# The Maritime Delimitation Between Eritrea and Yemen

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**Abstract.** The Award of the Arbitral Tribunal in the Second Phase (Maritime Delimitation) of the Eritrea-Yemen Arbitration follows the trend towards producing a single all-purpose delimitation line constructed on the basis of equidistance, the course of which is chiefly dictated by mainland coastal geography. Islands are accorded little impact upon the course of the final line, save to the extent necessary to permit them a full territorial sea. The potential relevance of other factors, including fishing and navigational interests is acknowledged but, given the methodology adopted, they did not influence the construction of the line. As in other cases, proportionality is demonstrated by comparison of areas with the relevant coastal lengths, although the usefulness of this is dubious. Although entirely separate exercises, it may be that the methodology pursued owes something to the outcomes of the first phase of the Arbitration, concerning sovereignty over the islands, and this may have a bearing upon the impact of the Award for maritime boundary delimitation more generally.

## 1. Introduction

In December 1995, clashes took place between the armed forces of Eritrea and Yemen on the Greater Hanish Island, which is situated in the Red Sea between their mainland coasts. It is one of a number of barren and uninhabited islands, islets, and rocks over which sovereignty was a matter of contention between these two countries. Laudably, the parties agreed to settle this dispute peaceably,[1] and in October 1996 they concluded an Arbitration Agreement which established a five-member Tribunal which was to "provide rulings in accordance with international law, in two

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1. Following mediation by France, the parties had entered into an Agreement on Principles on 21 May 1996 which was followed by the Arbitration Agreement on 3 October 1996. These documents, and the awards of the Arbitral Tribunal, are accessible through the website of the Permanent Court of Arbitration at www.pca-cpa.org, whose officers were appointed to service the work of the Tribunal under Art. 7(2) of the Arbitration Agreement.

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stages."[2] The first stage was to "result in an award on territorial sovereignty and on the definition of the scope of the dispute." The second would "result in an award delimiting the maritime boundaries."[3] The first stage award was concluded in October 1998[4] and the second stage award in December 1999.[5]

The purpose of this article is to consider how the second stage maritime boundary award relates generally to the law on maritime boundary delimitation. Therefore, it does not attempt to address all the questions that the award raises. In order to undertake even this more limited task, however, it is necessary to recall the findings of the Tribunal in the first stage award.[6] Although the Tribunal was scrupulous in maintaining that its determination in the first stage award was not conditioned by any views that it might have on the course of the maritime boundary, it is certainly possible to see the seeds of its approach to the latter question in the manner in which it dealt with the former. It should also be made clear that whilst Yemen is a party to the 1982 Law of the Sea Convention (LOSC), Eritrea is not.

Unsurprisingly, the Tribunal decided that neither Yemen nor Eritrea possessed territorial sovereignty over all of the contested islands. It divided the islands into a number of sub-groups and dealt with each separately. The first were the Mohabbakahs, which were described as "four rocky

2. *See* Agreement on Principles, Art. 2(1); Arbitration Agreement, Art. 1(1). The arbitrators appointed were, for Eritrea, Judge Stephen M. Schwebel and Judge Rosalyn Higgins; for Yemen, Dr. Ahmed Sadek El-Kosheri and Mr Keith Highet. It was agreed between them that the fifth appointee be Sir Robert Y. Jennings, who also served as President of the Tribunal. Thus, at the time of the awards, two members of the Tribunal were serving judges of the ICJ (Schwebel and Higgins), one (Jennings) had previously served as a member of the ICJ, another (El-Kosheri) had acted as a judge *ad hoc* on the ICJ whilst the final member (Highet) had appeared very frequently before the ICJ as counsel. Indeed, Mr. Highet was appearing before Judges Schwebel and Higgins in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria, which raised not wholly dissimilar issues, albeit that procedural rather than substantive matters were then at issue before the court. *See*, for example, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections, Judgment, 11 June 1998, 1998 ICJ Rep. 275.
3. *See* Arbitration Agreement, Art. 2(2), (3). This differed from the May 1996 Agreement on Principles which had envisaged the first stage being limited to the determination of the scope of the dispute and the second dealing with both the territorial sovereignty and maritime delimitation issues. The nub of the issue to be determined regarding the scope of the award was whether the Tribunal was to consider title to the 'northern islands', the Eritrean position. Yemen argued that this was not within the contemplation of the parties at the time of the Agreement on Principles. Eliding this question with that of the sovereignty issue itself in the Arbitration Agreement virtually assured that the Eritrean view would be adopted, and this proved to be the case.
4. Award of the Arbitral Tribunal in the First Stage of the Proceedings, Territorial Sovereignty and Scope of the Dispute (Eritrea *v.* Yemen), 9 October 1998 [hereinafter: Award, Phase I].
5. Award of the Arbitral Tribunal in the Second Stage of the Proceedings, Maritime Delimitation (Eritrea *v.* Yemen), 17 December 1999 [hereinafter: Award, Phase II].
6. For a more comprehensive presentation and analysis of the Phase I Award, *see* N. Antunes, *The Eritrea-Yemen Arbitration: First Stage – The Law of Title to Territory Re-Averred*, 48 ICLQ 362 (1999). *See also* C. Johnson, *Eritrea-Yemen Arbitration*, 13 LJIL 427 (2000).

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islets which amount to little more than navigational hazards."[7] Three of the four were located within the 12 nautical mile Eritrean territorial sea and, basing itself upon the "strong presumption that islands within the 12-mile coastal belt will belong to the coastal state, unless there is a fully-established case to the contrary,"[8] the Tribunal concluded that "in the absence of any clear title to them being shown by Yemen, the Mohabbakahs must for that reason today be regarded as Eritrean."[9] Although one of the four islands, High Islet, fell outside of the 12-mile belt, it "barely" did so,[10] and the Tribunal took the view that the "unity theory might find a modest and suitable place" bearing in mind that these islands had also been regarded "as one group, sharing the same legal destiny."[11]

The next group comprised the Haycocks, principally composed of three small islands the furthest seaward of which is some six nautical miles from the closest of the Hanish group of islands. The Tribunal again determined that they be subject to Eritrean territorial sovereignty, primarily because of their having been historically connected to "African-coast" jurisdiction and this being supported by other more recent *indicia* to the same effect.[12] It then linked with the Haycocks the features know as the South West Rocks. Although their name derives from their geographical relationship to Great Hanish, the Tribunal felt that there was "some evidence" of their being "at various times, considered to form the easternmost limit of African-coast jurisdiction" and so awarded them to Eritrea also.[13]

The Tribunal then turned to the group comprising the island of Zuqar and the Hanish Islands themselves. Although it gave some heed to the historical and cartographical evidence, it felt that it did not "compel a

7. Award, Phase I, para. 467.
8. *Id.*, para. 474. The Tribunal went on to state that "there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue." In so saying, the Tribunal was rejecting the 'leapfrogging' argument, advanced by Eritrea, that since islands located within the territorial sea themselves generate a territorial sea, a similar presumption applies to islands located in territorial seas generated from them as well. The award is, however, somewhat ambiguous since it is not entirely clear whether 'the islands' whose ownership needs to be at issue refers to the islands to be claimed on the basis of the presumption or to the islands from which the territorial sea is drawn. If the Tribunal was referring to territorial seas generated by islands, sovereignty over which is itself acquired on the basis of this presumption, then this might be considered acceptable. If, however, this precludes the operation of such a presumption in respect of islands located within a territorial sea generated from an island the sovereignty of which is uncontested, then this might seem unnecessarily restrictive. After all, and as the Tribunal itself acknowledged, "it would be no more than a presumption, capable of being rebutted by evidence of a superior title;" *id.* It is not obvious that an analogy with the 'leapfrogging' rules pertaining to the generative capacity of low-tide elevations found in Article 13 of the LOSC would be well-founded.
9. Award, Phase I, para. 472. The Tribunal supports this by reference to D. Bowett, The Legal Regime of Islands in International Law 48 (1979).
10. It lies 12.72 nautical miles from the territorial sea baseline.
11. Award, Phase I, para. 475.
12. *Id.*, paras. 476–481. The Tribunal also noted that this provided a further rationale for Eritrean sovereignty over the Mohabbakahs, including High Islet.
13. Award, Phase I, paras. 483–484.

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decision one way or another" and so looked at events in the period running up to the Arbitration Agreement in order to make a firm decision.[14] Taking each principal island separately, thus rejecting Yemen's argument that these islands should share a common destiny,[15] it concluded that the Yemen claim to Zuqar was very much the stronger.[16] Although the position with regard to Hanish was "not so clear-cut,"[17] the weight of evidence, "on balance" again supported the Yemen claim, and in consequence the entire Zuqar-Hanish group was to be subject to Yemen territorial sovereignty.[18]

It then remained for the Tribunal to consider the "northern islands" which comprised the lone island of Jabal al-Tayr and the Zubayr group. It found this difficult since there was "little evidence on either side of actual or persistent activities on and around these islands" but it felt that "in view of their isolated location and inhospitable character, probably little evidence will suffice."[19] The weight of that evidence supported Yemen territorial sovereignty over all of these islands and associated features.[20]

This, then, provides the principal frame of reference for the maritime boundary phase of the award. There is, however, one particular element in the Tribunal's presentation of the territorial sovereignty issues that needs to be brought out. It has already been seen that the proximity of the Mohabbakahs to the Eritrean mainland coast played an important role in determining the outcome. This is to be contrasted with Jabal al-Tayr and the Zubayr group of islands which were described as being "well out to sea, and so not proximate to either coast."[21] If proximity was of no real help here, however, relative distance was useful for illustrative purposes at the very least, and the islands were described as being "well eastwards" (*i.e.* to the Yemen side) of a coastal median. Unsurprisingly, the Tribunal also considered the "appurtenance factor" to be "relatively less helpful" when considering the question of sovereignty over the Zuqar-Hanish group since they were situated in the central part of the Red Sea. Indeed, it was noted that

> [a] coastal median line would in fact divide the island of Greater Hanish, the slightly greater part of the island being on the Eritrean side of the line. Zuqar would be well on the Yemen side of a coastal median.[22]

14. *Id.*, para. 491.
15. *Id.*
16. Award, Phase I, para. 504.
17. *Id.*, para. 505.
18. *Id.*, para. 508. It should be noted that included in the group was Three Foot Rock, situated approximately three nautical miles from South-West Haycock, which was awarded to Eritrea. *Id.*, para. 476.
19. *Id.*, para. 523.
20. *Id.*, para. 524.
21. *Id.*, para. 509. The Tribunal did, however, note that "they are slightly nearer to the Yemeni coastal islands than they are to the coast and coastal islands of Eritrea."
22. *Id.*, para. 486.

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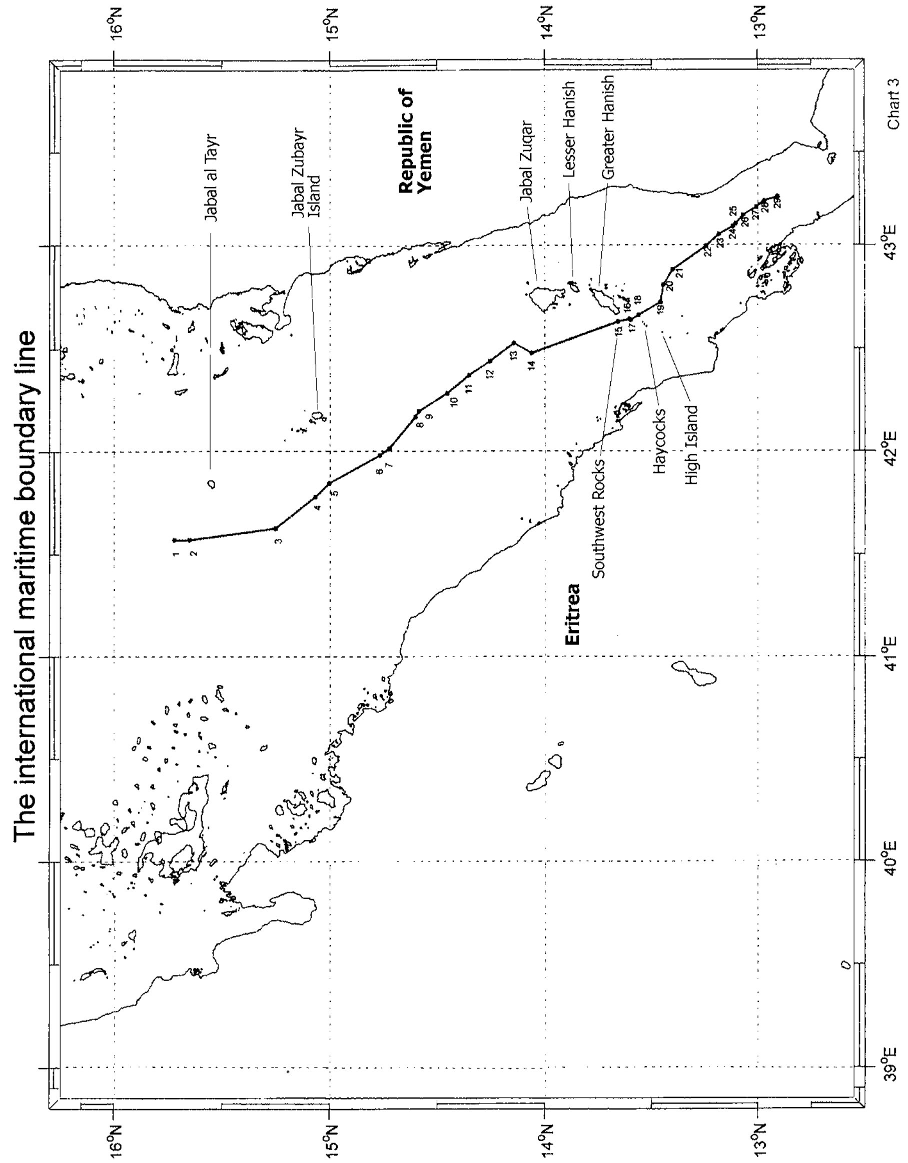


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It might be doubted whether the Tribunal would have used this descriptive technique if it was intending to proceed to recognize the sovereignty of the less proximate state to the group of islands in question.[23] What should be noted, however, is the use of the *mainland* coastal median line to describe and contextualize the relative geographical positions of the islands. During the hearings, Yemen had raised the question of whether the maritime boundary award might in some sense be "prefigured" by the sovereignty awards. This arose in the course of supplementary hearings relating to a series of petroleum concessions made by the parties which were consistent with the coastal median.[24] It is not difficult to see why Yemen was concerned: it wished to use these concessions to bolster its claim to the islands, but it feared that it might then prove difficult to deny it a role in the determination of the maritime boundary itself.[25] The Tribunal insisted that there could be "no question of even 'prefiguring', much less drawing, any maritime boundary line, whether median or indeed a line based on equitable principles, in this first stage of the arbitration,"[26] but this did not mean that it was not sending powerful indications of its probable line of reasoning. Its use of the coastal median line was one such signal.

## 2. The Applicable Legal Framework

The Arbitration Agreement provided that

> [t]he 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.[27]

23. A number of individual features awarded to Yemen do lie on the Eritrean side of the mainland median line, but this is masked by their being subsumed into the general description of the position of the group as a whole.
24. *See* Award, Phase II, Annex II, for the exchange. This recalled the Award, Phase I, paras. 389–439, in which the petroleum agreements and activities of the parties were examined. For the consequences of this discussion for the second stage. *See* Award, Phase II, paras. 75–86.
25. It is equally easy, however, to see that this concern might be misplaced. Having acquired title on the basis of such practice, it would be quite cogent to argue that the starting point for delimiting the resulting maritime boundary should be the sovereign territory thus acquired. Indeed, this turned out to be what happened. *See* Award, Phase I, para. 438, where the Tribunal observed that the petroleum contracts "lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdictions of the parties." The Tribunal found itself unable – or unwilling – to fully distance itself from the consequences of this, despite implying that it was attempting to do so. *See* Award, Phase II, paras. 81–83, and text at note 122, *infra*.
26. *Id.*, para. 113.
27. Arbitration Agreement, Art. 2(3); Award, Phase II, para. 5.

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This potentially troublesome provision is dealt with in an almost peremptory fashion in the award.

### 2.1. The nature of the boundary

The first problem concerns the nature of the boundaries to be delimited. The Agreement speaks of delimiting maritime "boundaries" rather than a maritime "boundary". This holds open the prospect of a number of possibilities. In those areas whether the coasts of the parties are less than 24 nautical miles apart, the boundary delimits the territorial sea. Where the coasts are further apart, the area to be delimited becomes the continental shelf and the Exclusive Economic Zone (EEZ). In the Denmark *v.* Norway case the ICJ treated the delimitation of the continental shelf and an Exclusive Fishing Zone as separate exercises, although it went on to produce a common boundary serving both functions.[28] It is often asserted that it is possible – at least in theory – to have separate boundaries delimiting areas of continental shelf and EEZ, though the cogency of this is questionable and the author is unaware of any boundary practice that supports this claim. In the *Gulf of Maine* case the Chamber of the ICJ acquiesced in the request of the US and Canada to draw a "single maritime boundary" that would divide their maritime zones[29] and in the course of doing so the Chamber rejected the use of factors which were principally connected with either the seabed or the water column and sought "neutral factors" that were relevant to both.[30] These factors were chiefly derived from coastal geography. Since the range and influence of factors which may be relevant to the delimitation of a territorial sea are likely to vary from those applicable to the delimitation of a continental shelf and/or EEZ, and that yet different factors and degrees of influence may attach to the delimitation of a single (or common) maritime boundary, it is clear that the characterization of the task to be undertaken can be of critical importance.

Yemen presented its arguments of the form of a claim for "one single international boundary line for all purposes,"[31] whereas Eritrea sought to

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28. Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark *v.* Norway), Judgment, 1993 ICJ Rep. 38, paras. 44 and 90 [hereinafter: Jan Mayen Case].
29. These being, at the time, the continental shelf and exclusive fishing zone. *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada *v.* United States of America), Judgment, 1984 ICJ Rep. 246, paras. 26–27 [hereinafter: Gulf of Maine case]. *Cf.* Dissenting Opinion of Judge Gros for trenchant criticism of this approach, *id.*, at p. 360. *See also* P. Weil, The Law of Maritime Delimitation–Reflections 122–124 (1989), who points out that the Chamber did reject the idea advanced by the parties that the single maritime boundary should be envisaged as a "synthetic" line, and adopted a "two zone-one common line" approach. However, given their preference for so-called "neutral factors" to bring this about, it is difficult to see the difference.
30. Gulf of Maine case, *supra* note 29, paras. 192–194. For a critical examination of this aspect of the Gulf of Maine case and the quest for 'neutral' factors, *see* M.D. Evans, *Delimitation and the Common Maritime Boundary*, 64 BYIL 283 (1993), at 304–309.
31. Award, Phase II, para. 114.

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draw a distinction between those parts of the delimitation line which divided areas of continental shelf and EEZ, which were governed by the LOSC Articles 74(1) and 83(1),[32] and those areas which comprised territorial seas and which were governed by LOSC Article 15.[33] The practical consequences of this as far as the claims of the parties were concerned will be considered below, but at this stage it is sufficient to note that the Tribunal itself fails to adopt a consistent approach to this question. Indeed, its approach verges on the schizophrenic. When evaluating the arguments of the parties, it has "little difficulty in preferring the Eritrean argument which brings into play Article 15,"[34] but when setting out its own preferred approach, says that "the international boundary shall be a single all-purpose boundary."[35] As will be seen, however, when it came to determining the course of this single all-purpose boundary line the Tribunal, in effect, drew two entirely separate sets of boundaries, one for the continental shelf/EEZ and one of a territorial sea and then combined them into what would better be described as a "composite maritime boundary."[36]

## 2.2. The legal principles relevant to the delimitation

The award is equally unclear when it comes to legal principles relevant to the delimitation. The Tribunal noted that the reference to the LOSC meant that Articles 74 and 83 concerning the delimitation of the EEZ and continental shelf were applicable and that the reference to "other pertinent factors" was a "broad" concept which "doubtless includes various factors that are generally recognized as being relevant to the process of delimitation."[37] The Arbitration Agreement did not mention customary law however, and this probably explains the Tribunal's statement that "many of the relevant elements of customary law are incorporated in the provisions of the Convention."[38] Whilst this is certainly true of the provisions

32. Art. 74(1) LOSC provides: "The delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." *Id.*, Art. 83(1), is in identical terms except for its referring to the continental shelf.
33. Art. 15 LOSC provides: "Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith."
34. Award, Phase II, para. 125.
35. *Id.*, para. 132.
36. *Id.*, para. 154, where the Award notes that "[i]n this part of the boundary there is added to the problem of delimiting continental shelves and EEZ the question of delimitating an area of overlapping territorial seas."
37. *Id.*, para. 130.
38. *Id.*

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concerning the delimitation of the territorial sea, this rather inverts the normal understanding of the provisions of the Convention concerning the delimitation of the continental shelf and EEZ, which, by providing that delimitation between opposite and adjacent states "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution" refers back to principles of customary law, rather than reflecting them.[39] Be that as it may, the important point is that the Tribunal did not think it mattered whether it was applying convention or custom since they were both bundled up and subsumed in the requirement that an equitable result be achieved,[40] and that

> [i]t is a generally accepted view, as 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 provisions of the Convention.[41]

As the Tribunal pointed out, it was reinforced in this conclusion by the arguments of the parties themselves, who both based their claims around the equidistance method. But there can be no doubting the accuracy of its conclusion in the light of the judgment of the ICJ in the Denmark *v.* Norway case,[42] although the path to that conclusion has been long and tortuous.[43]

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39. The Tribunal itself accepted that Arts. 74 and 83 LOSC "were consciously designed to decide as little as possible;" *id.*, para. 116. *See* R.R. Churchill & V. Lowe, The Law of the Sea 190 (1999), where they are described as "not very meaningful."
40. Award, Phase II, para. 116.
41. *Id.*, para. 131.
42. *See also* text at note 81, *infra*. The significance of this case for maritime boundary delimitation is evidenced both by the content and volume of the literature. *See*, *e.g.*, the case notes by J.I. Charney, 88 AJIL 105 (1994); and M.D. Evans, 43 ICLQ 697 (1994). *See also* R.R. Churchill, *The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation*, 9 IJMCL 1 (1994); G.P. Politakis, *The 1993 Jan Mayen Judgment: The End of Illusions*, 41 NILR 1 (1994); B. Kwiatkowska, *Equitable Maritime Boundary Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond*, 28 ODIL 91, at 101–107 (1997); M.D. Evans, *Maritime Delimitation after Denmark v. Norway: Back to the Future? in* G. Goodwin-Gill and S. Talmon, The Reality of International Law 153 (1999). The judgment is fully appraised, and its general significance for maritime boundary delimitation considered (despite its title), in the seminal examination of the court's jurisprudence. *See* H.W.A. Thirlway, *Law and Procedure of the International Court of Justice 1960–1989 Part Six*, 65 BYIL 1 (1994).
43. This has long been the position in state practice and it is a matter of some regret that the ICJ took so long to recognize this. *See also* Thirlway, who says that "[e]quidistance thus finally received from the court recognition of the status which it should have had, and did in fact have in state practice, from 1958 onwards;" *id.*, at 83. For an expression of this view prior to the Jan Mayen case, *see* Weil, *supra* note 29, at 203–208, 282–283.

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### 2.3. The role of equidistance

The role of equidistance in continental shelf and EEZ boundary delimitation has long been controversial. Despite its being adopted as a principle means of delimitation in the 1958 Geneva Convention on the Continental Shelf, Article 6, the ICJ concluded in the *North Sea Continental Shelf* cases that it did not form a part of customary international law, but that delimitation was to be based on the application of "equitable principles" in the light of all "relevant circumstances."[44] This set up the possibility of there being two competing standards, a treaty-based rule of equidistance and the customary rule of equitable principles. However, the decision of the Court of Arbitration in the *Anglo-French* case attempted to solve this problem by drawing Article 6 and equidistance into the framework of a more broadly conceived general rule when it declared that the rule in Article 6 was a single rule,

> a combined equidistance-special circumstances rule [...] [which] gives particular expression to a general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined on equitable principles.[45]

Thus, the language of equitable principles was in the ascendant, and, whilst equidistance was not to be discarded, it was to have no special status. It was to be understood as a useful method of delimitation, but was not a principle which informed and influenced the exercise as a whole. This was taken up by the ICJ which in the *Libya/Malta* case said that

> [t]he court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the court is required, as a first step, to examine the effects of a delimitation by application of the equidistance method. Such a rule would come near to an espousal of the idea of 'absolute proximity' which was rejected by the court in 1969, and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea. That a coastal state may be entitled to continental shelf rights by reason of distance from the coast, and irrespective of the physical characteristics of the intervening sea-bed and sub-soil, does not entail that equidistance is the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only possible point of departure. The application of equitable principles in the particular relevant

44. North Sea Continental Shelf Case (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v.* The Netherlands), Judgment, 1969 ICJ Rep. 3, paras. 82–85. *See* the Dispositif, para. 101C(a). This conclusion was subject to criticism from the outset. *See*, *e.g.*, E.D. Brown, The Legal Regime of Hydrospace 47–62 (1971), a view from which he has never wavered. *See also*, more recently, E.D. Brown, The International Law of the Sea, vol. I, at 168, 205 (1994).
45. Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland *v.* The French Republic), Award, Misc. No. 15 (1978) Cmnd. 7438, para. 70 [hereinafter: Anglo-French case].

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> circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset.[46]

Despite this ringing renunciation of equidistance the Court went on to use equidistance as its provisional starting point in the *Libya/Malta* case, although stressing once again that it was not the only method that it could have used. Eight years later there was no apology for the use of equidistance as a starting point in the Denmark *v.* Norway case. It would be easy to put this down to the fact that, for the first time, the Court was faced by a situation in which both parties before it were parties to the 1958 Convention on the Continental Shelf and it was, therefore, bound to apply equidistance as a matter of treaty law. However, the Court believed that

> [i]f the equidistance-special circumstances rule of the 1958 Convention is, in the light of [the *Anglo-French* Arbitration], to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference – at any rate in regard to delimitation between opposite coasts – between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.[47]

In the light of this, it could be concluded with some assurance that equidistance was likely to be adopted as the starting point for a delimitation involving opposite states, no matter whether that delimitation be conducted under the provisions of customary law, Article 6 of the 1958 Continental Shelf Convention or Articles 74 or 83 of the 1982 Convention,[48] and irrespective of whether the delimitation of a continental shelf, EEZ or of a single maritime boundary is at issue. Indeed, the Court declared that "[p]rima facie, a median line delimitation between opposite coasts results in general in an equitable solution" and "it is of course this prima facie equitable character which constitutes the reason why the equidistance method, endorsed by Article 6 of the 1958 Convention, has played an important part in the practice of states."[49] This is as unequivocal as it is possible to be. Where a delimitation between opposite coasts situated less than 400 nautical miles apart is concerned, the median line is the starting point.[50]

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46. Continental Shelf (Libyan Arab Jamahirya/Malta), Judgment, 1985 ICJ Rep. 3, para. 43.
47. Jan Mayen case, *supra* note 28, para. 46. *Cf.* the Separate Opinion of Judge Shahabuddeen, who argued that there was a difference between the effect of applying customary international law and Article 6; *id.*, at 130–159.
48. *Id.*, para. 51.
49. *Id.*, paras. 64–65.
50. *Cf.* Churchill & Lowe, *supra* note 39, at 187, who rather cautiously express the view that "in the case of delimitations between opposite (as opposed to adjacent) coasts, there is *an increasing tendency* for court and tribunals, even when applying customary law, to begin the process by drawing an equidistance line as a provisional boundary and then considering whether it requires modification in the light of the relevant circumstances" (emphasis added).

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Against this background, the position adopted by the Tribunal – that an equidistance line between opposite coasts normally produces an equitable result – can hardly be faulted. There are, however, serious problems associated with the manner in which the Tribunal gave effect to this understanding. The first concerns the assessment of what comprises the "opposite coasts" and the second concerns the extent to which the Tribunal was prepared to recognize and give effect to other factors pertinent to the delimitation exercise.

## 3. The Opposite Coasts

Both Yemen and Eritrea accepted that the delimitation should be effected by means of the median line between opposite coasts. The question was *which* coasts? The nub of the problem was whether the equidistance line should be drawn between the mainland coasts or whether it should be drawn from island coasts and, if so, which ones? In the northern section of the contested area a large number of islands and islets, known as the Dahlak Islands, lay off the Eritrean coast. Yemen had not contested Eritrean sovereignty over these islands and recognized that the easternmost islets should be used as basepoints for the purposes of constructing an equidistance line and that the waters between the mainland coast of Eritrea and the Dahlaks comprised internal waters.[51] To the south, Yemen also recognised that the Bay of Assab and its off-lying islands comprised a bay and that the low water line of the islands provided the appropriate base points.[52] Other than this, the position of each of the parties was transparently self-serving.[53]

### 3.1. The arguments of the parties

Yemen argued that the low-water lines of the island Jabal al-Tayr and of the island group of al-Zubayr provided the relevant coastline from which to construct an equidistance line in this area. Moving southwards, Yemen argued that the equidistance line should be drawn between the Hanish Islands and the Eritrean mainland coast. The obvious difficulty with this was that it failed to give any effect to the Haycocks and South West Island which, as has been seen, were awarded by the Tribunal to Eritrea in the

51. Award, Phase II, para. 14. The Tribunal notes that "Yemen, like Eritrea, was prepared to treat the Dahlaks as being part of the Eritrean coast;" *id.*, para. 114.
52. *Id.*, para. 127.
53. Yemen even went so far as to claim that, whilst the equidistance line should be drawn from the low water line on the Yemen side, it should be drawn from the high waterline on the Eritrean mainland coast, since this was the manner in which the territorial sea was to be determined under Eritrean domestic law. This was rejected by the Tribunal on the grounds that the arbitration agreement referred to the provisions of LOSC, which in Art. 5 makes it clear that it is the low-water line that is to be used. *Id.*, paras. 134–135.

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first phase of the award. Yemen declined to accept that these islets were entitled to influence the course of the equidistance line, but did accept that they might be "enclaved."[54] In the southernmost portion of the line, Yemen argued for equidistance between the mainland coasts, the area being essentially free from islands and islets which disrupted the equity of that approach.[55] In essence, then, Yemen was suggesting that the equidistance line be constructed taking into full account the islands which had been awarded to it in the first phase award (the Northern Islands and the Hanish Islands) whilst denying that those islands and islets that had been awarded to Eritrea should have any such effect.

Unsurprisingly, Eritrea contested this and sought to derive some benefit from the distinction between the northern area where the area to be delimited comprised the continental shelf/EEZ and the central area where the distance between the coasts of the parties (including that of all islands) meant that it was the territorial sea that was at issue. Eritrea argued that the northern area was governed by LOSC Articles 74/83, which stress the need for an equitable solution and do not mention equidistance at all. In the light of this, Eritrea – whilst certainly agreeing with Yemen that the Dahlak islands formed a part of the Eritrean mainland coast – contested the use of Yemen's islands in the northern section given their small and isolated nature. In the central section, however, Eritrea took a very different view of the role of islands. Since it was the territorial sea which was now at issue, Eritrea considered it appropriate to look to LOSC Article 15 (which expressly refers to equidistance) and, since the distance between the islands was much smaller, suggested that an equidistance line could be drawn giving full effect to the Eritrean islands. However, Eritrea did not actually propose that this be done, and its preferred solution was one of considerably greater complexity, if not of much subtlety.

Eritrea recalled that Yemen sovereignty over the islands had only been established by the first phase of the award, whereas Eritrean sovereignty over the islands that had been confirmed by that award had already been prefigured in previous arrangements between the parties. Under these circumstances, Eritrea took the view that the median line should be drawn between the mainland coasts of the parties and taking account of the Eritrean but not the islands recently acquired by Yemen. The mid-sea islands (Haycocks, South West island, and the Hanish islands) should be confined in certain 'boxes' that would become joint resource areas.[56]

54. *Id.*, para. 17.
55. *Id.*, para. 18.
56. In general terms, the joint resource area would extend from the 'median' line as envisioned by Eritrea in the west to the limits of the 12 nautical mile territorial sea drawn from Yemen's islands to the east. In other words, Eritrea sought the benefit of sharing in the resources of the territorial seas of the islands awarded to Yemen in the first phase of the arbitration whilst reserving for itself the use of the resources of the territorial seas of those islands that had been awarded to it, as far as the equidistance line between those islands and the Yemen mainland coast; *id.*, para. 46.

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### 3.2. The approach of the Tribunal

The mere juxtaposition of these views of the parties is sufficient to show them to be contradictory, but is this enough to demonstrate that they are wrong? As will be seen below, the Tribunal gave them short shrift before proceeding to offer its own version of the equitable solution but it fails to explain why either set of arguments cannot be accepted. Rather, the award tends to give the impression that the inconsistencies between the approaches of the parties suffice to justify their rejection. The award also fails to make clear the arbitrary – and potentially startling – nature of its own preferred approach, which is to proceed from the assumption that in a delimitation between opposite coasts, the equitable solution is to be achieved by the construction of an equidistance line between the mainland coasts. The case for granting an island any effect has to be made out.

As has already been seen, the Tribunal rightly pointed out that the generally accepted view is that equidistance between opposite coasts produces an equitable result[57] but this still leaves the crucial question of what comprises the opposite coasts unanswered. The Tribunal however, then simply declares that it "has decided … 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 coasts."[58] It is clear from the manner in which the Tribunal then proceeds that the phrase "as far as practicable" is not meant to qualify the rigour with which this presumption is to be applied, but is intended to reinforce the central message that islands are to be ignored for the purposes of constructing the equidistance line if it is at all possible to do so.

#### *3.2.1. The northern section*

Starting in the northmost section, the Tribunal agreed with both Yemen and Eritrea that the Dahlaks were "a typical example of a group of islands that forms an integral part of the general coastal configuration" and that "the baseline of the territorial sea will be found somewhere at the external fringe of the island system."[59] It thus viewed the outer edge of the Dahlaks as comprising the *mainland* coast. It then considered the Yemen claim that the "mid-sea" islands of Jabal al-Tayr and the Zubayr group should be used as basepoints, and the full force of the Tribunal's approach immedi-

57. *Id.*, para. 131.
58. *Id.*, para. 132 (emphasis added).
59. *Id.*, para. 139. There was a related problem flowing from the Eritrean claim to have a straight baseline system in the area. The Tribunal did not consider it necessary to use such a system, assuming it to be in existence, since it was free to determine its own baselines. A further issue concerned the Eritrean claim that the 'Negileh Rock' formed a part of such a baseline system. This appears to be a submerged feature and so was considered ineligible for inclusion in a straight baseline system or as a basepoint, taking into accounts LOSC Arts. 6 and 7. *Id.*, paras. 140–146. This would appear to be quite correct.

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ately becomes apparent. It says that the consequence of using these islands as basepoints was that "the Yemen-claimed median line boundary is 'median' only in the area of sea west of these islands."[60] This is stating the obvious, but it is only objectionable if there are good reasons for not using the islands. The Tribunal's principle reason follows immediately and it is that "[t]hese islands do not constitute a part of Yemen's mainland coast."[61] This, too, is stating the obvious, but it now appears that the very fact that an island is an island and not a "mainland" is sufficient to deprive a median drawn from it the status of being a 'true' median between the parties. This, of course, is nonsense. It is, then something of a relief when the Tribunal finally notes that "[m]oreover, the barren and inhospitable nature and their position well out to sea […] means that they should not be taken into consideration."[62] However, the Tribunal had already noted that it was confirmed in its thinking "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."[63] In other words, it was indeed possible to ignore the islands without producing an inequity and in consequence the boundary is fixed as the mainland coastal median[64] which continues southward until it reaches "the area of possible influence of the islands of the Zuqar-Hanish group" where "some decisions have to be made as to how to deal with this situation."[65]

### *3.2.2. The central section*

In fact, the Tribunal handled "this situation" by adopting a completely different approach. Yemen had argued that the delimitation in this region was to be conducted between the Yemen Islands and the Eritrean mainland.

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60. *Id.*, para. 147.
61. *Id.*
62. *Id.*
63. *Id.*, para. 119.
64. As with the Eritrean 'mainland,' the Tribunal found that a number of fringing islands existed that were capable of being included within a straight baseline system and in consequence considered it appropriate to utilize them as basepoints for the construction of the 'mainland' median. It is not clear whether the Tribunal would have been prepared to use them had they not fallen within the potential scope of Art. 7 LOSC, but it seems possible that it would not. There was, in addition, the "relatively large, inhabited and important island of Kamaran," which the Tribunal was, once again, prepared to use as a part of the 'mainland' coast, since it contributed to the formation of an important bay and "there can be no doubt that these features are integral to the coast of Yemen and part of it should therefore control the median line;" *id.*, paras. 149–152. This suggests that even comparatively significant islands could well be ignored if they cannot be seen as forming a part of mainland coast. *A fortiori*, smaller features would be excluded unless capable of fulfilling such a test, and compatibility with Art. 7 LOSC would seem to provide a reasonable basis upon which to make such an assessment, although it is itself somewhat opaque. For consideration of this topic see W.M. Reisman & G.S. Westerman, Straight Baselines in International Maritime Boundary Delimitation 71–104 (1992). *See also* J.A. Roach & R.W. Smith, *Straight Baselines: The Need for Universally Applied Norms*, 31 ODIL 47 (2000).
65. Award, Phase II, para. 153

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A median line would have left the Eritrean islands on the "wrong side" of that median, but this could be accommodated by enclaving them. The Tribunal was dismissive of the enclave solution, because of its "obvious impracticality"[66] in a main international shipping lane. But this still left the Tribunal to face the argument that Yemeni islands which were on the wrong side of the "mainland coastal median" might comprise the relevant "opposite coast" for the delimitation with Eritrea. This was difficult to reconcile with its working premise and it was fortunate that geography rescued the Tribunal from a predicament of its own creation.

The obvious flaw in the Yemen argument was that it overlooked the point that the Haycocks and South West Rocks were themselves capable of generating claims to a 12 nautical mile territorial sea and these claims both interlocked with the territorial sea generated from the Eritrean mainland and overlapped with the 12-mile territorial sea generated by the Yemeni islands. In other words, the delimitation concerned overlapping territorial seas rather than overlapping continental shelves and EEZs. The Tribunal then recalled that LOSC Article 15 provided for the use of an equidistance line to delimit overlapping territorial seas, unless historic title or special circumstances indicated otherwise. Without setting out the reasoning, the award records that the Tribunal found "no variance necessary" and that it considered an equidistance line to be "entirely equitable."[67] It was extremely fortunate for the Tribunal that the Eritrean islands were sufficiently close to the Yemeni islands to generate overlapping territorial seas. Had this not been the case, it could hardly have avoided addressing *directly* the question of whether the Zuqar-Hanish group could be used as basepoints for the delimitation of overlapping continental shelves. It is always difficult to gauge quite how much artistry is put into the construction of a judgment. Whether it be by accident or design, the construction of this award tends to mask the fact that although it did not address the matter directly, the Tribunal did in fact address it indirectly and concluded that this group of islands did not act as basepoints and that the continental shelf/EEZ boundary was to be the "mainland coastal median", as far as possible.

The Tribunal notes that the coastal median would cut through the territorial sea and the land territory of Hanish and therefore it must divert[68]

66. *Id.*, para. 154.
67. *Id.*, paras. 158–159.
68. *Cf.* para. 123, where the Tribunal says it decided to continue the line "until the presence of Yemen's Zuqar-Hanish group compels a diversion westwards" (emphasis added); *id.*

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and respect the territorial sea of that island.[69] Given that this statement comes immediately after the discussion of the overlapping territorial seas of Yemen and Eritrea further to the south, it is easy to miss the point that the very fact that the coastal mainland median line separating the maritime zones meets the territorial sea of these mid-sea islands at all means that they are not being accorded any entitlement to a continental shelf and EEZ.

The task for the Tribunal then becomes how to link together the "coastal mainland median" from the point where it meets the territorial sea of Zuqar to the Article 15 median line which divides the areas of overlapping territorial seas. The obvious way would be to follow the outer limit of the territorial sea but it was decided to simplify this by utilizing two geodetic lines which are faithful to the general direction of the 12-mile territorial sea boundary and, as the Tribunal says, this "makes for a neater and more convenient international boundary."[70] What the Tribunal does not say is that it is not granting those islands any effect in determining the delimitation of the continental shelf and EEZ and thus does not have to offer any explanation for its failure to do so. In effect, it adopts the "partial enclave" approach to the issue of islands that straddle the median line between opposite coasts, but fails to make this explicit. It is, therefore, clear that the Tribunal stayed true to its lights and effected the delimitation by means of a mainland coastal median to the extent that it was at all possible to do so.

## 4. The Pertinence of Other Factors

If the role of equidistance has been controversial in maritime delimitation, the function to be played by 'special' or 'relevant' circumstances has been

69. *Id.*, para. 160. Surprisingly, the Tribunal appears to qualify this by pondering whether these islands are entitled a territorial sea at all. It says "that they ought be regarded as having a territorial sea seems reasonable." It is difficult to see what reasonableness has to do with it. The Tribunal had already noted that the Haycocks – very much smaller than the Zuqar-Hanish islands – were entitled to generate a full 12 nautical mile territorial sea entitlement and it is virtually impossible to imagine how any tribunal could conclude otherwise. It might be noted, however, that for some quite inexplicable reason the Tribunal referred to the territorial sea generated from the Haycocks as part of the "Eritrean mainland coast territorial sea," which it is most certainly is not; *id.*, para. 158. It does, however, overlap with the mainland coast territorial sea and so provides a continuous belt extending from the mainland. The territorial sea drawn from the Zuqar-Hanish group does not overlap with the Yemen mainland coast territorial sea. But even this provides no rational justification for the suggestion that they might not have an entitlement to a territorial sea. The capacity of even the smallest and more isolated of islets to generate entitlement to territorial seas is too well established to admit of any doubt. *See* R. Jennings & A. Watts, Oppenheim's International Law, Vol I, Part II, 604 (1992).

70. Award, Phase II, para. 162. There was a degree of inevitability in the manner in which the remainder of the international boundary was determined south of the overlapping areas of territorial seas. A geodesic line was used to link the end of the 'Article 15' median line with the coastal median; *id.*, para. 163.

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equally so.[71] Article 6 LOSC provided that the equidistance, or median, line would be the boundary in the absence of agreement and "unless another boundary is justified by special circumstances." Having started out as a set of narrowly understood exceptions to a general rule, the list of such exceptions expanded and become more broadly drawn, to the extent that, arguable, they became the powerhouse behind the entire delimitation process.[72] The Denmark *v.* Norway case has once again changed the landscape and repositioned special or relevant circumstances in relation to equidistance so that they are, once again, modifiers rather than generators of the method of delimitation.[73]

## 4.1. The legal background

The ILC discussed continental shelf delimitation issues during its second to eighth meetings from 1950 till 1956 and prepared the draft convention text that was considered at the first LOSC in 1958. The ILC envisaged "special circumstances" as being a reasonably small and well defined body of exceptions to a rule of equidistance or use of the median line[74] but by the time its proposals were considered by the UN General Assembly 6th Committee, broader ranges or factors than those originally envisaged were already being advanced.[75] It was, however, the effect of geographical factors that received close scrutiny and which were widely acknowledged as being special circumstances.[76] It was recognized that non-geographical factors could be special circumstances[77] but there was neither clarification nor consensus as to what they might be and discussion tended to focus upon the effect features identified as special circumstances would have upon delimitation.

71. Much literature exists on this topic. For more general examinations, *see* S. Jagota, Maritime Boundary (1985); Weil, *supra* note 29; *see also* M.D. Evans, Relevant Circumstances and Maritime Delimitation 63–94 (1989); G.J. Tanja, The Legal Determination of International Maritime Boundaries (1990); D. Pharand & U. Leanza, The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime (1993); G. Despeux, Droit de la délimitation maritime (2000). From the perspective of the EEZ, *see* D. Attard, The Exclusive Economic Zone in International Law (1987); B. Kwiatowska, The 200 Miles Exclusive Economic Zone in the New Law of the Sea (1989); F. Orrego Vicuña, The Exclusive Economic Zone: Regime and Legal Nature under International Law (1989).
72. This was the logic of the argument presented by this author in Evans, *id.*, at 63–94.
73. *See*, *generally*, the works cited in note 42, *supra*.
74. *E.g.* YbILC 216 (1955-II); YbILC 300 (1956-II).
75. Iran raised the question of oil installations, whilst Venezuela referred to the "particular circumstances of each region and each state," by which economic and political, as well as geographical, factors were meant. *See* UN General Assembly 6th Committee, Summary Records, 490th meeting, para. 22; 493rd meeting, para. 44.
76. Islands received much consideration, but attention was also drawn to exposed mud flats and sand cays. *See* UNCLOS I, Official Records, I, 31st meeting, para. 9; 32nd meeting, para. 3.
77. The UK delegate, Commander Kennedy, remarked that apart from geographical factors, "other types of special circumstances were the possession [...] of special mineral exploration rights, or the presence of a navigable channel." *See* UNCLOS I, Official Records, I, 32nd meeting, para. 3.

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When in the *North Sea Continental Shelf* cases the ICJ indicated that equitable principles were to be applied in the light of relevant, rather than special, circumstances, this opened the door to a whole host of more ambitious claims. In subsequent cases decided by the ICJ and by arbitral tribunals the examples of special circumstances, both advanced and accepted, expanded greatly.[78] In a sense, this trend is best summed up by the award of the Arbitral Tribunal in the *Guinea/Guinea-Bissau* case in 1985 and, in a passage that stands as a conclusion to the expansionist phases of thinking concerning relevant circumstances, said:

> The factors and methods […] result from legal rules, although they evolve from physical, mathematical, historical, political, economic or other facts. However, they are not restricted in number and none of them is obligatory […] since each case of delimitation in a *unicum* […]. Where factors are concerned, the Tribunal must list them and assess them. They result from the circumstances of each particular case and, in particular, from characteristics peculiar to the region. These circumstances will be taken into consideration only when the Tribunal considers them relevant to the case in hand. These circumstances are varied and are not restricted to physical facts, whether geographical, geological or geomorphological.[79]

This expansion went hand in hand with the diminishing role granted to equidistance, firstly as a principle and secondly as a method of delimitation. Since the Denmark *v.* Norway case restored a certain pre-eminence to equidistance, at least as far as delimitation between opposite coasts is concerned, it might have been expected that there would have been a corresponding impact upon the range of relevant circumstances that might justify its modification, and at first sight this seems to have been the case.[80] Significantly, the Court observed that "the attribution of maritime areas to the territory of a state […] is a legal process based solely on the possession by the territory concerned of a coastline."[81] It is true that the judgment endorsed the potential relevance of factors such as security considerations,[82] the conduct of the parties,[83] and the effect of ice flows upon access to resources at the harvestable stage,[84] but the Court thought that

78. This trend was chronicled in M.D. Evans, *Maritime Delimitation and the Expanding Categories of Relevant Circumstances*, 40 ICLQ 1 (1991).
79. Maritime Delimitation case (Guinea/Guinea-Bissau), Arbitral Award, 25 ILM 252 (1986), at para. 89 [hereinafter: Guinea/Guinea-Bissau case].
80. When applying Art. 6 to the continental shelf the court said that "it is appropriate to begin by taking provisionally the median line […] and then inquiring whether 'special circumstances' require another boundary line." *See* Jan Mayen case, *supra* note 28, para. 49.
81. *Id.*, para. 80. Alone among the judges, the relevance of these factors to the delimitation was accepted in the Dissenting Opinion of Judge *ad hoc* Fischer, *id.*, para. 14. It would, therefore, seem that although the resources of the area to be delimited are relevant, the economics of the areas to which they are to appertain are not. The cogency of this distinction is, to say the least, questionable.
82. *Id.*, para. 81.
83. *Id.*, paras. 82–86.
84. *Id.*, paras. 77–78.

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none of these had any relevance on the facts of the case. It also confirmed that the geological and geomorphological characteristics of the seabed for delimitations conducted between 200 nautical mile zones were of no relevance,[85] and the potential relevance of socio-economic and population factors was also rejected. However, the Court did identify two factors, the disproportion in coastal length and equitable access to fishery resources, which it felt justified modifying the median line[86] and proceeded to do so in so liberal a manner as to justify the conclusion that although the equidistance line would be the normal starting point for a delimitation between opposite coasts, it would rarely be the finishing line.[87] It is against this background that the award between Yemen and Eritrea must be assessed.

### 4.2. The approach of the Tribunal

A variety of factors were identified by the parties as bearing upon the course of the delimitation line but they were presented as factors which indicated or supported the case for a particular overall solution rather than as factors which would justify the alteration of a line generated in accordance with a particular methodology. The Tribunal was therefore able to dismiss the relevance of all these factors at the same time as it rejected the various solutions presented. Indeed, it had little choice. In consequence, once the Tribunal had introduced its own preferred solution – the *prima facie* application of a mainland coastal median – the only substantial task left was to identify the relevant mainland coasts, which has already been examined in the previous section. Whereas in previous delimitations

85. *Cf.* Case Concerning the Delimitation of the Maritime Areas between Canada and France, Decision of 10 June 1992, 31 ILM 1149 (1992), paras. 46–47 [hereinafter: Canada/France case], although, since the Court of Arbitration accepted that the area was a geological continuum this was not, strictly speaking, the point; *id.*, para. 23. *See* K. Highet, *The Use of Geophysical Factors in the Delimitation of Maritime Boundaries in* J.I. Charney & L.M. Alexander, International Maritime Boundaries, Vol. I, 163 (1993), who points out that whilst geophysical features have been used sparingly in negotiated settlements, they have been not used at all in adjudicated/third party settlements. On the other hand, he points out that beyond 200 miles they form the basis of title and so "will be of the essence;" *id.*, at 196. *Cf.* H. Ruiz Fabri, *Sur La Délimitation des Espaces Maritimes entre le Canada et la France*, 97 RGDIP 67, at 75 (1993), who considers that this decision finally put paid to the potential relevance of the physical characteristics of the area to be delimited.
86. Since access to fishery resources is irrelevant to position of a continental shelf boundary, the court could have produced separate but divergent lines. However, the court said that "[s]o far as the continental shelf is concerned, there is no requirement that the line be shifted eastwards consistently throughout its length: if other considerations might point to another form of adjustment, to adopt it would be within the measure of discretion conferred on the court by the need to arrive at an equitable result;" Jan Mayen case, para. 90.
87. A point made some time ago by Weil, *supra* note 29, at 203. *See also* M.D. Evans, *Less than an Ocean Apart: The St. Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones*, 43 ICLQ 679 (1994), in which the proposition tested in the light of the Jan Mayen and Canada/France case. This theme was further revisited in Evans, *supra* note 42.

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islands have been considered as potential special or relevant circumstances *par excellence* and their effects upon an equidistance line examined in order to determine what, if any, effect, they were to be granted,[88] the Tribunal's approach inevitably elided that task into the business of generating its median line. It is not surprising, therefore, that the award does not expressly consider whether there are any 'relevant' or 'special' circumstances the effect of which call for an adjustment of its line since it had been generated in a holistic fashion.[89]

It is unrewarding, therefore, to scan the award for insights into the potential categories, roles and impact of special or relevant circumstances.[90] There are, however, a number of factors that were raised by the parties which were subject to particular consideration by the Tribunal and which do indeed merit further attention, irrespective of whether they be regarded as special or relevant circumstances in this particular context.

#### *4.2.1. Fishing*

The first concerned fishing. The Tribunal observed that the evidence advanced by the parties concerning their fishing practices, its significance and impact for the purposes of the delimitation, had been "contradictory and confusing"[91] and "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

88. The literature on islands within the delimitation process is voluminous. *See*, *e.g.*, Bowett, *supra* note 9; C.R. Symmons, The Maritime Zones of Islands in *International Law* (1979); H. Dipla, Le régime juridique de îles dans le droit international de la mer (1984); H.W. Jayewardene, The Regime of Islands in International Law (1990); D.W. Bowett, *Islands, Rocks, Reefs, and Low Tide Elevations in Maritime Boundary Delimitations*, *in* Charney & Alexander, *supra* note 85, at 131. In addition, all works previously cited concerning continental shelf and EEZ delimitation devote considerable space to the impact of islands. *See* references in notes 42 and 71, *supra*.
89. Paradoxically, this is more akin to the ICJ cases in the mid-1980s when the use of equidistance was at its most unfashionable, than to the approach in the Jan Mayen case in which equidistance was substantially rehabilitated. *See*, *e.g.*, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, 1982 ICJ Rep. 18, para. 70, where the court stressed that "[t]he result of the application of equitable principles must be equitable […]. It is, however, the result which is predominant; the principles are subordinate to the goal."
90. Alternatively, and taking the award on its own terms, one might say that as far as islands are concerned, this has already been done.
91. Award, Phase II, para. 61. The detailed arguments of the Parties are set out in paras. 52–60; *id.* They were summarized by the Tribunal in para. 49 as being "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 practices, 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."

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parties."[92] However, the Tribunal did not reject the potential relevance of fishing issues. It seems to have accepted that it was possible for a state to be sufficiently economically dependent on fishing so as to make this a legitimate factor to take into account when determining the line of delimitation, although this was not the case here.[93] The Tribunal also concluded that

> [n]either Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activities of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals.[94]

This suggests once again that this might be a legitimate concern in appropriate circumstances.[95] These matters pertain to fishing generally. In addition to this, there was the question of traditional artisanal fisheries which had been recognized by the Tribunal in the first phase award when it said that

> [I]n 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 [...]. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing

92. *Id.*, para. 73.

93. *Id.*, para. 64, where it was stated "[i]t 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" (emphasis added). This suggests that had the evidence been otherwise, this might have been a possible factor. However, it should also be noted that the Tribunal balanced the pre-existing dependency of Yemen against the prospective Eritrean activity. This is most unusual and leads one to suppose that it would only be as a consequence of an almost total disregard for fishing on the part of one of the states to a dispute that such a factor would come into play; *cf.* Tunisia/Libya case, *supra* note 89, para. 107, and Libya/Malta case, *supra* note 46, para. 50 where such prospective arguments are rejected.

94. Award, Phase II, para. 72. The origins of this, in the context of maritime boundary delimitation, is in the Gulf of Maine case, where it was said that "What the Chamber would regard as a legitimate scruple lies [...] in concern lest the overall result, even achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the likelihood and economic well-being of the population of the countries concerned;" *supra* note 29, para. 237. This in turn resonates with the Anglo-Norwegian Fisheries case (United Kingdom *v.* Norway), Judgment, 1951 ICJ Rep. 116, at 142. *See also* the Tribunal's presentation of the arguments of the parties, *supra* note 91.

95. It should be noted that the Tribunal did not test its own solution to ensure that it did not produce such consequences. Thus it did not treat it as an 'ex post facto' test of equity of the solution as had the Chamber of the ICJ in the Gulf of Maine case. This tends to confirm the approach of the ICJ in the Jan Mayen case, where this was used as an element in the generation of the appropriate line of delimitation for the fishing zone. It should also be noted that the Tribunal speaks of an "inequitable effect", suggesting that a less than "catastrophic" outcome would be sufficient to cause a proposed line to fall short of being an "equitable solution". *See* Jan Mayen case, *supra* note 28, para. 75.

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> 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.[96]

The Dispositif provided:

> The sovereignty found to lie within Yemen entails the perpetuation of the traditional fishing regime in the region, including the free access and enjoyment for the fishermen of both Eritrea and Yemen.[97]

The second phase award elaborates upon the practical consequences of this determination, which was based upon the Tribunal's understanding of local legal traditions,[98] but it refused to accept the Eritrean suggestion that such recognition of a traditional fishing regime had any relevance for the delimitation of the international boundary. It stressed that

> [t]he traditional fishing regime is not an entitlement in common to resources nor is it a shared right in them [...] [and] is not limited to the territorial waters of specified islands [...]. By its very nature it is not qualified by the maritime zones specified under the UN Law of the Sea Convention [...]. [A]ccordingly, it does not depend, either for its existence or protection, upon the drawing of an international boundary by this Tribunal.[99]

Against this background it would be quite wrong to conclude that the Tribunal was minimizing the potential relevance of factors relating to fisheries. On the contrary, it had already provided an innovative response which it fleshed out in considerable detail in this second phase award. However, the very nature of that response quite properly placed it outside the range of factors that might legitimately be taken into account when determining the course of the boundary line.

#### *4.2.2. Proportionality*

The second factor that was considered by the Tribunal concerns proportionality. Both parties were essentially agreed that the proper role of proportionality within the delimitation process was as a means of testing the equitability of the result and that it could not be used as a "method" that could generate a particular line of delimitation.[100] As ever, the problem was determining the basis on which proportionality would be calculated

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96. Award, Phase I, para. 526. For further consideration *see* Antunes, *supra* note 6, at 383–384.
97. Award, Phase I, Dispositif, para. 527 (vi).
98. Award, Phase II, paras. 92–94 and 101. These paragraphs reflect profound and provocative thinking, the consequences of which are considerable. Unfortunately, reflection upon them is beyond the limited scope of this article.
99. *Id.*, paras. 103, 109, 110.
100. *Id.*, para. 39. This reflects the orthodoxy following on from the North Sea and Anglo-French cases.

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and, as in previous cases, both parties argued that the result should produce a division of waters which was in proportion to the lengths of their coasts in the region. This is an endlessly problematic task, and the Tribunal records that the parties offered various calculations of their relevant coastal lengths which, though very different, miraculously suggested that their favoured line of delimitation was indeed not only equitable but proportionate.[101] The Tribunal notes this, but despite the rather disparaging tone of its own remarks,[102] is hardly in a position to criticise since, when it turned to the task itself, it did exactly the same. First, it confirmed that proportionality "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."[103] It then proceeded to identify the relevant coastal length. The most problematic question as far as the Tribunal was concerned was the identification of the northern and southern termini of the coasts. Rather than use a line of latitude, the Tribunal

> 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 rights 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.[104]

Working on this basis, the Tribunal found that the ratio of coastal lengths between Yemen and Eritrea was 1:1.31 and the ratio of the water areas attributed between them was 1:1.09. It concluded that "the line of delimitation it has decided upon results in no disproportion."[105] And who can disagree?[106] And if there is disagreement, then it would doubtless be perfectly possible to construct a system of relevant coasts, or decide to include or exclude territorial or internal waters in a fashion which was productive of a proportion that was compatible with equity. Little is gained

101. *Cf.* the exposé of the arguments of the parties in the Canada/France case in G. Politakis, *The French-Canadian Arbitration around St. Pierre and Miquelon: Unmasked Opportunism and the Triumph of the Unexpected*, 8 IJMLC 105 (1993).
102. *See* Award, Phase II, para. 42, where it is stated that "[s]uffice 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 won 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".
103. Award, Phase II, para. 165.
104. *Id.*, para.167.
105. *Id.*, para. 168.
106. But *cf.* Gulf of Maine case, where the Chamber felt that a ratio of coastal fronts of 1.38:1 in favour of the US needed to be reflected in the positioning of an "equidistance" line; *supra* note 29, para. 222.

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by analysing in detail the application of a methodology that involves the comparisons of variables, all of which fall for subjective assessment by a Tribunal.

It is difficult to resist the conclusion that demonstrating the equitability of a result by reference to proportionality amounts to little more than an exercise in formalism which gives both parties and tribunals an opportunity to demonstrate their creative abilities. To the extent that it is important that the exercise is carried out in a credible fashion, there may be certain constraints, but these will lie at the outer edges of the bands of equitable discretion that the court or tribunal will be exercising in any event.

What is significant about the Tribunal's approach to this illustrative exercise is that it once again reflects its basic approach, which is to invest primacy in mainland coastal geography and to ignore the coasts of islands.[107] Against this background, the Yemen's argument that an assessment of proportionality between coastal lengths was inappropriate in the central section of the delimitation area because of factors particular to the waters between the Yemeni islands and the Eritrean mainland was clearly destined to fail.[108] There was, then, a congruence between the Tribunal's favoured method and its means of demonstrating the equitability of the result in the language of proportionality. This is to be welcomed, although it is at the same time both the very least and the most that can legitimately be expected of the exercise.

### *4.2.3. Other factors*

Two final factors need to be mentioned, both of which were related and of significance in the complex central section of the delimitation area. Yemen had argued that the Eritrean Haycocks and the South West Rocks should be enclaved within the Yemen territorial sea. In the course of rejecting this approach, the Tribunal stressed the need for convenience in an international boundary and clearly thought it would be a most inconvenient, and, indeed, "impractical" approach "in the immediate neighbourhood of a main international shipping lane."[109] Even if an approach was not "impractical," the Tribunal was also concerned to ensure convenience. It refers to the "simplicity desirable in the neighbourhood of a main shipping lane"[110] and finds further reflection in the decision to use straight line segments to link the Article 15 territorial sea median in the central

107. Other, that is, from those such as the Dahlaks which comprise the relevant mainland coast. *See* Award, Phase II, para. 166.
108. *Id.*, para. 40, where these arguments are summarized.
109. *Id.*, para. 155. *See also* para. 125, which speaks of the "advantage of avoiding the need for awkward enclaves in the vicinity of a major shipping route."
110. *Id.*, para. 128.

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section with the mainland coastline median.[111] A concern for simplicity and practicality is once again a very welcome feature of this award.

A final point to note is that, when rejecting the enclaving of those Eritrean islands, the Tribunal quoted with approval the view expressed in the *Guinea/Guinea-Bissau* award that one of the principal motivations underpinning the award was

> [t]o 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.[112]

It does, then, seem that the award is not inimical to the potential pertinence of a variety of innovative factors, even though its principal methodology at first sight seems to marginalize them.

## 5. Conclusion

It is clear that the Tribunal did indeed carry out the delimitation by means of a mainland coastal median to the extent that it was at all possible to do so, and that this coloured its approach to almost all aspects of its presentation and evaluation of the arguments placed before it. What still remains to be explored is why it adopted this approach in the first place. Two reasons are given, but neither is wholly convincing.

First, the Tribunal says that this is "in accord with practice and precedent in like situations" but it fails to offer any evidence to support this.[113] The obvious example, one might think, would be the *Anglo-French* case, in which the Tribunal took the view that the geographical relationship of the parties to the area to be delimited was the crucial factor in determining the appropriate method to be used, and said that "where the coastlines of two opposite states are themselves approximately equal in their relation to the continental shelf [...] the boundary [should] in normal circumstance be the median line."[114] This was also the case here. Moreover, the position of the Channel Islands, as British islands on the 'wrong side' of the coastal median also needed to be considered but here, of course, the Tribunal did adopt an enclave solution. The parallels with the Hanish-Zuqar group are not exact, since the Yemen islands, as a group, straddled the mainland coastal median, rather than being on the 'wrong side' of it. Nevertheless, the essential question to be answered was the same: what role are these

111. *Id.*, para. 162, where it is said that "this makes for a neater and more convenient international boundary."
112. *Id.*, para. 157, quoting the Guinea/Guinea-Bissau award, the Tribunal associating this particularly with Judge Lachs, the President in the earlier award; *supra* note 79, para. 125.
113. *Id.*, para. 131.
114. Anglo-French case, *supra* note 45, para. 182.

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islands to play in the context of the delimitation?[115] In the *Anglo-French* case the focus was on the result of the using the Channel Islands and there was no assumption that their use required justification.[116]

A similar conclusion can be drawn from the *Dubai/Sharjah* award, in which the effect of the island of Abu Musa, situated some 35 nautical miles off the laterally aligned coasts of the parties, was discussed. The Tribunal decided that the equidistance method was applicable and the island constituted a special circumstance which, in the circumstances of the case, was to have no influence other than being awarded a 12 nautical mile territorial sea. This appears to parallel very closely the treatment of the Hanish-Zuqar group in the *Eritrea-Yemen* award. However, in the *Dubai/Sharjah* award, the Tribunal emphasised that "the entitlement of an island to a continental shelf is an inherent right" but that "certain islands" could amount to special circumstances "where their existence would otherwise produce a distortion [...] which would be inequitable", as was the case here.[117] Indeed, the Tribunal also noted that this approach had been adopted in other cases concerning off-lying islands in the region[118] and so it might seem, at first sight, that the Tribunal in the *Eritrea-Yemen* award was merely following a well established neighbouring regional practice.[119] Indeed, it says that the requirement of achieving an equitable result

> [d]irectly 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 geographic context.[120]

115. It should also be recalled that the UK did *not* argue that the Channel Islands formed the appropriate 'opposite coast' for the purposes of constructing a median line. Rather, the argument was that their entitlement to a continental shelf merged with that the mainland coasts in the middle of the English Channel so as to produce a continuous belt, and this proposition was accepted by the Court of Arbitration; *id.*, para. 169, 190. This is similar to the position taken by the Tribunal with regard to the Eritrean territorial seas of the Haycocks and South West Rocks but it is not reflected in its handling of the Hanish-Zuqar group; see text to notes 65–68, *supra*.
116. It was, of course, concluded that "[t]he presence of these British Islands close to the French coast, if they are given full effect in delimiting the continental shelf, will result in a substantial diminution of the area of continental shelf which would otherwise accrue to France [...] the presence of the Channel Islands must be considered, prima facie, as constituting a special circumstance." *See* Anglo-French case, *supra* note 45, para. 196. In other words, it was the result of granting them effect that was objectionable.
117. Dubai/Sharjah Border Arbitration, Court of Arbitration, 19 October 1981, 91 ILR 543, at 675–677. For an examination of the award *see* D. Bowett, *The Dubai/Sharjah Boundary Arbitration of 1981*, 65 BYIL 103 (1994).
118. *Id.* The boundaries referred to were the Iran-Saudi Arabia Agreement of January 1969 and the Qatar-UAE (Abu Dhabi) agreement of March 1969, for which *see* Charney and Alexander, *supra* note 85, Vol II, at 1519 and 1541 respectively.
119. Indeed, supporting practice can be found from other regions too. For an overview, *see* Jayewardene, *supra* note 88, at 422–442.
120. Award, Phase II, para. 117.

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It is, however, difficult to see that this was actually done, since the award does not seek to demonstrate the nature of the inequity that would follow from their use. As far as the northern islands were concerned, the inequity of the result may be presumed and, although this still does not explain why the Tribunal granted them no effect at all, the result is not unacceptable. The treatment of the central islands is, however, much more problematic. If the Tribunal had followed the approach in the *Anglo-French* case, one might have expected to see some evaluation of the extent to which the use of these islands to generate a continental shelf and EEZ did in fact produce a significant impact upon the equidistance line. Given the Tribunal's preference for approaching the delimitation of those areas where coasts were 24 or less miles apart as a territorial sea delimitation, the only places where there would have been an effect would have been in the areas linking the territorial sea median to the mainland coastal median, pushing the line towards Eritrea and thus giving Yemen a greater share.

Would this have been inequitable? According to the Tribunal's proportionality test, the final result already left Eritrea at a slight – though by no means great – disadvantage. But it would have been helpful to have known the extent to which granting the Hanish-Zuqar islands an entitlement would have impacted upon this. In short, the Tribunal does not make out the case for considering the use of these islands as the opposite coast for the purposes of the delimitation to be inequitable, nor is the case manifest. There is, then, a very real difference in approach to this central question and it is evident that the Tribunal's award goes further than the *Anglo-French* case in marginalizing the role of islands between opposite coasts in delimitation and its fundamental approach finds no direct support in the *Anglo-French* case.[121]

The second justification advanced by the Tribunal is certainly much more plausible. The Tribunal referred back to its finding in the first phase award that the petroleum contracts entered into by both Yemen and 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 jurisdictions of the parties."[122] It had, of course, already said that this finding could not "prefigure" the second phase but it is very difficult to resist the conclusion that, at the very least, it overshadowed it.[123] Why the Tribunal should have fixed on this as an overarching scruple

121. Arguably, it might find more support in state practice. *See*, *e.g.*, Jayewardene, who concludes from his analysis of state practice that "[a]n island lying immediately adjacent to and on the right side of an equidistance line which disregards it, should be disregarded unless its size and significance warrant a full value, or some effect on the boundary;" *supra* note 88, at 389. But *cf.* Bowett, who, surveying the same practice points out that "there are agreements under which islands have been given full weight despite their proximity to a mainland-to-mainland equidistant line" and concludes that this is merely "one method for reducing the effect of an island;" *supra* note 88. At 141–144.

122. Award, Phase II, para. 132, quoting Award, Phase I, para. 438.

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can only be answered by the members of the Tribunal themselves but the Second Phase award becomes much more explicable – if not necessarily more acceptable – once it is appreciated that the Tribunal found support for the near wholesale disregard of islands in the past practice of the parties themselves. To the extent that this provides a rationale for the Tribunal's approach, the value of the award for the evolving jurisprudence concerning the delimitation of maritime areas is diminished.

This would be a welcome conclusion. It is, of course, true that the role of islands in questions of maritime delimitation is endlessly problematic, but wishing them away does not help. It should not be forgotten that LOSC Article 121 makes it quite clear than all islands are entitled to generate a continental shelf and EEZ in exactly the same fashion as any other form of land territory, excepting only "rocks which cannot sustain human habitation or economic life of their own."[124] The award certainly implies that justice will have been done if, when located between opposite coasts, they are able to enjoy the full extent of their territorial sea.[125] Of course, this means does not mean that islands must be treated for the purposes of delimitation in exactly the same way as mainland coasts, since the requirements of LOSC Articles 74 and 83 that delimitation be conducted on the basis of international law "in order to achieve an equitable solution" can and usually will justify curtailing their impact if it is indeed inequitable. However, it would certainly be inappropriate to conclude that, as a general rule, the equitable solution is the mainland coastal median and that islands will be granted an effect only if this can be done in a fashion that does not disturb that vision of equity. Such an approach might well be justified on the facts of the particular case, either in the light of the general geographical situation or in the light of the conduct of the parties, but it would be inappropriate to consider it a generally acceptable approach.

Although the second phase award does give the impression of a degree of doctrinal rigidity, it does so only from the narrow perspective of the traditional preoccupations of maritime boundary delimitation with which this article is chiefly concerned. There is, moreover, notable resonance with the *Guinea/Guinea-Bissau* Arbitration, in which a broader, more

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123. *Supra* note 25.
124. Arts. 121(2), (3). For a comprehensive examination of the consequences of these provisions for maritime boundary delimitation, *see* J.I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AJIL 863 (1999). His conclusion is that although such features when located within the territorial sea can potentially be used as basepoints for delimitation, notwithstanding their own inability to 'generate' an entitlement and so have a role to play in delimitation but that their role "will depend on the factors considered in such delimitations;" *id.*, at 875. In other words, their potential relevance is not be excluded *in limine*. If this is true of such features located within a territorial sea, *a fortiori*, islands which fall outside of the scope of Art. 121(3) and which are located outside of the territorial sea should be treated no more harshly.
125. *See*, *e.g.*, para. 119.

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contextual approach was taken,[126] and it should also be remembered that the second stage maritime delimitation phase must be seen in the context of the award as a whole. Viewed from that broader perspective, it appears in a very different light. However, this also means that the second phase award must be treated with caution within the overall corpus of material pertaining to maritime delimitation.

126. *Supra* note 79.

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