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Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)

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In the United States, state courts have long been aware that well-reasoned decisions evaluating the state interests that must be taken into account in determining the scope of federally protected rights can help to elicit deference to state law from the U.S. Supreme Court. Municipal courts in Europe are also learning that well-reasoned decisions are more likely to elicit deference from regional international tribunals, be it in the context of the principle of subsidiarity in the European Community or in the context of the margin of appreciation under the European Convention on Human Rights. If nothing else, this case may help nurture a similar attitude in municipal courts generally, at least with respect to treaty obligations that may well be invoked before an international tribunal with compulsory jurisdiction.

Notwithstanding the delay in instituting proceedings in the present case, the need for urgency in prompt-release cases makes it likely that only the decision of a municipal trial court, and not that of an appellate court, will ordinarily be available at the time the Tribunal is seized. Although trial courts are accustomed to the idea that their decisions will be reviewed, they are also accustomed to the considerable freedom afforded them by appellate courts on certain matters. It is likely that appellate courts, once they articulate the relevant considerations and standards, only episodically manifest an interest in fact-sensitive "trial management" matters such as bond. The underlying point of this case is that the Tribunal is not a municipal appellate court applying municipal law.

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Maritime delimitation between opposite states—traditional "artisanal" fishing regimes—transboundary nonliving resources—interpretation of prior award—straight baselines—effect of coastal and midsea islands


Arbitral Tribunal, December 17, 1999.

On December 17, 1999, the Arbitral Tribunal (Tribunal), convoked by Eritrea and Yemen in the Arbitration Agreement of October 3, 1996, and comprising Judges Rosalyn Higgins and Stephen Schwebel, appointed by Eritrea, Dr. Ahmed El-Kosheri and the late Keith Highet, appointed by Yemen, and Sir Robert Jennings, presiding, delivered the second award in a process that the parties had elected to conduct in two stages. In the first stage, the Tribunal addressed territorial sovereignty and the scope of the dispute. The second and final award, reviewed here, addressed maritime delimitation. Unfortunately, the pleadings have not been published, and the student must rely on the Tribunal's brief summaries of them. The author reported on the first stage in 93 AJIL 668 (1999).
Notwithstanding the title of the award, scarcely a third of its 50 pages and 169 paragraphs deals directly with the delimitation of the maritime boundary. The greater part is devoted to clarification and elaboration of certain innovative parts of the first award—in particular, paragraph 526, in which the Tribunal, having awarded critical island groups to Yemen, stated that “[i]n 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.”\(^2\) In the first award’s \textit{dispositif}, the Tribunal had decreed 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.”\(^3\)

In the second phase, Eritrea contended that these holdings in the first award required the establishment of “joint resource zones which the Tribunal should delimit,”\(^4\) and that the Tribunal, at the very least, should “specify with precision what was entailed by its finding as to the traditional fishing regime.”\(^5\) Yemen rejected Eritrea’s interpretation and insisted that its sovereignty over the islands had not been made conditional, that Yemen alone was to ensure the preservation of traditional fishing rights, that no agreement with Eritrea was necessary, and that, in any case, the Tribunal’s finding was in favor of the fishermen of the two countries, not the state of Eritrea.\(^6\)

Relying ostensibly on Islamic law, which was neither selected nor argued by the parties, the Tribunal held that the traditional fishing regime “is one of free access and enjoyment for the fishermen of both Eritrea and Yemen,”\(^7\) but that Eritrea may act for its nationals “through diplomatic contacts with Yemen or through submissions to this Tribunal.”\(^8\) As for the specific features of this regime:

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 the effecting of repairs.\(^9\)

“Artisanal” fishing, as contrasted with “industrial fishing,” did not preclude improvements in the power or mode of locomotion of fishing vessels, in their means of communications and navigation, or in their fishing techniques.\(^10\) It did, however, exclude guano and mineral extraction.\(^11\) The traditional regime also included “certain associated rights,”\(^12\) among them access and transit rights over waters and

\(^2\) \textit{Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Eritrea/Yemen (Oct. 9, 1998), para. 526} [hereinafter Award I]. The texts of both awards, as well as other documents relating to the arbitration, are available online at the Web site of the Permanent Court of Arbitration, <http://v.pca-cpa.org>.

\(^3\) Id., para. vi.

\(^4\) \textit{Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), Eritrea/Yemen (Dec. 17, 1999), para. 89} [hereinafter Award II].

\(^5\) Id.

\(^6\) Id., para. 90.

\(^7\) Id., para. 101.

\(^8\) Id. For comments on this self-authorized continuing supervisory role, see infra \textit{Continuing Jurisdiction}.

\(^9\) Id., para. 103.

\(^10\) Id., para 106.

\(^11\) Id., para. 104.

\(^12\) Id., para. 107.
[The entitlement to enter the relevant ports, and to sell and market the fish there....

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 fisher[men] to the acquit system to resolve their disputes inter se is to be also maintained and preserved. 13

This regime was to operate throughout the waters of Yemen and Eritrea and in territory in their ports. Although it was not to limit Yemen’s competence to regulate either the fishing activities of nationals of third states or industrial fishing activities by Eritreans, 14 it was to limit Yemen’s competence to regulate the traditional fishing regime and to enact environmental measures that could affect that regime; henceforth, such measures could be taken only “with the agreement of Eritrea.” 15

As mentioned, this traditional regime, based, as the Tribunal put it, on “a common rule as well as a common religion,” 16 did not encompass the exploitation of petroleum deposits. 17 But 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. 18

The Tribunal also inferred an obligation—based on historical connections, friendly relations, and state practice—to “give every consideration to the shared or joint or unitized exploitation” of resources that straddle maritime boundaries. 19

In the first phase, the Tribunal concluded that Eritrean and Yemeni offshore petroleum contracts neither established nor significantly strengthened the states’ respective claims over disputed islands. 20 The Tribunal also concluded, however, that the contracts “lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties.” 21 In the second phase, the Tribunal inched away from its earlier finding 22 and stated that “[w]hile 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.” 23

Eritrea and Yemen face each other across the Red Sea from approximately 18° longitude in the north to approximately 12°80’ in the south. In the north, the continental coasts of the two states are approximately 150 nautical miles apart. In the south, where the Red Sea funnels down to the Bab al Mandab straits, their continental coasts are less than 24 nautical miles apart. The first award had assigned the midsea islands of Jebel Tair, Zubayr, Zuqar, and Hanish to Yemen, and the Haycocks and Southwest Rocks to Eritrea; with a 12-mile limit, only territorial seas remained between these islands of the respective states. Given the distribution of islands and the funneling configuration of the Red Sea as it descends southward, the delimitation in the south and parts of the middle sectors divided only territorial waters. In the north, the delimitation divided continental shelf and exclusive economic zones. The

13 Id.
14 Id.
15 Id., para. 108.
16 Id., para. 85.
17 Id., para. 104.
18 Id., para. 86.
19 Id.
20 Award I, supra note 2, para. 437.
21 Id., para. 438.
22 The Tribunal justified this change on the basis of Article 2(3) of the Arbitration Agreement, which enjoined the Tribunal during the second phase to take into account “the opinion it will have formed on questions of territorial sovereignty.” Arbitration Agreement, Oct. 3, 1996, Art. 2(3), <http://www.pca-cpa.org/ERYearbargree.htm>.
23 Award II, supra note 4, para. 84.
Tribunal had “enclaved,” as it were, the fishing claims of the parties in its special “artisanal regime,” at once acknowledging the validity of traditional fishing claims while denying them any capacity to force an adjustment of the maritime boundary line. Hence, the delimitation was essentially based on geographical factors.

For those who had studied the first award, it came as no surprise that the Tribunal decided in its second award 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,” measured from the low-water line, “in accord with the well established customary rule of the law of the sea,” the boundary terminating in the north and south so as to avoid trespassing on areas where third states might have claims. But many decisions had to be made in order to achieve this outcome.

In setting out its decision, the Tribunal emphasized that it was not endorsing the boundaries claimed by either party. The major issue does not appear to have been the appropriateness, in principle, of using a median line as a boundary, but the extent to which the location of specific islands should affect its placement. In the words of the Tribunal, the question was

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.

As for the effect to be accorded the various islands in the northern stretch of the boundary line, the Tribunal treated Eritrea’s Dahlak archipelago, which has a considerable population, as “an integral part of the general coastal configuration,” with the baseline “found somewhere at the external fringe of the island system.” In contrast, Yemen’s midsea islands of al-Tayr and Zubayr, which were described by the Tribunal as “barren and inhospitable...and...well out to sea,” and which (presumably in contrast with the Dahls) “do not constitute a part of Yemen’s mainland coast,” were allowed no effect on the median line. (As the chart indicates, however, the Zubayr group is considerably closer to the Yemeni mainland than the outermost Dahls are to Eritrea.) The large and inhabited Yemeni island of Kamaran, along with very small islands south and west of Kamaran, were deemed integral to the coast of Yemen. North of Kamaran, the Tribunal selected Tiqfash, Kutama, and Uqban as Yemeni basepoints because they “all appear to be part of an intricate system of islands, islets and reefs which guard this part of the coast.” With these basepoints, the entire northern stretch of the boundary is “a mainland-coastal median, or equidistance, line.”

24 Id., para. 152.
25 Id., para. 155.
26 Id., para. 153.
27 Id., para. 156.
28 Id., para. 113.
29 Id., para. 117.
30 Id., para. 139. The baseline issue is taken up below. At paragraph 118, the Tribunal described all the Dahls, including the outer islands, “as an integral part of the Eritrean mainland coast.” To appreciate the implications of this holding, one must bear in mind that some of the outermost Dahls are more than fifty nautical miles from the mainland coast.
31 Id., para. 147.
32 Id.
33 Id., para. 148; see also id., para. 119. Although the Tribunal indicated that the islands’ “barren and inhospitable nature and their position well out to sea...mean that they should not be taken into consideration in computing the boundary line,” it abandoned this principle when it allowed Yemen’s Zuqar and Hanish group to push the median line toward Eritrea in the middle stretch. See id., paras. 160-62, discussed in text accompanying infra notes 45-53.
34 Id., para. 150.
35 Id., para. 151.
36 Id., para. 153.
By ostensibly “deferring” to Yemen, the Tribunal sidestepped the question of whether Eritrea’s straight baselines along the outermost Dahlaks were appropriate in the circumstances: “Yemen appears to have little difficulty in agreeing that the Dahlaks form an appropriate situation for the establishment of a straight baseline system.” The Tribunal also confirmed that straight baselines were appropriate in one particular Yemeni sector, and applied—on its own—Article 7 of the 1982 Law of the Sea Convention (LOS Convention) to a coastal section for purposes of locating the median line: “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.” But the Tribunal was hardly liberal in its application of Article 7. It remarked that part of Eritrea’s proposed lines comprised a “somewhat unusual straight baseline system.” And although the Tribunal said that “the validity or definition” of Eritrea’s straight baselines here “is hardly a matter that the Tribunal is called upon to decide,” it thereupon proceeded to disallow one of Eritrea’s proposed basepoints for its straight baseline—a feature called Negileh Rock—because it failed to meet the requirements of Article 7(4) of the LOS Convention. The Tribunal then indicated basepoints on certain outer Dahlak islets, Mojeidi, and an unnamed islet east of Dahret Segala, and applied them. With these coastal data selected by the Tribunal, the maritime boundary in the northern sector, between points 1 and 13, was a median line equidistant from the respective coasts of Eritrea and Yemen, as described above.

In the middle stretch of the boundary line, between points 13 and 20, the Zugar and Hanish islands, both attributed to Yemen in the first award, confront the Haycocks and South West Rocks, attributed to Eritrea in the first award. The islands of each state generate territorial seas of up to twelve miles. Because the small Eritrean islands could have extended the legal coast of Eritrea beyond twelve nautical miles from the mainland, Yemen contended that they should be enclaved. The Tribunal rejected that proposal both on legal and policy grounds. Legally, the Tribunal accepted the extension of maritime zones through “leapfrogging” seaward by means of a series of contiguous territorial seas of islands and rocks within twenty-four miles of each other. As far as policy was concerned, the Tribunal relied upon Judge Lachs in Guinea/Guinea-Bissau for authority to design maritime boundaries so as to take account of development or security considerations, but the Tribunal did not explain how it was applying that general principle in this case. In the insular configuration produced by the first award, the combined territorial seas of each state were no more than four or five miles wide. Following Article 15 of the LOS Convention, the Tribunal found a median-line boundary appropriate, from which neither historic titles nor

77 Id., para. 140.
78 Id., para. 142 ("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. " (emphasis added)).
80 Award II, supra note 4, para. 151.
81 Id., para. 142.
82 Id.
83 Id., para. 146.
84 Id., paras. 154, 155. In its first award, the Tribunal rejected this technique as a way of extending sovereignty to islands and rocks. Award I, supra note 2, para. 449. The issues are, of course, distinguishable. Any “naturally formed area of land . . . which is above water at high tide” may generate a territorial sea that in principle may extend up to 12 nautical miles. LOS Convention, supra note 39, Arts. 5, 121. The question of sovereignty over an island is not resolved solely (if at all) by its proximity to other land territory of the state.
85 Award II, supra note 4, para. 156.
86 Id., para. 157.
87 Id., para. 156.
89 Award II, supra note 4, para. 157.
other special factors required any variance. The resulting line, which allowed each state a territorial sea of about two and a half miles, was pronounced "an entirely equitable one."

In order to connect the line in the northern stretch that had been generated by the opposite continental coasts with the line in the middle stretch that had been generated by the opposite islands, the Tribunal decided to draw a boundary looping around Yemen’s Zuqar-Hanish group. Although the Tribunal stated that each island here ought to be regarded as having a territorial sea because it "seems reasonable," Greater Hanish did not receive a full territorial sea. The effect of this truncated territorial sea on the median line was further increased by applying a geodetic line joining points 13 and 14 instead of a possible line that could have followed the coastline of Zuqar. Although the Tribunal stated that it thus avoided cutting through Hanish, it is not clear why, once geodetic lines were adopted, points 15 and 15 were not simply joined, dispensing with point 14; the result would have been truer to the Tribunal’s principle. In the southern stretch of the boundary, from points 20 to 29, the configuration of reciprocal continental opposition resumed. The boundary line in this stretch was connected to the line in the middle stretch, again by means of a geodetic line between points 20 and 21. As for the terminal points at each end of the maritime boundary, the Tribunal took pains to ensure that they were well short of where the boundary might infringe on the maritime space of a third state.

The parties had apparently agreed in principle that a relevant factor in maritime-boundary delimitation was the respective lengths of their coastlines. But they disagreed on what the lengths are. The Tribunal calculated the ratio of coastlines as 1:1.31, and the ratio between the water areas that it was attributing to each of the parties as 1:1.09. The Tribunal did not indicate the bases for its calculations. After stating its calculations, the Tribunal simply said that "the line of delimitation it has decided upon results in no disproportion."

* * * *

The maritime delimitation here is consistent with current developments in the law and appears to have been well received by both parties. But there are a number of striking innovations in the award that merit comment.

Choice of Law

Article 2 of the Arbitration Agreement had provided for application of the LOS Convention and "any other pertinent factor." Thanks to this choice of law, the Tribunal could apply the Convention, even though Eritrea was not party to it, without having to consider whether particular provisions had become customary law. The additional reference—to "any other pertinent factor"—is rather odd in a choice-of-law clause; some body of law or another referential system would be required in order to render a "factor" "pertinent," whether that system was already extant or only in statu nascendi, as in Libya/Tunisia, where both parties

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50 Id., para. 158.
51 Id., para. 159.
52 Id., para. 161.
53 Id.
54 Id., para. 163.
55 Id., para. 164.
56 Id., para. 39.
57 Id., paras. 40-43.
58 Id., para. 168.
60 Arbitration Agreement, supra note 22, Art. 2(3).
accepted a convention that was still being negotiated. Yet the body of law that would make some other factor pertinent is not indicated. In certain choice-of-law clauses in international arbitration, unusual formulas may be designed to signal to the tribunal the parties’ common preferences, which are sometime couched in code. If Article 2 contained such preferences, they remain occult. It is unlikely that the parties were signaling an interest in a distributive justice award *ex aequo et bono*, but the choice of law might have been insurance against a restrictive reading of LOS Convention Articles 15, 74, and 83 that would have excluded innovations to be found in the case law. Whatever the parties’ intentions, the Tribunal nicely rooted the factors in international law by interpreting the “pertinent factor” part of the Arbitration Agreement’s Article 2 as referring to the various factors “that are generally recognised as being relevant to the process of delimitation . . . .”

The Tribunal’s introduction of Islamic law, apparently on its own initiative, was far less satisfactory. Although the choice-of-law clause does not mention Islamic law, and the parties did not argue it either as a “pertinent factor” or otherwise, the Tribunal purported to use it as the basis for its elaboration of the continuing “artisanal fishing regime.” Developed doctrinally in different schools for well over a millennium, Islamic law has become—through its rich case law or *responsa*, the property taxonomies of the Osmanlis, and the extraordinarily complex and varied customary law component—a serious and intellectually imposing enterprise. Any scholar, but particularly nonspecialists like this writer, must proceed with caution. Yet even a layman can see that the Tribunal’s treatment was superficial. The only citations the Tribunal vouchsafed were two general formulations (one only marginally relevant) in two separate articles in the Encyclopedia of Public International Law, and one highly general and rather romantic statement, delivered without any citation of authority: “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 the Dankhalis and Yemenites alike.” But that is not a regime. As John Wilkinson, one of the preeminent investigators of the ways that Islamic law was developed in customary practice, has written:

> As natural resources, the ultimate *dominium* (ownership) remains with the Creator, the *utile* (use) is the common heritage of mankind. However, because the availability of these resources is limited and can give rise to competition, the basic problem that must be resolved is to what extent and under what conditions can these resources be appropriated.

> It is reasonable to assume that that, in Islamic practice, those parts of the *res communis* that had important economic value were subjected to property regimes not unlike those found in comparably developed systems. Otherwise they, too, would have been prone to fall victim to that universal and iron law, the “tragedy of the commons.”

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61 Continental Shelf (Tunis./Libyan Arab Jamahiriya), 1982 ICJ REP. 18, 23 (Feb. 24) (citing Special Agreement Between Tunisia and Libya, Art. 1).

62 For example, the choice-of-law clause in the Aminoil arbitration: Article III, paragraph 2 of the Agreement provided that “the law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world.” Kuwait v. American Indep. Oil Co. (Aminoil), Mar. 24, 1982, 66 ILR 519, 561.

63 I am grateful to Bernard Oxman for this observation.

64 Award II, supra note 4, para. 190.

65 Id., para. 92, with references there to paragraphs 121 and 128 of the first award.

66 Id., paras. 93, 94. The references are to MAJID KHADDURI, 6 INTERNATIONAL LAW, ISLAMIC 227–33, and to AHMED S. EL-KOSHERI, 7 HISTORY OF THE LAW OF NATIONS, REGIONAL DEVELOPMENTS: ISLAM 222–30, with a specific reference to page 229.

67 Award II, supra note 4, para. 92.

What is especially puzzling here is that in order to buttress the regime it was installing, the Tribunal had no need to invoke a system of law that was not authorized by the parties. If, indeed, the "artisanal regime" was customary law, international law would have allowed its application, even without the "other pertinent factor" component in the choice-of-law clause. Moreover, one may question the Tribunal's statement that "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." "Allowing"— perhaps. But nothing in the conception of sovereignty prevented a sovereign from agreeing to easements in favor of third parties. Despite the sweeping (and doubtful) conclusion in the early decision of North Atlantic Coast Fisheries that easements do not exist in international law, these very useful and economically rational institutions have been recognized and used by the Permanent Court of Justice and the International Court of Justice. The idea may also be especially pertinent in the context of contemporary extensions of coastal state jurisdiction.

The Tribunal's brief foray into Islamic law may have seemed like a nice local touch or even an ecumenical flourish, but it was unnecessary and, I submit—with no disparagement of the intellectual richness and force of Islamic law—unwise in context. The essential function of general international law, as a secular corpus juris, is to provide a common standard and to play a mediating role between states with different cultures, legal systems, and belief systems. When, in the absence of a choice of law by the parties, international tribunals incorporate other legal systems—especially those claiming a divine source—the results may prove to be mischievous, even pernicious. International tribunals would be well advised to stick to international law, particularly when the parties have expressly indicated that they wish it to be applied and when it contains all the elements necessary for achieving the tribunals' objectives.

Many scholars were astonished and offended by Lord Asquith's at once disdainful and ignorant dismissal of Islamic law in the Abu Dhabi award: "The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments." The Tribunal's second award can in no way be compared to that appalling statement, but the award is nevertheless troubling for its rather casual incorporation of the same body of law to buttress an "artisanal" regime that is essentially being created pro hac vice. Nor should we minimize the risks of introducing a rich and complex legal system—one on which Tribunal received no information whatsoever from the parties—to buttress an ongoing resource regime that could be returned to the Tribunal for further determinations.

The "Artisanal Fishing Regime"

One is reminded of the remark of an old and seasoned trial lawyer who said that he never asked a question in court unless he knew the answer he would get—and it was the answer he wanted to get. The remark has a certain relevance to the drafting of judgments and

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69 Award II, supra note 4, para. 95.
71 See, e.g., Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 ICJ REP. 6 (Apr. 12).
72 See, e.g., references to traditional rights and activities, including habitual fishing by nationals of other states, in the LOS Convention, supra note 99, Arts. 47(6), 51, 60(7), 62(3), 66(3).
73 One is reminded of Judge Cassesse's criticism, in quite a different context, of the Kahane Commission's introduction of Rabbinic law into the Shatila and Sabra Inquiry. ANTONIO CASSESE, Sabra and Shatila, in VIOLENCE AND LAW IN THE MODERN AGE 76, 80 (S. J. E. Greenleaves trans., 1988).
74 See in this regard the prescient observations of Hans Kelsen at the conclusion of his GENERAL THEORY OF LAW AND STATE 446 (Anders Wedberg trans., Harvard Univ. Press, 1945).
75 Petroleum Development Ltd. v. Sheikh of Abu Dhabi, Sept. 1951, 18 ILR 144, 149.
awards, especially in serial (and possibly continuing\textsuperscript{77}) cases like Eritrea/Yemen. For whatever the origin of the “artisanal fishing regime” in the first award, this creation by the Tribunal bedeviled it in the second.

Whatever the Tribunal intended in the first, sovereignty stage, paragraph 526 of that award was seized upon by Eritrea—hardly surprisingly—as a way of trying to regain some of what it had lost.\textsuperscript{78} The Tribunal consequently had to devote almost a quarter of its second award to explaining what it had meant in the first one.\textsuperscript{79} A further irony is that it appears from a reading of both awards that fishing had not been a major concern of either party, even though both used fisheries arguments—spectacularly unsuccessfully—to try to persuade the Tribunal that each should get territory and maritime space, their real objectives. The Tribunal hardly concealed its own sarcasm when, at paragraph 71, it said:

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 the line of delimitation proposed by itself or by the other Party.\textsuperscript{80}

Nevertheless, paragraph 526 in the first award had made the “artisanal fishing regime” an ineluctable element in the second award. The Tribunal’s maritime delimitation is essentially geographical and, as such, consistent with the current development of this body of law by the ICJ. The Tribunal said, early in the second award, that “the fishing practices of the Parties from time to time are not germane to the task of arriving at a line of delimitation.”\textsuperscript{81} (This conclusion may also have been necessitated by the failure of both parties to make a persuasively convincing case. As the Tribunal said in this regard, “[t]he evidence advanced by the Parties has to a very large extent been contradictory and confusing.”\textsuperscript{82} And even more disparagingly, “[i]t is difficult if not impossible to draw any generalised conclusions from the welter of alleged facts advanced by the Parties in this connection.”\textsuperscript{83}) But since (1) the so-called tra-

\textsuperscript{77} See infra Continuing Jurisdiction.
\textsuperscript{78} See supra text accompanying notes 2–3.
\textsuperscript{79} Curiously enough, the second award simply takes for granted its competence to interpret the first award. In fact, this is a far-reaching, and, in my view, important innovation in international arbitral procedure, which affirms and consolidates the still controversial position of the German-U.S. Claims Commission in the Sabotage cases that “[e]very tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, a fortiori it may, while it still has jurisdiction of a cause, correct error into which it has been led by fraud and collusion.” Decision of the Commission Rendered by the Umpire, Dec. 15, 1933, in MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY, DECISIONS AND OPINIONS FROM JANUARY 1, 1933 TO OCTOBER 30, 1939, at 1115, 1127–28 (1940). If it may correct its errors, may it not clarify elements that the parties misapprehend? Though the parties did not apparently argue the issue in the case under review, the Tribunal itself, after noting that Yemen had not discussed the traditional fishing regime, asked, on July 16, 1999, “Would Yemen indicate how, if at all, the traditional fishing regime should be taken into account in the delimitation . . . ?” Yemen’s long written reply to the question concluded that

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 his point in the proceedings.

Award II, supra note 4, Annex II.

\textsuperscript{80} Id., para. 71.
\textsuperscript{81} Id., para. 63. The Tribunal added: “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.” Id., para. 64.
\textsuperscript{82} Id., para. 61.
\textsuperscript{83} Id., para. 70.
ditional regime had been upheld in the first award and had been premised on a formerly undivided and unallocated ocean space, and (2) the maritime delimitation the Tribunal was now fashioning would not be adjusted to accommodate the traditional "artisanal" regime, the Tribunal had boxed itself in and had no choice but to codify or prescribe the traditional regime so that it could continue to flourish in the new, partitioned legal environment established by its award.

Although the "artisanal fishing regime" installed by the Tribunal appears to be a reasonable effort to be fair to each of the parties and to the traditional fishing communities, it is manifestly not self-enforcing. Yemeni regulation of traditional fishing, henceforth subject to a veto by Eritrea, goes far beyond the prudent restraint of the regime established in the *Lac Lanoux* award\(^4\) and could well foment discord. Allowing nationals of one state, as of right, to exploit resources and conduct related activities in the waters and territory of the other, and without regard to regulations applicable even to the latter's nationals, may lead to further disputes or may permit the intentional fabrication of disagreements as a means of exerting diplomatic pressure on unrelated matters. The Tribunal itself seemed conscious of the potentially dark underside of its creation and stated that Eritrea may act on behalf of its nationals, whether through diplomatic espousal to Yemen "or through submissions to this Tribunal."\(^5\) In so saying, the Tribunal appears to have decided *sua sponte* that it will continue in existence, in "sleep mode," as it were, ready to be called back into operation by Eritrea if it should believe that its fishermen's rights have been violated by Yemen.\(^6\)

### Continuing Jurisdiction

Although there is no explicit basis in the compromissory documents for this continuing, dormant role, was the Tribunal simply trapped in the theoretical web it had woven? Or does this role signal a recognition on the part of tribunals that in the new, post-Grotian law of the sea, ad hoc tribunals—created, for example, to resolve a dispute over environmental degradation or species conservation—may have to continue in existence *sine die* in order to fulfill their mandates? If the latter alternative should come to pass, then ad hoc tribunals, hitherto ephemeral institutions that would have rendered their decisions and, *functus officio*, then dissolved, may become permanent institutions in particular interstate matters. Although some believe that every increase in mandatory third-party decision making represents a positive evolution of international law, the actual effects of such *sine die* tribunals on contemporary international politics could be mixed. Their increased presence could discourage states from participating in what, until now, has been thought of as ad hoc third-party decision procedures.

### The Law of the Sea

In the *North Sea Continental Shelf* cases,\(^7\) the ICJ laid the groundwork for the modern international law of maritime-boundary delimitation. In a variety of experiments since then, the Court has adjusted, or subtly reduced the effect of, some of the factors it had incorporated into its original decision calculus. Because the Third Law of the Sea Conference did not establish a precise legislative standard regime for delimiting exclusive economic zones and continental shelves,\(^8\) the development of this very important sector of international law

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\(^4\) *Lac Lanoux* Arbitration (Fr. v. Spain), Nov. 16, 1957, 24 ILR 101, 119.

\(^5\) Award II, *supra* note 4, para. 101.

\(^6\) Yet Eritrea itself did not pray for this particular continuing relief. In the Tribunal's summary of the final submissions of the parties in paragraph 46(7), Eritrea asked only that "the Tribunal should 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."

\(^7\) *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), 1989 ICJ Rep. 3 (Feb. 20).

\(^8\) As stated by the Tribunal in the case under review, the delimitation articles "were consciously designed to decide as little as possible." Award II, *supra* note 4, para. 117. See in this regard Bernard H. Oxman, *The Third
continues to be preeminently an international judicial responsibility, which has not always accorded law-making effect to state practice. In the case discussed here, the Tribunal not only reinforced some trends already under way, but made a number of important innovations and clarifications.

Straight baselines. The straight baseline regime, introduced by the ICJ in the Fisheries case, quickly spawned many exorbitant claims. In subsequent cases, the Court chose to ignore rather than to criticize them. This self-imposed abstention may have neutralized the legal effect of exorbitant straight baselines in cases before the Court, but it deprived the straight baseline regime of judicial controls. The result was uncertainty for international users as to where valid seaward boundaries were. In the case under review, the Tribunal, to its credit, assumed a more active judicial role and has enriched the jurisprudence of straight baselines in a number of ways.

Though it often couched its determinations in indirect language, the Tribunal confirmed both the validity of Yemeni straight baselines in one of its sectors and the general appropriateness of straight baselines in an Eritrean sector. Moreover, the Tribunal applied Article 7 of the LOS Convention rigorously and strictly, disallowing a particular basepoint because it failed the strictures of Article 7(4). By indirectly indicating the basepoints that it itself would use, the Tribunal provides, by comparison, new guidance on what constitutes reasonable implementation of Article 7. Most strikingly, the Tribunal seemed to view straight baselines as part of the tool kit of the international decision maker for fashioning maritime boundaries based on equidistance, and not only as an option available to a state, part or all of whose coasts meet the test of Article 7.

Apparently, the Tribunal was unperturbed that both Yemen's and Eritrea's straight baselines were making their debut in the arbitration and had not been published prior to it. (Indeed, the Tribunal, acting sua sponte, applied Article 7 to a sector when Yemen itself had not.) Yet Article 16 of the LOS Convention requires, inter alia, that straight baselines be shown on charts "of a scale or scales adequate for ascertaining their position" and that the coastal state "shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations." Given the discretionary and somewhat subjective character of straight baselines, this requirement would appear to have been designed as a necessary component of their validity and opposability to third states, in contrast to normal baselines, which, quite understandably, need not be published as such. After all, the normal baseline—that is, the "low-water


Award II, supra note 4, para. 142.

Id., para. 140.

In principle, this method is, of course, one of several for determining the general direction of the coast for purposes of delimitation of an equitable maritime boundary and does not, as such, constitute a determination that the lines used for this purpose are necessarily permissible straight baselines enclosing internal waters. One notes in this regard that Cuba and the United States calculated their maritime boundary, in part, with reference to hypothetical straight baselines along the coast of the United States, which were designed to balance the straight baselines established by Cuba, which the United States did not recognize as valid. See Robert W. Smith, Report Number 1-4, in 1 INTERNATIONAL MARITIME BOUNDARIES 417, 419 (Jonathan I. Charney & Lewis M. Alexander eds., 1993).

Award II, supra note 4, para. 151.

LOS Convention, supra note 39, Art. 16(1).

Id., Art. 16(2).

See id., Art. 16. I am grateful to Jonathan Charney for this insight.
line along the coast as marked on large-scale charts officially recognized by the coastal State—can readily be determined by third-party users; low-water data are widely available, and the maximum breadth of the territorial sea is statutorily limited.

The question of the effect of nonregistration under Article 16 would appear more urgent than the unresolved question of the effect, under Article 102(2) of the UN Charter, of the nonregistration of bilateral treaties that are sought to be adduced in proceedings in the ICJ. At least in the case of bilateral treaties, both parties will know the agreements, as they are parties to them. But how can international users, availing themselves of the freedom of navigation, know of unpublished straight baselines and their consequent projection of different legal regimes vers le large? The Tribunal's having allowed full legal effect, vis-à-vis one other party, to unpublished straight baselines for the purpose of boundary delimitation cannot be a precedent for allowing a comparable legal effect on international users when straight baselines and their consequent seaward maritime zones have not been either published and registered in accordance with Article 16 of the LOS Convention or given "due publicity" on charts showing the baselines in accord with Article 4(6) of the 1958 Territorial Sea Convention.

One regrets that the Tribunal, having expanded Article 7 into a tool that it could use in fashioning its own maritime-boundary architecture, did not take up these related issues, even if only obiter dictum.

At the very least, one hopes that the Tribunal's laudable assumption of responsibility for ensuring that straight baselines comply with Article 7 will now routinely be shouldered by the ICJ, the International Tribunal for the Law of the Sea, and arbitral tribunals seised of international maritime-boundary cases, so that a richer international jurisprudence, generated by their decisions, can henceforth act as a restraint on exorbitant straight baselines.

Protection of international-community interests in bilateral delimitations. The second award is also distinctive in its explicit incorporation of the concerns of international users. One of the reasons for selecting the delimitation line was that it "has the advantage of avoiding the need for awkward enclaves in the vicinity of a major international shipping route." As the Tribunal said, "the line preferred by the Tribunal, mindful of the simplicity desirable in the neighborhood of a main shipping lane, is one that would mark this passage directly independently of the Yemen and Eritrean islands." Elsewhere, the Tribunal questioned a proposal of Yemen, inter alia because of "the obvious impracticality of establishing limited enclaves around islands and navigational hazards in the immediate neighborhood of a main international shipping lane." These statements are welcome. States' frequently shrill demands for equity for themselves can drown out the common interest that is left unvocalized in bilateral international disputes. In order to achieve an equitable delimitation of a hitherto shared resource that, though now delimited, is still subject to significant use by other members of the international community, the broader, more inclusive interests of that community must be taken into account.

Further attenuation of the role of coastal proportionality, but the possibly expanded use of a proportional water-area test. After North Sea Continental Shelf had installed proportionality of coastlines as a factor in determining whether a provisional line constituted an equitable solution, counsel for opposing parties in subsequent cases have always argued the proportionality issue, often forgetting that the ICJ called not for strict proportionality, but for "a reasonable
degree of proportionality.” As the arbitral tribunal in the *Anglo-French Channel* case put it, “it is disproportion rather than any principle of proportionality which is the relevant criterion or factor.” Moreover, that tribunal said, “[p]roportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf.” In fact, the case law on proportionality suggests that only a disproportion of significant orders of magnitude will affect a provisional median line. Except for *Gulf of Maine*, where the holding was problematic on this point, *Libya/Malta*, where the relevant coasts were 192 miles and 24 miles respectively, and *Jan Mayen*, where the disparity was also very large, international tribunals have not varied provisional median lines for smaller disparities. The Eritrea/Yemen Tribunal has followed this trend. After noting that the coastal ratios were 1:1.31, the Tribunal simply stated that the line of delimitation “results in no disproportion.” It appears that the Tribunal assumed that the coastal proportionality test was pertinent in delimitations between opposite coasts, as well as in territorial-sea delimitations. The award does not indicate whether the proportionality comparison excluded the segments of the territorial-sea delimitation.

Following the practice of the Tribunal in *St. Pierre and Miquelon*, the Tribunal in the case under review also calculated what it characterized as the “water areas” that resulted from its delimitation, but since the bases for the calculation are not set out, in contrast to *St. Pierre and Miquelon*, the student cannot tell which water areas were included. It would have been ironic, for example, if Eritrea’s internal waters were included in this calculation, while the coasts of internal water areas, which Eritrea sought to include in its coastal computation, were not. It is striking that the Tribunal’s water-area division, according to its calculation, was nearly equal: 1:1.09. In *Jan Mayen*, the ICJ observed that “judicial treatment of maritime delimitation does not involve the sharing-out of something held in undivided shares.” Yet in situations of coastal opposition, that appears to be the precise function of the median line.

*Islands.* Although in the first phase the Tribunal applied Article 121 of the LOS Convention quite strictly, in the second, delimitation phase the Tribunal said it was assigning value to factors such as size, habitability, and actual habitation for purposes of influencing the location of the boundary. With respect to midsea islands, the factors were “size, importance and like considerations in the general geographical context.” How these criteria, not all of which are distinguished by their clarity or precision, were actually applied is not clear on the face of the award, but it seems that the Tribunal began by considering a median line between the continental coasts and subsequently examined the proportionate or dis-

108 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 IICJ Rep. 13, 50 (June 3). But in this instance, the Court was also influenced by the character of the Mediterranean as a semi-enclosed sea, that is, by “the general geographical context.” *Id.*
110 *In St. Pierre and Miquelon*, the Tribunal found the coastal ratio between France and Canada to be 1:15.3. Delimitation of Maritime Areas Between Canada and the French Republic (*St. Pierre and Miquelon*) (Can./Fr.), June 10, 1992, 95 ILM 645, 662 [hereinafter St. Pierre and Miquelon arbitration].
111 Award II, para. 168.
114 *See* e.g., Award II, *supra* note 4, para.139. Though the point would appear obvious, the Tribunal reaffirmed that in circumstances in which the normal baseline in the sense of Article 5 of the LOS Convention is used, the coastline of an island system is “somewhere at the external fringe of the island system.” *Id.*
115 *Id.*, para. 117.
proportionate consequences of allowing full effect to midsea islands. The Tribunal’s having volunteered that the water area allotted to each party was nearly equal may indicate that proportionality was given significant weight in considering the effect to be given to islands.

**Factors in delimitation.** As mentioned earlier, the Tribunal considered, in addition to the usual factors for bilateral delimitation, the inclusive interests of the international community of maritime users. It also made certain adjustments because they made for “a neater and more convenient” boundary. It is rather ironic that this inclusive interest is finally explicitly considered at a time when global positioning system technology is increasingly available. One wonders, in addition, whether such adjustments would have been made if there were grounds to believe that significant hydrocarbon deposits might be in the area.

The Tribunal rejected one proposed deviation from the median-line principle, apparently on the ground that it might compromise the security of one of the states. Yet the Tribunal was perfectly comfortable with a territorial sea of some 2.5 nautical miles for each state in the middle sector and did not even mention the issue of security in that connection. Did the Tribunal mean that security concerns would be triggered if an island were cut off from its continental state by some sort of enclave, but not if the territorial sea were extremely narrow? It seems sensible—indeed, inescapable—to ignore the security implications of very narrow territorial seas; there are many areas in which a territorial-sea delimitation would leave each of the states with far less than 12 miles. Presumably, the Tribunal meant that security concerns (including law enforcement) would best be served by a 12-mile territorial sea, if possible and otherwise appropriate, but that where circumstances required, a narrower territorial sea could be set. In any case, long-range and over-the-horizon weapons have consigned Bynkershoek’s “cannon shot rule” to the museum of antiquities of international law, and have largely depreciated the erstwhile defensive value of the broad territorial sea. But if the Tribunal meant that cutting an island off from its continental state is always a security risk, such a position would present difficulties since there are many geographical circumstances in which extensive enclaving of islands is an ineluctable part of any maritime-boundary solution.

**Transboundary nonliving resources.** The Tribunal noted that “there has grown up a significant body of cooperative State practice in the exploitation of resources that straddle maritime boundaries.” In the complex paragraph 86, which is quoted in relevant part above, the Tribunal seemed to assume that some of these practices were rapidly acquiring, but have not yet attained, customary international law status.

**The Function of Dissent in International Arbitration**

Finally: a very general and perforce speculative observation stimulated by the fact that both the first and second awards were unanimous even though four of the five arbitrators in Eritrea/Yemen were party-appointed. In the past, it was virtually a foregone conclusion that ad hoc or party-appointed judges or arbitrators in a public international proceeding would dissent if the party that had designated them lost.

This use of dissent had systemic consequences, some positive and some negative. Dissent provided some face saving for the losing state, which could at least point to a (hopefully) coherent statement of a version of law that would have vindicated its position, while liberating the majority to craft a clear statement of the law. From the perspective of the incremental development of the law, the dissent could be ignored as an opinion that had been rejected by a collegium of international jurists, skilled in the procedures and methods of our discipline, whereas the majority opinion could serve as one more brick in the edifice of

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116 Id., para. 162.
117 Id., para. 84.
118 See text accompanying supra notes 18–19.
international law. But, especially in public international arbitration, the expected and virtually pro forma dissent also reduced the “judicial” character of the proceeding by acknowledging that party-appointed arbitrators were, in the memorable expression of Fox and Simpson, “judge advocates,” or in the more candid, but less diplomatic expression of the French, arbitres-parties.

In the regime of international commercial arbitration, it is believed that unanimous awards are less susceptible to attack by national courts exercising their review competence. Chairpersons of tribunals that include party-appointed members therefore try to draw potential dissenters into unanimous awards with a variety of concessions—some substantive, some merely linguistic. Since the resultant awards are not likely to be published and, in any case, are not binding precedents, the damage to the coherence and efficacy of the legal system caused by a statement of the law that is less than pellucid and logical is contained within the award itself and may well be offset by the satisfaction and consequent voluntary compliance of the losing party. But a unanimous decision, in which a party-appointed arbitrator has not supported his or her “party,” may seem to give a greater judicial character to the proceeding.

Eritrea v. Yemen is striking for its unanimity, but it seems to this student that the internal coherence of the two awards may have suffered as a consequence. Over time, and in comparison to a better reasoned, but merely majority decision, the deficits in coherence may prove costly to the international legal system. Is the price that the international legal system pays for unanimity too high?

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European Court of Human Rights—regulation of cultural property—preemptive right of state to acquire works of art—compensation for deprivation of possessions—UNESCO Convention on Cultural Property


An Italian law enacted in 1939 requires that any transaction transferring full or partial title or possession of a work of historic or artistic interest be declared to the Ministry of Cultural Heritage (Ministry). Section 31 of the law gives the state a preemptive right to the work; under section 32, that right may be exercised within two months of the declaration. In 1954 the Italian authorities declared that Portrait of a Young Peasant by Vincent van Gogh was covered by the 1939 law. In 1977 the Swiss art dealer and collector Ernst Beyeler bought the painting in Italy through an intermediary. The seller made a declaration under the 1939 law, but named only the intermediary and not Beyeler. In 1988, after Beyeler had contracted to sell the painting for about U.S.$8.5 million, the Ministry exercised its right of preemption. Concluding that the 1977 transfer was void, the Ministry paid Beyeler the 1977 contract price of about U.S.$500,000. Its action was upheld by the Italian courts, but not by the European Court of Human Rights.

In 1983, six years after the fact, the intermediary disclosed to the Ministry that Beyeler had been the end buyer in the 1977 sale. The next day, Beyeler informed the Ministry that the

121 In some circumstances, an unpersuasive unanimity may only increase the perception that the award is, in substance, an attempt to strike a compromise between the positions of the parties, and not actually a principled application of the law.


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