End Points of the Boundary Line

164. Reference has been made above to the need not to extend the boundary to areas that might involve third parties. The points where the decision of the Tribunal halts the progress of the boundary line are, for the northern end, turning point 1 and, for the southern end, point 29. The effect can, of course, also be seen on the illustrative Charts 3 and 4 in the map section of the Award. The Tribunal believes that these terminal points are well short of where the boundary line might be disputed by any third State.

* % * % *

The Test of Proportionality

165. The principle of proportionality was described by the International Court of Justice in the *North Sea Continental Shelf* cases as "the element of a reasonable degree of proportionality, which a delimitation in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of the coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region". This was also described as one of the "factors" to be taken into account in delimitation.[16] It is not an independent mode or principle of delimitation, but rather a test of the equitableness of a delimitation arrived at by some other means.[17] So, as the Award stated in the *Anglo-French Channel* case, "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor".[18]

166. The Parties in the present case have disagreed strongly in their arguments of this matter, not so much about the meaning of "proportionality" as over the respective lengths of their coasts for the purposes of this calculation. There is in the Tribunal's view no doubt that the "general direction" of the coast means that the calculation of the Eritrean coastal length should follow the outer circumference of the Dahlak group of islands, although Eritrea was more inclined to have it follow the line of the mainland coast.

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[16] I.C.J. Reports 1969, p. 54.

[17] See I.C.J. Reports 1981, p. 58, the *Libya/Malta* case.

[18] 18 ILM 60.

167. A much debated point was: how far north the Eritrean coast should go. Eritrea wished to include in the proportionality calculation the whole of its mainland coast up to the latitudinal line of 16°N; and, indeed, this line was used by Yemen to define what it called its northern sector of the area in question. The Tribunal however doubts the appropriateness of employing a horizontal line of latitude to divide, for the purposes of the proportionality test, waters of the Red Sea which lie at an angle of roughly 45°. The Tribunal has therefore considered the relevant proportion of the Eritrean coast, which can be said to be "opposite" that of Yemen, as ceasing where the general direction of that coast meets a line drawn from what seems to be the northern terminus of the Yemen land frontier at right angles with the general direction of the Yemen coast. In the same way the Tribunal determined the southern end point to be considered for the computation of the length of the Yemen coast.

168. The Tribunal through its expert in geodesy has calculated the ratio of the lengths of the coasts concerned, measured by reference to their general direction, and the ratio between the water areas it has attributed to the Parties. The first ratio, of coastal lengths, Yemen : Eritrea, is 387026 metres to 507110 metres, or *1 : 1.31*. The second ratio of water areas, including the territorial seas, Yemen : Eritrea, is 25535 kilometres^2 to 27944 kilometres^2, or *1 : 1.09*. The Tribunal believes that the line of delimitation it has decided upon results in no disproportion.

CHAPTER VI – Dispositif

169. Accordingly, **THE TRIBUNAL**,
taking into account the foregoing considerations and reasons,

UNANIMOUSLY FINDS IN THE PRESENT CASE THAT

The International Maritime Boundary between Eritrea and Yemen is a series of geodetic lines joining, in the order specified, the following points. The points are defined in degrees, minutes and seconds of the geographic latitude and longitude, based on the World Geodetic System 1984 (WGS 84). The line and the numbers of the turning points are shown for purpose of illustration only in Charts 3 and 4 in the map section of this Award.

Turning Point	Latitude	Longitude
1	15° 43 10 N	41° 34 06 E
2	15° 38 58 N	41° 34 05 E
3	15° 15 10 N	41° 37 31 E
4	15° 04 00 N	41° 46 43 E
5	15° 00 12 N	41° 50 42 E
6	14° 46 06 N	41° 58 47 E
7	14° 43 30 N	42° 00 42 E
8	14° 36 05 N	42° 10 02 E
9	14° 35 14 N	42° 11 35 E
10	14° 27 16 N	42° 16 54 E
11	14° 21 11 N	42° 22 04 E
12	14° 15 23 N	42° 26 09 E
13	14° 08 39 N	42° 31 33 E
14	14° 03 39 N	42° 28 39 E
15	13° 39 30 N	42° 37 39 E
16	13° 36 13 N	42° 38 30 E
17	13° 35 51 N	42° 38 14 E

18	13° 33 38 N	42° 39 37 E
19	13° 27 28 N	42° 43 25 E
20	13° 26 39 N	42° 48 21 E
21	13° 24 01 N	42° 52 47 E
22	13° 14 23 N	42° 59 47 E
23	13° 10 54 N	43° 03 03 E
24	13° 06 57 N	43° 05 21 E
25	13° 06 08 N	43° 06 06 E
26	13° 04 05 N	43° 08 42 E
27	13° 00 27 N	43° 10 54 E
28	12° 58 10 N	43° 12 45 E
29	12° 54 23 N	43° 13 58 E

Done at London this 17th day of December 1999

The President of the Tribunal

/s/ Professor Sir Robert Y. Jennings

The Registrar

/s/ Tjaco van den Hout

ANNEX 1 – The Arbitration Agreement

The Government of the Republic of Yemen and the Government of the State of Eritrea (hereinafter "the Parties");

Prompted by the desire to re-establish their peaceful relations in the spirit of the traditional friendship between their two peoples,

Conscious of their responsibilities toward 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,

Considering the "Agreement on Principles" between Yemen and Eritrea signed at Paris the twenty-first day of May, 1996 (hereinafter "the Agreement on Principles");

Have agreed as follows:

Article 1

1. On or before 31 December 1996, the Parties will provide the names and addresses of their appointed arbitrators to one another and to France. The four arbitrators thus named shall meet within two weeks to consider the choice of the President of the Tribunal.

2. Within two weeks thereafter the four arbitrators will narrow their consideration to a list of five names which they will then circulate to the Parties.

3. The Parties will have two weeks from the date of circulation of the list during which they may present their views concerning the list.

4. The four arbitrators shall then attempt to reach agreement on the choice of the President. On reaching agreement, they will inform the Parties that the Tribunal has been formed.

5. If no agreement has been reached by 15 March 1997, they shall so inform the President of the International Court of Justice and, pursuant to the Agreement on Principles, they shall request him to choose the President of the Tribunal. In transmitting this request, the four arbitrators shall make known any views that the Parties have expressed on the choice of the President of the Tribunal. The President of the International Court of Justice shall choose within two weeks and after consultation with the Party-appointed arbitrators. By 31 March 1997 at the latest, he shall notify the

Parties, the four arbitrators and France that the Tribunal has been formed and of the name of the President of the Tribunal.

6. The Tribunal shall meet on or before 11 April 1997.

7. All the members of the Tribunal commit themselves to exercise their powers impartially and conscientiously.

8. France shall transmit a certified copy of the Agreement on Principles and of this Arbitration Agreement to the members of the Tribunal as soon as they are chosen.

Article 2

1. The Tribunal is requested to provide rulings in accordance with international law, in two stages.

2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.

3. The second stage shall result in an award delimiting maritime boundaries. The Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor.

a) The Tribunal shall describe the course of the delimitation in a technically precise manner. To this end, the geometric nature of all elements of the delimitation shall be indicated and the position of all the points mentioned shall be given by reference to their coordinates in the World Geodetic System 1984 (W.G.S. 84).

The Tribunal shall also indicate for illustrative purposes only the course of delimitation on an appropriate chart.

b) After consultation with the Parties, the Tribunal shall designate a technical expert to assist it in carrying out the duties specified in letter a) above.

Article 3

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

2. a) If a member of the Tribunal chosen by a Party is unable or unwilling to act and to continue to perform his functions, this Party shall name a replacement within a period of one month from the date on which the Tribunal declares the existence of the vacancy.

b) If the President of the Tribunal is unable or unwilling to act and to continue to perform his functions, a replacement shall be chosen by the Party-appointed members of the Tribunal within a maximum period of two months from the date on which the Tribunal declares the existence of the vacancy. If they cannot agree within this period, the President of the Tribunal shall be chosen by the President of the International Court of Justice.

c) Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy had occurred.

3. All members of the Tribunal shall be deemed to be present for the purposes of the provisions of paragraph 1 of this Article and notwithstanding the existence of vacancies where the only matter for consideration is the declaration of vacancies for the purposes of paragraph 2 of this Article or where either Party has neglected to fill a vacancy as provided by paragraph 2, letter a) of this Article.

Article 4

1. Subject to paragraph 2 of this Article, the decisions of the Tribunal concerning questions of substance or questions of procedure, including questions related to the competence of the Tribunal or the interpretation of this Arbitration Agreement shall be made by a majority of its members if those decisions cannot be made unanimously.

2. In the case of an even division of the votes in the circumstances referred to in paragraph 3 of Article 3 above, the vote of the President shall be decisive.

Article 5

Subject to the provisions of this Arbitration Agreement, the Tribunal shall decide on its rules of procedure and on all questions relating to the conduct of the arbitration.

Article 6

1. Each Party, within thirty days of the signature of this Arbitration Agreement, shall designate an Agent, who will represent it and act on its behalf for the purposes of the arbitration, and shall communicate the name and address of its Agent to the other Party and, upon its formation, to the Tribunal.

2. Each Agent so designated shall be entitled to name one Co-Agent or more to act for him where necessary. The name and the address of the Co-Agent(s) so named shall be communicated to the other Party and, upon its formation, to the Tribunal.

Article 7

1. The Tribunal shall sit in London.

2. The Tribunal shall appoint a Registrar after consultation with the Agents, as soon as possible and in any event no later than its first meeting.

The Registrar shall perform his functions impartially and conscientiously.

3. After consultations with the Agents the Tribunal may engage such staff and secure such services and equipment as it deems necessary.

4. The Tribunal may consult any experts of its choice after notice to the Parties. Such experts shall perform their functions impartially and conscientiously.

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

b) If either Party fails to respond to a request for the production of documents or evidence under paragraph a), the Tribunal may draw from this failure any appropriate evidentiary inference and may make an award based upon the evidence before it.

c) At any time during the arbitral proceedings the Tribunal may request if necessary that a nonparty to this Arbitration Agreement provide to it documents or other evidence relevant to the question. Any documents or other evidence so provided shall be transmitted simultaneously to both Parties.

Article 8

1. The proceedings before the Tribunal shall be adversarial.

2. Without prejudice to any question relating to the burden of proof, the proceedings before the Tribunal shall include two stages as follows.

3. The first stage concerning questions of territorial sovereignty and the definition of the scope of the dispute mentioned in Article 2, paragraph 2 of this Arbitration Agreement shall include two phases, one written and the other oral.

3.1 The written pleadings shall consist of:

a) A memorial to be submitted by each Party to the Tribunal and to the other Party not later than 31 August 1997;

b) A counter-memorial to be submitted by each Party to the Tribunal and to the other Party not later than three months after submission of the memorials;

c) Any other pleading that the Tribunal deems necessary, such pleading to be submitted not later than two months after submission of the counter-memorials.

3.2 An oral phase shall follow the written phase.

a) It shall be held at the seat of the Tribunal, at the place and on the dates determined by the Tribunal after consultation with the Agents. The oral phase shall start in so far as possible not later than three months after the submission of the last written pleadings of the Parties under Article 8, paragraph 3.1 above.

b) Each Party shall be represented in the oral phase of the proceedings by its Agent or, as appropriate, by its Co-Agent, and by such counsel, advisers and experts as it may designate.

3.3 At the conclusion of the oral phase, the Tribunal shall declare the end of the proceedings in the first stage. Notwithstanding such declaration, the Tribunal may request from the Parties their written views on any issues necessary for the elucidation of any aspect of the matters before the Tribunal until the award on questions of territorial sovereignty and the definition of the scope of the dispute is rendered.

3.4 The Tribunal shall render its award, which shall be binding, on questions of territorial sovereignty and the definition of the scope of the dispute

in so far as possible not later than three months from the end of the proceedings as declared under Article 8, paragraph 3.3 above.

3.5 The Tribunal shall communicate this award to the Agents on the day of its rendering. The Tribunal and the Parties may make public this award as of the day of its rendering.

4. The second stage concerning questions of delimitation of maritime boundaries mentioned in Article 2, paragraph 3 of this Arbitration Agreement shall begin immediately upon the rendering of the award which concludes the first stage. It shall include two phases, one written and the other oral.

4.1 The written pleadings shall consist of:

a) A memorial to be submitted by each Party to the Tribunal and to the other Party not later than four months after the rendering of the award on questions of territorial sovereignty and the definition of the scope of the dispute;

b) A counter-memorial to be submitted by each Party to the Tribunal and to the other Party not later than two months after submission of the memorials;

c) Any other pleading that the Tribunal deems necessary, such pleading to be submitted not later than two months after submission of the counter-memorials.

4.2 The oral phase shall follow the written phase.

a) It shall be held at the seat of the Tribunal, at the place and on the dates determined by the Tribunal after consultation with the Agents. The oral phase shall start in so far as possible not later than three months as of the submission of the last written pleadings of the Parties under Article 8, paragraph 4.1 above;

b) Each Party shall be represented in the oral phase of the proceedings by its Agent or, as appropriate, by its Co-Agent, and by such counsel, advisers and experts as it may designate.

4.3 At the conclusion of the oral phase, the Tribunal shall declare the end of the proceedings in the second stage. Notwithstanding such declaration, the Tribunal may request from the Parties their written views on any issues necessary for the elucidation of any aspect of the matters before the Tribunal until the award on questions of delimitation of maritime boundaries is rendered.

4.4 The Tribunal shall render its award on questions of delimitation of maritime boundaries in so far as possible not later than three months after the end of the proceedings before it as declared under Article 8, paragraph 4.3 above.

5. The Tribunal shall be empowered for good cause only to extend the time periods established in this Article on its own or at the request of either Party. The total cumulative extension of the time periods granted by the Tribunal at the request of either Party during the proceedings under the provisions of this sub-paragraph cannot exceed two months for each Party for each stage.

6. The Registrar shall provide the Parties with an address for the filing of their written pleadings and of any other document. The Registrar shall transmit to the Parties simultaneously copies of all written pleadings and documents upon receipt thereof.

7. If, within the period of time fixed by this Arbitration Agreement or by the Tribunal, either Party fails to make a scheduled appearance or file a written pleading, the Tribunal shall continue the proceedings nonetheless and shall make an award based upon the pleadings before it.

Article 9

1. The written and oral pleadings before the Tribunal shall be in English. Decisions of the Tribunal shall be in English.

The Tribunal shall keep a verbatim transcript of all hearings.

Verbatim transcripts of the oral proceedings shall be communicated to the Agents as soon as possible.

2. All documentary evidence shall be filed in their original languages by the Parties. The Parties shall arrange for any translation that they deem necessary for their own preparation of the case.

The Tribunal may avail itself of translation services where it deems appropriate.

Any translations thus generated shall be provided to the Parties.

3. All written pleadings and verbatim transcripts of the oral proceedings and all the deliberations of the Tribunal shall be confidential.

4. Members of the public shall not be admitted to the oral proceedings.

Article 10

1. The remuneration of the members of the Tribunal and of the Registrar shall be borne equally by the Parties.

2. The general expenses of the arbitration shall be borne equally by the Parties. The Registrar shall keep a record and render a final account of the expenses.

3. Each Party shall bear all the expenses incurred by it in the preparation and conduct of its case.

Article 11

1. Without prejudice to the provisions of the Agreement on Principles, the Tribunal, either on its own or after examining the request of one of the two Parties, may prescribe any provisional measures which it considers appropriate under the circumstances to prevent irreparable harm or damage to the natural resources of the area or to preserve the status quo as of 21 May 1996. The Parties shall apply such measures within the time period prescribed by the Tribunal.

2. In no event will a request for provisional measures or a prescription of provisional measures affect the time periods for the submission of pleadings or rendering of the awards under Article 8 above.

Article 12

1. a) The awards of the Tribunal shall state the reasons upon which they are based.

b) The awards of the Tribunal shall include the time period for their execution.

c) For each award of the Tribunal, each member of the Tribunal shall be entitled to attach an individual or dissenting opinion.

2. The Tribunal shall notify immediately to the Agents or Co-Agents its awards, signed by the President and the Registrar of the Tribunal, and any individual or dissenting opinion.

3. At the end of the second stage, the Tribunal shall make public both awards and any individual or dissenting opinions.

Article 13

1. The awards of the Tribunal shall be final and binding. The Parties commit themselves to abide by those awards, pursuant to Article 1, paragraph 2 of the Agreement on Principles. They shall consequently apply in good faith and immediately the awards of

the Tribunal, at any rate within the time periods as provided for by the Tribunal pursuant to Article 12, paragraph 1(b), of this Arbitration Agreement.

2. The Tribunal is empowered to correct within three months of the rendering of its awards any material error relating to those awards such as arithmetical, mathematical, cartographical or typographical errors. Any such corrections shall in no event affect the timetables set out in Article 8 above.

3. Each Party may refer to the Tribunal any dispute with the other Party as to the meaning and the scope of the awards within thirty days of their rendering. The Tribunal shall render a decision regarding any such dispute within sixty days of the day on which the dispute is referred to the Tribunal. Pending this decision, the time periods for the submission of written pleadings set forth in Article 8 above may be suspended by the Tribunal.

Article 14

1. This Arbitration Agreement shall enter into force thirty days after the date of its signature by the two Parties.

2. The Tribunal shall apply the provisions of this Arbitration Agreement.

Article 15

1. Nothing in this Arbitration Agreement can be interpreted as being detrimental to the legal positions or to the rights of each Party with respect to the questions submitted to the Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations and grounds on which those decisions are based.

2. In the event of any inconsistency between the Agreement on Principles and this Arbitration Agreement implementing the procedural aspects of that Agreement on Principles, this Arbitration Agreement shall control. Except with respect to such inconsistency, the Agreement on Principles shall continue in force.

Article 16

1. France shall deposit a copy of this Arbitration Agreement within thirty days of its entry into force with the Secretary-General of the United Nations, with the Secretary-General of the Organization of African Unity, and with the Secretary-General of the Arab League.

2. The President of the Tribunal shall deposit a copy of both awards as soon as possible after the rendering of the award on delimitation of maritime boundaries with the

Secretary-General of the United Nations, with the Secretary-General of the Organization of African Unity, and with the Secretary-General of the Arab League.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Arbitration Agreement.

DONE AT PARIS, this third day of October, one thousand nine hundred and ninety-six, in three original copies, each one in the Arabic, English and French languages, the English text being authentic.

For the Government
of the Republic of Yemen

HUSSEIN ALI AL-HUBAISHI
Legal Advisor of the Government

For the Government
of the State of Eritrea

SALEH MEKY
Minister of Marine Resources

ANNEX 2

Yemen's Answer to Judge Schwebel's Question Put to Yemen on Tuesday, 13 July 1999

On day 6 of the proceedings (Transcript, Day 6, 13 July 1999, pp. 99-100), Judge Schwebel put a question to Yemen's counsel as follows:

> "Ms. Malintoppi, during oral argument in the first round Yemen maintained that it was beyond the Tribunal's authority at that stage to consider matters of *res communis condominia* and the like, stating that to do so would prefigure topics which might be considered only at the second stage. An argument which was remarkable, since Eritrea had said nothing in such regards, nor had the Tribunal. Just now, you argue that it is too late for Eritrea to argue such matters indicating, if I understood correctly, that they were for the first stage. Are Yemen's pertinent arguments consistent?"

In Yemen's submission, Yemen's arguments are consistent. This can be seen from reviewing the context in which Yemen raised the matter in the first stage, the points raised by Ms. Malintoppi in her intervention relating to the second stage, and the terms of the Arbitration Agreement.

The matter first arose at paragraph 20 of Yemen's written submission on the relevance of the oil agreements and activities dated 8 June 1998. There, Yemen stated the following:

> "It is always attractive to seek to discover a basis for dividing a group of islands, not least in an arbitration. The attraction must be the greater when the task of the Tribunal extends to the process of maritime delimitation, and no doubt caution will be needed to avoid a prefiguring of equitable principles and concepts, which are in law only relevant in the second phase of these proceedings".

The point to which Yemen was referring concerned the applicable law. In the first stage, Yemen considered that the applicable law was derived from the principles of international law relating to territorial sovereignty and title to territory. It was Yemen's submission that equitable principles, *infra legem*, were primarily related to the law of maritime delimitation – a matter to be dealt with in the second stage – not to the law of territorial sovereignty *per se*. Yemen's view was thus that the concept of equitable principles was particularly relevant to the second stage of the proceedings, and that this issue should not be prefigured in the first stage. Yemen made no specific reference to concepts such as *res communis* or *condominia* when it raised the matter.

In the second stage of these proceedings, Yemen fully accepts that equitable principles form part of the applicable law of maritime delimitation. However, and this was the point discussed by Ms. Malintoppi, the application of equitable principles to maritime delimitation, when read in conjunction with the scope of the Tribunal's mandate as established in the Arbitration Agreement and the Agreement on Principles, does not encompass the creation or modalities of "joint resource zones" around Yemen's islands in the manner that Eritrea's Prayer for Relief requests.

It follows that Yemen does not maintain that Eritrea's arguments in favour of the creation of such zones are too late at this stage, but rather that the applicable law, together with the provisions of the Arbitration Agreement and the Agreement on Principles, does not provide a legal or jurisdictional basis for acceding to Eritrea's requests.

It should be noted, however, that the 1994 and 1998 Agreements between Yemen and Eritrea, particularly those sections related to fishing, clearly indicate that Yemen and Eritrea are currently involved in working together to administer the fish resources throughout the southern Red Sea region.

Yemen's Answer to the Tribunal's Question Put to Yemen on Friday, 16 July 1999

At the close of the oral hearings (Transcript, Day 8, 16 July 1999, page 45), the Tribunal put the following question to Yemen:

> "The Tribunal has noted that, in the arguments of Yemen, relatively little has been said about the traditional fishing regime which the Tribunal recalls is an essential part of the *Dispositif* of the Award of 9 October 1998. Would Yemen indicate how, if at all, the traditional fishing regime should be taken into account in the delimitation, particularly taking into consideration the agreements signed by the two Governments in 1994 and 1998?"

Yemen's answer was as follows:

Yemen recognises that, in deciding the issue of sovereignty over various Red Sea Islands in the first Award, the Tribunal stated in its *Dispositif* that 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" (paragraph 527(vi) of the Award). This decision is final and binding between the Parties, as stipulated in Article 13(a) of the Arbitration Agreement. Yemen is fully committed to apply and implement the Award in all of its aspects, including with respect to the perpetuation of the traditional fishing regime for the fishermen of both Eritrea and Yemen.

As was clear from the Parties' presentations during the oral hearings, both Parties consider that the Tribunal's *Dispositif* must be read in conjunction with the reasoning that appears in the body of the Award. With respect to "the perpetuation of the traditional fishing regime in the region", Yemen has also taken note of the Tribunal's pronouncements in other parts of the Award which bear on the issue. For example, the first sentence of paragraph 526 provides:

> "In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region."

The historical basis of this finding was further explained in paragraph 128 where the Tribunal stated:

> "This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. Equally, the persons sailing for fishing or trading purposes from one coast to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature."

It is Yemen's view that the holdings of the Tribunal in the first Award with respect to the traditional fishing regime constitute *res judicata* without prejudice to the maritime boundary that the Tribunal decides on in the second stage of the proceedings. In other words, the traditional fishing regime that has existed for the benefit of the fishermen of both countries throughout the region is to be perpetuated notwithstanding the decision that the Tribunal reaches as to the delimitation of the maritime boundary between the two countries. Indeed, it is clear that both Parties understood this to be a mutual obligation which existed apart from the question of delimitation of their maritime boundary in that, as the November 1998 Agreement between the two Governments indicates, Yemen and Eritrea have been formulating a regime of cooperation with respect to fishing in the spirit of good neighbourliness and friendship which has prevailed since the Award in the first stage of this arbitration.

In Yemen's submission, the delimitation to be effectuated by the Tribunal in its second Award will have a different purpose than the preservation of the traditional fishing regime. For example, counsel for Eritrea admitted during its rebuttal presentation that issues such as mineral extraction were not included in the Tribunal's notion of the traditional fishing regime (Transcript, Day 8, 16 July 1999, page 27). Clearly, mineral

extraction is related to the delimitation of the continental shelf, a matter which is relevant to the second stage.

Similarly, the delimitation of the column of water or Exclusive Economic Zone of the Parties, as well as of their respective territorial seas in the Central and Southern Sectors, involves matters which, pursuant to the 1982 Convention on the Law of the Sea, go beyond the preservation of the traditional fishing regime. It is in this connection that Yemen advanced the dependence of its coastal population on fishing and the incidence of Yemen's fishing practices in the region as relevant circumstances to be taken into account in the delimitation process.

In short, the perpetuation of the traditional fishing regime is not synonymous with the rights and obligations of the Parties that will be determined by a delimitation of a single maritime boundary throughout the relevant area. It is for these reasons that Yemen does not consider that the decision of the Tribunal on the traditional fishing regime should have any impact on the delimitation of the maritime boundaries between the two Parties in the second stage.

In this connection, it is appropriate to refer to the 1994 Agreement between Yemen and Eritrea to which specific reference is made in the Tribunal's question. As can be seen from its terms, the 1994 Agreement is entirely consistent with the preservation of the traditional fishing regime decided by the Tribunal in the first stage.

The Agreement was signed by the Minister of Fish Wealth on behalf of Yemen and the Minister of Marine Wealth on behalf of Eritrea. The latter, of course, also acts as Eritrea's Agent in the present arbitration.

It is significant that Paragraph 1 of the Agreement specifically provides for a fishing regime that is remarkably similar to that recognised in the Tribunal's first Award. That paragraph provides, *inter alia*, that:

> "Both the State of Eritrea and the Republic of Yemen shall permit fishermen who are citizens of the two States, without limiting their numbers, and who carry cards to engage in the occupation of fishing, to fish in the territorial waters of the two States, the contiguous zone and the Exclusive Economic Zone of the two countries in the Red Sea (with the exception of the internal waters), provided that the fishermen of the two countries be enumerated and that they be granted official licenses to engage in the occupation of fishing specifying the locations where they will be received and may market their products in Appendix No. 1."

Moreover, Paragraph 4 of the Agreement provides in relevant part that the persons included in Paragraph 1 shall be permitted to "market their fish products in the

territory of the other State and in the locations specified in Appendix No. 1 of this Memorandum of Understanding". The Tribunal will note that these provisions are very similar to the Tribunal's findings set out in paragraph 128 of the Award in the first stage.

Unfortunately, the 1994 Agreement could not be fully implemented at the time due to the events of 1995. Nonetheless, the Agreement remains in effect, and Yemen remains fully committed to its implementation. As can be seen from its terms, the 1994 Agreement envisages a regulatory framework which is well suited to addressing the kinds of concern raised by Eritrea in its pleadings regarding traditional fishing in the region.

The Tribunal's question also makes reference to the Agreement signed between the two Parties in November 1998. In Yemen's view, this Agreement evidences the good faith of both Parties in pursuing mutual cooperation in a number of areas, including fishing. In particular, Article 1(d) of the Agreement provides for the formation of a Committee for Cooperation in the Area of Fish Wealth and Maritime Fishing. Pursuant to Article 3(4) of the Agreement, this committee would be expected to address the question of drafting a special agreement "in the area of fish wealth, maritime fishing and the protection of the maritime environment".

With respect to the relevance of the 1994 and 1998 Agreements to the perpetuation of the traditional fishing regime, it is appropriate to recall what counsel for Yemen had to say on this matter during the oral hearings:

> "Indeed, as Mr. Picard has shown, the Parties have already established a framework for addressing the modalities of their fishing activities in the Red Sea with their 1994 and 1998 agreements. These agreements could well represent a very important context within which any further questions between the Parties as to the preservation of the traditional fishing practices mentioned in paragraph 526 of the Award could be dealt with" (Transcript, Day 6, 13 July 1999, page 88).

Implementation of these two Agreements would also be consistent with the letter of the President of the Tribunal, dated 8 November 1998, which indicated that these issues "are a matter for the Parties themselves to resolve in good faith, bearing in mind what the Tribunal has found in Paragraph 526 of the Award".

In conclusion, Yemen considers that the Tribunal has already decided on the preservation of the traditional fishing regime between the Parties in its first Award. The Award as it stands is *res judicata*, and in view of the language of Article 13, paragraph 3 of the Arbitration Agreement, it is not appropriate to interpret the meaning and the scope of the Award in the first stage at this point in the proceedings. Therefore, and bearing in mind the framework that has been established by the 1994 and 1998

Agreements, Yemen does not believe that the traditional fishing regime needs to be further taken into account in the delimitation of the maritime boundary between the Parties at this stage of the proceedings.

Eritrea's Answer to Judge Schwebel's Question

[*letterhead: The State of Eritrea Zuqar-Hanish Archipelago Arbitration Office]*

Mrs. Phyllis Hamilton
Permanent Court of Arbitration
Peace Palace, the Hague
The Netherlands August 12, 1999

By facsimile: 31-70-3024167

Re: Eritrea/Yemen Arbitration

Dear Mrs. Hamilton:

As you probably recall, during the July oral hearings on the maritime phase of the Eritrea/Yemen arbitration, the Tribunal requested that the State of Eritrea supply it with the coordinates for the historic median line which was referred to in Eritrea's written and oral pleadings. It was requested that these co-ordinates be supplied within four weeks of the close of the hearings (simultaneously with the filing of Yemen's response to the question that it was asked.)

I am attaching the co-ordinates to this letter. In fact, you will find attached to this letter two sets of co-ordinates, one for the historic median line and one for the western boundary of the shared resource zone described in Eritrea's written pleadings The difference between the two is that the historic median line gives full effect to the Eritrean Mohabbaka and Haycockislands and to Southwest Rock. The western boundary of the shared resource zone does not, and thus runs to the west of the historic median line. The co-ordinates that have been chosen for drawing these two lines are either on land territory of Eritrea or on straight baselines drawn in accordance with the United Nations Convention on the Law of the Sea.

I hope that you will forward this information to the Tribunal, and also to Counsel for the Republic of Yemen (after Yemen submits its response to the question that was posed to them). At the point that you receive this, I will be in transit from Asmara to New Haven and so I hope that no problems arise concerning our submission. I will be reachable in New Haven by the end of the day on Friday, August 13 if any problems do arise, and I hope that you will be able to forward to me there the answer that Yemen submits to the question that the Tribunal has presented it with.

Many thanks again for your cordial assistance.

Sincerely yours,
/s/
Professor R. Lea Brilmayer
Co-Agent, the State of Eritrea

Basepoint Coordinates for Eritrea's Proposed Historic Median Line

	Longitude	Latitude
1	40.256123	16.261644
2	40.260834	16.088427
3	40.610901	15.894623
4	40.627377	15.881909
5	40.675121	15.845072
6	40.705509	15.821624
7	40.726833	15.800971
8	40.774303	15.754568
9	40.821114	15.722202
10	40.859592	15.697753
11	40.873196	15.684411
12	40.899334	15.658775
13	40.923637	15.634940
14	40.959450	15.599816
15	40.984978	15.574780
16	41.007191	15.552997
17	41.033173	15.527514
18	41.064766	15.496529
19	41.090080	15.471701
20	41.097931	15.464003
21	41.194546	14.617983
22	41.315613	14.490411
23	41.327480	14.467098
24	41.333321	14.454417
25	41.674259	14.101558
26	41.682278	14.093115
27	41.992912	13.888812
28	42.033104	13.856160
29	42.083229	13.815438
30	42.143177	13.766736
31	42.163944	13.749866
32	42.597202	13.634215
33	42.597584	13.634094
34	42.597961	13.633973
35	42.629669	13.539982
36	42.630470	13.539621
37	42.649868	13.350410
38	42.649937	13.349084
39	42.898411	13.022588
40	42.909142	13.015216

41	42.945763	12.990066
42	42.946693	12.989246
43	42.972328	12.966615
44	42.999687	12.942464
45	43.027813	12.909046
46	43.046738	12.879812

Basepoint Coordinates for Eritrea's Proposed Historic Median Line in Degrees and Minutes (Approximated)

	Longitude		Latitude	
	Degree	Minute	Degree	Minute
1	40	15	16	16
2	40	16	16	5
3	40	37	15	54
4	40	38	15	53
5	40	41	15	51
6	40	42	15	49
7	40	44	15	48
8	40	46	15	45
9	40	49	15	43
10	40	52	15	42
11	40	52	15	41
12	40	54	15	40
13	40	55	15	38
14	40	58	15	36
15	40	59	15	34
16	41	0	15	33
17	41	2	15	32
18	41	4	15	30
19	41	5	15	28
20	41	6	15	28
21	41	12	14	37
22	41	19	14	29
23	41	20	14	28
24	41	20	14	27
25	41	40	14	6
26	41	41	14	6
27	42	0	13	53
28	42	2	13	51

29	42	5	13	49
30	42	9	13	46
31	42	10	13	45
32	42	36	13	38
33	42	36	13	38
34	42	36	13	38
35	42	38	13	32
36	42	38	13	32
37	42	39	13	21
38	42	39	13	21
39	42	54	13	1
40	42	55	13	1
41	42	57	12	59
42	42	57	12	59
43	42	58	12	58
44	43	0	12	57
45	43	2	12	55
46	43	3	12	53

Basepoint Coordinates for the Western Edge of Eritrea's Proposed Delimitation

Western Basepoint Coordinates

	Longitude	Latitude
1	40.256123	16.261644
2	40.260834	16.088427
3	40.610901	15.894623
4	40.627377	15.881909
5	40.675121	15.845072
6	40.705509	15.821624
7	40.726833	15.800971
8	40.774303	15.754568
9	40.821114	15.722202
10	40.859592	15.697753
11	40.873196	15.684411
12	40.899334	15.658775
13	40.923637	15.634940
14	40.959450	15.599816
15	40.984978	15.574780
16	41.007191	15.552997
17	41.033173	15.527514
18	41.064766	15.496529
19	41.090080	15.471701

20	41.097931	15.464003
21	41.194546	14.617983
22	41.315613	14.490411
23	41.327480	14.467098
24	41.333321	14.454417
25	41.674259	14.101558
26	41.682278	14.093115
27	41.992912	13.888812
28	42.033104	13.856160
29	42.083229	13.815438
30	42.143177	13.766736
31	42.163944	13.749866
32	42.182957	13.719868
33	42.209858	13.677422
34	42.236946	13.629816
35	42.290718	13.558626
36	42.292160	13.556718
37	42.314285	13.507826
38	42.332073	13.468508
39	42.456223	13.322620
40	42.502346	13.277068
41	42.548088	13.231894
42	42.583633	13.196643
43	42.621857	13.158704
44	42.659718	13.121125
45	42.696766	13.084354
46	42.898411	13.022588
47	42.909142	13.015216
48	42.945763	12.990066
49	42.946693	12.989246
50	42.972328	12.966615
51	42.999687	12.942464
52	43.027813	12.909046
53	43.046738	12.879812

Eastern Basepoint Coordinates

54	41.725754	16.630884
55	41.734745	16.575695
56	41.738682	16.551414
57	41.749630	16.541800
58	41.775238	16.519312
59	41.812977	16.486170

60	41.839870	16.462553
61	41.863270	16.442003
62	41.890648	16.417961
63	41.961689	16.292364
64	42.269432	15.701784
65	42.266293	15.700562
66	42.274937	15.697087
67	42.276882	15.685533
68	42.366718	15.489594
69	42.401192	15.467257
70	42.512936	15.415102
71	42.530704	15.291346
72	42.594810	15.210606
73	42.603222	15.200403
74	42.690079	15.195890
75	42.612560	15.189135
76	42.749393	15.179667
77	42.621025	15.169647
78	42.638046	15.163574
79	42.972595	14.600204
80	42.983734	14.391216
81	42.983959	14.384205
82	43.016117	14.331829
83	43.034367	14.289636
84	43.052059	14.248733
85	43.085064	14.107971
86	43.096539	14.067361
87	43.103230	14.054599
88	43.122894	14.017092
89	43.141998	13.980651
90	43.158348	13.949471
91	43.189007	13.916190
92	43.229725	13.821691
93	43.252224	13.484743
94	43.248089	13.434113
95	43.242542	13.374463
96	43.228340	13.302191
97	43.224674	13.271644
98	43.208839	13.259463
99	43.207760	13.243280
100	43.225060	13.202319
101	43.225647	13.199706
102	43.236843	13.168642

103	43.253857	13.136574
104	43.288876	13.080974
105	43.303009	13.063622

Basepoint Coordinates for the Western Edge of Eritrea's Proposed Delimitation in Degrees and Minutes (Approximated)

Western Basepoint Coordinates

	Longitude		Latitude	
	Degree	Minute	Degree	Minute
1	40	15	16	16
2	40	16	16	5
3	40	37	15	54
4	40	38	15	53
5	40	41	15	51
6	40	42	15	49
7	40	44	15	48
8	40	46	15	45
9	40	49	15	43
10	40	52	15	42
11	40	52	15	41
12	40	54	15	40
13	40	55	15	38
14	40	58	15	36
15	40	59	15	34
16	41	0	15	33
17	41	2	15	32
18	41	4	15	30
19	41	5	15	28
20	41	6	15	28
21	41	12	14	37
22	41	19	14	29
23	41	20	14	28
24	41	20	14	27
25	41	40	14	6
26	41	41	14	6
27	42	0	13	53
28	42	2	13	51
29	42	5	13	49
30	42	9	13	46
31	42	10	13	45
32	42	11	13	43

33	42	13	13	41
34	42	14	13	38
35	42	17	13	34
36	42	18	13	33
37	42	19	13	30
38	42	20	13	28
39	42	27	13	19
40	42	30	13	17
41	42	33	13	14
42	42	35	13	12
43	42	37	13	10
44	42	40	13	7
45	42	42	13	5
46	42	54	13	1
47	42	55	13	1
48	42	57	12	59
49	42	57	12	59
50	42	58	12	58
51	43	0	12	57
52	43	2	12	55
53	43	3	12	53

Eastern Basepoint Coordinates

54	41	44	16	38
55	41	44	16	35
56	41	44	16	33
57	41	45	16	33
58	41	47	16	31
59	41	49	16	29
60	41	50	16	28
61	41	52	16	27
62	41	53	16	25
63	41	58	16	18
64	42	16	15	42
65	42	16	15	42
66	42	16	15	42
67	42	17	15	41
68	42	22	15	29
69	42	24	15	28
70	42	31	15	25
71	42	32	15	17
72	42	36	15	13

73 42 36 15 12

ANNEX 3

TRANSLATION

Memorandum of Understanding between the State of Eritrea
and the Republic of Yemen
For Cooperation in the Areas of Maritime Fishing, Trade,
Investment, and Transportation

Based on the spirit of friendship and cooperation and to translate into action the common objectives and interests between the two fraternal countries of the State of Eritrea and the Republic of Yemen and achieve the interests of the two fraternal peoples, the delegation of the Republic of Yemen headed by Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhl, the Minister of Fish Wealth, visited the State of Eritrea and received a warm reception from Ali Sayyid Abdallah, the Interior Minister, on Friday, 11 November 1994. They held initial discussions at the Eritrean Interior Ministry in the capital, Asmara, followed by talks between the two parties in the city of Massawa. Dr. Salih Makki, the Minister of Marine Wealth for the State of Eritrea, chaired the Eritrean side, while Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhl, the Minister of Fish Wealth for the Republic of Yemen, chaired the Yemeni side.

The talks between the two sides resulted in agreement on the following matters:

First: The Area of Fish Wealth

1. Both the State of Eritrea and the Republic of Yemen shall permit fishermen who are citizens of the two States, without limiting their numbers, and who carry cards to engage in the occupation of fishing, to fish in the territorial waters of the two States, the contiguous zone and the Exclusive Economic Zone of the two countries in the Red Sea (with the exception of the internal waters), provided that the fishermen of the two countries be enumerated and that they be granted official licenses to engage in the occupation of fishing specifying the locations where they will be received and may market their products in Appendix No. 1. Each fisherman must submit a fishing license application to the other party within three months from the date of the signing of this Memorandum of Understanding while complying with the following:

a. The use of sound fishing methods, the non-use of explosives and not polluting the marine environment, as well as the non-use of poisons, chemicals or other means of extermination.

b. Not to use methods and fishing equipment damaging the growth of marine organisms.

c. Not to remove or cut marine plants or coral reefs of any kind.

d. Confinement to the fishing seasons in both of the two countries.

e. Use of all means to ensure the protection of the environment and rationalization of fishing practices.

f. Adherence to all laws and regulations of the other country in the sea to the extent these laws and regulations are applicable and do not conflict with the above provisions.

2. For the purposes of Paragraphs 1.d and 1.f above, the concerned authorities in both States in the Red Sea must notify the concerned authorities in the other State of laws, regulations and rules or any agreements with a third party in the waters the other party is using. Each party shall undertake to issue directives for compliance with that information.

3. Each fisherman or worker on any fishing vessel located in the territorial waters of the other [S]tate must carry a fishing license and a card establishing his identity and nationality in accordance with the laws and regulations of his State, and he must fly the flag of his State over his vessel.

4. Persons included in the provisions of Paragraph (1) above shall be permitted to do the following:

a. Market their fish products in the territory of the other State and in the locations specified in Appendix No. 1 of this Memorandum of Understanding.

b. Obtain the appropriate facilities for maintenance of the vessels and obtain foodstuffs, fuels, and ice at the prevailing prices in the country where they are present and for the period during which they remain at sea.

5. If the authorities in either of the two States are compelled to detain any fishing vessel or fisherman or worker on board any vessel, the authorities of that State must notify immediately the authorities of the other State of the names of the detained individuals and the vessels and the property contain[ed] therein and specify the reasons for and date of the detention.

6. The two States shall cooperate in the area of fishery research, protection of the marine environment from pollution, and the exchange of technical expertise and training at specialized institutions in the two countries.

Second: The Area of Maritime Trade, Investment and Transportation

1. Study the possibility of creating joint fishing companies between the two States.

2. Study the conclusion of a maritime transportation agreement between the two States.

3. Study the conclusion of a trade agreement between the two States. Until such a[n] agreement can be concluded, the concerned authorities in each of the two countries shall offer all facilities available to them according to their laws to facilitate the transporting of locally-produced goods in the two countries.

Third: The Area of Security

The two States shall work to implement the Protocol signed by the Interior Ministries of the two countries in Sanaa on 10 November 1993 to achieve the objectives provided for in the said Protocol.

Fourth: The Implementation of the Subjects of the Memorandum

1. The concerned authorities in each of the two States, following the signing of this Memorandum of Understanding, shall take all necessary measures including but not limited to the issuance of

decrees, orders, licenses, or directives to implement the contents of this Memorandum of Understanding.

2. The concerned agencies in the two States shall organize patrols off their coasts in the Red Sea and establish communication networks between the major security centers of the two States in the Red Sea at a time and method to be agreed by them.

3. Special offices shall be established in the two States to monitor and execute the articles of this Memorandum[.] The headquarters for these offices shall be specified in Appendix No. 1 of this Memorandum.

4. Contacts between the two sides regarding the implementation of this Memorandum of Understanding shall take place through diplomatic channels while abiding by the contents of Paragraph (2) of Article (4) above.

5. The two Governments shall consult on matters tha[t] may arise from the implementation of this Memorandum of Understanding, anything related to amendment, deletion or addition, as well as amendment or addition to the Appendix.

Signed at Massawa on this day of Tuesday, 15 November 1994.

For the Republic of Yemen
Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhl

Minister of Fish Wealth

For the State of Eritrea
Dr. Salih Makki

Minister of Marine Wealth

Appendix No. 1

A. Centers for Fishing Registration and Monitoring and Marketing in the Republic of Yemen:

1. Maydi
2. Khoba
3. Hodeidah
4. Khokha
5. Mocha

Centers for Fishing Registration and Monitoring and Marketing in the State of Eritrea:

1. Assab
2. Tio
3. Dahlak
4. Massawa

Appendix No. 2

Members of the State of Eritrea Delegation:

1. Dr. Salih Makki, Minister of Marine Wealth
2. Ramadhan Ouliay, Naval Forces Commander
3. Musa Rabi'a, Eritrean Police Chief
4. Muhammad Idris Amir, Middle East Bureau, Foreign Ministry

Members of the Republic of Yemen Delegation:

1. Dr. Abd al-Rahman Abd al-Qadir Ba-Fadhl, Minister of Fish Wealth
2. Col. Abd al-Karim Muharram, Chief of Staff, Naval Forces
3. Col. Muhammad Rizq al-Sarami, Undersecretary, Central Agency of Political Security
4. Ambassador Ahmad al-Basha, Ambassador of the Republic of Yemen to the State of Eritrea
5. Ambassador Muhammad al-Wazir, Chairman, African Bureau, Foreign Ministry
6. Dr. Rashad al-Ulaymi, Director-General, Legal Affairs, Interior Ministry
7. Najib Abd al-Qawi Hamim, Director-General, External Cooperation, Ministry of Supply & Commerce
8. Khalid Sa'id al-Dhubhani, Director, Fishing Administration, Ministry of Planning & Development
9. Ali al-Maqalih, Director, Office of the Minister of Fish Wealth

SECOND STAGE: MARITIME DELIMITATION

SECOND STAGE: MARITIME DELIMITATION

SECOND STAGE: MARITIME DELIMITATION

Treaty Establishing the Joint Yemeni-Eritrean Committee for Bilateral Cooperation Between the Government of the Republic of Yemen And the Government of the State of Eritrea

Based on the progressive civilized example set by bilateral relations between the Republic of Yemen and the State of Eritrea, and

Affirming their shared desire to continue to strengthen and reinforce these relations in service to their common interests, and

Aware of the importance of strengthening and developing bilateral cooperation in all fields of mutual concern,

The two parties have agreed to the following:

Article One – The two parties shall form a Joint Committee for Bilateral Cooperation between them in all fields of mutual concern, containing representatives of each party, to be called the Joint Yemeni-Eritrean Committee for Bilateral Cooperation, hereinafter referred to as the "Joint Committee," with the two Ministers of Foreign Affairs presiding. The Ministry of Planning and Development from the Yemeni side and the Ministry of Foreign Affairs from the Eritrean side, with the presence of required assistants, shall have jurisdiction over the secretariat and monitor implementation of Joint Committee results.

Article Two – The Joint Committee shall assume the following tasks:

1. Studying programs and recommendations designed to expand bilateral cooperation between the two countries and signing agreements, protocols, and implementation programs in that regard.

2. Monitoring the implementation of agreements, protocols, memoranda of understanding and minutes signed between the two countries in the fields referenced in Paragraph 1 of this Article.

3. Discussing proposals submitted by either country with the purpose of strengthening and developing the horizons of cooperation between them in all various fields of mutual interest.

4. Encouraging the exchange of bilateral visits and meetings between officials of both countries, and exchanging information and documents relevant to joint cooperation relations.

Article Three

1. The Committee may form permanent and temporary subcommittees and work teams to carry out certain specific tasks in the framework of Joint Committee work.

2. The subcommittees and work teams referred to in Paragraph 1 of this Article shall submit their recommendations to the Joint Committee for approval.

Article Four – The draft agenda for each round of exchanging recommendations shall be prepared through diplomatic channels and shall be submitted sufficiently in advance of the convening of the round. The Joint Committee may assign a technical committee from both sides to prepare for its meetings.

Article Five – The Joint Committee shall convene its round annually, alternating between Sanaa and Asmara. Special minutes shall be prepared for each round, signed by the chairmen of both sides on the Joint Committee, and approved by the relevant authorities in both countries pursuant to the laws and regulations in effect in each country.

Article Six – This treaty shall come into force on the date the ratification instruments are exchanged in accordance with the constitutional procedures in effect in each country. It shall remain in force for five (5) years and shall be renewed automatically for identical periods, provided neither party informs the other party in writing of its desire to terminate the treaty six months prior to its expiration date. Any additions or amendments to the articles of this treaty shall only be made with the written approval of both parties thereto.

The treaty has been drawn up in Sanaa on Friday, 25 Jumada II 1419, equivalent to 16 October 1998, in two original copies in the Arabic language, both having equal legal weight.

For the Government of the State of Eritrea	For the Republic of Yemen
[Signed]	[Signed]
Haile Woldense	Abd al-Qadir Abd al-Rahman Ba-Jammal
Minister of Foreign Affairs	Deputy Prime Minister and Foeign Minister

SECOND STAGE: MARITIME DELIMITATION

SECOND STAGE: MARITIME DELIMITATION

List of Abbreviations

EEZ	Exclusive Economic Zones
FAO	Food and Agricultural Organization of the United Nations
I.C.J. Reports	International Court of Justice – Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ILR	International Law Reports
UNDP	United Nations Development Program
WGS	World Geodetic System