

ERITREA V. YEMEN

A Case Summary for the
Maritime Dispute Resolution Project



U.S.-ASIA LAW INSTITUTE
NEW YORK UNIVERSITY SCHOOL OF LAW

Maritime Dispute Resolution Project

Case Concerning
Sovereignty and Maritime Delimitation
(*Eritrea v. Yemen*)

Case Summary by Peter Dutton*



A research project of the
U.S.-Asia Law Institute

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** The views expressed herein are those of the author, and do not necessarily reflect the views of the United States Navy or any agency of the United States Government.

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Project Overview

This case summary was prepared as part of the U.S.-Asia Law Institute's Maritime Dispute Resolution Project. The institute began the project in 2018 in order to better understand the circumstances in which interstate maritime disputes are successfully resolved and distill lessons for governments.

The two main questions the project seeks to answer are:

- When are international institutional dispute resolution mechanisms effective in resolving maritime disputes?
- What insights can be applied to the maritime disputes in East Asia?

To address these questions, leading international lawyers and legal scholars held workshops to analyze selected disputes from around the world. This and other case studies were prepared for the workshops and are based on the official records.

Citation:

Phase I: Award on Territorial Sovereignty and Scope of the Dispute, (1998) XXII RIAA 211, (1999) 119 ILR 1, (2001) 40 ILM 900, ICGJ 379 (PCA 1998), 9th October 1998, Permanent Court of Arbitration [PCA]

Phase II: Award on maritime delimitation, (1999) XXII RIAA 335, (2001) 40 ILM 983, (1999) 199 ILR 417, ICGJ 380 (PCA 1999), 17th December 1999, Permanent Court of Arbitration [PCA]

Section I – Background and Summary of the Case

This case involves two new states seeking to decrease tension and resolve conflict over disputed islands and related maritime zones in the Red Sea near the strait of Bab-el-Mandeb. Eritrea was held by the Ottoman Empire until 1918 and thereafter became a colony of Italy until 1941, when the British assumed administrative control. In 1952 the British transferred Eritrea to Ethiopia as part of a federated state, but Eritreans fought for and achieved independence from Ethiopia in 1993. Historically, Yemen was a tribal society under nominal control of the Ottoman Empire. The British established a coaling station in Aden in 1839 and controlled all of Yemen after the fall of the Ottoman Empire until Yemen's independence as two states in 1967 and 1968. War between the two states began almost immediately and continued until the two states united in 1990. After ending the conflicts that resulted in their emergence as states, Yemen and Eritrea turned on each other to address disputes that had lain dormant since the fall of the Ottoman Empire.

At the end of World War I, the Ottoman Empire dissolved and Turkey, its successor state, negotiated the Treaty of Lausanne to end the conflict. Article 16 of the Treaty expressly left sovereignty over the Red Sea islands indeterminate. After Yemen and Eritrea achieved statehood, conflict broke out between them in November and December 1995 over ownership of the Red Sea islands and associated maritime resource rights. The United Nations became involved with efforts to prevent a wider conflict in this very important maritime trade route, and ultimately efforts by France to mediate between the parties were successful.

The case proceeded in two stages with the issue of sovereignty adjudicated in the first stage and maritime delimitation in the

second. Key issues in the first stage included historical and ancient title to the islands and the preservation of traditional or artisanal fishing rights throughout the disputed region. In the second stage, the tribunal effected maritime delimitation on the basis of the median line between opposing coasts, and found the resulting line to be both proportionate and equitable.

Section II – Summary of Key Procedural Steps

Step 1

This arbitration was preceded by an *Agreement on Principles* brokered in Paris with the support of the governments of France, Egypt, and Ethiopia to assist the parties. The agreed principles included renunciation of the use of force, peaceful settlement of the disputes, an agreement to constitute an arbitral panel to resolve the disputes, and an agreement to settle the sovereignty disputes on the basis of historic title.

Step 2

Simultaneous with the signing of the *Agreement on Principles*, the parties further agreed to issue a *Joint Statement* agreeing that each sought to “re-establish trust and cooperation and to contribute to peace and stability.”

Step 3

The parties next negotiated an *Arbitration Agreement*, which provided that the arbitration would proceed in two stages. The first stage would 1) settle the issues of territorial sovereignty over the disputed islands in accordance with the principles, rules, and practices of international law and in particular of historic titles, 2) and define the scope of the dispute on the basis of the respective positions of the parties. The second stage would delimit maritime boundaries

taking into account the tribunal's opinions regarding territorial sovereignty, UNCLOS, and any other pertinent factors.

Step 4 and 5

The parties engaged in arbitration in two stages as per the *Arbitration Agreement*. The award in Stage One was issued October 9, 1998. The award in Stage Two was issued December 17, 1999.

Section III – Summary of Key Substantive Issues

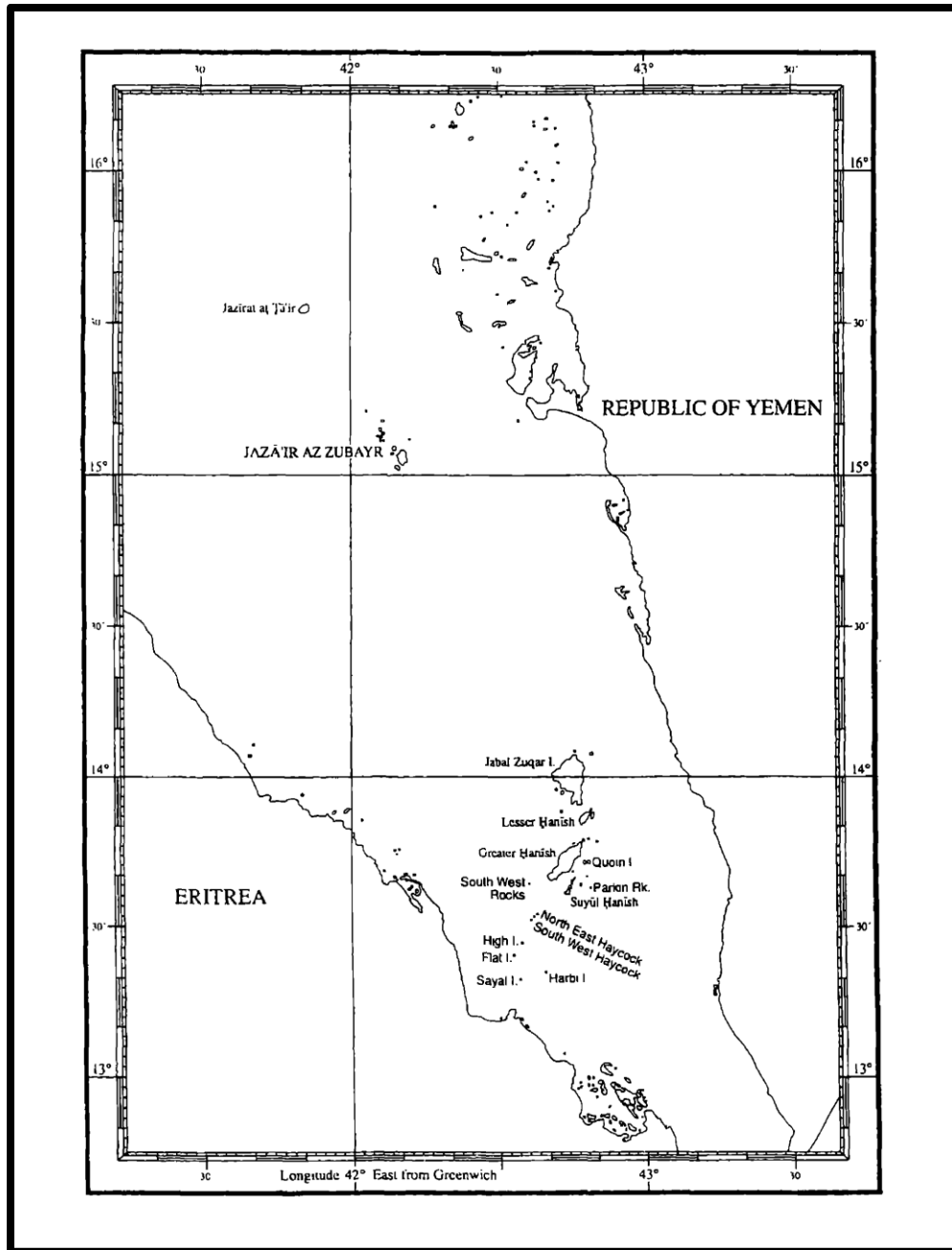
Stage One: Sovereignty

1) Historic or ancient title

At issue was sovereignty over various groups of small islands in the southern portion of the Red Sea (see map below). Eritrea based its claim to the islands on succession of title amounting to a historic title. It based its claim on a chain of title extending over more than 100 years. Key to Eritrea's argument was the concept of historical succession from the Italian colonial period through the post-World War II period when Eritrea was part of a federation with Ethiopia. Yemen based its claim on original, historic, or traditional Yemeni title. Yemen traced the dispute back to medieval times before the establishment of the Ottoman Empire, when Yemen was governed independently. Yemen argued that with the demise of the Ottoman Empire title to the islands reverted to Yemen.

Neither party persuaded the Tribunal of the existence of historic or ancient title to the disputed islands. The Award stressed the “waterless and uninhabitable” character of the islands, islets, and rocks in dispute and noted the long-standing private use of the islands by the fishing communities of both parties.

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Source: Phase I Award.

The tribunal rejected the existence of any doctrine of reversion in international law whereby territory reverts to a newly independent State if territory was once held by it under a previous sovereign. Specifically, the tribunal held that once the Ottoman Empire became the acknowledged sovereign over all the islands in dispute, it belonged to that state to dispose of the territory as it saw fit. This it did when its successor state—Turkey—relinquished title to the islands under the 1923 Treaty of Lausanne, leaving the ultimate sovereign to be determined at a later date. Additionally, the tribunal was unconvinced as a matter of fact that the “tribal, mountain and Muslim medieval society” that preceded Ottoman society ever actually held sovereignty in the modern sense over the islands.

As to Eritrea’s argument of succession of title through possession by Italy and Ethiopia, the tribunal held that the Treaty of Lausanne, to which Italy was a party, explicitly left sovereignty to be determined by the parties at a later date. It further found that Italy closely adhered to that provision in its dealings with other colonial powers and as such had no sovereignty to confer upon Ethiopia or, in turn, Eritrea.

2) Effective occupation

Since neither party could prove historic or ancient title, the court turned to the “evidence of use, presence, display of governmental authority and other ways of showing possession (*effectivités*) which may gradually consolidate into title.” It articulated the test as “the continuous and peaceful display of the functions of state within a given region” and allowed that the test may be modified when “dealing with difficult or inhospitable territory.” It based its view of gradual consolidation of title on three categories of evidence—the government’s “physical activity and conduct” in relation to the territory, international “repute,” and “the opinions and attitudes of other governments.” Further, since the evidence of *effectivités* by either party was slight, the tribunal took into account geographical

factors when making an award. It found there is in international law a principle of natural or geophysical unity, but rejected it as an absolute principle. The tribunal rejected Yemen's position that all the islands in question formed a natural unity.

Neither party argued for a critical date, which would have served to cut off subsequent acts of administration as evidence supporting a sovereign claim. Accordingly, the tribunal considered all evidence before it in making a determination of *effectivités*. As in other cases where ancient title was claimed but not proved, such as the *Minquiers and Ecrehos Case*, it was the relatively recent history of a government's use and possession of the territory in dispute (in this case, post-1967 when the British left the region) that ultimately proved to be a main basis for the award of sovereignty.

Mohabbakahs. The tribunal held Eritrea to be the sovereign over the Mohabbakahs, which are four rocky islets each within 12 nautical miles of the Eritrean coast, since there was no evidence of Yemeni historic title and no serious claim to the islands by Yemen until litigation commenced. Additionally, relying on the principle of geophysical unity, the tribunal found "there is a 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...but there is no like presumption outside the coastal belt where the ownership of the islands is plainly at issue."

Haycocks. The tribunal held Eritrea to be the sovereign over the Haycocks, which are three small islets situated just outside the Eritrean territorial sea. This was based on what the tribunal referred to as the portico doctrine, which supports the presumption that for reasons of security and convenience islands off a country's coast belong to it, absent a clearly established title to the contrary.

In both its ruling on the Mohabbakahs and the Haycocks, the tribunal awarded sovereignty to Eritrea over “islands, islets, rocks, *and low tide elevations*” forming the island group. In the case of the Mohabbakahs, it would appear that such low-tide elevations were within the territorial sea. It is unclear from the decision whether that is the case for the Haycocks.

Southwest Rocks. These rocks were also awarded to Eritrea since they are proximate to the African coast and there is some evidence they have been treated by other governments as part of the African territory.

The Zuqar-Hanish Group. These larger islands in the central Red Sea and the main islands under dispute were awarded to Yemen. First, the tribunal determined on the basis of historical precedent that the Ottoman Empire treated these islands as part of its territory in Yemen. Second, the tribunal found as a matter of international repute, Yemen had a “marginally better case” in showing that maps accorded the islands to it and not the African coast. Finally, on the basis of effectivités, the tribunal found the weight of evidence supported Yemen’s case on the basis of maintenance of a lighthouse, its approval of and support for an exploratory expedition, its approval of construction of a landing strip and scheduled flights, and licensing to develop a tourism project.

Jabal al-Tayr and the Zubayr Group. Yemen was awarded these islands on the basis of international repute, in that Yemen was invited to the 1989 London Lighthouse Conference to participate in discussions about maintenance of the lighthouses on these islands. Additionally, oil and gas exploration and production agreements granted by Yemen for the waters around these islands were not protested by Ethiopia and neither Ethiopia nor Eritrea made similar agreements for waters in this area.

3) Traditional fishing regime

The tribunal found that a traditional fishing regime existed in the waters around the islands awarded to Yemen and directed that it be perpetuated. Specifically, it held “in the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.”

Stage Two: Maritime Delimitation

1) Traditional fishing regime

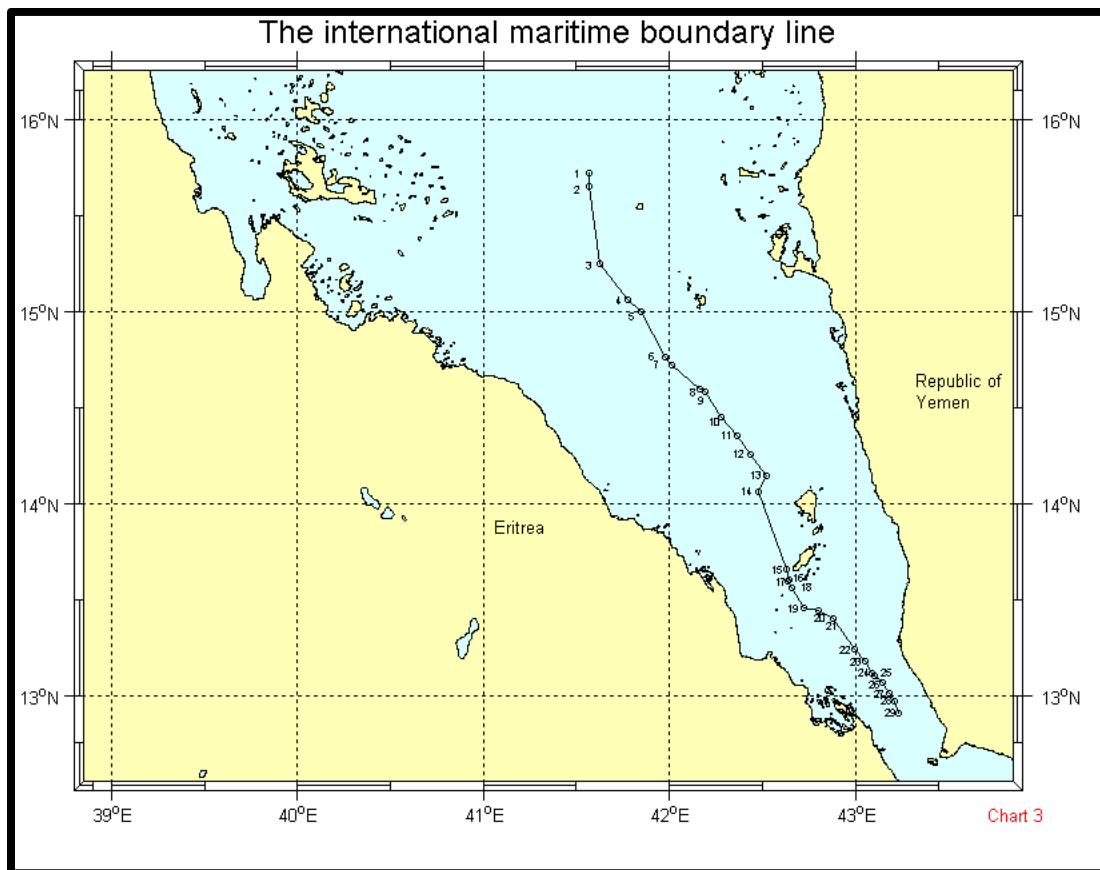
Both sides asked for clarification of the extent of the traditional fishing rights enjoyed by Eritrean fishermen as awarded by the tribunal in the first stage. The tribunal reiterated that it found both parties have artisanal and traditional fishermen who have used the waters and the land of the islands awarded to Yemen and that these were important uses that deserved protection. The tribunal expressed respect and support for the long practice of Islamic concepts and traditions in relation to sharing and regulating the fisheries of the area. The tribunal clarified that the traditional fishing rights it recognized applied to the region as a whole, including a right of access by Yemeni fishermen to the waters and islands of those groups awarded to Eritrea. The traditional fisheries regime was not limited to the “territorial waters” of specified islands. It extends to the waters beyond the territorial sea and applies “to the region as a whole,” including a right of access to sell fish in each side’s ports. But these traditional rights extend only to fishing and related activities, not to collection of guano or mineral extraction on the islands themselves, and are limited to traditional, artisanal fisheries practices as opposed to industrial fishing.

2) Maritime Delimitation

The Tribunal delimited the international maritime boundary between the two states by means of a single all-purpose boundary separating, as appropriate, their territorial seas and their exclusive economic zones and continental shelves (see map below).

Yemen had proposed a median line to the west of its awarded islands between those islands and the Eritrean coast. Eritrea proposed two different options—a median line between the opposing coastlines, or one that incorporates a large box within which traditional fishing could be carried out. The tribunal rejected Eritrea's box regime, reiterating that traditional fishing rights apply throughout the region's waters as a whole. It determined that a single, all-purpose boundary should be awarded using a median line approach from the low water line of opposing coastlines, taking into account fringing islands and appropriate straight baselines as components of the opposing coastlines. The tribunal determined that small, single islands or groups of islands that are barren, inhospitable, and positioned well out to sea do not form a part of the mainland coast.

The tribunal drew the boundary in three segments based on the median line separating EEZ/continental shelf or territorial sea, as appropriate for the particular segment. As used by the ICJ, the tribunal then employed a post-delimitation test of proportionality to determine “the equitableness of a delimitation arrived at by other means.” It determined the length of the relevant coastlines and found a 1:1.31 ratio in Eritrea's favor. It determined that the delimited area resulted in a 1:1.09 ratio, also in Eritrea's favor, and held that this resulted in no disproportion requiring adjustment.



Source: Website of the Permanent Court of Arbitration

Section IV – Implementation of the Tribunal’s Decision

Both sides appear to have accepted the results of the arbitration as final, and there have been no flare-ups of armed conflict in the twenty years since the arbitration decisions were announced. However, according to the 2016 Maritime Claims Reference Manual, neither party has enacted legislation to make the

EEZ/continental shelf boundary awarded in stage two a permanent part of its domestic legislation.

The parties continue to dispute the meaning of the Tribunal's award of artisanal fishing rights throughout the region as a whole. Eritrea rejects the portion of the tribunal's ruling that Yemen's fishing rights extend to its territorial sea, and the Eritrean Navy has arrested and detained hundreds of Yemeni fishermen in the years since the tribunal's award.

Section V – Conclusions

The procedural aspects of this case are notable in the high degree of support the parties received from the United Nations and from states trusted to serve as honest brokers through the process. The road from crisis to arbitration proceeded deliberately, step-by-step with the parties in control of the process but with helpful facilitation. This may be a model for successful international support to parties.

The main aspects of the arbitral award on sovereignty and maritime delimitation represent a fairly standard approach to the relevant jurisprudence. As to sovereignty, the Tribunal applied a definition of *effectivités* based on the approach taken in the seminal *Island of Palmas* case, which has been applied consistently in cases since then. Its approach to maritime delimitation is also quite consistent with the jurisprudence of the International Court of Justice in delimiting maritime boundaries both before and after the United Nations Convention on the Law of the Sea came into force. Two aspects of the case, however, are troublesome as a matter of law and may have contributed to some of the confusion and disagreement over the state of international law today.

1) Artisanal Fishing Rights in Eritrea's Territorial Sea and Access to Ports.

Certainly the most troublesome, both for the parties and as a matter of law, is the Tribunal's decision to provide access for traditional or artisanal fishing to the fishermen of both Yemen and Eritrea to all waters of whatever character throughout the region as a whole. The Tribunal's award thus allows artisanal fishing in the EEZ of another state, an approach that has been rejected by subsequent tribunals as contrary to the explicit provisions of UNCLOS (see, e.g., the 2006 *Barbados-Trinidad and Tobago arbitration*). Additionally, the award allows artisanal fishing in all territorial seas, including the coastline of Eritrea, rather than differentiating between the coastal territorial sea and the territorial sea around the disputed features. This ignores a well-established principle of international law, which is that a primary purpose for the existence of a coastal state's right to claim sovereignty over a twelve-nautical mile belt off its coastline is to enhance the coastal state's security. Perhaps even more challenging is the decision to allow artisanal fishermen a right of access to each state's ports. This aspect of the ruling appears to go beyond anything either party requested and intrudes into the state's internal waters if not its actual territory. As noted above, these aspects of the decision, rather than resolving the disputes, have continued to exacerbate them.

2) Sovereignty over low-tide elevations.

A second challenging aspect of the decision is the explicit award of sovereignty over low-tide elevations to Eritrea in the Mohabbakahs and Haycocks, and to Yemen in the Zuqar-Hanish group, Jabal al-Tayr, and the Zubayr group. The award did not say whether the referenced low-tide elevations were within an existing territorial sea, and therefore it made no legal differentiation between those low-tide elevations within twelve nautical miles of another island or rock and those beyond twelve nautical miles. Several times in the

award, the tribunal referenced various provisions of UNCLOS, the final text of which had been in existence for sixteen years prior to the decision and which came into force four years before the decision was issued. Presumably, the arbitrators were aware that UNCLOS article 121 expressly treats low-tide elevations as part of the seabed and not subject to sovereign acquisition unless the low-tide elevation falls within the territorial sea, in which case by the operation of article 13 it may be used as a base point to extend the territorial sea. This understanding of the impact of the provisions of UNCLOS is the approach that was subsequently taken by the arbitral tribunal in the *South China Sea* case.

Accordingly, two lessons can be derived from this case. The first is that helpful support can be provided by trusted states to facilitate pre-litigation movement of the parties from conflict to institutional dispute resolution. The second lesson is the importance of careful drafting of the scope of the tribunal's authority over a matter to attempt to preclude judicial over-reach.



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