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

B E T W E E N :

THE GOVERNMENT OF THE STATE OF ERITREA

-and-

THE GOVERNMENT OF THE REPUBLIC OF YEMEN

AWARD OF THE ARBITRAL TRIBUNAL IN THE FIRST STAGE OF THE PROCEEDINGS (TERRITORIAL SOVEREIGNTY AND SCOPE OF THE DISPUTE)

The Arbitral Tribunal:

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

Representatives of the Government of the State of Eritrea:

His Excellency Mr. Haile Weldensae, Agent
Professor Lea Brilmayer and Mr. Gary B. Born, Co-Agents

Representatives of the Government of the Republic of Yemen:

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

THE ERITREA – YEMEN ARBITRATION
PHASE I: TERRITORIAL SOVEREIGNTY AND SCOPE OF DISPUTE

AWARD

TABLE OF CONTENTS

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CHAPTER I – The Setting up of the Arbitration and the Arguments of the Parties

Introduction

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

2. The Arbitration Agreement was preceded by an "Agreement on Principles" done at Paris on 21 May 1996, which was signed by Eritrea and Yemen and witnessed by the Governments of the French Republic, the Federal Democratic Republic of Ethiopia, and the Arab Republic of Egypt. The Parties renounced recourse to force against each other, and undertook to "settle their dispute on questions of territorial sovereignty and of delimitation of maritime boundaries peacefully". They agreed, to that end, to establish an agreement instituting an arbitral tribunal. The Agreement on Principles further provided that

> . . . concerning questions of territorial sovereignty, the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.

3. Concurrently with the Agreement on Principles, the Parties issued a brief Joint Statement, emphasizing their desire to settle the dispute, and "to allow the re-establishment and development of a trustful and lasting cooperation between the two countries", contributing to the stability and peace of the region.

4. In conformity with Article 1.1 of the Arbitration Agreement, Eritrea appointed as arbitrators Judge Stephen M. Schwebel and Judge Rosalyn Higgins, and Yemen appointed Dr. Ahmed Sadek El-Kosheri and Mr. Keith Highet. By an exchange of letters dated 30 and 31 December 1996, the Parties agreed to recommend the appointment of Professor Sir Robert Y. Jennings as President of the Arbitral Tribunal (hereinafter the "Tribunal"). The four arbitrators met in London on 14 January 1997, and appointed Sir Robert Y. Jennings President of the Tribunal.

5. Having been duly constituted, the Tribunal held its first meeting on 14 January 1997, at Essex Court Chambers, 24 Lincoln's Inn Fields, London WC1, UK. The Tribunal took note of the meeting of the four arbitrators, and ratified and approved the actions authorized and undertaken thereat. Pursuant to Article 7.2 of the Arbitration Agreement, the Tribunal appointed as Registrar Mr. P.J.H. Jonkman, Secretary-General of the Permanent Court of Arbitration (the "PCA") at The Hague and, as Secretary to the Tribunal, Ms. Bette E. Shifman, First Secretary of the PCA, and fixed the location of the Tribunal's registry at the International Bureau of the PCA.

6. The Tribunal then held a meeting with Mr. Gary Born, Co-Agent of Eritrea, and Mr. Rodman Bundy, Co-Agent of Yemen, at which it notified them of the formation of the Tribunal and discussed with them certain practical matters relating to the arbitration proceedings.

7. Article 2 of the Arbitration Agreement provides that:

> 1. The Tribunal is requested to provide rulings in accordance with international law, in two stages.
>
> 2. The first stage shall result in an award on territorial sovereignty and on the definition of the scope of the dispute between Eritrea and Yemen. The Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of

historic titles. The Tribunal shall decide on the definition of the scope of the dispute on the basis of the respective positions of the two Parties.

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

8. Pursuant to the time table set forth in the Arbitration Agreement for the various stages of the arbitration, the Parties submitted their written Memorials concerning territorial sovereignty and the scope of the dispute simultaneously on 1 September 1997 and their Counter-Memorials on 1 December 1997. In accordance with the requirement of Article 7.1 of the Arbitration Agreement that "the Tribunal shall sit in London", the oral proceedings in the first stage of the arbitration were held in London, in the Durbar Conference Room of the Foreign and Commonwealth Office, from 26 January through 6 February 1998, within the time limits for oral proceedings set forth in the Arbitration Agreement. The order of the Parties' presentations was determined by drawing lots, with Eritrea beginning the oral proceedings.

9. At the end of its session of 6 February 1998, the Tribunal, in accordance with Article 8.3 of the Arbitration Agreement, closed the oral phase of the first stage of the arbitration proceedings between Eritrea and Yemen. The closing of the oral proceedings was subject to the undertaking of both Parties to answer in writing, by 23 February 1998, certain questions put to them by the Tribunal at the end of the hearings, including a question concerning the existence of agreements for petroleum exploration and exploitation. It was also subject to the proviso in Article 8.3 of the Arbitration Agreement authorizing the Tribunal to request the Parties' written views on the elucidation of any aspect of the matters before the Tribunal.

10. In its Communication and Order No. 3 of 10 May 1998, the Tribunal invoked this provision, requesting the Parties to provide, by 8 June 1998, written observations on the legal considerations raised by their responses to the Tribunal's earlier questions concerning concessions for petroleum exploration and exploitation and, in particular, on how the petroleum agreements and activities authorized by them might be relevant to the award on territorial sovereignty. The Tribunal further invited the Parties to agree to hold a short oral hearing for the elucidation of these issues.

11. Following the exchange of the Parties' written observations, the Tribunal held oral hearings on this matter at the Foreign and Commonwealth Office in London on 6, 7 and 8 July 1998. By agreement of the Parties, Yemen presented its arguments first. In the course of these hearings, the Tribunal posed a series of questions concerning the interpretation of concession evidence, and the Parties were requested to respond thereto in writing within seven days of the end of the oral hearings. On 17 July 1998, both Parties submitted their written responses to the Tribunal's questions. Eritrea indicated at that time that it anticipated a brief delay in submission of the documentary appendix accompanying its submission; this documentary appendix was received by the International Bureau of the PCA on 22 July 1998. On 30 July 1998, the International Bureau received from Yemen a submission entitled "Yemen's Comments on the Documents Introduced by Eritrea after the Final Oral Argument". Eritrea objected to this late filing by Yemen.

12. In the course of the supplementary hearings in July 1998, the Tribunal informed the Parties of its intention to contact the Secretary-General of the Arab League, in order to ascertain the existence, and obtain copies, of any official Arab League reports of visits to any of the islands in dispute, particularly in the 1970s. A letter on behalf of the Tribunal was sent by fax to the Secretary-General of the Arab League on 20 July. His response, dated 28 July, was transmitted by the registry to the Co-Agents and the Members of the Tribunal.

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Arguments of the Parties on Territorial Sovereignty

13. Eritrea bases its claim to territorial sovereignty over these "Red Sea Islands" (hereinafter the "Islands")[1] on a chain of title extending over more than 100 years, and on international law principles of "effective occupation". Eritrea asserts that it inherited title to the Islands in 1993, when the State of Eritrea became legally independent from the State of Ethiopia. Ethiopia had in turn inherited its title from Italy, despite a period of British military occupation of Eritrea as a whole during the Second World War. The Italian title is claimed then to have vested in the

[1] The identification of the specific islands or island groups in dispute between the Parties has been entrusted to the Tribunal by Article 2 of the Arbitration Agreement (see para. 7, above), and is dealt with in the part of this Award dealing with the scope of the dispute. References to "the Islands" in this Award are to those Islands that the Tribunal finds are subject to conflicting claims by the Parties. The geographic area in which these islands are found is indicated on the map opposite page 1.

State of Ethiopia in 1952-53, as a consequence of Eritrea's federation with, and subsequent annexation by, Ethiopia.

14. Eritrea traces this chain of title through the relevant historical periods, beginning with the Italian colonization of the Eritrean mainland in the latter part of the 19th Century. The parties do not dispute that, prior to Italian colonization, the Ottoman empire was the unchallenged sovereign over both coasts of the Red Sea and over the Islands. Bypassing the Ottomans and dealing directly with local rulers, Italy established outposts in furtherance of its maritime, colonial and commercial interests. Despite Ottoman objections, it proclaimed the Italian colony of Eritrea in 1890. Eritrea contends that in 1892 Great Britain recognized Italian title to the Mohabbakah islands, a group of islands proximate to the Eritrean coast.

15. Eritrea asserts that, without challenging Ottoman sovereignty, Italy also maintained an active presence in other southern Red Sea islands at that time. Italian naval vessels patrolled the surrounding waters in search of pirates, slave traders and arms smugglers, and the colonial administration allegedly issued concessions for commercial exploitation on the Islands. According to Eritrea, there was no Yemeni claim to or presence on or around the Islands during this time. The Imam Yahya, who ultimately founded modern Yemen, occupied a highland region known as the *Gebel*, and, according to Eritrea, openly acknowledged his lack of sovereignty over the coastal lowlands known as the *Tihama*. This territorial arrangement was confirmed by the 1911 "Treaty of Da'an", an understanding between the Imam and the Ottoman Empire.

16. Eritrea asserts that the weakening of the Ottoman Empire in the years immediately preceding the First World War fuelled Italian plans to occupy an island group known as the "Zuqar-Hanish Islands". These plans were preempted by a brief period of British military occupation in 1915, which was short-lived and, according to Eritrea, without legal consequences. At the end of the War, Italy purportedly renewed and expanded its commercial and regulatory activities with respect to what Eritrea refers to as the "Zuqar-Hanish and lighthouse islands". These activities are cited by Eritrea as evidence of Italy's intent to acquire sovereignty over the Islands.

17. The question of sovereignty over the Islands formed part of the post-First World War peace process that culminated in the signature of the Treaty of Lausanne in 1923. While certain former territory of the defeated Ottoman empire was divided among local rulers who had supported the victorious Allies, Eritrea contends that none of the Arabian Peninsula leaders who had supported the Allies was in sufficient geographical proximity to the Islands to be considered a plausible recipient. The Imam of Sanaa was not a plausible recipient of the Islands, both because of his alliance with the Ottoman Turks, and because his sovereignty did

not extend to the Red Sea coast. Eritrea cites Great Britain's rejection of claims made by the Imam in 1917-1918 to parts of the Tihama, and relies on the Imam 's characterization of these territories as having been "under the sway of his predecessors" as acknowledging that the Imam indeed lacked possession and control at that time.

18. Eritrea traces Great Britain's failure to persuade the remaining Allies to transfer the Islands to Arab rulers selected by Great Britain, or to Great Britain itself, through the unratified 1920 Treaty of Sèvres and the negotiations leading up to the conclusion of the Treaty of Lausanne in 1923. Eritrea relies on Articles 6 and 16 of the Treaty of Lausanne as having left the islands open for Italian occupation. Article 6 established the general rule that, in terms of the Treaty, "islands and islets lying within three miles of the coast are included within the frontier of the coastal State." Eritrea interprets this provision, and subsequent state practice under the treaty of Lausanne, as withholding the islands in question from *any* Arabian peninsula leader, because none of the Islands are within three miles of the Arabian coast. Eritrea further argues that the Imam could not have been given the disputed islands pursuant to Article 6, because his realm was neither a "state" nor "coastal" at the time the Treaty of Lausanne was signed.

19. Article 16 of the Treaty of Lausanne contained an express Turkish renunciation of all rights and title to former Ottoman territories and islands, and provided that their future was to be "settled by the parties concerned." Eritrea argues that because Article 16 did not transfer the Islands to any particular state, and did not specify any particular procedure for conveying ownership of the Islands, their ultimate disposition was left to general international law standards for territorial acquisition – conquest, effective occupation, and location within the territorial sea. Eritrea claims to find further support for this in subsequent state practice interpreting Article 16.

20. Eritrea asserts that by the end of the 1920s, Italy had acquired sovereignty over the disputed islands by effective occupation, and that neither the 1927 conversations between Great Britain and Italy, which came to be known as the "Rome Conversations", nor the aborted 1929 Lighthouse Convention were contra-indications. This effective occupation consisted, inter alia, of the construction in 1929 of a lighthouse on South West Haycock Island, which Eritrea claims led Great Britain to repeat acknowledgments of Italian sovereignty over the Mohabbakahs, previously made in 1892 and 1917. Eritrea finds further support for effective Italian occupation during this period in the dispatch of an expedition to the Zuqar-Hanish islands and their subsequent occupation by Italian troops. Eritrea asserts that in the period 1930-1940 Italy exercised sovereign rights over the Islands through the colonial government in Eritrea. Eritrea cites, inter alia, the granting of fishing licenses with respect to the surrounding waters, the granting

of a license for the construction of a fish processing plant on Greater Hanish, and the reconstruction and maintenance of an abandoned British lighthouse on Centre Peak Island. These satisfy, in Eritrea's view, the *corpus occupandi* requirement of effective occupation and, accompanied as they were by the requisite sovereign intent (*animus occupandi*), constitute the acquisition of sovereignty by effective occupation.

21. Eritrea further asserts that Yemen did not protest or question Italy's activities on the Islands during this time. Great Britain, however, sought assurances that Italian activities did not constitute a claim of sovereignty. Eritrea characterizes Italy's responses that the question of sovereignty was "in abeyance" or "in reserve" as a refusal to give such assurances. According to Eritrea, this formula was understood by both Italy and Great Britain as preserving Italy's legal rights while allowing Great Britain to withhold diplomatic recognition of those rights. Tensions between the two states on this and other matters led to conclusion of the 1938 Anglo-Italian Agreement, which Eritrea claims is probative of Italian and British views at that time. It is said to reflect, among other things, the parties' understanding that the Islands were not appurtenant to the Arabian Peninsula, and that Italy and Great Britain were the only two powers with a cognizable interest in them.

22. The 1938 Anglo-Italian Agreement also contained an express undertaking on the part of both Italy and Great Britain with respect to the former Ottoman Red Sea islands, that neither would "establish its sovereignty" or "erect fortifications or defences". This constituted, in Eritrea's view, not a relinquishment of existing rights, but simply a covenant regarding future conduct. Eritrea argues that, at the time of the Anglo-Italian Agreement, Italy's sovereignty over the Islands had already been established as a matter of law, and it remained unaffected by the agreement. Eritrea further asserts that in December of 1938, Italy formally confirmed its existing territorial sovereignty over the Islands by promulgating decree number 1446 of 1938, specifically confirming that the Islands had been, and continued to be, part of the territory of the Eritrean *Commissariato* of Dankalia.

23. Eritrea characterizes the eleven-year British occupation of Eritrea that commenced in 1941 in the wake of the Second World War as congruent with the law of belligerent occupation. Eritrea's territorial boundaries remained unchanged, and the territory of "all Italian colonies and dependencies" surrendered to the Allies in the 1943 Armistice "indisputably included", in Eritrea's view, the Islands. The 1947 Treaty of Peace provided for disposition of Italy's African territories by the Allied Powers, which was accomplished in 1952 by the transfer to Ethiopia, with which Eritrea was then federated, of "all former Italian territorial possessions in Eritrea". This marked, in Eritrea's view, the passing to Ethiopia of sovereign title to the Islands.

24. Eritrea claims that the drafting history of the 1952 Eritrean Constitution confirms the inclusion of the disputed islands within the definition of Eritrean territory. This is, according to Eritrea, the only plausible interpretation of the phrase "Eritrea, including the islands" in the definition of the territory of Eritrea, and it is said to be supported by advice given to Ethiopia at the time by its legal adviser, John Spencer. Eritrea claims that this was further reinforced by similar language in subsequent constitutional and legislative provisions, in particular, the 1952 Imperial Decree federating Eritrea into the Ethiopian Empire, and the 1955 Ethiopian Constitution.

25. Another basis for Ethiopian sovereignty put forward by Eritrea is the inclusion of the Islands within Ethiopia's territorial sea. Eritrea relies on the rule of international customary and conventional law that every island is entitled to its own territorial sea, measured in accordance with the same principles as those applicable to the mainland. In Eritrea's view, a chain of islands linked to the mainland with gaps no wider than twelve miles falls entirely within the coastal state's territorial sea and therefore under its territorial sovereignty. Thus, measuring from the Mohabbakah islands, which Eritrea asserts were indisputably Ethiopian, Ethiopia's 1953 declaration of a 12-mile territorial sea encompassed the Zuqar-Hanish islands.

26. The 35-year period between 1953 and Eritrean independence in 1991 is characterized by Eritrea as one of extensive exercise of Ethiopian sovereignty over the Islands. This allegedly included continuous, unchallenged naval patrols, which became increasingly systematic as the Eritrean Liberation Movement gathered strength. In addition, following transfer of the administration of the lighthouses to Asmara by the British Board of Trade in 1967, Ethiopia is said to have further consolidated its sovereignty by requiring foreign workers on the lighthouse islands to carry passports and similar documents, overseeing and regulating the dispatch of all provisions to the lighthouse islands, being involved in all employment decisions affecting lighthouse workers, approving all inspection and repair visits to the lighthouse islands, and tightly controlling radio transmissions to and from the lighthouse islands. Other alleged acts of Ethiopian sovereignty put forward by Eritrea include the exercise of criminal jurisdiction over acts committed on the Islands, regulation of oil exploration activities on and around the Islands, and an inspection by then President Mengistu and a group of high-ranking Ethiopian military and naval personnel during the late 1980s, for which Eritrea has submitted videotape evidence.

27. Eritrea claims that throughout the 1970s the two Yemeni states and their regional allies acknowledged Ethiopian control over the Islands by their statements and actions. It alleges that, until the early 1970s, neither North Yemen nor South

Yemen had displayed any interest in the Islands. Regional interest in the Islands is said to have been sparked by false reports of an Israeli presence there in 1973. According to Eritrea, the presumption on the part of Yemen, its neighbouring states and the Arab media that Ethiopia had leased the Islands to Israel constituted an acknowledgment of Ethiopian sovereignty. In support, Eritrea claims that the Arab states not only condemned Ethiopia for having made Ethiopian islands available to Israel, but also looked ultimately to Ethiopia for permission to visit the Islands in order to investigate the allegations of Israeli military activity.

28. Eritrea contends that the final years before Eritrean independence were marked by aerial surveillance and continuous naval patrols by Ethiopian forces.

29. Eritrea claims that, after winning its independence in 1991, it acquired sovereign title to the Islands and exercised sovereign authority over them. Eritrea asserts that, as they have been throughout recent history, Eritrean fishermen are dependent upon the Islands for their livelihood. Eritrean administrative regulations are said strictly to control fishing around the Islands, prescribing licensing and other requirements for fishing in the surrounding waters. Eritrea further contends that its vessels police foreign fishing vessels in Eritrean territorial waters, and routinely patrol the waters around the Islands in order to enforce fishing regulations, seizing vessels that fail to comply. It asserts that Yemen did not maintain any official presence in the Islands, and that it was only in 1995 that Eritrean naval patrols discovered a small Yemeni military and civilian contingent purportedly engaged in work on a tourist resort on Greater Hanish Island. This led, in December 1995, to hostilities that ended with Eritrean forces occupying Greater Hanish Island, and Yemeni forces occupying Zuqar.

30. With respect to territorial sovereignty, Eritrea seeks from the Tribunal an award declaring "that Eritrea possesses territorial sovereignty over each of the "islands, rocks and low-tide elevations" specified by Eritrea in its written pleadings, "as to which Yemen claims sovereignty."

* * *

31. Yemen, in turn, bases its claim to the Islands on "original, historic, or traditional Yemeni title". Yemen puts particular emphasis on the stipulation in Article 2.2 of the Arbitration Agreement, that "[t]he Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles." This title can, according to Yemen, be traced to the *Bilad el-Yemen*, or realm of Yemen, which is said to have existed as early as the 6th Century AD. Yemen advances, in

support of this claim, map evidence,[2] declarations by the Imam of Yemen, and what it refers to as "the attitude of third States over a long period".

32. Yemen contends that its incorporation into the Ottoman Empire, from 1538 to *circa* 1635, and again from 1872 to the Ottoman defeat in 1918, did not deprive it of historic title to its territory. Yemen asserts that the creation of the Ottoman *vilayet* of Yemen as a separate territorial and administrative unit constituted Ottoman recognition of Yemen's separate identity. It relies on the work of 17th, 18th and 19th Century cartographers who allegedly depicted Yemen as a separate, identifiable territorial entity. Further map evidence is adduced in support of Yemen's contention that the Islands form part of that territory.

33. In further support of its assertions that Yemen maintained historic title to the Islands, Yemen retraces the drafting history of its 1934 Treaty with Great Britain, citing several exchanges of correspondence in which the Imam insisted, in one form or another, on his rights to the "Islands of the Yemen". Yemen cites Great Britain's rejection of the Imam's proposal to attach to the treaty a secret appendix concerning the Islands, on the grounds that the Islands, as former Ottoman possessions, were to be dealt with pursuant to Article 16 of the Treaty of Lausanne.

34. Yemen argues that this did not constitute a denial of traditional Yemeni title, and puts forward documents that it claims support the characterization of British official opinion in the period 1933 to 1937 as being reluctant to challenge Yemeni title. Yemen further contends that the Treaty of Lausanne had no effect on Yemeni title, because Yemen was not a party to the Treaty, and because Turkey's renunciation of rights could not prejudice the interests of third parties. Yemen takes the view that the effect of Article 16 was not to make the Islands *terra nullius*, but rather, territory "the title to which was undetermined." Yemen argues in addition that Article 16 has, in any event, ceased to have effect between "the parties concerned", because of their own conduct, and that of third states, in recognizing, or failing to make reservations concerning, Yemen's sovereignty in respect of the Islands.

35. Another ground put forward in support of Yemen's claim that its original title extends to the Islands is "the principle of natural or geographical unity". Yemen argues that this doctrine is a corollary of the concept of traditional title, and that

[2] Although Eritrea has also submitted cartographic evidence showing the Islands to be Ethiopian, Eritrean or, in any event, not Yemeni, it places relatively little weight on this type of evidence. Eritrea takes the position that maps do not constitute direct evidence of sovereignty or of a chain of title, thereby relegating them to a limited role in resolving these types of disputes.

it operates in conjunction with evidence of the exercise of acts of jurisdiction or manifestations of state sovereignty. Yemen cites case law of the International Court of Justice and arbitral decisions in support of the premise that once the sovereignty of an entity or natural unity as a whole has been shown to exist, it may be deemed, in the absence of any evidence to the contrary, to extend to all parts of that entity or unity. According to Yemen, there is a "concordance of expert opinion evidence on the character of the islands as an entity or natural unity", including British admiralty charts, the *Red Sea and Gulf of Aden Pilot*, produced by the United Kingdom Hydrographic Office, and the *Encyclopedia Britannica*.

36. Yemen relies on various categories of evidence of sovereignty, which it asserts may serve to confirm and supplement the evidence of traditional or historic title, as well as constituting independent sources of title. These include economic and social links between the Islands and the Yemeni mainland, the exercise of sovereignty in the form of acts of jurisdiction, recognition of Yemen's title by third states, and confirmation of Yemeni title by expert opinion evidence.

37. Yemen cites case law and commentary in support of its contention that, within the appropriate geographical context, the private activities of individual persons constitute relevant evidence of historic title to territory. Yemen's analysis of these facts and activities begins with the names "Hanish" and "Zuqar," which, it asserts, have Arabic roots. Yemen also notes the presence on the Yemeni coast of inhabitants with names derived from the word "Hanish", and a family history, as fishermen, intertwined with that of the Islands. Yemen points out that, during the disturbances of 1995, two members of such a family were taken prisoner by Eritrean forces while fishing near Greater Hanish Island. Yemen also alleges the existence of anchorages and settlements on the Islands bearing distinctly Yemeni Arabic names. Yemen claims that, for generations, Yemeni fishermen have enjoyed virtually exclusive use of the Islands, even establishing, in contrast to Eritrean fishermen, permanent and semi-permanent residence there.

38. Yemen further asserts that the Islands are home to a number of Yemeni holy sites and shrines, including the tombs of several venerated holy men. It points to a shrine used primarily by fishermen, who have developed a tradition of leaving unused provisions in the tomb to sustain their fellow fishermen.

39. In addition, Yemen points out that the Islands fall within the jurisdiction of a traditional system of resolving disputes between fishermen, in which a kind of arbitrator may "ride the circuit" along the coast and among the Islands, in order to insure access to justice for those fishermen who are unable to travel.

40. Yemen emphasizes the economic links between the Islands and the Yemeni fishermen who rely for their livelihood on them and their surrounding waters, and who sell their catch almost exclusively on the Yemeni mainland. Yemen contrasts this with the situation of the Eritrean fishermen, pointing out that, because of the difficulty of hygienic transport of fish to the interior of Eritrea (including the capital of Asmara), Eritrea lacks a fish-eating tradition. According to Yemen, most Eritrean fishermen find a better market for their wares on the Yemeni coast. Yemen asserts that for centuries, the long-standing, intensive and virtually exclusive use of the Islands by Yemeni fishermen did not meet with interference from other states.

41. Yemen provides an historical review of alleged Yemeni acts of administration and control, which are said to supplement and confirm Yemen's historic title to the Islands, as well as forming independent, mutually reinforcing sources of that title. The earliest of these acts, a mission sent to Jabal Zuqar by the King of Yemen in 1429 to investigate smuggling, predates Ottoman rule. In the Ottoman period, Yemen asserts that the Islands were considered part of the *vilayet* of Yemen, and that the Ottoman administration handled, inter alia, tax, security, and maritime matters relating to the Islands. Yemen cites an 1881 lighthouse concession by the Ottoman authorities to a private French company, for the construction of lighthouses throughout the empire, which included some of the islands in the *vilayet* of Yemen. Yemen also cites 19th Century Ottoman maps and annual reports, which place the Islands within the *vilayet* of Yemen.

42. Yemen emphasizes that the post-Ottoman British presence on the Islands was intermittent, and that Great Britain never claimed sovereignty over them. Following establishment of the Yemen Arab Republic in 1962, its Government allegedly asserted legislative jurisdiction over the Islands on at least two occasions. Yemen claims that its navy conducted exercises on and around the Islands, and that its armed forces played a key role in confirming the absence of Israeli troops on the Islands in 1973. In Yemen's rendition of the events surrounding the 1973 incident, the Islands are consistently characterized as Yemeni, rather than Ethiopian.

43. Yemen cites a number of examples of the issuance of licenses to foreign entities wishing to engage in scientific, tourist and commercial activities in and around the Islands, and of the granting of permits for anchorage. Yemen presents evidence concerning the authorization given to a German company by the Yemeni Ministry of Culture and Tourism and the Yemen General Investment Authority in 1995 for the construction of a luxury hotel and diving centre on Greater Hanish Island. Yemen further asserts that it exercised jurisdiction over the Islands in respect of fishing, environmental protection, the installation and maintenance of geodetic stations, and the construction and administration of lighthouses, including the publication of relevant Notices to Mariners. Yemen has placed in

evidence elaborate chronological surveys, covering a variety of time periods, of alleged Yemeni activities "in and around the Hanish Group".

44. Yemen contends that from 1887 to 1989, at least six states confirmed, by their conduct or otherwise, Yemen's title to the Islands. Yemen points out that upon conclusion of the Anglo-Italian Agreement of 1938, which Eritrea characterizes as being limited to future conduct, the Italian Government informed the Imam of Yemen that, pursuant to the agreement, Italy had undertaken not to extend its sovereignty on or to fortify the "Hanish Island group," and that it had, in the negotiations, "kept in mind . . . above all Yemen's interests". Yemen claims to find further acknowledgment of Yemeni rights in British practice and "internal thinking," as reflected in Foreign Office and Colonial Office documents of the 1930s and 1940s. French recognition of Yemeni title is said to include a request for permission to conduct military manoeuvres in the Southern Red Sea in 1975, and for a French oceanographic vessel to conduct activities near the Islands in 1976.

45. Yemen attributes similar evidentiary value to German conduct and publications, and to official maps published by the United States Army and Central Intelligence Agency, as recently as 1993. Yemen offers evidence of what it terms "revealing changes in Ethiopian cartography" in support of its contention that Ethiopia did not claim title to the Islands. It relies particularly on Ethiopian maps from 1978, 1982, 1984 and 1985, on which all or some of the Islands appear, by their colouring, to be allocated to Yemen.

46. Yemen also puts forward cartographic evidence on which it relies as official and unofficial expert evidence of Yemeni title to the Islands. Such evidence serves, according to Yemen, as proof of geographical facts and the state of geographical knowledge at a particular period. Yemen supplements this cartographic evidence with the published works of historians and other professionals.

47. Yemen gives an historical review of this evidence, beginning with 17th and 18th Century maps depicting the independent *Bilad el-Yemen*. Yemen asserts that while some 18th Century maps fail to depict the Islands accurately, the more accurate of these attribute them to Yemen. Yemen places great emphasis on writings and maps reflecting the first-hand impressions of Carsten Niebuhr, a Danish scientist and explorer who visited the Red Sea coast from 1761-1764. Niebuhr's works suggest political affiliation and other links between the Islands and the Yemeni mainland.

48. Yemen further submits in evidence a large number of 19th and 20th Century maps, of varied origin, the colouring of which appears to attribute all or some of the Islands to Yemen. At the same time, it did not deny that certain Yemeni maps attribute the Islands to Ethiopia or Eritrea; or at least not to Yemen.

49. In addition to proffering cartographic and other evidence in support of its assertions of historic title to the Islands, Yemen argues that, until the events of December 1995, Ethiopian and Eritrean conduct was consistent with Yemeni sovereignty. Yemen alleges that as recently as November 1995, Eritrea acknowledged in an official communique to the President of Yemen that the Islands had ". . . been ignored and abandoned for many years since colonial times, including the eras of Haile Selassie and Mengistu, and during the long war of liberation."

50. Yemen insists that, during the Ottoman period, the Islands were consistently administered as part of the *vilayet* of Yemen, and that title never passed to Italy during the period of Italian colonization of the Eritrean mainland. Yemen cites several occasions on which, in its view, Italy had declined to claim sovereignty. These include exchanges between the British and Italian Governments in the late 1920s and 1930s and culminated in the 1938 Anglo-Italian Agreement which amounts, in Yemen's view, to a definitive agreement by both parties not to establish sovereignty over islands with respect to which Turkey had renounced sovereignty by Article 16 of the Treaty of Lausanne. Yemen interprets Italian decree number 1446 of December 20, 1938 not as a confirmation of existing territorial sovereignty but rather as a mere "internal decree providing for the administration of the islands to be undertaken from the Assab department of Eritrea."

51. Yemen argues further that the phrase "the territory of Eritrea including the islands" in the 1952 UN-drafted Eritrean Constitution does not refer to the disputed islands, because the official Report of the United Nations Commission for Eritrea, prepared in 1950, indicates Yemeni title to the Islands, by depicting them in the same colour as the Yemeni mainland on UN maps accompanying the Report. Yemen contests all Eritrean allegations of Ethiopian acts of sovereignty or administration, and asserts that Ethiopian conduct, particularly its publication of official maps on which the Islands were the same colour as the Yemeni mainland, constituted recognition of Yemeni sovereignty over the Islands.

52. According to Yemen, while Yemeni fishermen historically fished around the Islands and used them for temporary residence, Yemen exercised a wide array of state activities on and around them. These activities are alleged to have included, during the 1970s, the consideration of requests by foreign nationals to carry out marine and scientific research on the islands, periodic visits of Yemeni military officials to Greater Hanish and Jabal Zuqar, and related patrols on and around these islands. Yemen also claims to have protested the conduct of low-level military flights by France over the Hanish islands, as well as Ethiopia's arrest of Yemeni fishermen in the vicinity of the Islands, and further asserts that it

investigated a number of lost or damaged foreign vessels around Greater Hanish and Jabal Zuqar.

53. With respect to the 1980s and 1990s, Yemen alleges that various Yemeni air force and naval reconnaissance missions were conducted over and around the Islands. Yemen also asserts that it granted licenses allowing nationals of third states to visit the certain islands for scientific purposes and tourism, and that some of these visitors were accompanied by Yemeni officials. In 1988, Yemen is said to have embarked on a project to upgrade and build a series of lighthouses, accompanied by Notices to Mariners, on Centre Peak Island, Jabal al-Tayr, Lesser Hanish Island, Abu Ali, Jabal Zuqar and Greater Hanish Island. Yemen also claims to have erected geodetic stations on Greater Hanish and Jabal Zuqar and authorized construction of a landing strip on Greater Hanish, which was used frequently in the early 1990s. Yemen also contends that, during this period, it continued its patrols of the islands, arresting foreign fishermen and confiscating vessels found operating in waters around the islands without a Yemeni license.

54. With respect to territorial sovereignty, Yemen seeks from the Tribunal an award declaring "that the Republic of Yemen possesses territorial sovereignty over all of the islands comprising the Hanish Group of islands . . . as defined in chapters 2 and 5 of Yemen's Memorial."

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Arguments of the Parties on the Relevance of Petroleum Agreements and Activities

55. In response to specific questions from the Tribunal, which were dealt with in supplemental written pleadings, at resumed oral hearings in July 1998, and in post- hearing written submissions, both Parties have presented evidence of offshore concession activity in the Red Sea. Yemen contends that its record of granting offshore concessions over the last fifty years reinforces and complements a consistent pattern of evidence indicating Yemeni title to the islands. As the granting of oil concessions serves to confirm and maintain an existing Yemeni title, rather than furnishing evidence of effective occupation, it need not, in Yemen's view, be supported by evidence of express claims. This is said to be congruent with Yemen's assertions of historic title.

56. In evidence of what it terms "longstanding and peaceful administration of its petroleum resources" on and around the Islands, Yemen has submitted agreements and maps concerning concession blocks granted or offered since 1974. One of these concession blocks (Tomen) encompasses some of the Islands, in this case, the "Hanish Group", while another (Adair) is bounded by a line that

cuts through Greater Hanish. Yemen further relies on a 1991 hydrocarbon study of the Red Sea and Gulf of Eden regions carried out by the United Nations Development Program (UNDP) and the World Bank. As this study enjoyed the participation of the governments concerned, particularly Ethiopia and successive Yemeni governments, Yemen relies on it as a useful overview of petroleum activities undertaken by the two states from the early 1950s.

57. Yemen relies on both case law (in particular the *Eastern Greenland* case[3]) and scholarly writing in support of its assertion that the granting of exploration permits and concessions constitutes evidence of title, addressing such evidentiary categories as: the attitude of the grantor state, its grant and regulation of the operation of the concession, ancillary government-approved operations, and the attitude of the concessionaire and of international agencies. In addition, Yemen derives from the absence of protests evidence of Ethiopian and Eritrean acquiescence.

58. Yemen invokes the presumption that a state granting an oil concession does so in respect of areas over which it has title or sovereign rights. The activity of offering and granting concessions with respect to blocks that encompass or approach the Islands constitutes, in Yemen's view, a clear manifestation of Yemeni sovereignty over the Islands. Yemen cites, in addition, express reservations, in the relevant agreements, of Yemeni title to the concession areas. In addition to demonstrating Yemen's attitude regarding title, the granting of these economic concessions to private companies is said to constitute evidence of the exercise of sovereignty in respect of the territory concerned. Yemen finds additional evidence of the exercise of sovereignty in Yemen's monitoring and regulation of the operations undertaken by the various concessionaires and the granting of permits for ancillary operations such as seismic reconnaissance.

59. Yemen further argues that a company will not enter into a concession with a state for the development of petroleum resources unless it is persuaded that the area covered by the concession, and the underlying resources, in fact belong to that state. Furthermore, the reservations of Yemeni title in the concession agreements submitted by Yemen are said to constitute express recognition by the concessionaires of Yemeni title to the blocks concerned. The UNDP/World Bank study constitutes, in Yemen's view, recognition of Yemeni title by these international agencies, as well as expert evidence to the same effect.

[3] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53.

60. Yemen also proffers the UNDP/World Bank study as evidence of Ethiopian acquiescence. Because the study was prepared in collaboration with, and ultimately distributed to, all concerned governments, Ethiopia can, in Yemen's view, be held to have had notice of the existence and scope of Yemeni concessions implicating the Islands, without issuing any protests. Yemen relies further on other maps and reports published in the professional petroleum literature, of which it asserts Ethiopia and Eritrea should have been aware.

61. Finally, Yemen asserts that Ethiopian and Eritrean petroleum activities did not encompass or touch upon the Islands, and therefore provide no support for a claim of sovereignty. Despite this, Yemen alleges that it consistently made timely protests with respect to those Ethiopian concessions that, in Yemen's view, encroached in any manner upon its territorial sea, continental shelf and exclusive economic zone.

62. Eritrea, in turn, proffers evidence of offshore petroleum activities, conducted primarily by Ethiopia, at a time at which, it alleges, "Ethiopia's title was already established". Eritrea cites oil-exploration related activities "on the islands" as confirming Ethiopia's pre-existing claim to sovereignty, which could not, in its view, be divested by Yemen's unilateral grants of offshore mineral concessions. Eritrea also argues that, in the absence of any physical manifestation of control either on islands or in their territorial waters, the mere granting of concessions by Yemen would not suffice to establish title through effective occupation, "even if the islands had been previously unowned."

63. According to Eritrea, the concession evidence put forward by Yemen is irrelevant, because it represents unilateral attempts by Yemen to establish permanent rights to the seabed, in violation of customary international law and the United Nations Convention on the Law of the Sea (the "Law of the Sea Convention"). Yemen's concession agreements are further said to be irrelevant because they were entered into only after the present dispute arose, were not accompanied by Yemeni government activities, and did not pertain to the territory in dispute. Eritrea also questions the factual accuracy of Yemen's allegations concerning concession agreements, pointing to Yemen's failure to submit in evidence copies of certain of these agreements.

64. Eritrea argues that, under both the Law of the Sea Convention and customary international law, mineral rights to the seabed can neither be acquired nor lost through the unilateral appropriation of one competing claimant. Pending agreement with the opposite coastal state, Yemen was, in Eritrea's view, entitled only to issue concessions on a provisional basis. If the alleged concessions could not effectively confer the very mineral rights with which they purported to deal, they could not indirectly settle the question of sovereignty over the Islands. Accord-

ing to Eritrea, petroleum concessions are relevant only where they demonstrate the existence of a mutually recognized de facto boundary line. There had, in this case, been no attempt by Yemen to reach mutual agreement with Ethiopia or Eritrea.

65. Eritrea contends that the provisional character of any concessions issued by Yemen is derived not only from Article 87(3) of the Law of the Sea Convention, which permits the provisional granting of concessions, provided this does not prejudice a final delimitation, but also from Yemen's own continental shelf legislation, adopted in 1977, which provides that "pending agreement on the demarcation of the marine boundaries, the limits of territorial sea, the contiguous zone, the exclusive economic zone . . . shall not be extended to more than the median or equidistance line."

66. Eritrea further asserts that Yemen's offshore concessions were issued after 1973, with full knowledge of Ethiopia's sovereignty claims to the Islands. This is claimed not only to have implications for the delimitation of the surrounding seabed, but to limit as well the evidentiary value of Yemen's concession evidence in resolving the question of sovereignty.

67. Thus Eritrea argues that the post-1973 grant of concessions by Yemen reflects attempts to manufacture contacts with the disputed islands. This is further supported, in Eritrea's view, by the lack of any related Yemeni state activity pertaining specifically to the territory in dispute. According to Eritrea, concessions can be brought to bear on the question of territorial acquisition in two ways. The first is exemplified by the deep sea fishing concession granted by Italy to the *Cannata* company in the 1930s, which led inter alia to construction of a commercial fishing station on Greater Hanish Island. According to Eritrea, the *Cannata* concession was accompanied by the direct involvement of state officials, including Italian troops stationed on the island.

68. Another way in which concessions may be relevant to territorial acquisition is that reflected in the *Eastern Greenland* case. *Eastern Greenland* does not, in Eritrea's reading, necessarily require the physical presence of a particular state official, but rather activities by individuals who, while not themselves employees of the state, act under colour of state law. Eritrea cites doctrine in support of its position that the concession activity of private individuals is relevant only when it involves some kind of real assertion of authority, since "the exercise or display must be genuine and not a mere paper claim dressed up as an act of sovereignty." Eritrea argues that the scope of Yemeni and private activity with respect to petroleum concessions "does not approach the quality and significance of Ethiopia's long-standing pattern of governmental activities on and around the disputed islands." Eritrea further asserts that the few concession agreements

actually placed in evidence by Yemen ultimately bear little or no relationship to the islands in dispute.

69. In addition, Eritrea characterizes much of Yemen's petroleum activity as pertaining to "marine scientific research," rather than economic exploitation. Article 241 of the Law of the Sea Convention expressly precludes marine scientific research activities from constituting the legal basis for any claim to any part of the marine environment or its resources.

70. Eritrea argues that its failure to protest Yemeni concessions does not amount to acquiescence, particularly in light of military and political upheaval in Ethiopia during the relevant period. Eritrea has submitted evidence aimed at demonstrating that the 1991 UNDP/World Bank report relied on by Yemen as evidence of notice to Ethiopia may never have been received by Ethiopia, embroiled as it then was in the fall of the Mengistu regime and the end of the civil war. And even if it had been ultimately received, Eritrea posits that in 1991, knowing it would soon lose its entire coastline to the soon-to-be independent Eritrea, Ethiopia would have had no reason to protest Yemeni concessions.

71. Even if it had had actual notice of some or all of Yemen's concessions, Eritrea contends that it was entitled to rely on their being provisional under Article 87(3) of the Law of the Sea Convention and under Yemen's own 1977 continental shelf legislation.

72. Finally, at the oral hearings in London in July 1998, Eritrea produced evidence of a 1989 Ethiopian concession agreement which, in its view, included at least some of the Islands, notably Greater Hanish, on which Eritrea relies as evidence of related activities which are said to have taken place on Greater Hanish Island, including the placement of beacons. Moreover, it has introduced evidence of publication in 1985 of a series of maps, one of which is entitled "Petroleum Potential of Ethiopia" and purports to encompass a block of the Red Sea that includes the Hanish islands.

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CHAPTER II – The Scope of the Dispute

73. The Arbitration Agreement seeks from the Tribunal an award "on the definition of the scope of the dispute between Eritrea and Yemen." It further instructs the Tribunal to decide on the definition of the scope of the dispute "on the basis of the respective positions of the two Parties."

74. The Parties agree that this provision was included in the Arbitration Agreement as a result of the Parties' inability to reach agreement on the definition of the scope of the dispute. According to Eritrea, at the time of the military confrontation in late 1995, which resulted in an Eritrean military occupation of Greater Hanish and some of the small surrounding islands and the Republic of Yemen's military occupation of Zuqar Island, Eritrea wished to seek a determination of all respective Eritrean and Yemeni claims, either by international arbitration or adjudication. Yemen would not agree to such a submission, insisting instead, as Eritrea relates it, on limiting the scope of the dispute to Eritrea's alleged illegal occupation of Hanish Island. Because neither Party wanted this disagreement on scope to prevent the conclusion of the Agreement on Principles and subsequent Arbitration Agreement, they agreed to leave the determination of scope to the Tribunal.

75. In Eritrea's interpretation of the phrase "the respective positions of the Parties", both Parties are free to put forth and elaborate on their positions concerning the scope of the dispute at any point in the proceedings. Eritrea purports to have done so by including in its Memorial, submitted on 1 September 1997, a non-exhaustive list of "islands, rocks and low-tide elevations" with respect to which it asserts territorial sovereignty, and requesting the Tribunal to rule that the scope of the dispute includes each of these specified "islands, rocks and low-tide elevations". Eritrea insists that as its position with regard to scope has not altered over time, the time at which it was determined is irrelevant. While indicating that it had not expected Yemen to claim the Mohabbakah islands, Eritrea has expressed willingness to defend its claim to the Mohabbakahs: i.e., to consider them encompassed by the scope of the dispute. Eritrea further asserts that Yemen was, in fact, aware of Eritrean claims to Jabal Al-Tayr and the Zubayr group.

76. Yemen, however, puts forward the view that "the respective positions of the Parties" are to be determined at the date of the Agreement on Principles (21 May 1996). Yemen submits that "the task of the Tribunal is to determine the extent to which there was a dispute between the Parties over certain islands in the Red Sea and their maritime limitation as of that date." According to Yemen, the respective positions of the Parties at that date reflected their mutual understanding that Jabal Al-Tayr and the Zubayr group of islands were not considered to fall within the scope of the dispute. Yemen characterizes the scope of the dispute as

involving "the Hanish Group of Islands," comprising – in its view – Abu Ali island, Jabal Zuqar, Greater and Lesser Hanish, Suyul Hanish, the various small islets and rocks that surround them, the South West Rocks, the Haycocks and the Mohabbakahs. It asserts that the "Northern Islands" of Jabal Al-Tayr and the Zubayr group were never in dispute between the Parties, and were not reflected in Eritrea's "position" until 1 September 1997, the date of filing of the Parties' Memorials, and thus fell outside the scope of the dispute.

77. The Parties' divergent positions on the substance of the dispute are reflected in a document dated 29 February 1996, entitled "French Memorandum for Yemen and Eritrea". In the aftermath of the December 1995 hostilities, Eritrea and Yemen had, on advice from the UN Secretary-General, invited the French Government to "contribute to the seeking of a peaceful settlement of the dispute between them in the Red Sea." This memorandum was the result of three diplomatic missions to the region, consisting of in-depth talks with the representatives of the two Governments, and it led to the subsequent conclusion between the Parties of the Agreement on Principles, in May 1996, and the Arbitration Agreement, in October 1997.

78. As described in the French memorandum, "[t]he problem raised is as follows. According to Eritrea the dispute concerns at present not only the island of Great Hanish which underwent the events we know about in autumn 1995, but also all of the Hanish-Zucur archipelagoes, particularly the island of Djebel Zucur, since Yemen has stationed troops there whereas these archipelagoes come under Eritrean sovereignty." With respect to the Yemeni position, the French memorandum continues: "According to Yemen this dispute concerns the island of Greater Hanish, where Eritrea has sent troops, but cannot concern the Hanish-Zucur archipelagoes in their totality, particularly the island of Djebel Zucur, since they come under Yemeni sovereignty."

79. The French mediator therefore proposed that the arbitral tribunal be asked "to provide rulings on the questions of territorial sovereignty, as well as delimitation of maritime boundaries, in a zone defined for example by geographical coordinates." This definition would, according to a French Draft Agreement on Principles dated 29 February 1996, take into account "the undisputed sovereignty of either Party on islands and rocks, such as, for example, the Dahlak Islands for Eritrea, or the Zubair Islands for Yemen." This proposal was rejected by the Parties, in favour of leaving the determination of the scope of the dispute to the arbitral tribunal.

80. Article 1 of the Agreement on Principles of 21 May 1996 provides:

[. . .]

1.2 They shall request the Tribunal to provide rulings in accordance with international law in two stages:

a) in the first stage, on the definition of the scope of the dispute between Eritrea and Yemen, on the basis of the respective positions of the two parties;

b) in the second stage, and after having decided on the point mentioned in letter a) above, on:

i) questions of territorial sovereignty,

ii) questions of delimitation of maritime boundaries.

2. They commit themselves to abide by the decision of the Tribunal.

81. Article 2 of the Arbitration Agreement, however, provides as follows:

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

82. Article 15 of the same Arbitration Agreement also provides:

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

2. In the event of any inconsistency between the Agreement on Principles and this Arbitration Agreement implementing the procedural aspects of that Agreement on Principles, this Arbitration

> Agreement shall control. Except with respect to such inconsistency, the Agreement on Principles shall continue in force.

83. Since there is indeed in this respect an inconsistency between the Agreement on Principles and the Arbitration Agreement, under Article 15(2) of the Arbitration Agreement the provisions of the latter prevail to the extent of the inconsistency. The Tribunal must therefore decide the question of scope, as well as the resulting questions of sovereignty, in the present first stage of the proceedings.

84. This decision on scope has to be made "on the basis of the respective positions of the two Parties", and on this point the provisions of the two agreements are identical. It is apparent, however, from the submissions of the Parties in their written pleadings and in their oral presentations for the first stage that the positions of the two Parties differ with respect to the scope of the arbitration. Eritrea's position is that the scope includes all the islands of the Zuqar-Hanish chain, the Haycocks and the Mohabbakahs, and also the northern islands of Jabal al-Tayr and the Zubayr group. Yemen, however, though claiming all the islands of the Zuqar-Hanish chain, including, in their view, the Haycocks and the Mohabbakahs, does not concede that the northern islands are in dispute in this arbitration.

85. The contention of Yemen, as mentioned above, is that the respective positions of the two Parties at the time of the Agreement on Principles (21 May 1996) were different from what they became at the time of the subsequent Arbitration Agreement (3 October 1996). According to Yemen, at the time of the Agreement on Principles, Eritrea was apparently not seeking to claim the northern islands or to bring them within the scope of the arbitration, although it may be noted that there was already an existing dispute over the northern islands.[4] It seems clear, moreover, that Yemen, at the time of the Agreement on Principles, was not claiming the Mohabbakahs.

86. But, according to Yemen, the date of the Agreement on Principles is "the critical date" for the determination by the Tribunal of the "respective positions of the two Parties" on which the scope of the Arbitration is to be decided, because it was the date of the definitive agreement of the Parties to submit the matter to this

[4] In a letter dated 4 January 1996, Yemen formally protested an Eritrean oil concession to the Andarko Company which, according to Yemen, constituted "a blatant violation of Yemeni sovereignty over its territorial waters in so far as it extends to the exclusive territorial waters of the Yemeni Jabal al-Tayr and al-Zubayr islands, in addition to the violation of the rights of the Republic of Yemen in the Exclusive Economic Zone."

Arbitration. From this proposition Yemen concludes that the northern islands do not come within the scope of the present arbitration.

87. This somewhat technical "critical date" argument, fails, in the opinion of the Tribunal, to take sufficient account of the crucial change brought about in the Arbitration Agreement in the specification of the first stage of the Arbitration as being that in which this question of scope was to be determined by the Tribunal. Whereas, in the Agreement on Principles, the decision on scope was to be the whole matter of the first stage, the later Arbitration Agreement joined within that stage both the award on sovereignty and the decision on scope. This now meant that the Tribunal was to decide the issue of scope "on the basis of the respective positions of the two Parties" only after having heard the entire substantive contentions of both Parties on the question of sovereignty. This later provision must throw doubt upon the proposition that the Parties nevertheless intended the earlier date of the Agreement on Principles still to be the critical date for the determination of scope.

88. In addition, the later Arbitration Agreement did not, in its Article 2(2), qualify in any way its use of the phrase "on the basis of the respective positions of the two Parties." If not qualified, the ordinary meaning of that phrase in its context, and in the light of the object and purpose of the Arbitration Agreement, would seem to be that it is "the respective position of the two Parties" as at the date of the Arbitration Agreement, and not at some unspecified date, that should form the basis for the determination by the Tribunal of the scope of the dispute under the Arbitration Agreement.

89. Moreover, and by implication consistent with this analysis, Yemen, although taking some care in various ways to reserve its position on scope, has in fact provided a full argument in support of its claim to sovereignty over Jabal al-Tayr and the Zubayr group, and in the July 1998 supplementary hearings on petroleum agreements, considerably elaborated on that argument.

90. The Tribunal therefore, on the question of the scope of the dispute, prefers the view of Eritrea and accordingly makes an Award on sovereignty in respect of all the islands and islets with respect to which the Parties have put forward conflicting claims, which include Jabal al-Tayr and the Zubayr group, as well as the Haycocks and the Mohabbakahs.

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CHAPTER III – Some Particular Features of This Case

In General

91. It is convenient at the outset to call attention to some features of this case. There is one striking difference between the Parties themselves. Yemen traces its existence back to medieval times and even before the establishment of the Ottoman Empire; Eritrea on the other hand became a fully independent state, separate from Ethiopia, in the early 1990s. Nevertheless, Eritrea traces what it regards as its own title to the disputed islands through an historical succession from the Italian colonial period as well as through the post-Second World War period of its federation as part of the ancient country of Ethiopia. Accordingly the Tribunal has been presented by both Parties with great quantities of material put forward as evidence of the establishment of a legal title through the accumulated examples of claims, possession or use or, in the case of Yemen, through consolidation, continuity and confirmation of an "ancient title". All these materials of quite varying character and weight have had to be sifted, analysed and assessed by the Tribunal.

92. Since much of these materials relates to the actions and reactions or conduct of the Parties or of their predecessors, it is well to have in mind that both have experienced periods in which they were preoccupied by civil wars on either side of the Red Sea: Yemen from 1962-70, and Ethiopia with the severe and bloody conflict with Eritrean rebels which resulted in the independence of Eritrea in 1993.

93. The disputed islands and islets range from small to tiny, are uniformly unattractive, waterless, and habitable only with great difficulty. And yet it is also the fact that they straddle what has been, since the opening of the Suez Canal in 1869, one of the most important and busiest seaways in the world. These contradictory aspects of the disputed islands are reflected in the materials presented to the Tribunal. During the earlier periods the islands seem often hardly to have been noticed by coastal countries other than by local traditional fishermen who used them for shelter and their waters for anchorage; but did receive considerable attention, amounting even to temporary occupation, from rival colonial powers, notably Great Britain and Italy. This was no doubt because, after the opening of the Canal, this sea, narrowing in its southern part where the islands are situated, was the principal route from Europe to India, the East Indies and the Far East.

94. The former interest in these islands of Great Britain, Italy and to a lesser extent of France and the Netherlands, is an important element of the historical materials presented to the Court by the Parties, not least because they have had access to the archives of the time, and especially to early papers of the British Governments of the time. Much of this material is interesting and helpful. One general caveat

needs, however, to be made. Some of this material is in the form of internal memoranda, from within the archives of the British Foreign Office, as it then was, and also sometimes of the Italian Foreign Office. The Tribunal has been mindful that these internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made.

Critical Date

95. Faced with such a mass of legal and political history, the Tribunal has felt it right to consider whether the notion of the "critical date" or "critical period" might assist in the organisation or the interpretation of this voluminous material. It has noted, however, that the Parties themselves have spoken of a critical date only in relation to the question discussed above: whether, in deciding on the scope of the Arbitration, the critical date is that of the Agreement on Principles or the Agreement on Arbitration. Neither of them has sought to employ a critical date argument in relation to any of the questions involving the substance of the dispute. In this situation the Tribunal has thought it best to follow the example of the 1966 award in the arbitration between Argentina and Chile presided over by Lord McNair, and has accordingly "examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates."[5]

Uti Possidetis

96. Yemen in its Counter Memorial introduced the doctrine of *uti possidetis* to explain what it holds to have been the legal position of these islands after the dissolution of the Ottoman Empire following the end of the First World War. The position is said to have been, in the words used by Yemen, that "[o]n the dismemberment of an empire like the Ottoman Empire, there is a presumption, both legal and political in character, that the boundaries of the independent states which replace the Empire will correspond to the boundaries of the administrative units of which the dismembered Empire was constituted." The principle of *uti possidetis* presumably provides the legal aspect of this presumption on which Yemen relies. Eritrea strongly contests this.

97. There is, however, a prior problem regarding the facts on which a legal presumption of *uti possidetis* would purport to be based. For such a legal presumption to

[5] Argentina v. Chile (9 Dec. 1966), 16 R.I.A.A. 111, 115; 38 I.L.R. 16, 20 (1969).

operate it is necessary to know what were indeed "the boundaries of the administrative units of which the dismembered Empire was constituted." It is known that by *firmans* issued in 1841, 1866 and 1873, the Sublime Porte granted to the Khedive of Egypt the right to exercise jurisdiction over the African coast of the Red Sea. Presumably this right of jurisdiction over the African coast might naturally have extended to the islands which were in the neighbourhood of the coast and geographically at least seemed to belong to that coast. But how far this jurisdiction extended over the archipelago which is the principal element in the present dispute is to some extent a matter for conjecture. It seems that, unsurprisingly, the *firman* did not mention the archipelago. The sources provided by the Parties in relation to this question are primarily British Foreign Office internal papers and memoranda. And the answers there given were, it is made quite clear, based upon informed speculation. It is known that there were from time to time small Ottoman garrisons upon Zuqar and upon Hanish, and there are suggestions that they came from the Arabian side, and probably had their supplies from that coast.

98. There is particularly the September 1880 memorandum of Sir Edward Hertslet (author of the celebrated and influential *Map of Africa by Treaty*, and Librarian of the Foreign Office) compiled in the Foreign Office for the use of the Board of Trade, which was responsible for lighthouses in the Red Sea and which had sought Foreign Office help with the question of jurisdiction over lighthouse islands. In this memorandum Hertslet carefully distinguished between sovereignty, which the Ottoman Empire possessed over all these possessions, and a right of jurisdiction over the African side, which had been conferred on the Khedive. He drew up three long lists of the islands in the Red Sea. The first list was of the islands which in his opinion could be said to be "in close proximity" to the African coast, and the second list was of those in close proximity to the Arabian coast. The first list includes the Mohabbakahs and the Haycocks; the second list contains the islands in the "Jabel Zukar Group", those in the "Little Harnish Group", and those in the "Great Harnish Group". This memorandum appears to have been accepted as a working paper by both the Foreign Office and the Board of Trade, notwithstanding the fact that the perception of the second group as being "in close proximity" to the Arabian coast might be regarded as questionable in terms of physical geography. The third list was a relatively short one of islands near "the Centre of the Red Sea" including Jabal Al-Tayr and the Zubayr group, the jurisdiction over which was thought by Hertslet to be "doubtful", although the sovereignty remained Ottoman.

99. It is doubtful how far it would be right to base a legal presumption of the *uti possidetis* kind upon these speculations of a concerned but not disinterested third-government department; and this quite apart from the legal difficulties of creating a presumption which would be plainly at odds with the specific provi-

sion made for at least some of these islands by Article 16 of the Treaty of Lausanne of 1923.[6] Yemen of course pleads that this was *res inter alios acta*. But Turkey having been in a position to refuse to accept the Treaty of Sèvres, the sovereignty over these islands must have remained with Turkey until the Treaty of Lausanne was signed, and presumably until 1926 when it was ratified. Added to these difficulties is the question of the intertemporal law and the question whether this doctrine of *uti possidetis*, at that time thought of as being essentially one applicable to Latin America, could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War.

100. Nevertheless, all this material about the position of the Islands during and shortly after the period of the Ottoman Empire remains an instructive element of the legal history of the dispute. It is especially interesting that even when the whole region was under Ottoman rule it was assumed that the powers of jurisdiction and administration over the islands should be divided between the two opposite coasts.

Article 15, Paragraph 1 of the Arbitration Agreement

101. This paragraph provides as follows:

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

The Tribunal finds this provision less than perspicuous. A question to the Parties about it evoked different answers; both were to the general effect that this clause was meant as a "without prejudice" clause concerning the arguments and points of view they might wish to present to the Tribunal. As both Parties have fully argued their cases without either of them having occasion to invoke this provision, it seems to the Tribunal best to leave the matter there.

The Task of the Tribunal in the First Stage

102. The Agreement for Arbitration provides in the second paragraph of its Article 2:

[6] Throughout this award, the date used for the Treaty of Lausanne is its date of signature, in 1923, rather than that of its entry into force (1926).

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

Several of the clauses of this paragraph call for consideration. First there is the requirement that this stage shall "result in an award on territorial sovereignty." Thus, the Agreement does not require the Tribunal, as is often the case in agreements for arbitration, to make an allocation of territorial sovereignty to the one Party or the other. The result furthermore is to be an award "on" territorial sovereignty not an award "of" territorial sovereignty. The Tribunal would therefore be within its competence to find a common or a divided sovereignty. This follows from the language of the clause freely chosen by the Parties. It seems right that to call attention to the broader possibilities admitted by this unusual arbitration clause. The Tribunal has indeed considered all possibilities.

103. Further consideration must be given to the clause that requires the Tribunal to "decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable in the matter, and on the basis, in particular, of historic titles."

104. As already mentioned, both Parties rely on various elements of evidence of possession and use as creative of title, and this is itself an appeal to what is a familiar kind of historic claim. As Judge Huber said in the *Palmas* case, "[i]t is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control."[7]

105. But Yemen also relies primarily upon what it calls specifically an "historic title". This calls for reflection upon the meaning of "title". It refers not to a developing claim but to a clearly established right, or to quote Pollock, "the absolutely or

[7] Island of Palmas (Neth. V. U.S.) 2 R.I.A.A. 829 at 867 (Apr. 4, 1928). Professor Max Huber, at the time President of the Permanent Court of International Justice, acted as sole arbitrator in proceedings conducted under the auspices of the Permanent Court of Arbitration, pursuant to the 1907 Convention for the Pacific Settlement of International Disputes.

relatively best right to a thing which may be in dispute."[8] It is a matter of law, not of possession, though it would normally indicate a right in law to have possession even if the factual possession is elsewhere.

106. The notion of an historic title is well-known in international law, not least in respect of "historic bays", which are governed by rules exceptional to the normal rules about bays. Historic bays again rely upon a kind of "ancient title": a title that has so long been established by common repute that this common knowledge is itself a sufficient title. But an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence. Eritrea pleads various forms of this kind of title, and so also does Yemen, which relies upon this latter kind of title as "confirmation" of its "ancient title".

107. The injunction to have regard to historic title "in particular" can hardly be intended to mean that historic title is to be given some priority it might not otherwise possess; for if there is indeed an established title – the best right to possession – then it is by definition a prior right. So perhaps the phrase "in particular" is put in out of abundant caution, lest the Tribunal, faced with a welter of other interests and uses, were to forget that there can be a separate category of title that does not depend upon use and possession, but is itself a right to possession whether or not possession is enjoyed in fact. At any rate, as will appear below, the Tribunal has not failed to examine historic titles of all kinds in its consideration of this case.

108. There have been different points of view between the Parties about the effects of this twofold division of a first stage award on territorial sovereignty and a second stage award on maritime boundaries. It was in the course of the supplementary proceedings on the Parties' petroleum agreements that Yemen became strenuously exercised over the possibility that the Tribunal might be tempted to "prefigure" (a nicely chosen expression) an eventual stage two maritime solution as an element of its thinking about stage one. Thus paragraph 20 of Yemen's written pleadings in the supplementary petroleum agreements phase states as follows:

> This last element [prefiguring] is of particular concern to the Government of Yemen. It is always attractive to seek to discover a basis for

[8] SIR FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE 177 (6th ed., 1929).

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

This paragraph was repeated word for word in Yemen's oral argument in the July 1998 supplementary hearings.

109. A novel feature of Yemen's arguments, introduced at a late stage of the proceedings but clearly and strongly felt, concerned an apparently unacceptable supposition that an equitable solution was being contemplated for the first stage. This was curious, if only because it seems to have been the first and only reference to equity or equitable principles by either Party in course of the pleadings. Furthermore, no member of the Tribunal had mentioned equity or equitable principles.

110. This matter arose again in a somewhat different form in Yemen's answers to four questions put to both parties at the close of Yemen's oral argument in the supplementary proceedings, and which questions both Parties answered later in writing. The purpose of these questions was simply to ask both Parties how it was that some of their petroleum agreements, particularly those of Yemen, appeared to be drawn to extend to some sort of coastal median line. In response, Yemen felt obliged to "express the strongest possible reservation against the 'prefiguring' of a median line".

111. Eritrea replied, in the Tribunal's view rightly, that Article 2.2 of the Arbitration Agreement requires the Tribunal to "decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, or historic titles." That formula must include any principles, rules or practices of international law that are found to be applicable to these matters of sovereignty, even if those principles, rules or practices are part of maritime law. Certainly the Tribunal is not in this first stage to delimit any maritime boundaries or to prefigure any such delimitation. But that is an entirely different matter from applying all international law that may relevant for the purpose of determining sovereignty, which is the province of this first stage.

112. In general, the Tribunal is unable to accept the proposition that the international law governing land territory and the international law governing maritime boundaries are not only different but also discrete, and bear no juridical relevance to each other. Such a theory is indeed disproved by Yemen's own request to the British Government to be allowed to attend the 1989 Lighthouses Conference on

the ground that the northern islands were within Yemen's Exclusive Economic Zone.

113. It is well to have the considered view of the Tribunal on these questions stated at the outset of this Award. At the same time, it may be said that the Tribunal has no difficulty in agreeing with Yemen, and indeed also with Eritrea, that there can 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.

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CHAPTER IV – Historic Title and Other Historical Considerations

114. Article 2 of the Agreement for Arbitration enjoins the Tribunal to decide territorial sovereignty in accordance with applicable international law "and on the basis, in particular, of historic title." The Tribunal has thus paid particular attention both to the arguments relating to ancient titles and reversion thereof proposed by Yemen and arguments relating to longstanding attribution of the Mohabbakahs to the colony of Eritrea and to early establishment of titles by Italy pronounced by Eritrea. An important element of Yemen's case is that of an asserted "historic title" to the Islands, and this is indeed reflected in the very language of both the Agreement on Principles and the Arbitration Agreement. Thus the Tribunal fully recognises that the intention of Article 2 is that, among all the relevant international law, particular attention should be accorded to such elements. Notwithstanding its analysis of how the principles, rules and practices of international law generally bear on its decision on territorial sovereignty, the Tribunal has had the most careful regard to historic titles as they bear on this case.

115. For its part, Eritrea makes no argument for sovereignty based on ancient title, in spite of the undeniable antiquity of Ethiopia. Rather, Eritrea in part asserts an historic consolidation of title on the part of Italy during the inter-war period that resulted in a title to the Islands that became effectively transferred to Ethiopia as a result of the territorial dispositions after the defeat of Italy in the Second World War. This argument will naturally fall to be dealt with in the chapters below dealing with the inter-war periods and the armistice and related proceedings at the end of the Second World War.

116. Yemen has asserted an historic or "ancient title" running back in time to the middle ages, under which the islands are asserted to have formed part of the *Bilad el-Yemen*. This ancient title predated the several occupations by the Ottoman Empire, asserts Yemen, and reverted to modern Yemen after the collapse of the Ottoman Empire at the end of the First World War.

117. It is thus only Yemen that has raised substantial questions of an "historic" or "ancient" title that existed before the second Ottoman occupation of the nineteenth century; it is therefore to an appreciation of the historical background necessary for an understanding of that claim to an early title that the Tribunal now turns. This chapter will consider the ways in which the overall history of the Arabian peninsula must be understood in then contemporary legal terms, as a preface to the Tribunal's ultimate conclusion on the legal questions concerning "historic titles". In addition, this chapter will address Yemen's theory of "reversion," which is critical to any decision as to the legal effect of an "historic title."

118. Yemen's arguments on historic and ancient title touch upon several important historical considerations. One relates to the identity of historic Yemen and whether it comprised the islands in dispute. A second questions the existence of a doctrine of reversion recognized in international law, and a third relates to the place of continuity within a concept of reversion of ancient title. Those claims advanced by Eritrea that are based on both history and international law are addressed elsewhere. This chapter further addresses such important historical matters as the tradition of joint use of the Islands' waters by fishermen from both sides of the Red Sea, and the Ottoman allocation of administrative jurisdiction between the two coasts.

119. Yemen's claim is based essentially on an "ancient" or "historical" title pursuant to which the Imam's inherent and inalienable sovereignty extended over the entirety of what historically has been known as *Bilad el-Yemen*, which existed for several centuries and is alleged by Yemen to have included the southern Red Sea islands. This sovereignty is further characterized by Yemen as having remained unaffected by and having survived the Ottoman annexation of Yemen, in spite of the Sublime Porte's having declared Yemen to be one of the *vilayets* falling under Ottoman rule.

120. The arguments advanced by Yemen in this respect must be evaluated within the historical and legal context that prevailed during the relevant period, extending from the end of the 19th Century until the dissolution of the Ottoman Empire.

121. The particularity of the relationship between the Ottoman Empire and Yemen should be taken into account as an important historical factor. In spite of the Treaty of Da'an, concluded in 1911, which granted the Imam of Yemen a greater degree of internal autonomy, he remained a suzerain acting within Ottoman sovereignty until the total disintegration of the Ottoman Empire and the loss of all its Arabian possessions, including the *vilayet* of Yemen.[9] It was only in 1923, by virtue of Article 16 of the Treaty of Lausanne, that the Ottoman Empire not only recognized the renunciation of all its sovereignty rights over Yemen, but explicitly renounced its sovereign title over the islands that had previously fallen under the jurisdiction of the Ottoman *wali* in Hodeidah.

122. The territorial extent of Imamic Yemen as an autonomous entity must be distinguished from that of the Ottoman *vilayet* of Yemen. During the entire period from the second half of the 19th Century until 1925, the Imam of Yemen had neither

[9] See, in particular, JOHN BALDRY, *One Hundred Years of Yemeni History: 1849-1948*, in L'ARABIE DU SUD VOL. II at 85 (J. CHELHOD ET AL., EDS.1984); ROGER JOINT DAGUENET, HISTOIRE DE LA MER ROUGE: DE LESSEPS À NOS JOURS, 113-116, 186-190, 240-241(1997).

sovereignty nor jurisdiction over the Tihama and the Red Sea coasts. Under his agreements with the Ottoman sultan, the Imam administered an exclusively land-locked territory, limited to the high mountains. The Ottoman *wali* exercised exclusive jurisdiction over the coasts until 1917. Thereafter, the coasts came under the control of the Idrisi, a local tribal ruler supported first by the Italians, and later by the British Government. The coast came under the Imam's rule only in 1926. As will be seen later, this fact has negative legal implications for the "reversion" argument advanced by Yemen, as well as for the application of certain other rules of international law, including the concept of ancient "historic title" in its full classical sense.

123. There can be no doubt that the concept of historic title has special resonance in situations that may exist even in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area. A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters.

124. In the present case, neither party has formulated any claim to the effect that the disputed islands are located within historic waters. Moreover, none of the Islands is inhabited on other than a seasonal or temporary basis, or even has the natural and physical conditions that would permit sustaining continual human presence. Whatever may have been the links between the coastal lands and the islands in question, the relinquishment by the Ottoman Empire of its sovereignty over the islands by virtue of Article 16 of the 1923 Treaty of Lausanne (discussed in greater detail in Chapter V) logically and legally adversely affects any pre-existing title.

125. It was recognized in the course of the oral hearings that, by the law in force at the time, Ottoman sovereignty over the regions in question was lawful. The fact that Yemen was not a party to the Treaty of Lausanne, and that it perceived both the British and the Italians as having been usurpers in the Red Sea, does not negate that legal consequence. It has not been established in these proceedings to the satisfaction of the Tribunal that the doctrine of reversion is part of international law. In any event, the Tribunal concludes that on the facts of this case it has no application. No "reversion" could possibly operate, since the chain of titles was necessarily interrupted and whatever previous merits may have existed to sustain such claim could hardly be invoked. During several decades, the predominant role was exercised by the western naval powers in the Red Sea after its opening to international maritime traffic through the Suez Canal, as well as through the colonization of the southern part of the Red Sea on both coasts. An important result of that hegemony was the maintenance of the status quo imposed after the First World War, in particular that the sovereignty over the islands covered by

Article 16 of the Lausanne Treaty of 1923 remained indeterminate at least as long as the interested western powers were still in the region. As long as that colonial situation prevailed, neither Ethiopia nor Yemen was in a position to demonstrate any kind of historic title that could serve as a sufficient basis to confirm sovereignty over any of the disputed islands. Only after the departure of the colonial powers did the possibility of a change in the status quo arise. A change in the status quo does not, however, necessarily imply a reversion.

126. This should not, however, be construed as depriving historical considerations of all legal significance. In the first place, the conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain "historic rights" which accrued in favour of both parties through a process of historical consolidation as a sort of "*servitude internationale*" falling short of territorial sovereignty.[10] Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea. In the second place, the distinction in terms of jurisdiction which existed under the Ottoman Empire between those islands administered from the African coast and the other islands administered from the Arabian coast constitutes a historic fact to be taken into consideration.

127. According to the most reliable historical and geographical sources, both ancient and modern, the reported data clearly indicate that the population living around the southern part of the Red Sea on the two opposite coasts have always been inter-linked culturally and engaged in the same type of socio-economic activities. Since times immemorial, they were not only conducting exchanges of a human and commercial nature, but they were freely fishing and navigating throughout the maritime space using the existing islands as way stations (*des îles relais*) and occasionally as refuge from the strong northern winds. These activities were carried out for centuries without any need to obtain any authorizations from the rulers on either the Asian or the African side of the Red Sea and in the absence of restrictions or regulations exercised by public authorities.

128. This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to

[10] See in this respect, YEHUDA Z. BLUM, *Historic Rights*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 120 *et seq.;* and HISTORIC TITLES IN INTERNATIONAL LAW 126-129 (1965).

operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. Equally, the persons sailing for fishing or trading purposes from one coast to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature.[11]

129. These historical facts are witnessed through a variety of sources submitted in evidence during the arbitral proceedings. A comprehensive evaluation of the evidence submitted by both Parties reveals the presence of deeply-rooted common patterns of behaviour as well as the continuation, even in recent years, of cross-relationships which are marked by eventual recourse to professional fishermen's arbitrators (*aq'il*) in charge of settling disputes in accordance with the local customary law. Such understanding finds support in the statements attributed to fishermen from both coasts of the Red Sea, taken as a whole, which have been submitted by both Parties.

130. The socio-economic and cultural patterns described above were perfectly in harmony with classical Islamic law concepts, which practically ignored the principle of "territorial sovereignty" as it developed among the European powers and became a basic feature of 19th Century western international law.[12]

131. However, it must be noted that the Ottoman Empire, which directly or through its suzerains governed the quasi-totality of the countries around the Red Sea during the first half of the 19th Century including *Bilad El-Yemen* and what became known thereafter as Eritrea, started after the end of the Crimean War in 1856 to abandon the communal aspects of the Islamic system of international law and to adopt the modern rules prevailing among the European concert of nations to which the Sublime Porte became a fully-integrated party during the Berlin Congress of 1875. According to this new modern international law, the legal

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[11] See in particular, CHARLES FORSTER, THE HISTORICAL GEOGRAPHY OF ARABIA, VOL. 1 at 113, VOL. II at 337 (1984) (first published in 1844); JOSEPH CHELHOD ET AL., L'ARABIE DU SUD - HISTOIRE ET CIVILISATION, VOL. I, at 63, 67-69, 252-255 (1984); ROGER JOINT DAGUENET, HISTOIRE DE LA MER ROUGE: DE MOÏSE A BONAPARTE 20-24, 86-87 (1995); and YVES THORAVAL ET AL., LE YEMEN ET LA MER ROUGE 14-16, 17-20, 35-37, 43-47, 51-54 (1995).

[12] See in particular, A. SANHOURY, LE CALIFAT, 22, 37, 119, 163, 273, 320-321 (1926); MAJID KADOURI, *Islamic Law*, 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 227 *et seq.*; and AHMED S. EL KOSHERI, *History of Islamic Law*, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 222 *et seq.*

concept of "territorial sovereignty" became a cornerstone for most of the state powers, and the situation in the Red Sea could no longer escape the juridical consequences of that new reality.

132. Hence, it is understandable that both Parties are in agreement that the islands in dispute initially all fell under the territorial sovereignty of the Ottoman Empire. Within the exercise of the Ottoman's sovereignty over these islands, it has to be noted that the Sublime Porte granted to the Khedive of Egypt the right to administer the Ottoman possessions (*vilayet*) on the African Coast which at present form "the State of Eritrea", and this delegation of power included jurisdiction over islands off the African Coast, including the Dahlaks and eventually the Mohabbakahs.

133. The sovereignty of the Ottoman Empire over both coasts of the Red Sea is undisputed up to 1880 and this remained the case with regard to the eastern, or Arabian, coast until the First World War. Among the various documents introduced in support of this historical fact, Eritrea has submitted the French-language version of a memorandum dated 6 December 1881, issued by the Egyptian Khedival Ministry of Foreign Affairs, which indicates that in May 1871, Italy recognised that the Ottoman flag had been flying since 1862 over the African Coast at a point going beyond the south of Assab. The Egyptian memorandum added that until 1880 the Egyptian Government believed the affirmation of the Italian Government that the Italian presence had been essentially of private and commercial character. Consequently, the entire African coast and the islands off that coast remained until then under the Khedive's jurisdiction. At the same time, all other islands were, and continued to be, under the jurisdiction of the Ottoman *wali* stationed in Hodeidah and appointed by the Sublime Porte.

134. Hence, a clear distinction has to be made between the Red Sea islands which were under jurisdiction of the Khedive of Egypt acting on behalf of the Ottoman Empire until 1882 and the other Red Sea islands which remained under the Ottoman *vilayet* of Yemen until the dissolution of the Empire after the First World War.

135. A British Foreign Office Memorandum dated 10 June 1930, relying expressly on the Hertslet memorandum of 1880, indicates that the Khedive of Egypt exercised jurisdiction off the African coast over the "Mohabakah Islands, Harbi and Sayal". With regard to the other category, the British Memorandum describes "the Great Hanish group as being off the Arabic Coast and consequently under the sovereignty and within the exclusive jurisdiction of the Sultan".

Paragraph 16 of the same Memorandum emphasised that:

> Great Hanish, Suyal Hanish, Little Hanish, Jebal Zukur, Abu Ail, being nearer to the Arabian Coast, appear before the war to have been considered as under both the jurisdiction and sovereignty of Turkey.

136. Furthermore, Eritrea has submitted Italian Colonial Ministry documents, including a note dated October 11, 1916, entitled "The Red Sea Islands", reflecting the findings of an inquiry conducted on the islands themselves. After devoting Part I to "Farsan" and Part II to "Kameran", Part III of the note deals with "the other islands", which included what is referred to as "Gebel Zucur". This heading included not only the "group of 12 sizeable rocks", but also "the two great and small Hanish islands". With regard to these islands, it was noted that "[t]he Ottoman authorities kept a small garrison of 40 there under the command of a Mulazim to monitor the movement of importation vessels to the Yemen Coast from Gibut.", and further that, "faced with the difficulties of supplying water and victuals on account of a shortage of resources, the Ottoman authorities withdrew the garrison." After the bombardment of Midi by Italian warships, the Ottoman authorities are said to have "restored the garrison in 1909 and increased the number of askaris to 100."

137. These Italian colonial documents, which confirm Ottoman sovereignty over the Hanish-Zuqar islands and assert that they continued in 1916 to be administered by the *vilayet* of Yemen, are consistent with the views expressed in a telegram addressed by the Governor of the Eritrean Colony to the Italian Minister of the Colonies and transmitted on October 18, 1916 to the Italian Minister of Foreign Affairs. A Foreign Ministry note entitled: "The Red Sea Islands", dating back to July 31, 1901, is attached thereto as "Appendix II". The 1901 Note bases the division of the islands into three groups:

> The most northerly islands, which are of little or almost no relation to the Colony of Eritrea on account of the distance, those facing Massaua and the most southerly islands which are opposite the Eritrean Coasts of Beilul and Assab. Almost all are found on the eastern coast of the Red Sea, except the Dahalac islands, which are under our rule, and a few others of much less importance.

With regard to the second group, the Italian note indicates:

> Leaving aside the archipelago of the Dahalac islands – which is under the sovereignty of Italy and which include the biggest islands in the Red Sea – Cotuma, Diebel Tair and Camaran are notable in this second group of the archipelago; all of which under Turkish rule.

The note explicitly characterizes as "Turkish": "Cotuma", "Djebel. . . called Gebel Sebair" and "Camaran".

Turning to the third group, the 1901 Italian note refers to a:

> . . . group of islands known as Hanish or Harnish (Turkish). It comprises the island of Gebel Zucar, large and small Hanish islands and the other minor islands of Abu-ail, Syul-Hanish, Haycoc and Mohabbach, and a few islets amounting to large rocks.

138. Contemporary British documents also reflect the view that the islands in question, with the exception of Mohabbakahs, formed part of the *vilayet* of Yemen, and appear to link their future disposition to this historical attachment to the Arabian Coast.

139. A Foreign Office Memorandum dated 15 January 1917 and entitled "Italy and the Partition of the Turkish Empire" provides in paragraph 38:

> Lastly, everyone seems to be agreed that the islands in the Red Sea which were previously under Turkish sovereignty pass naturally to the Arab State, though some special regime will be necessary in Kamaran Island in view of the pilgrim traffic.

140. Lord Balfour, in a 13 March 1919 letter to Lord Curzon, indicated that the solution envisaged for "Abu Ail, Zabayir and Jebel Teir" as well as "Kamaran, Zukur and the Hanish Islands (Great Hanish, Little Hanish and Suyul Hanish group)" was either "to annex them" to the British Empire or "to claim that they should be handed over to some independent Arab rulers on the mainland other than the Imam of Sanaa or the Idrisi".

141. Lord Curzon's letter addressed to Lord Balfour on 27 May 1919 linked the subject of any handover to Arab rulers with the essentially political question of the area's future, "the whole question of the future of the Red Sea Islands" was to be considered "ultimately bound with that of the future status of Arabia". Therefore, Lord Curzon indicated that:

> [t]he policy of his Majesty's Government should in the first place be directed towards the recognition by the High Contracting Parties of the fact that the islands form a part of the mainland and will accordingly become the property of the Arabian rulers concerned; and that these rulers are to be in special relation with His Majesty's Government.

142. As will be expanded upon later, the allocation of administrative powers over the Red Sea islands, whether by the Ottoman Empire acting as sovereign power on both coasts or only as exercising jurisdiction from the Arabian Coast alone, represents an historic fact that should be taken into consideration and given a certain legal weight.

143. Before leaving this study of the historical considerations, it is necessary to recall the question of ancient or historic Yemeni title, to which Yemen gave such crucial importance in the presentation of its case. It has been explained in this chapter that there are certain historical problems about this argument. First, there is the historical fact that medieval Yemen was mainly a mountain entity with little sway over the coastal areas, which were essentially dedicated to serving the flow of maritime trade between, on the one hand, India and the East Indies, and on the other, Egypt and the other Mediterranean ports. Second, the concept of territorial sovereignty was entirely strange to an entity such as medieval Yemen. Indeed, the concept of territorial sovereignty in the terms of modern international law came late (not until the 19th Century) to the Ottoman Empire, which claimed, and was recognized as having, territorial sovereignty over the entire region.

144. But there are other problems with the Yemeni claim to an ancient title, in particular the effect of Article 16 of the Treaty of Lausanne and the necessity of establishing some doctrine of continuity of ancient title and of reversion at the end of the Ottoman Empire. This subject is explored in detail in the following chapter, and the final view of the Tribunal on this question of ancient title is expressed in Chapter X.

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CHAPTER V – The Legal History and Principal Treaties and Other Legal Instruments Involved; Questions of State Succession

145. The series of major instruments engaging, in various combinations, the maritime users of the Red Sea form an important backdrop to the legal claims of the parties in this arbitration. Their binding nature or otherwise, their status as directly legally significant or as *res inter alios acta*, and the meaning of their terms, have all engaged the attention of the Parties.

146. The so-called Treaty of Da'an of 1911 was in fact an internal instrument by which the Imam of Yemen obtained for himself greater internal powers of autonomy within the Ottoman Empire. However, sovereignty over all the Ottoman possessions, including the islands in dispute, remained vested in the Empire itself until it was legally divested of its Arabian possessions after the First World War.

147. The Principal Allied Powers (the British Empire, France, Italy and Japan) agreed at Mudros an armistice with Turkey on 30 October 1918. The 1918 Armistice of Mudros was a vehicle for ending hostilities and indeed for permitting belligerent occupation. It was not an instrument for the transfer of territory. It is not disputed that immediately before the signing of the Armistice of Mudros title to all the islands was Ottoman. It was further agreed in these proceedings that Ottoman title had been secured by military occupation, which was lawful by reference to the international law of the day. An essential component of sovereign title is the right to alienate. Just as the Ottoman Empire would have been free to cede title to the islands to a third state at any time during the period 1872 to 1918, so it still had the legal right itself to determine where title should go after 1918. Its freedom in this regard was curtailed not by the operation of a doctrine of reversion which would spring into operation upon any divesting of title by Turkey, but by the realities of power at the end of the War.

148. It cannot be the case therefore that title passed in 1918 to the Imam. Accordingly the Tribunal is not able to accept that sovereignty over the islands in dispute reverted to Yemen.

149. It was intended that a treaty of peace, containing the future settlement of Turkish territory in Europe and elsewhere, should follow the 1918 Armistice of Mudros. To that end, the Principal Allied Powers (forming together with Armenia, Belgium, Greece, the Hedjaz, Poland, Portugal, Roumania, the Serb-Croat-Slovene State and Czechoslovakia the "Allied Powers") on the one hand, and Turkey on the other, signed a Treaty of Peace at Sèvres on August 10, 1920. The long and detailed

provisions contained but a single clause that might have had application to the islands in the Red Sea in dispute in the present case. Article 132 provided:

> Outside her frontiers as fixed by the present Treaty Turkey hereby renounces in favour of the Principal Allied Powers all rights and title which she could claim on any ground over or concerning any territories outside Europe which are not otherwise disposed of by the present Treaty.
> Turkey undertakes to recognize and conform to the measures which may be taken now or in the future by the Principal Allied Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect.

150. In the event, the Treaty of Sèvres was not ratified by Turkey and did not enter into effect. Accordingly, title to the Red Sea islands in dispute must thus have remained with Turkey – even though it knew that it would in due course be required to divest itself of such title. Indeed, Great Britain had been occupying certain islands since 1915 to forestall Italian activity, and had been displaying the flag but without claiming title.

151. The initial position of Great Britain at the peace talks at Sèvres was that the islands lying east of the South West Rocks off Greater Hanish island should be placed under the sovereignty of the independent chiefs of the Arabian mainland. The British appreciated that reasons of history and geography would make the Arab mainland rulers strong claimants when Turkey finally relinquished title and future sovereignty had to be determined, and indeed that their desire to exclude any European Power from establishing themselves on the east coast would make the passing of title to a "friendly Arab ruler" a desirable outcome.[13] But that is a different matter from title passing automatically by reversion from Turkey to Yemen. In the event, a different proposal was agreed in Article 132 of the Treaty of Sèvres.

152. Much has been made by Yemen of the fact that throughout the years that ensued, the Imam protested to Great Britain that "the islands" had not been returned. These "islands" were not specified. While this may indeed support

[13] Compare the policy objective that was explored by the Foreign Office for the islands of Sheikh Saal, Kamaran, and Farsan, and for Hodeidah, namely occupation. In the event, a 1915 telegram from the Viceroy of India indicates that the British flag had been hoisted on Jabal Zuqar and the Hanish Islands. These events were characterized, in a message to the Foreign Office from the British Resident in Aden as a "temporary annexation". By 1926 Britain did not regard itself as holding sovereign title.

allegations of the existence of a Yemeni claim, there is no evidence that it was either intended, or interpreted, to include the islands in dispute in the present case. Furthermore, a state's protests about the refusal of others to allow it to exercise effective control over what it maintains in its own territory have little legal significance if the protesting state does not, in fact, have title. More relevant is the fact that Turkey undoubtedly had title in 1918 and failed to divest itself in 1920. The instrument by which it did finally divest itself was the Treaty of Lausanne in 1923.

153. The Imam was not a party to the Treaty of Lausanne and in that technical sense the Treaty was *res inter alios acta* as to Yemen. If title had lain with Yemen at that time, the parties to the Treaty of Lausanne could not have transferred title elsewhere without the consent of Yemen. But, as indicated above, title still remained with Turkey. Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.

154. These are the legal realities with which an analysis of the Treaty of Lausanne must be approached. Two further realities are, as stated just above, that the Imam had asserted claims during this period though without specificity as to which particular islands his claims attached, and that Italy, by its conduct, had also revealed its aspirations for the islands. The formulation of the Treaty of Lausanne was undoubtedly agreed upon in full knowledge both of the position of the Imam and the ambitions of Italy.

155. Great Britain (which had briefly in 1915 sent troops to Jabal Zuqar and the Hanish islands) had been interested at one stage in an amendment to Article 132 of the Treaty of Sèvres which would have added to the rather general Turkish renunciation of all "rights and title" a specific clause which referred to "any islands in the Red Sea". As the first paragraph of this proposal referred to rights and title in the Arabian peninsula, it may be assumed that Great Britain thought the islands were not encompassed in that reference, but that some particular provision was needed if they too were to pass out of Turkish title. The Treaty of Lausanne, signed in 1923, did make reference to islands as well as to territories though by now the earlier proposal that underlay the abortive Treaty of Sèvres

(that Turkish title should pass to the Allied Powers,[14] whether as a condominium or otherwise) was dropped.

156. Article 6 provided that, in the absence of provisions to the contrary, islands and islets lying within three miles of the coast are included within the frontier of the coastal state. While some of the Dahlaks and some of the Assab islands would have fallen outside the three-mile limit, they were generally regarded as appurtenant to the African littoral and thus belonging to Italy. The Mohabbakahs (the nearest being almost six miles away) and the Haycocks did not fall within the provisions, though, as will be shown below, Italian *jurisdiction* over them had been acknowledged. Whether or not the Mohabbakahs are islets rather than islands, and notwithstanding that Article 6 refers to islets, whereas Article 16 did not, the Mohabbakahs were not islets transferred to Italian title by virtue of Article 6.

157. Article 15 provided for the renunciation, in favour of Italy, of certain specified and named islands in the Aegean. Article 16 provided as follows:

> Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognized by the said Treaty, the future of those territories and islands being settled or to be settled by the parties concerned . . .

158. Although "territories" and "islands" are separately mentioned, their treatment under Article 16 is identical. These phrases presumably covered also those islets not transferred by operation of Article 6. What was intended by "the parties concerned" is not wholly clear, but, given the knowledge of the claims of the Imam, as well as the hopes of Italy, and given further that the phrase used elsewhere in the Treaty is "The High Contracting Parties", it is not unreasonable to conclude that what was envisaged was a settlement of the matter in the future by all those having legal claims or high political interest in the islands, whether Treaty of Lausanne High Contracting Parties or not. A 1923 British Foreign Office document acknowledges, for example, the likelihood of France, Italy and Yemen being "interested parties". This interpretation accords with the assurances that Italy gave the Imam, at the time of the signature of the 1938 Anglo-Italian

[14] The Treaty of Lausanne, entered into five years after the end of hostilities, in fact uses the term "High Contracting Parties" rather than Allied Powers. Those High Contracting Parties were the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State on the one hand, and Turkey on the other.

Agreement, that Yemen's "interests" had been "kept in mind", and with the working assumptions of the British Board of Trade with respect to the 1923 Treaty of Lausanne, that the "local Arab rulers on the mainland might put in their claim to be 'interested' parties".

159. It is not certain whether in 1923 either Great Britain or Italy would have regarded the reference to islands in the Red Sea over which Turkey had title as including the Haycocks. This was because Italian jurisdiction in those islands had already been acknowledged. Until the very end of the 19th century the Ottomans treated those living in Eritrea as being of Turkish nationality and subject to Ottoman jurisdiction. But certain accommodations were being reached. Italy had in 1883, 1887 and 1888 entered into a series of agreements with local Eritrean leaders. The Treaty of 1888 with the King of Shoa provided that "Italy will protect on the sea coast the safety of the Danakil littoral" (Art. VIII) and that "Italy will watch over the security of the sea and the Colony" (Art. IX). By Article V, the Sultan Mohamed Hanfari ceded to Italy "the use of the territory of Ablis". In 1887 a further treaty, which seems to have no special relevance for the matters at issue, was signed. In 1888 a Treaty of Friendship and Commerce between Italy and the Head of the Danakils provided that Italy would guarantee the security of the Danakil coast. Further "The Sultan Mohamed Anfari recognises the whole of the Danakil coast from Afila to Ras Dumeira as an Italian possession" (Article 111). As a British Foreign Office Memorandum in 1930 was later to put it "… the Italian rights of surveillance drifted into what was tantamount to territorial rights to the littoral" and Great Britain, having made no protest, "could not now fall back upon the terms of the Agreement of May, 1887."

160. Exploring the possibility of a new shipping route on the African side of the Red Sea, and the need to light it, the British government wrote to the Italian government in 1892 referring to the proposed sites: North East Quoin (or alternatively Rahamet, on the coast), South West Rocks, "one of the Haycocks" and Harbi – and suggested that under Article 111 of the 1888 Treaty they appeared to be within the jurisdiction of Italy (though doubt was expressed internally about South West Rocks). It seems likely that this reading of Article 111 of the 1888 Treaty – which is not on its face self-evident – was influenced by the Hertslet memorandum of 1880 and its attached list. That Memorandum spoke of the western coast of the Red Sea as being under the jurisdiction of the Khedive of Egypt and the east coast as under the jurisdiction of the Sultan. Hertslet suggested that "the various islands and reefs in close proximity to the coast, and which are enumerated in List 1, would appear to be under" the Khedive's jurisdiction. List 1 includes "Harbi", White Quoin Hill, and "Mah-hab-bakah". The "Jibbel Zukur", "Little Harnish" and "Great Harnish" groups are attributed to the Eastern coast. "Haycock" appears twice within the list of islands appurtenant and in proximity to the east coast. As to the islands "near the

centre" (listed by Hertslet as "Jibbel Teer" and the "Zebayar Group"), including a further Haycock, Hertslet in 1880 thought that "jurisdiction over the islands … would appear to be doubtful; but the sovereignty over them no doubt belongs to the Sultan."

161. It must also be noted that others within the British diplomatic service placed less weight on proximity.[15] Italy was asked whether it did indeed claim jurisdiction. Italy confirmed that "the places mentioned" were subject to its own jurisdiction. British recognition of Italian jurisdiction over the Haycocks (and presumably *a fortiori* of the Mohabbakahs) occurred in 1892. In 1930, internal British memoranda speak of Italian sovereignty over South West Haycock (or sometimes, simply "the Haycocks") as having occurred in June 1892. But it was added "[e]xcept *as against ourselves*, the Italian claim to sovereignty over these islands does not appear to be very strong" (emphasis added).

162. Later evidence indicates that Great Britain regarded the issue of sovereignty as unsettled, even if Italian jurisdiction was acknowledged. Both the Mohabbakahs and the Haycocks would thus in 1923 be regarded by the Lausanne Treaty parties as Turkish territory falling, as to sovereignty, within the reach of Article 16, notwithstanding intermittent acceptance that they were under the jurisdiction of Italy.

163. The situation is clearer as regards Abu Ali, Jabal al-Tayr and the Zubayr group. They were envisaged at the time as having belonged to the Ottomans (but as never having previously been claimed by the Imam). These three islands fell under the terms of Article 16 of the Treaty of Lausanne.

164. There are three key points at issue in respect of Article 16. The first is the legal implications of it being *res inter alios acta* in respect of Yemen. The second is what islands in fact fell under this provision, i.e., were still under Ottoman sovereignty up to the date of the Treaty. The Tribunal has addressed these points above (see paras. 153-159). And the third is whether Article 16 either permitted acquisitive prescription by a single state of some or all of these islands and, if not, whether such acquisitive prescription could and did nonetheless occur (even if in violation of a treaty obligation).

165. The correct analysis of Article 16 is, in the Tribunal's view, the following: in 1923 Turkey renounced title to those islands over which it had sovereignty until then. They did not become *res nullius* – that is to say, open to acquisitive prescription – by any state, including any of the High Contracting Parties (including Italy).

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[15] See Reilly, ADEN AND YEMEN, Colonial Office 1960, 69-70.

Nor did they automatically revert (insofar as they had ever belonged) to the Imam. Sovereign title over them remained indeterminate *pro tempore*. Great Britain certainly regarded it as likely that some undefined islands which "pertained to the Yemen" were covered by Article 16. Indeterminacy could be resolved by "the parties concerned" at some stage in the future – which must mean by present (or future) claimants *inter se*. That phrase is incompatible with the possibility that a single party could unilaterally resolve the matter by means of acquisitive prescription.

166. Given the Great Power politics in the region, the application of these legal principles was inevitably sometimes less than clear. Great Britain in fact secured jurisdiction over Kamaran island in this fashion; the records show that British civil servants and ministers over the years continued to entertain notions of appropriation of particular islands; but Great Britain was at pains to ensure the continued efficacy of Article 16 so far as Italian acts were concerned, through frequent enquiries to the Italian Government.

167. The islands to which the Article 16 proviso applied at the outset were therefore the Mohabbakahs, the Haycocks, South West Rocks, and certainly the Zuqar-Hanish group, Abu Ali, Jabal al-Tayr and the Zubayr group.

168. Far from the Treaty of Lausanne "paving the way" for Italian sovereignty, as has been suggested by Eritrea, it presented a formidable obstacle. It is arguable that acquisitive prescription might nonetheless have been effected by Italy in the face of its obligations should the other parties to the Treaty of Lausanne have so allowed. Italy would have tried to secure the most favourable position, both on the ground and in diplomacy, for that day in the future when title would be determined. In terms of political aspiration, *animus occupandi* undoubtedly existed. But whether claims to sovereignty were made and acknowledged, so that certain islands would be effectively *au dehors* the reach of Article 16 of the Treaty of Lausanne, must be doubtful. Still less plausible is the contention that the High Contracting Parties (and Great Britain in particular) would have allowed, or acquiesced in, an incremental assumption of sovereignty by Italy.

The 1927 Rome Conversations

169. This conclusion is confirmed by the history following the Treaty of Lausanne. In 1927, conversations took place in Rome between the Italian Government and the British Government relating to British and Italian interests in Southern Arabia and the Red Sea ("the Rome Conversations"). In the signed record they agreed to cooperate in seeking to secure the pacification of Ibn Saud, the Imam Yahya and the Idrisi of Asir; and noted that Great Britain regarded it as "a vital imperial interest that no European Power should establish itself on the Arabian shore of

the Red Sea, and more particularly on Kamaran or the Farsan islands, and that neither … shall fall into the hands of an unfriendly Arab Ruler." This proviso was repeated, *pari passu*, in respect of the west coast and Kamaran and the Farsan islands.

170. No such specific reference was made to the other islands now in dispute. Whereas Articles 4 and 6 apply to Kamaran and Farsan, Article 5 must, in the view of the Tribunal, be taken to apply to the other islands in dispute. Article 5 provided:

> That there should be economic and commercial freedom on the Arabian coast and the islands of the Red Sea for citizens and subjects of the two countries and that the protection which such citizens and subjects may legitimately expect from their respective governments should not assume a political character or complexion.

171. This article can only be understood to mean that acts which might otherwise be construed as providing an incremental acquisition of sovereignty were by the agreement of the parties not to be so construed. To seek to identify acts "having a sovereign character" thus became without legal purpose.

172. Eritrea has argued that no legal weight is to be given to these provisions, in the first place because this record was not registered under Article 18 of the Covenant of the League of Nations and in the second place because it cannot be invoked by Yemen, either for that reason or because it was *res inter alios acta*. That this was not registered was undoubtedly because it was not regarded as a treaty between states. But it was nonetheless an accurate account of what both parties had agreed and was signed by them as such. It is simply evidence of the thinking of the time – this time by both parties – in much the same way as the Tribunal has been presented with a myriad of other evidence in non-treaty form. Insofar as Yemen wishes to draw it to the attention of the Tribunal, it is not relying on a treaty that is *res inter alios acta*, nor indeed resting its own claim on it. It is diplomatic evidence, like any other, but of an undoubted interest because it reflects what was recorded by both parties as that which they had agreed to.

173. The provisions of Article 5 of the Rome Conversations were, of course, fully consistent with Article 16 of the Treaty of Lausanne, and indeed reinforced it. The former did not replace the latter but rather provided a further mechanism for assuring that fishing, commercial and navigation-related activities could continue without the indeterminate status of the islands being jeopardised.

174. Italy and Great Britain each now sought to ensure that sovereignty was indeed reserved. When Great Britain proposed to France certain arrangements

concerning the management of the old Ottoman lighthouses at Abu Ail, Jabal al-Tayr, Centre Peak and Mocha, Italy asked for acknowledgment that the last belonged to Yemen and that sovereignty was reserved as to the first three islands. Great Britain was able to provide this. And when it was learned in London that Italy was preparing to build a lighthouse on South West Haycock (which it thought of as part of the Mohabbakahs) Great Britain sought assurance that the Haycocks as well as the Hanish islands were indeed viewed by Italy as falling under Article 5 of the Rome Conversations. Italy in 1930 informed Great Britain that it had sovereignty over South West Haycock, regarding which it made a specific reservation, that it lay in the Mohabbakahs, that it was prepared for South-West Haycocks and the rest of the Hanish islands to be treated in accordance with Article 5 of the Rome Conversations. The British reaction was not to take up the offer of talks from Italy, lest Italy should seek to have its sovereignty over South West Haycock "settled" within Article 16 of the Treaty of Lausanne, but rather tacit acceptance that everything should be treated under the framework of Article 5 of the Rome Conversations.

175. In 1931, further assurances were received from Italy over its establishment of armed posts on Greater Hanish and Jabal Zuqar. Italy assured Great Britain that these posts were for the protection of concessionaires and that sovereignty over the Hanish islands remained in abeyance. The juridical status of these islands was said to be the same as that of Farsan and Kamaran in the Rome Conversations of 1927. Further, Italy recalled that it had in 1926, during the negotiation of the abortive Lighthouse Convention of 1930, confirmed that sovereignty over Abu Ali, Zubayr and Jabal al-Tayr was equally to remain in abeyance, falling also under Article 5 of the Rome Conversations.

176. These assurances were also to be sufficient for the British authorities in the face of a 1933 incident in which HMS Penzance visited Jabal Zuqar and Hanish, noting, inter alia, the presence of Italian soldiers and the flying of the Italian flag. Great Britain, in the meantime, was providing comparable assurances regarding Kamaran.

177. The Italian Royal Legislative Decree No.1019 of 1 June 1936 made arrangements for the administration of Italian East Africa. It provided, inter alia, in its Article 4, that the territory of Dankalia was constituted by reference to a line from the lowlands to the east of Lake Ascianghi at the southern limit of Aussa and was part of Eritrea. Although no islands were named in terms, the specifying of the lines which constituted these administrative boundaries brought the Hanish-Zuqar group within the commissaryship of Dankalia. None of the line-drawing provided for by Decree 1019 covered Abu Ali, Zubayr or Jabal al-Tayr.

178. This was affirmed in terms by General Government Decree No.446 of 20 December 1938: "the Hanisc-Sucur Islands are deemed to be included within the bounds of the Commissaryship of the Government of Dancalia and Aussa (Assab)." In the view of the Tribunal these administrative arrangements cannot, in the light of the Rome Conversations and subsequent assurances, be regarded as international claims to sovereignty, rather than as to jurisdiction. Nor would they have been regarded as such by Great Britain. And only eight months beforehand Italy had assured the Imam that it had undertaken with Great Britain not to extend its sovereignty to the Hanish islands (and that it had been able to secure the dispatch of an Italian doctor to Kamaran on that basis).

179. At the same time, Italy unsuccessfully asked Great Britain to revoke its own Decree regarding Kamaran, which Italy regarded as upsetting the status quo agreement reached in 1927. At the same time, Great Britain did continue to regard the sovereignty over Kamaran as reserved.

180. Italy, which had recognised independent Yemen in 1926, entered into a treaty of Amity and Economic Relations with that country in September 1937. While Italy confirmed unconditionally its "recognition of the full and absolute independence, without restrictions" of the King of Yemen and his Kingdom, the Tribunal cannot view this as illuminating the current problems.

181. Developments in Yemen and Saudi Arabia, including their relations with each other, made Italy and the United Kingdom believe that matters should be clarified further. After several months of negotiation there was signed on 16 April 1938 an Agreement and Protocols which entered into effect on 16 November 1938. Annex 3 of the agreement included detailed dispositions of relevance to the Red Sea islands:

> *Article 1*
> Neither Party will conclude any agreement or take any action which might in any way impair the independence or integrity of Saudi Arabia or of the Yemen.
>
> *Article 2*
> Neither Party will obtain or seek to obtain a privileged position of a political character in any territory which at present belongs to Saudi Arabia or to the Yemen or in any territory which either of those States may hereafter acquire.

Article 3

The two Parties recognise that, in addition to the obligations incumbent on each of them in virtue of Articles 1 and 2 hereof, it is in the common interest of both of them that no other Power should acquire or seek to acquire sovereignty or any privileged position of a political character in any territory which at present belongs to Saudi Arabia or to the Yemen or which either of those States may hereafter acquire, including any islands in the Red Sea belonging to either of those States, or in any other islands in the Red Sea to which Turkey renounced her rights by Article 16 of the Treaty of Peace signed at Lausanne on the 24th July 1923. In particular they regard it as an essential interest of each of them that no other Power should acquire sovereignty or any privileged position on any part of the coast of the Red Sea which at present belongs to Saudi Arabia or to the Yemen or in any of the aforesaid islands.

Article 4

(1) As regards those islands in the Red Sea to which Turkey renounced her rights by Article 16 of the Treaty of Peace signed at Lausanne on the 24th July, 1923, and which are not comprised in the territory of Saudi Arabia or of the Yemen, neither Party will, in or in regard to any such island:

(a) Establish its sovereignty, or

(b) Erect fortifications or defences.

(2) It is agreed that neither Party will object to:

(a) The presence of British officials at Kamaran for the purpose of securing the sanitary service of the pilgrimage to Mecca in accordance with the provisions of the Agreement concluded at Paris on the 19th June, 1926, between the Governments of Great Britain and Northern Ireland and of India, on the one part, and the Government of the Netherlands, on the other part; it is also understood that the Italian Government may appoint an Italian Medical Officer to be stationed there on the same conditions as the Netherlands Medical Officer under the said Agreement;

(b) The presence of Italian officials at Great Hanish, Little Hanish and Jebel Zukur for the purpose of protecting the fishermen who resort to those islands;

(c) The presence at Abu Ail, Centre Peak and Jebel Teir of such persons as are required for the maintenance of the lights on those islands.

182. The Ministry of Foreign Affairs of Italy had, in an internal Note of 31 March, made clear that the formula being negotiated would confirm that the Red Sea islands formerly under Turkish sovereignty "belong neither to Great Britain, Italy or the two Arab States, but remain of reserved sovereignty." An accompanying list of islands "of reserved sovereignty" indicated that Kamaran, Abu Ali and Jabal al-Tayr were at the time under British occupation, and described as occupied by Italy: Greater Hanish, Jabal Zuqar, Centre Peak, and Lesser Hanish. South-West Haycock is not listed in the Italian Foreign Ministry Note as coming within this arrangement, notwithstanding the assurances on this point given to Great Britain in 1930 regarding understandings reached during the 1927 Rome Conversations. In the Treaty of 1938 itself, however, the islands agreed to fall within its provisions are not specified. Nor is there any reflection of an internal British proposal that the termination of the 1927 Rome Conversations be made clear.

183. It would seem that the 1938 Treaty is to be seen not as replacing but as supplementing and expanding the 1927 undertakings (always less than a formal treaty), the "political character and complex formula of the latter having been found unsatisfactory." The Rome Treaty was never registered with the League of Nations and by virtue of Article 18 of the Covenant could not be invoked by either party against the other. More relevant to Yemen is the fact that it is a third party to the treaty. There is no evidence, however, that either Italy or the United Kingdom failed to proceed with registration for any reason other than the approaching war clouds. The text of the treaty still has significance, which the Tribunal may properly take account of, as to the understanding of the parties in the autumn of 1938 regarding the current position of the islands and their intention at that moment as to how they should continue to be treated. No change is to be discerned from the essential thrust of what had gone before: claims were to remain inactive. The islands were not *res nullius* to be acquired by Italy or Great Britain.

184. The wording of Article 3 is not without its ambiguities. What it does show is that, on the one hand, there *were* some islands in the Red Sea regarded in 1938 as belonging to Saudi Arabia and to Yemen. It also shows, on the other hand, that there were other Red Sea islands regarded as belonging to neither, and whose title was still indeterminate.

185. As Article 4 clearly and specifically refers to Kamaran, Greater Hanish, Little Hanish, Jabal Zuqar, Abu Ali, Centre Peak and Jabal al-Tayr as not being under the sovereignty of Saudi Arabia or Yemen, it is uncertain what islands were regarded as "at present belong[ing] to Yemen". In any event, Italy and the United Kingdom did not in 1938 regard title to any of the named islands as belonging to Yemen or as having been settled within the terms of Article 16 of the Treaty of

Lausanne; and they each undertook not to establish sovereignty thereon. There is nothing in the record to show that the term "establish" in Article 4 was intended to mean other than "acquire" or "seek to acquire" sovereignty, as used in Article 3, through the various acts referred to in the Treaty, especially fortifications. It may be concluded that the 1938 Treaty evidences no recognition by Italy or Great Britain of any Yemeni title to the disputed islands. But at the same time the Treaty expressly excluded any Italian claims of sovereignty thereto.

186. The consequence of this series of international instruments and engagements was that from 1923 to 1938 Italy could make no claim that it already had a title that must be recognised. The only clear claim to sovereign title was to South West Haycock – but even that claim to an existing title was to be treated, at Italy's own suggestion, as "in abeyance" until title to the islands generally should later be settled by the parties concerned under Article 16 of the Treaty of Lausanne.

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187. As for Yemen, it in turn made sporadic claims to Red Sea islands during this period, in general and unspecified terms. While Great Britain had assured Yemen that Italy's lighthouse activities did not prejudice Yemen's position, neither it nor Italy regarded the islands as being within Yemen's ownership up to 1938. As the Treaty of Lausanne provisions had been the mechanism by which the Ottoman Empire divested itself of ownership of these islands, that fact is not wholly without significance for Yemen, which, even putting the argument in its own terms, has to show not only a right of reversion but also that such a right overrode the decision that the previous sovereign had been obliged to make as to the future of the islands.

188. In 1933 Great Britain was in fact negotiating a Treaty with the Imam. The view was expressed within the Foreign Office that Yemen had legally been part of the Ottoman Empire and "any islands pertaining to it" were "fully covered by Article 16 of the Treaty of Lausanne and the disposal was therefore a matter for international agreement." Contrary to the submissions of Yemen, this does not clearly assume Yemeni title – it assumes that what had been sovereign had now become indeterminate, until title was attributed by the "interested Parties".

189. The islands claimed by the Imam during the negotiation with the United Kingdom for the Treaty of Friendship and Mutual Cooperation of Sanaa of 1934 were without specific identification, but they were clearly later understood by the British to have meant Kamaran and the various unoccupied islands, the largest of which are Zuqar and Greater Hanish. The assertion of that claim was acknowledged although it was not reflected in the text of the Treaty and the refusal of the British Government to do more was made clear to the Imam.

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190. As neither Italy nor Yemen held sovereign title at the outbreak of the Second World War, all the islands (save perhaps South West Haycock and the Mohabbakahs) may be assumed to have fallen within the relinquishment provisions that Italy was obliged to accept. This conclusion is also supported by an examination of the documents relating to the years 1941-50.

191. The 1941 Proclamation of British Military Jurisdiction brought under the command of Lieutenant-General Platt "[a]ll territories in Eritrea and Ethiopia". This wording seems to the Tribunal neither "broad" nor indeed "narrow", but merely general and uninformative geographically and legally. The Armistice did speak of the "[i]mmediate surrender of Corsica and of all the Italian territory, both islands and mainland, to the Allies . . ." (para. 6). But what islands are there referred to is wholly uncertain; the explanation in Article 41 of the "Additional Conditions of Armistice" with Italy that "the term 'Italian Territory' includes all Italian colonies and dependencies . . . (but without prejudice to the question of sovereignty). . ." carries things no further. The phrase remains question-begging and in addition carries a specific caveat. Armistice agreements are instruments directed to stopping or containing hostilities and not to acknowledging or denying sovereign title.

192. In 1944 the British Colonial Office conducted an internal assessment on the status of Kamaran, the Great Hanish group, the Little Hanish group, the Jabal Zuqar group (including Abu Ali), the Zubayr group (including Centre Peak), and Jabal al-Tayr. In correspondence the history was briefly recounted, and it was recalled that under Article 16 of the Treaty of Lausanne "their future was to be settled by the 'parties concerned'. It never has been. They are in fact international waifs." The letter continued: "Once upon a time the Italians were interested in all these islands." It was thought that the Dutch now had some interest.[16] "Apart from the British, however, the most serious claimant seems to be the Yemen, off whose coast all the islands lie." The claims of the Imam in 1934 were recalled.

193. The author of the letter (a civil servant within the Colonial Office) suggested that matters could be left as they were; or tidied up "in the same way"; or the UK could annex the islands.

[16] The Dutch had not been signatories to the 1923 Treaty of Lausanne and had in fact remained neutral in the First World War.

194. Leaving aside the assessment of all the islands as "off Yemen's coast" or the assumption, without legal analysis, that they were free for annexation, the letter evidences what seemed to be a widely-held view within the British Government that sovereignty over these islands remained unsettled within the terms of Article 16 of the Treaty of Lausanne.

195. By 1947 the question of title had, of course, to be faced in the Treaty of Peace with Italy. Under Article 23 Italy renounced "all right and title to the Italian territorial possessions in Africa, i.e., Libya, Eritrea and Italian Somaliland." The third paragraph of that provision then provided:

> The final disposition of these possessions shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France within one year from the coming into force of the present Treaty . . . .

That this did not refer to the islands here in issue is made fully clear by Article 43, which provides:

> Italy hereby renounces any rights and interests she may possess by virtue of Article 16 of the Treaty of Lausanne signed on July 24, 1923.

Both the placement of this article (at a point distant from Article 2) and the very need for such a provision made it clear that the disputed Red Sea islands did not fall to be disposed of under Article 23(3). This provision was not meant to operate as a revision or renunciation, by parties other than Italy, of Article 16 of the Treaty of Lausanne.

196. Instead, Article 16 of the Treaty of Lausanne remained intact. Italy was now obliged to renounce "any rights and interests" under it. This refers not merely, as has been submitted by Yemen, to Italy's right to protest at a purported acquisition by another or to be party eventually to a settlement of title. It refers also to a renunciation of any claims Italy might have made and any legal interests she might have asserted regarding the islands.

197. A United Nations working paper drawn up in December 1949 in connection with the preparation of the draft Eritrean Constitution supports the view that the Hanish, Zuqar and more northerly islands were not among those to be settled (and eventually affirmed as passing to independent Eritrea). The section on the Geography and History of Eritrea says that the Italian colony "includes the Dahlak archipelago off Massawa, and the islands further south off the coast of the Danakil country." This would seem to refer to those Mohabbakahs in

proximity to Assab. The section that recalls the "attempts to colonize the highlands of Eritrea" makes no reference to any colonization of the islands.

198. The Ministry of Foreign Affairs of Ethiopia did protest when it commented on the draft constitution. It pointed out that the language used in Article 2 of the draft Constitution "would impliedly exclude all archipelagoes and islands off the coast. Surely, this exclusion was not intended." But that language – namely that "the territory of Eritrea, including the islands, is that of the former Italian colony of Eritrea" – remained intact in the final text of the Constitution.

199. The Italian Government had also been invited to express its opinions on the future of Eritrea to the UN Commission on Eritrea. Italy urged independence for Eritrea, emphasising that its renunciation of all title did not make Eritrea a *res nullius*. It spoke of the regions that had been occupied by Italy to establish Eritrea. In that context, reference was made to the Dahlak islands. In urging the continued unity of Eritrea no mention was made of any other islands. None of the rapidly ensuing instruments – the British Military Authority (BMA) Termination of Powers Proclamation of 1952, or the revised Constitution of Eritrea of 1955, changed matters.

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CHAPTER VI – Red Sea Lighthouses

200. The Red Sea lights bear on this arbitration in three main ways. First, each of the parties has at various moments suggested that its establishment or maintenance of lighthouses on the various islands constitute acts of sovereignty. Second, the diplomatic correspondence relating to the lighthouses might throw some light on the underlying claims to the islands where they are located, not least because the lighthouse islands were necessarily named. So much of the other material relates to islands without specification. Third, the relationship between the several lighthouse conventions and the provisions of Article 16 of the Treaty of Lausanne might have some legal significance.

201. From the late 19th century the Red Sea lights have had an historical importance in this region, although this is now somewhat reduced with the advent of radar. But radar may not be available to many of those fishing in the Zuqar-Hanish islands. The Ottoman authorities, and later the various coastal states, along with the major shipping users, have all played a role in the story of the Red Sea lights. In 1930, a proposed treaty regime for the lights was drawn up, but never came into force. From 1962 until 1989, a treaty regime did indeed govern the lights.

202. In 1881, the Ottoman Empire granted a forty-year concession to the S*ociété des Phares de l'Empire Ottoman*, owned by Messieurs Michel and Collas, to build a series of lighthouses in the Red Sea and the Persian Gulf. Almost endless disputes were to arise regarding the concession for the Red Sea lighthouses.

203. The British Government had proposed to the Sublime Porte that four lights should be erected at Jabal al-Tayr, Abu Ail, Jabal Zubayr and at Mocha, to assist navigation. Anxious at the difficulties encountered with the concessionaires, it began in 1891 to revive an earlier idea to explore the possibility of a western navigation route through the Red Sea. As the envisaged route was to be "abreast of the Italian possessions at Assab", Italy was asked to facilitate the technical mission and to allow supplies to be taken on at Assab – a request to which Italy readily agreed.

204. Once a western route was recommended by the Board of Trade, the British Government had to concern itself with questions of title. The so-called "Western Hanish" route would have entailed lights on North East Quoin (or at Rakmat), South West Rocks, one of the Haycock islets and Harbi islet. In 1891 the Board of Trade, relying on the Hertslet Memorandum of 1880, suggested that North East Quoin and Harbi were within Egyptian jurisdiction and South West Rocks and the Haycocks within Ottoman jurisdiction – with the Sublime Porte claiming sovereignty to all four islands. The Marquis of Salisbury, in writing to the British Ambassador to Rome in January 1892, stated "The islands and rocks

recommended by the Board of Trade . . ., with the exception of South-west Rocks, seems [sic] to be in effect within the jurisdiction of Italy. That over the South-west Rocks would appear to be doubtful." From 1881 to 1892 there was an extended international correspondence on this subject.

205. A Note of 3 February 1892 was addressed to the Italian government to seek clarification. The Note included the statement that "according to Article 3 of the Treaty between Italy and Sultan Ahfari of Aussa of the 9th December 1888", the jurisdiction over the new sites, "with the exception perhaps of South-West Rocks, appears to belong to Italy." Italy was asked whether it claimed jurisdiction over these sites, and if so whether it would itself be prepared to erect lights there, or alternatively if it would be willing for Great Britain to do so.

206. The Italian Government replied in June of that year that "the King's Government consider these points as a maritime appendage of the territory over which they exercise their sovereignty" but urged the British Government to erect and maintain the lighthouses and to fix the method of reimbursement.

207. In the event, the western route was not proceeded with and the Ottomans arranged for the building of four lighthouses at Mocha on the Arabian coast, and on Jabal al-Tayr, on Abu Ali and in the Zubayr group (on Centre Peak). This was maintained by the French concessionaires for the Ottomans until 1915. Great Britain occupied the three lighthouse islands in 1915.

208. When the Ottoman Empire was required to renounce its possessions, sovereignty over the lighthouse islands fell, under Article 16 of the Treaty of Lausanne, "to be settled by the parties concerned". The light at Mocha was recognised by Great Britain as being within the territory succeeded to by the Imam. Great Britain had on occasion contemplated trying to acquire sovereignty over the islands it occupied but on balance thought they did not have enough strategic value. It is significant that Great Britain did not regard itself as precluded from attempting to acquire sovereignty by the terms of Article 16 of the Treaty of Lausanne. It was not until 1927 that Great Britain formally stated (to France) that it had definitely renounced this idea. And in certain quarters the idea of annexing Hanish and Zuqar, as well as Jabal al-Tayr and Abu Ali, was not totally dead even in 1944.

209. It is also striking that, throughout the series of enquiries that Great Britain was to make after 1923 to Italy about the status of certain other islands, it never once put to Italy that a claim would be contrary to the terms of Article 16 of the Treaty of Lausanne. Rather, Great Britain was content to satisfy itself that Italy's position was consistent with the bilateral understandings of the Rome Conversations of 1927.

210. Notwithstanding this, the Tribunal has already indicated that in its view the history, text and purpose of Article 16 argues against the unilateral acquisition of title over the islands whose status was left undetermined in 1923. Nor is it necessary to consider whether Italy was seeking to establish title contrary to the agreement in hand and entered into in the Treaty of Lausanne, because Italy's posture was in fact much more cautious.

211. In 1927 Great Britain negotiated an agreement with France for the maintenance of all four lighthouses by the French company and approached the main users of the route – Germany, the Netherlands, Japan and Italy – to regulate the matter by a convention. Italy, expressing the wish that it had been consulted earlier, made two points. First, Mocha was claimed by the Imam and he should be a party. Second, Italy wished to know whether sovereignty of the islands was to be attributed to the neighbourhood coast or whether the point would be reserved. No Italian claim to any of the islands was presented. The British Government conceded that Mocha was under the rule of the Imam and affirmed that the status of the islands was to be reserved. These reassurances led to the conclusion of the Convention concerning the Maintenance of Certain Lights of 1930.

212. Although this Convention did not enter into force, and thus cannot be said to bind the parties as a treaty, it is useful evidence of their thinking at that date. The preamble and the annex refer to the renunciation by Turkey of both the islands and of Mocha, the occupation of the islands by Great Britain, and the provision in Article 16 of the Treaty of Lausanne that "the future of these islands, and of that territory [is] a matter for settlement by the Parties concerned." The annex continued: "(e) . . . no agreement on this subject has been come to among the parties concerned and it is desirable in the interests of shipping to ensure that the lighthouses on the said islands shall be maintained". It then proceeded to determine that a lighthouse company should take possession of and manage the lighthouses on Abu Ali, Zubayr and Jabal al-Tayr. Italy was prepared to put its signature to this and to Article 13, which clearly affirmed the continued operation of Article 16 of the Treaty of Lausanne:

> Art. 13. In the event of the arrangement contemplated in article 16 of the Treaty of Lausanne being concluded between the parties concerned, the High Contracting Parties will meet in conference in order to decide whether it is desirable to terminate the present Convention, or to modify its terms with a view to making it conform to the aforesaid arrangement.

213. Although the 1930 Convention was ratified by Italy and the Netherlands, it did not come into force, because the French Government was locked in disagreement

with the British Government as to whether the lighthouse company, Michel et Collas, should be paid on the basis of gold. France refused to ratify.

214. In the meantime, in the very same year, Italy was preparing to erect a lighthouse on South West Haycock. The Haycocks had not been specifically mentioned in the 1927 Rome Conversations and the British were anxious to establish that Article 5 thereof should nonetheless apply, the more so as "the erection of a lighthouse . . . may be regarded as implying some definite claim to sovereignty." Great Britain was concerned as to whether indeed South West Haycock did fall within the Rome Conversations – there were internal divisions on the question of title – and it noted that the islet was only 20 miles from the "Italian" coast. It was decided to seek assurances. These were sought in an aide-memoire of 18 February 1930, in which Italy was reminded of the earlier exchanges in 1927. In that document Great Britain referred to South West Haycock as being "in the Hanish group of Islands".

215. In its Pro-Memoria of 11 April 1930, Italy observed that the lighthouse was being built for navigational reasons. It asserted that South West Haycock was not part of the Hanish islands, but rather belonged to the Mohabbakah archipelago over which it alleged that the Ottomans had never claimed sovereignty.[17] Italy therefore made "a special reserve regarding Italian sovereignty over this island" and then consented to "the question being considered on the same lines as that of the sovereignty of all the islands of the Hanish group, in accordance with the spirit of the conversations of Rome of 1927."

216. The Pro-Memoria can only be read as a claim to sovereignty over South West Haycock by Italy (while at the same time agreeing that the erection of the lighthouse was to be treated as a commercial rather than a sovereign act) and a failure to advance a comparable claim to title over the Hanish group. The internal evidence shows that this was an assessment that Great Britain was at the time inclined to accept, and with which it was satisfied; although in other documents Great Britain treats South West Haycock as part of the Hanish group, and as having been Ottoman. In the event, all fell to be treated as provided by Article 16 of the Treaty of Lausanne, which was reinforced by the understandings reached in the Rome Conversations.

217. The South West Haycock lighthouse was extinguished in 1940. It was abandoned after 1945. When the 1930 Convention failed to come into effect the British

[17] The Tribunal notes, however, that prior to Italian occupation, the islands off the African coast were administered by the Khedive of Egypt on behalf of the Ottoman Empire.

authorities were left with the sole financial burden of the existing lights. It decided to abandon the Centre Peak light (in the Zubayr group) from September 1932 and Italy (which had been notified, along with France) reactivated the Centre Peak light in 1933. The decision was taken in Italy to inform the "interested powers" that this was being done for reasons of navigational necessity, and that the Imam "who lays claim to rights over the islands" should be "informed of the provisional nature of the occupation and the usefulness to himself in having the lighthouse reactivated." It was apparently originally intended to ask for contributions, but in the event this was not done.

218. The British authorities were notified by Note Verbale on October 4, 1933 of the anxieties of the Captain of the Port at Massawa as to safety on the Massawa-Hodeidah route, in the absence of the Centre Peak light, and of Italy's decision to take over the lighthouse. The Note Verbale expressly stated:

> . . . the Royal Ministry for Foreign Affairs need hardly add that the presence of an Italian staff on the Island of Zebair (Centre Peak), which will ensure the operation of the light, implies no modification of the international judicial status of the island itself, which, together with the islands of Abu Ail and Gebel Taiz [sic], was considered by the Italian and British governments in 1928 during the negotiations for the Red Sea Lights Convention, when the conclusion was reached that the question of sovereignty of those islands should remain in suspense.

219. Thus in the northern islands, too, Italy had established a navigational interest but affirmed that it had no implications for sovereignty. The British decided this was a sufficient comfort not to have to pursue this matter further with the Italians.

220. The situation remained essentially unchanged by the 1938 agreement. Article 4(2) of Annex 3 again affirmed that neither Great Britain nor Italy would establish sovereignty over the renounced islands, following Article 16 of the Treaty of Lausanne, and that no objections would be raised to lighthouse personnel.

221. By the outbreak of the Second World War it may be said that the maintenance of the lights is seen as a non-sovereign act and there is agreement that the underlying title to the islands concerned was left in abeyance – though Italy had asserted title (even if choosing not to press it) to South West Haycock. But this turned upon a perception of South West Haycock as being part of the Mohabbakahs, rather than upon any suggestion that the erection of a lighthouse thereon itself had a role in establishing sovereignty. In the course of the Second World War, the South West Haycock and the Centre Peak lights were extinguished.

222. In June 1948 the British Military Authority (BMA) in Eritrea sought legal advice as to whether it was liable under any international conventions for the re-establishment of various lights previously operated by the Government of Italy. These included those at South West Haycock and at Centre Peak. The advice (which eventually came from the Ministry of Transport) was that there was no obligation under any convention.

223. The decision by the BMA that it had no responsibility for the lights at South West Haycock and Centre Peak was not because it thought those islands were not Italian. No particular attention seems to have been given to that aspect. Rather, it was decided that as long as the Abu Ali light was maintained there was no real danger to shipping. Further, the Admiralty advised that a state was under no obligation to light its coasts. Thus even if South West Haycock and Centre Peak had been Italian (and neither was addressed in the 1948 correspondence nor is there any evidence that Zubayr was ever regarded by the British as Italian), no obligation was passed to the BMA as the occupying power.

224. After the Second World War, the British did continue to take responsibility for the lighthouses at Abu Ali and Jabal al-Tayr, and from 1945 received financial contribution from the Netherlands. These arrangements were in 1962 brought within an agreement made between Denmark, Federal Republic of Germany, Italy, the Netherlands, Norway, Sweden, the United Kingdom and the United States, and formally accepted also by Pakistan, the Soviet Union and the United Arab Republic. Yemen was not a party. Nor was Ethiopia. The criterion for invitation was clearly that of navigational importance and not of title to the coast or islands. The opening recitals to the 1962 agreement rehearse the history of the Abu Ail and Jabal al-Tayr lights, recall the abortive 1930 Convention, refer to Article 16 of the Treaty of Lausanne, and add: "No agreement on the subject of the future of the above-mentioned islands has been come to among the Parties concerned."

225. Further, Article 8 was to make crystal clear that nothing in the text following was to be regarded either as a settlement of the future of the islands referred to in Article 16 of the Treaty of Lausanne, "or as prejudicing the conclusion of any such settlement." This Article reproduces the provisions of Article 15A of the 1930 Lighthouses Convention. The United Kingdom was affirmed as the "Managing Government" for these two lights and was entitled to appoint an agent for this purpose (Article 2). Article 6 provided for discontinuance of this role upon notice to the other parties, and indicated the procedures to be followed in that eventuality.

226. As in 1930, the managerial role of the United Kingdom had nothing to do with the issue of title to the islands; nor did management even place the United Kingdom

in a favourable position for when the title issue came to be resolved. This clearly followed the pattern of the Rome Understandings (as they bear on the management of lights) and of the abortive 1930 Convention – even though the 1962 Convention concerned two lights only.

227. The United Kingdom managed the lighthouses at Jabal al-Tayr and Abu Ali from Aden, but realised that arrangements would have to be made when the British would leave Aden upon the independence of the People's Democratic Republic of Yemen in 1967. The Savon and Ries Company was accordingly appointed agent under Article 2 of the 1962 agreement, for management duties. It so happened that Savon and Ries were operating out of Massawa, and the staff engaged in lighthouse functions at the Board's request came increasingly from Ethiopia, but in the view of the Tribunal this was simply a matter of practical convenience. The various Ethiopian authorizations for inspection and repair visits to the islands and the control exercised over radio transmissions were immaterial as to sovereignty. Everything remained as it had been so far as title to the islands was concerned – that is to say, Article 8 of the 1962 Convention continued to govern.

228. In 1971 the British Government decided to replace the lights by automatic lights, dispensing with the services of lighthouse-keepers. The United Kingdom notified Yemen of this intention, assured that Government that "the action of the Board of Trade in accordance with [the 1962 convention] does not infringe upon rights of sovereignty" and asked whether Yemen had any objection. The fact that the communication was addressed to Yemen, a non-signatory of the 1962 Convention, would seem to indicate that, while the islands remained unattributed in accordance with the terms of the 1962 Treaty, Yemen was regarded by the United Kingdom as a "party concerned" within the terms of Article 16 of the Treaty of Lausanne and as having claims to Abu Ali and Jabal al-Tayr that should not be prejudiced. It may also be noted that by this time Italy had lost its possessions on the Red Sea coast and was not, therefore, any longer a "party concerned" within the meaning of Article 16 of the Treaty of Lausanne.[18]

229. Although at an earlier era the legal advice within the British Government was that Abu Ali and Jabal al-Tayr (as well as Centre Peak) were islands that were *res nullius* and various candidates had been suggested at different moments of time as "parties concerned", it would seem that by the early 1970s Yemen was

[18] Nor has Italy or, for that matter, any state asserted that it considers itself to be "a party concerned" for this purpose. The Tribunal therefore concludes that, with respect to the islands in dispute, the only present-day "parties concerned" are the Parties to this arbitration.

regarded as the leading "party concerned" for purposes of Article 16 of the Treaty of Lausanne, at least so far as Abu Ali and Jabal al-Tayr were concerned.

230. In 1975 the management of these two lights was transferred from Savon and Ries' offices in Ethiopia to its offices in Djibouti. Five years later, the agency for management was passed by the British authorities to a new company it had formed, the Red Sea Lights Company.

231. In 1987 Yemen relit the lighthouse on Centre Peak, issued pertinent Notices to Mariners and, in 1988, upgraded it. This appears to have occasioned no protest by Ethiopia, which could not have assumed that such acts were rendered without significance by virtue of Article 16 of the Treaty of Lausanne (to which Yemen was not a party), or by the various bilateral Italian-UK agreements, or by the 1962 Lighthouse Convention – none of which were opposable to Yemen.

232. On June 20, 1989, Yemen contacted the United Kingdom regarding "the matter of the Lighthouses installed on Abu Ali (Ail) and Jabal al Tair Islands which is to be discussed on Tuesday 20 June 1989." Yemen formally stated that:

> 1. The two Islands mentioned above lie within the exclusive economic zone of the Yemen Arab Republic.
> 2. In the light of this fact the Yemen Arab Republic is willing to take the responsibility of managing and operating the said two lighthouses for the benefit of National and International Navigation. As you may be aware, the Ports and Marine Affairs Corporation in the Yemen Arab Republic is already running and operating several lighthouses some of which lie within the area of these two Islands.

233. Unless positive action was taken to extend the 1962 Convention, it would expire in March 1990. In 1988 and 1989 it became clear that many parties had denounced the 1962 Treaty or indicated their intention to do so. The United Kingdom, the managing authority of the lights, was among these. Egypt offered to take over that role, but it was clear that there were not sufficient votes for extending the Convention beyond 1990.

234. A meeting of the parties was held in London in June 1989. Having established its credentials and interest, Yemen was invited as an observer to the 1989 Conference on the future of the two northern lights, notwithstanding the fact that (like Ethiopia) it had not been a party to the 1962 agreement. The Report to the Government of Yemen of the Yemeni technicians attending the 1989 meeting refers to the fact that the British had confirmed the installation and operation by Yemen of new lighthouses on Jabal Zubayr and Jabal Zuqar. Manifested interest

and professional competence appear to be the motivating factors for Yemen's presence. Ethiopia was not invited to attend and had not requested this.

235. Yemen supported the Egyptian proposal that Yemen would manage the lighthouses on Jabal al-Tayr and Abu Ali and did so without reserve as to title. The minutes show that they also indicated their willingness to operate lights on the two islands at their own expense with almost immediate effect should the agreement lapse. The minutes contain no reference by Yemen to the islands being in its Exclusive Economic Zone – though that point had been included in the pre-meeting exchanges with the United Kingdom.

236. The reference to Yemen's Exclusive Economic Zone rather than to title to the islands themselves does not appear to have been casual. It is mentioned twice again in the internal report sent after the 1989 conference from the Yemeni Director-General of the Ports and Maritime Affairs to the Government of Yemen. Yemen's offer – which was accepted – was in language other than claim of a right of sovereign title. Yemen did not say that it had title to Abu Ali or Jabal al-Tayr, nor to the nearby islands, and thus it would be for it alone to provide any lights. The 1961 agreement had no chance of survival and Egypt's offer to become managing authority could not provide the answer. The international treaty regime for the Red Sea lights was coming to an end.

237. The erection and maintenance of lights, outside of any treaty arrangements and for the indefinite future, had certain implications. The acceptance of Yemen's offer did not constitute recognition of Yemen sovereignty over islands. But it did accept the reality that Yemen was best placed, and was willing, to take on the role of providing and managing lights in that part of the Red Sea; and that when the time came finally to determine the status of those islands Yemen would certainly be a "party concerned". (Yemen, of course, was not bound by Article 8 of the 1962 Convention and indeed appears not to have known at the time of the arrangements made under it.)

238. Eritrea has contended that there was no need for Ethiopia to have protested the relighting by Yemen of lights on Abu Ali and Jabal al-Tayr, as its "activities were merely a continuation of the historic activities of Great Britain on Jabal A'Tair and Abu Ali." But Yemen was not in the same legal relationship with Ethiopia over the matter of lights as had been Great Britain and, if such was the reasoning for a failure to reserve claimed Ethiopian sovereignty, it was misplaced.

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CHAPTER VII – Evidences of the Display of Functions of State and Governmental Authority

Analysis of the Evidence

239. The factual evidence of "*effectivités*" presented to the Tribunal by both parties is voluminous in quantity but is sparse in useful content. This is doubtless owing to the inhospitability of the Islands themselves and the relative meagreness of their human history. The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any. The facts alleged by Eritrea and Yemen in the present case must be measured against these tests, with the following qualification. Not only were these islands for long uninhabited and ungoverned or, if at all, governed in the most attenuated sense, but the facts on which Eritrea relies were acts by its predecessor, Ethiopia, which were not "peaceful", unless that term may here be understood to include acts in prosecution of a civil war. Nevertheless, the Tribunal cannot discount these facts, given the singular circumstances of this case.

240. The Tribunal has found it useful to classify the wide variety of factual evidence advanced by the Parties in relation to this subject, and will now examine these categories of evidence in turn.

Assertion of Intention to Claim the Islands

241. Evidence of intention to claim the Islands *à titre de souverain* is an essential element of the process of consolidation of title. That intention can be evidenced by showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the Islands. The Tribunal notes that the evidence submitted by both Parties is replete with assertions of sovereignty and jurisdiction that fail to mention any islands whatsoever, and with general references to "the islands" with no further specificity.

Public Claims to Sovereignty over the Islands

242. Eritrea's claim that these islands were included as part of "the former Italian colony of Eritrea" by the Italian Military Armistice of 1943, the 1947 Treaty of Peace, and the 1952 Constitution is barely supported by evidence. It is true that Italy wished to claim the islands and indeed established a presence on some of them; but these facts were always subject to repeated assurances that the

islands' legal position was indeterminate in accordance with Article 16 of the Treaty of Lausanne and with the Rome Conversations (see Chapter V, above). The 1952 Eritrean Constitution defined the extent of Eritrean territory as "including the islands," but failed to specify which islands were intended. The same uncertainty existed in the language of Article 2 of the United Nations Resolution approving the 1952 Constitution, the 1955 Ethiopian Constitution, the 1987 revision of the Ethiopian Constitution, and the 1997 Constitution of the newly-independent State of Eritrea.

243. The scant evidence of Ethiopian legislation before the Tribunal suffers from the same uncertainty as do the constitutional provisions. The 1953 Ethiopian Federal Crimes Proclamation and a 1953 Maritime Order put in evidence by Eritrea were not explicit about the Islands. The former was content merely to specify "any island which may be considered as appertaining to Ethiopia," and the latter simply republished the phrase "including the islands." A Maritime Proclamation of 1953 referred merely to "the coasts of the Ethiopian islands."

244. Seventeen years later, in 1970, Ethiopia promulgated an order for a state of emergency. This Order did not specify the Islands; nor did the implementing regulations promulgated by the Minister of National Defence. Three 1971 operations orders are cited by Eritrea to demonstrate that "the islands in dispute here fell within the ambit of Ethiopia's concern". They identify Greater Hanish and Jabal Zuqar as being "areas" to be visited or as reference points for patrol routes. In 1987, the Ethiopian Ministry of National Defence was given responsibility "for the defence of the country's territorial waters and islands" but, again, those "islands" remained unidentified.

245. In 1973, the Ministry of Foreign Affairs of the Yemen Arab Republic informed the Imperial Ethiopian Embassy in Sanaa of the YAR's plans to conduct a full aerial survey of its territory that would cover certain "Yemeni islands." These were identified as: "Great Hanish", "Little Hanish", "Jabal Zuqur", "Jabal al Zair", "Jabal Zal Tair", and "Humar". The reason given for the notification was that the photographs, which were to be take from a height of 30,000 feet, might show "parts of the Ethiopian coasts". Ethiopia responded that "some of the islands listed in the afore-mentioned note could not be identified under the nomenclature used, while others are Ethiopian islands." This exchange of correspondence is cited in a January 1977 "Top Secret" memorandum of the Ministry of Foreign Affairs of The Provisional Military Government of Socialist Ethiopia, which details the measures Ethiopia considered taking to protect its interests. The memorandum refers to islands in the southern part of the Red Sea that "have had

no recognized owner", with respect to which Ethiopia "claims jurisdiction"[19] and "both North and South Yemen have started to make claims." It names the Hanish islands, Jabal Zuqar, Jabal al-Tayr and Jabal Zubayr, and points out that the 1973 response to the YAR had deliberately been left vague, because there was insufficient time to collect evidence in support of Ethiopia's "claim over the islands" and for fear of provoking a military response from Yemen and its Arab allies, particularly in the wake of false reports, in 1973, of an Israeli presence on certain Red Sea islands. The memorandum urges that "Ethiopia . . . take a clear stand in this respect in order to protect its ownership."

246. Yemen relies on a claim of historic title, asserted to stem from time immemorial. It was allegedly most early evidenced in 1429, when King al-Zahir of Yemen sent a mission to Jabal Zuqar to investigate two vessels engaged in smuggling that had run aground on the island. The relevance of this happening is vigorously contested by Eritrea on various grounds which were not responded to in substance by Yemen. It appears to be unique, and isolated. The Tribunal does not consider it important in relation to the determination of title to Zuqar. Its only significance (which has been substantially weakened by Eritrea's rebuttal of its relevance, not replied to by Yemen) might be that it could support an interpretation of the Imam's aspirations so as to include at least Jabal Zuqar, but that in turn fails since there is no evidence that when he advanced his claim of historic rights in 1918, the Imam knew of the 1429 expedition. Moreover, the source for that information was only published in 1976, long after the claim of historic rights had allegedly been advanced by the Imam.

247. In his reply to a British proposal for a treaty of friendship, the Imam is recorded as having requested, inter alia, "(2) Establishment of his rule and independence over all the Yemen, i.e., over that part which was once under the sway of his predecessors. . . ." This claim could not have been more general. Indeed, the word "that part," being expressed in the singular, would not seem naturally applicable to islands. This generalized claim was apparently manifested on several occasions in bilateral diplomatic conversations during the inter-War period, but no constitutional or legislative act of Yemen or of the Imam claimed any of the Islands specifically or described them specifically as Yemeni territory.

248. Yemen asserted in the oral hearings that in 1933: ". . . certain British representatives expressed puzzlement as to why the Imam was so adamant about his claim to the islands of Al-Yemen, including the islands of the Hanish Group." The Yemeni Foreign Minister allegedly "made the Imam's claim to the Hanish

[19] Eritrea has submitted two translations of this document, one of which refers to "jurisdiction" and the other to "sovereignty".

Islands well known to German officials in 1930, France in 1936 and, of course, England, in connection with the 1934 treaty and on many other occasions." Yemen added that "the Imam stated and restated his historic claims to the British, to the French and to the Italians whenever this was practically possible", and this appears to be borne out by contemporaneous evidence from 1930 to 1936.

249. Other evidence of communications between the Imam and British diplomats, including the records of the Clayton mission of 1926, and Colonel Reilly's communications to the Foreign Office are too vague to serve as evidence of a specific claim by the Imam to the Islands at that time.

250. Although Yemen asserted in the oral hearings that Yemen's response to the granting of an oil concession by the United Kingdom in the area of Kamaran Island in 1956 "restated the claim to the Red Sea Islands", the language actually used in the official statement merely stated that "[t]he Yemeni Government considers Kamaran island and the other Yemeni islands to be a inseparable part of Yemen". It also added that "[t]he Yemeni Government continues to insist upon its rights to the Yemeni islands and their liberation." A likely inference to be drawn from this is that the "islands" referred to could not have been the islands now in question since those were not islands that required "liberation".

251. In 1973 there were press reports that Israel had occupied Jabal Zuqar with the permission of Ethiopia. Substantial effort was devoted by both sides in the proceedings to seeking to demonstrate that the respective reactions to the matter were relevant to sovereignty over the Islands. A 1973 press statement issued by the Embassy of the Yemen Arab Republic in Mogadishu reported that Yemeni investigations had found "Lesser Hanash, Greater Hanash, Zukar, Alzubair, Alswabe and several other islands at the Yemeni coast", to be free of foreign infiltration, and further stated that:

> [. . .]
>
> The Y.A.R. always controls and maintains its sovereignty over its islands at the Red Sea, with the exception of the islands of Gabal Abu Ali and Gabal Attair which were given to Ethiopia by Britain when the latter left Aden and surrendered power in our Southern Yemen.

This supports an inference that the phrase "its islands in the Red Sea" included the disputed Islands; moreover, the press statement emphasized that the Yemen Arab Republic maintained its claim of sovereignty over those islands "given by Britain to Ethiopia," and urged Ethiopia to surrender those islands.

252. Yemen's "historic claim" was initially expressed in vague and general terms following the end of World War I, and reiterated in bilateral diplomatic contexts in the inter-War period. After World War II it was reasserted in 1956, even though largely in doubtful and indirect terms. In 1973, however, it was expressly revived in a public statement (which, although it said that Jabal al-Tayr and the Zubayr group had been "given to Ethiopia," also reasserted Yemen's "rights and possession" to them and was specific about the other, "mentioned," islands). The statement therefore left little room for doubt that Yemen had sustained or renewed its claim over all of the larger Islands, including the northern islands – or, at any rate, as of 1973. There is no evidence that Yemen subsequently abandoned or relinquished this claim. The evidence does, however, also suggest that Yemen had no presence on and little knowledge about Jabal al-Tayr and the Zubayr group at that time, and supposed that they were in the possession of Ethiopia. The fact was that, for many years, the northern lighthouses were administered from Ethiopia by employees of the lighthouse company.

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Legislative Acts Seeking to Regulate Activity on the Islands

253. There is no evidence of post-war Ethiopian legislation seeking expressly to regulate activity on the Islands. As discussed above, no Ethiopian legislation between 1953 and 1992 specifically purported to exercise jurisdiction and state functions over the Islands. From 1992 to the inception of the dispute in 1995, no Eritrean legislation explicitly treated the Islands as being subject to the jurisdiction and control of Eritrea.

254. The Ethiopian Federal Crimes Proclamation and the 1953 Maritime Order put in evidence by Eritrea were not explicit. They applied to "any island which may be considered as appertaining to Ethiopia" and "the islands." A related Maritime Proclamation of 1953 referred merely to "the coasts of the Ethiopian islands." These instruments would of course have applied to the Dahlak group and to the islands in the Bay of Assab; but those islands are not disputed.

255. As to Yemen, the evidence of administrative and legislative decrees advanced to support a claim of the exercise of state functions follows substantially the same pattern as the evidence introduced by Ethiopia: there is silence as to whether the Islands are intended to be included in the ambit of the decrees. There is no evidence of Yemeni legislation openly seeking to regulate activity on the Islands. From 1923 to the inception of the dispute in 1995, no Yemeni legislation specifically treated the Islands as being subject to the jurisdiction and control of Yemen.

256. In 1967, two decrees were issued by the President of the Yemen Arab Republic concerning territorial waters and continental shelf. However these did not mention the Islands by name. Yemen contends that the subsequent Yemeni licensing in 1987 of a research program in waters off the Islands by the German research vessel, the *F.S. Meteor*, demonstrated their applicability to the Islands. While that is unclear, it is arguable that this incident can be viewed as crystallizing Yemeni intent as to the scope of the 1967 legislation.

257. In conclusion, the evidence on behalf of both Parties shows legislative and constitutional acts without any specific reference to the Islands by name. It should be borne in mind that during most of these years both Ethiopia and Yemen were distracted by civil war or strife, and serious internal instability. Yemen did not resile from the broad and loose claims made before World War II – which might or might not have embraced the islands in dispute – but did not pursue or articulate them until 1973.

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Activities Relating to the Water

Licensing of Activities in the Waters Off the Islands

258. There is much evidence that Ethiopian naval units had for many years conducted surveillance in the Red Sea and in particular around the Zuqar/Hanish archipelago. As pointed out below, it is not clear whether those actions were evidence of fisheries control and administration or whether they primarily related to security measures, or both, particularly in light of the fierce struggle by the Eritrean freedom fighters in the two decades prior to Eritrean independence. In any event, there is little evidence that the Ethiopian activity was based on fisheries regulations or laws as such.

259. As to Eritrea, the evidence only dates from early 1992. In January of that year the Eritrean provisional government issued a notice prohibiting in general terms unlicenced fishing activity in "Eritrean territorial waters". Eritrea has asserted that its Ministry of Marine Resources "has regulated fishing in Eritrean waters since shortly after Eritrean independence." On 1 April 1995, the Ministry of Marine Resources issued a "Manual and Guidelines for the Administration of Foreing [sic] Vessel Licensing and Operations."

260. In September 1995, Trawler Regulation I was issued by the Ministry of Marine Resources. The statement is made by Eritrea that the handout appended to Trawler Regulation I "includes the Zuqar-Hanish islands within Areas No. 11 and

12 (Beilul and Berá isole)."[20] The areas are separated laterally by dotted lines. These lines do not however extend to, or surround, the Zuqar/Hanish archipelago. (Comparison with Maps 1 and 2 shows, in the case of Map 2's depiction of the Dahlak ("Dehalak") archipelago, a carefully-drawn lateral boundary around the Dahlaks.)

261. As far as Yemen is concerned, there is no evidence of any regulation or order as such regulating fisheries as such in Yemeni waters. The evidentiary record is devoid of any assertion of a formal legal basis for fisheries jurisdiction assumed by the Yemeni Government over the waters surrounding the Zuqar/Hanish archipelago. A witness statement cited in support of the proposition that Yemeni Government "launches are vigilant in controlling illegal fishing" merely details that the witness (a Navy Captain) "was assigned by [his] … command to arrest foreign fishermen pirates … who were looting our maritime wealth in a random and illegal manner," but indicates no further detail.[21]

262. Yet Yemen has asserted that it has "tightly regulated fishing activities on and around the Hanish Islands" and that "the Government has actively controlled illegal fishing." There is a substantial record of fishing vessel arrests by Yemeni authorities between 1987 and 1990. It should be noted however that they are recent in time, and appear to have been primarily directed in recent years against large Egyptian industrial fishing vessels.

263. In conclusion, the Tribunal is of the view that the activities of the Parties in relation to the regulation of fishing allows no clear legal conclusion to be drawn. The record of these activities under Ethiopian administration is, as will be seen below, open to conjecture. Since Eritrean independence, the record is less than clear. Since 1987, Yemen appears to have been engaged in some regulation of fishing, primarily directed toward larger vessels. The balance of this evidence does not appear to tilt in one direction or another.

Fishing Vessel Arrests

264. Although there is evidence before the Tribunal that a substantial number of arrests of fishing vessels for violation of the respective fishing regulations and orders have occurred, the period of time comprised in that evidence is brief. It is

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[20] Map 3 (dated November 1993) shows Area 10 ("Bera'isole") and Area 11 ("Beilul"), but Area 12 is actually "Assab-Dumeira."

[21] The samples of fishing and boat licenses supplied by Yemen are not helpful; when they specify fishing areas, they only state "Red Sea."

difficult therefore to characterize those actions as the "continuous and peaceful display of state authority."

265. The evidence before the Tribunal concerning Ethiopian regulation of fishing or fishing violation arrests is almost wholly derived from former Ethiopian naval officers. There are many detailed witness statements that recount service in the Ethiopian patrolling forces during the Eritrean war of independence. In most instances the whereabouts of particular incidents are rendered in general terms, albeit with frequent reference in particular to islands of the Zuqar/Hanish archipelago. Although there are few dates given for the various vessel arrests referred to in the witness statements, the majority of activities reported appear to have taken place during the two decades preceding Eritrean independence in 1991.

266. A fair reading of the witness statements shows that by far the principal concern of the Ethiopian military during this period was to combat the EPLF activities on and around the Islands and to deny the use of the Islands to rebel forces either as a staging area for strikes on to the Eritrean coast of Ethiopia or as supply depots and strategic bases. The Ethiopian naval officers concerned did also exercise police powers when they would stop and check fishing boats.

267. The primary purpose of such an exercise was suppression of the insurgency. In most of these cases the witnesses stated that part of their duties was to stop all fishing boats and check their papers and cargo. Thus, "[t]he Dankali fishermen were suspected of cooperating with the rebels in smuggling arms, ammunition and other supplies across the Red Sea." However the duties of these naval patrols also extended to keeping foreign fishermen out of what Ethiopia considered to be her territorial waters. Vessels that were not licensed to fish in the waters or that were of non-Ethiopian registration were arrested or requested to leave.

268. The Eritrean pleadings state that the evidence shows "the inspection of fishing and/or commercial vessels as a primary function of their routine patrols around the islands." Having regard to the fierce fighting that was going on over the years in question in and around the area in question, it is not clear that enforcing fishing regulations was the primary purpose of these Ethiopian naval patrols.

269. At the same time, the Tribunal is not disposed to discount the evidence introduced by Eritrea on the grounds that the acts were not "peaceful". Military action taken in a civil war is in any event not normally regarded as a belligerent act that would have no legal relevance for the question of title. Accordingly, even though the Tribunal does not accept Eritrea's contention that most activity was

directed at fishing regulation, the Tribunal finds nonetheless that they are not without legal significance.

270. In 1976, an Ethiopian naval patrol boat arrested three Yemeni fishermen on Greater Hanish Island. Yemen protested to the United Nations Security Council this "flagrant act of aggression and . . . distinct violation of the sovereignty of the Yemen Arab Republic." Ethiopia responded, in a formal letter from its UN Permanent Representative to the President of the Security Council, that "[t]he Ethiopian patrol boats were carrying out their responsibilities within Ethiopian jurisdiction."

271. Following independence, the record shows that much attention became devoted to control of Eritrean fisheries affairs, entailing inter alia a number of vessel arrests, some of which involved Yemeni fishermen. Although a substantial number of witness statements speak of supervis ory authority and activity by Ministry of Marine Resources authorities in conjunction with the Eritrean Navy, the evidence dates from the time of Eritrean independence and in almost all instances relates to matters occurring after 1995. Without precise fixing of coordinates and distances, it is unfortunately difficult to see whether the activities and vessel arrests in question actually occurred with respect to the waters around the Zuqar/Hanish archipelago or Jabal al-Tayr and the Zubayr group. Many witness statements and reports are not clear as to how close to the contested islands the incidents were.

272. As to Yemen, a number of incidents between 1987 and 1995 are also in evidence. There is documentary evidence of an arrest in 1989 of an Egyptian trawler "next to Zuqar island … in the territorial waters of Yemen". There is also testimony from a Navy Captain that in May 1995 he was assigned "to arrest foreign fishermen pirates" and that he arrested "several launches" of "Gulf ownership" with Egyptian crews after a gun battle "in Yemeni territorial waters," "in an area between al-Jah and Zuqar". Although Yemen asserted that in 1990 four Egyptian fishing vessels were arrested "in the area of the Hanish Group", and the owners required to pay an indemnity to Yemen and undertake not to repeat their actions, the supporting document does not specify the location of the arrests.

273. However, a 1990 report addressed to the Yemeni Defence Ministry describes twenty separate incidents between 1987 and 1990 in which a total of more than sixty vessels are reported to have been arrested, accosted, "escorted to" a naval base, or "warned to leave" – a good number of these incidents appear to have related to Egyptian commercial fishing vessels. While some of these are described as having been in the vicinity of the Zuqar/Hanish archipelago or Jabal al-Tayr, Zubayr and Abu Ali, the report refers to the "area of" a named island or islands; one exception is a report of unlicenced fishing by two Egyptian trawlers

"at Zuqar". In most instances, when vessels were ordered to leave, the report states that the warnings specified that they should depart "from territorial waters" or "from Yemeni waters".

Other Licensing Activity

274. Apart from fishing, there have been no attempts on the part of Eritrea to demonstrate any licensing activities in respect of the waters off the Islands. For its part, Yemen asserts the official approval in 1993 of plans for a tourist boat operation between al-Khawkha and Greater Hanish. There was also a license granted by Yemen to a German company for the building of a diving centre on the north end of Greater Hanish in 1995. As will be discussed below, between 1972 and 1993 the Yemeni Government recorded eight instances of requests for approval for activities relating to the use of the waters around the Islands, and in several cases approval was given for research and diving expeditions and the like.

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Granting of Permission to Cruise Around or to Land on the Islands

275. As discussed, there is an abundance of evidence before the Tribunal relating to the manifold activities of the Ethiopian Navy in the 20-year period before Eritrean independence. That evidence largely indicates that the Ethiopian naval patrols operated intensive patrolling in and around the Islands during the Ethiopian war against the Eritrean insurgents. In that role, the naval vessels stopped ships, boats and dhows in those waters, requested identification and inspected equipment and cargo. Tourist vessels anchored near the Zuqar-Hanish islands were arrested and brought into Ethiopian ports for investigation and the film from their cameras was destroyed.

276. There is evidence that informal requests from third parties for permission to cruise around, anchor at or land on the Islands were sometimes made to naval patrols. For example, one witness statement indicates that radio requests made to Ethiopian patrol craft to anchor "at the north western cove off Hanish," received from "large foreign commercial vessels" (including ones of Greek, Japanese, Yugoslavian and Italian nationality), were granted for reasons such as "repairs, shelter or rest."

277. As to Yemen, there is evidence that in 1978 three Kuwaiti fishing trawlers requested and received shelter from a storm at Jabal Zuqar, and that on two occasions in 1991 foreign flag vessels sought and received permission to anchor at Zuqar and Hanish for repairs.

278. In addition, between 1972 and 1995 Yemen received at least eight formal requests from third parties, including one from a foreign Government, for permission to cruise around, anchor at, or land on the Islands: A request from an Italian organization to conduct research on Jabal Zuqar was declined by the Government of the Yemen Arab Republic in 1972; the French Government in 1975 requested permission to conduct naval exercises in the vicinity of the Hanish Islands; in 1983 a request from a French organization to film submarine life was approved; in 1987, a German request for scientific research studies to be conducted by the *F.S. Meteor* around the Hanish Islands was approved by an official governmental decree and the project was completed without incident; for indeed *The Meteor* seemingly carefully avoided the territorial waters of both Ethiopia and Yemen. In 1992 approval was given for a diving trip by a British yacht, the *Lady Jenny V*, around the Islands; in 1993 the Yemen Government approved a research expedition to the Zuqar/Hanish archipelago to be conducted with the Royal Geographical Society; in 1993, the Government approved the French research expedition of the Ardoukoba Society to Greater Hanish, and also approved a German diving expedition on the yacht *Cormoran*. There is also an unsupported statement that a Polish request for diving in the area was rejected in late 1995.

279. It should be noted however that there is no specification of the islands in the application or report of the cruise of the *Meteor* though the Report mentions the Hanish Islands and states that "maximum values were noted at the Hanish Islands..." Moreover, the terms of the license specified that the "research operation must be conducted in waters at a depth of 100 meters or more", thus excluding research in any close proximity to the Islands.

280. What can be concluded is that there was somewhat greater Yemeni activity than Ethiopian/Eritrean activity in the granting of permission relating to the Islands in the periods stated.

Publication of Notices to Mariners or Pilotage Instructions Relating to the Waters of the Islands

281. Other than Eritrea's fishing regulations, Eritrea has produced no evidence of publication, by Ethiopia or by Eritrea, of general information concerning pilotage or maritime safety.

282. In the five years between 1987 and 1991 Yemen published six Notices to Mariners in connection with its installation of new lighthouses in the Islands. These were: Centre Peak (1987 and 1988); and Jabal Zuqar (1989). Following the 1989 London Conference on Red Sea Lights, Yemen issued a Notice to Mariners concerning a new solar lighthouse on Jabal al-Tayr, and one concerning a new system on Abu

Ali. In 1991 the Yemen Ports Authority constructed a new lighthouse on Low Island, and an official telex notification was sent to the Hydrographer of the Royal Navy in Taunton (referring to it as "Hanish as Saghir" Island). In 1992 a similar telex was sent indicating a "beaconpipe" at "Jabal-at-Tair", a lighthouse at "Sawabey" (al-Zubayr), a lighthouse at Abu Ali, a beacon at Zuqar, and beacons at Hanish Sashir and Hanish Kabir.

283. The Tribunal notes that such notices form a natural adjunct to the operation and maintenance of lighthouses, but that latter function, in the particular circumstances of the Red Sea, does not generally have legal significance. The issuance of such notices, while not dispositive of the title, nevertheless supposes a presence and knowledge of location. Moreover, it is to be noted that in relation to these indications, accuracy in identifying the navigational aid and its location is of the prime importance, rather than the provenance of the information.

Search and Rescue Operations

284. Eritrea has produced evidence maintaining that in 1974, the M.V. *Star of Shaddia* was stranded off Zubayr. There is no evidence as to her nationality. *HMS Ethiopia* attempted a rescue, but was unable to approach the ship because of severe weather and mechanical difficulties, and departed without being able to assist.

285. In 1990, the Yemeni Ports Authority rescued an Iraqi vessel, the *Basra Sun*, from the rocky coast of Jabal Zuqar after it had requested assistance.

286. Since there is under the law of the sea a generalized duty incumbent on any person or vessel in a position to render assistance to vessels in distress, no legal conclusions can be drawn from these events.

The Maintenance of Naval and Coast Guard Patrols in the Waters Around the Islands

287. Eritrea has produced a large amount of evidence relating to naval patrolling activity in and around the Islands. The activities alleged are for the most part not referred to in documentary evidence, but rather in affidavits prepared in connection with these proceedings. However, the Tribunal takes note of statements by Eritrea that a large amount of Ethiopian naval records were destroyed in the course of hostilities.

288. **1953-1973:** For the first twenty-year period (1953-1973), Eritrea has introduced two types of evidence: naval logbooks from 1959-1967 and naval operations reports primarily from the 1970s.

289. **Naval logbooks:** The Eritrean Memorial states that "there are numerous records that the Islands were 'visited and/or observed'"(Eritrean Memorial, p. 427), implying that most of the logs indicate this. It also states that they "demonstrate in painstaking detail the continuous Ethiopian presence in the disputed islands" and characterizes them as "record[ing] visits" to the Islands.

290. However, the logs themselves – in contrast with the operations reports – relating to the years 1959, 1961, 1962, 1963, and 1967, do not use the word "visit." Moreover, it is not clear to the Tribunal what that term entailed. The "observations" are largely contained in Column (13) of the standard printed logbook form, labelled "Soundings Fixes Bearings Observations," and a study of the entries in that column shows that they are almost uniformly position "fixes" of azimuth bearings on land points and islands, sometimes from as far as fifteen miles offshore.[22] The Tribunal cannot therefore draw many useful conclusions about Ethiopian exercise of governmental functions with respect to the Islands on the basis of these logs alone.

291. **Operations reports and orders:** Eritrea has placed in evidence three operations reports – two cruises in April 1970 and one in July 1971. However, the language in which the missions are recorded in the operations reports is too vague to be relied upon as establishing state functions with respect to the Islands in this case, e.g., patrolling the "area south" of Greater Hanish and the Haycocks, sailing "to Grand Hanish and back," and investigating vessels "south of Zuqar" and "vicinity Jebel Attair." The only relevant precision accorded by this evidence is in the operation report of HMS Ethiopia for July 20/21 and 25/26, where she "[a]nchored Zuqar" overnight in order to remedy mechanical difficulties. Episodes of that nature can hardly give rise to a legal claim of occupation and control.

292. Furthermore, although the Eritrean Memorial captions its description of the reports with a statement that they demonstrate the "continuous Ethiopian naval presence around the disputed islands," for the twenty years in question they cover only two cruises in April 1970 and one cruise in July 1971. In consequence, these documents hardly support the assertion that the Ethiopian Navy

[22] In one example, it appears that the officer of the watch has helpfully added estimated radar ranges of distance, e.g.: "Ø Jabal at Tair Isl. 045° 6.0 by radar," and "Ø Haycock Isl. 106° 15 by radar," showing that the vessel (H.I.M.S. PC-12) was far offshore on both occasions.

maintained a "continuous presence" around the Islands for the entire period of 1953-1973.

293. There are also in evidence four operations orders of the Ethiopian Navy, from January, July, September and October of 1971. They instructed the preparation of "a Schedule" for visiting the different areas," including "Kebir Hanish" and "Zukar", and patrols "around Hanish I[s]lands", "within the route: Dumeira is – Fatmah Lt. – Rs Darma – Kabir Hanish – Zuqar – Edd and Ras Darma", and another with a similar routing. They cover less than one year out of twenty, though this may be explained by the asserted destruction of Ethiopian naval records during the civil war. In warfare continuing over several decades, it does not seem likely that Ethiopian activity in controlling insurgency would be limited to a single year.

294. **1974-1980:** Eritrea has also put forward documentary evidence of a similar nature relating to activities from 1974 up until the end of 1980, but this is just as sparse as that for the preceding twenty years. Again, it takes the form of log-books and orders which, being contemporaneous, have a special interest, as well as correspondence. The log-book entries, for 1974, 1977 and 1980 reveal the same kind of imprecision as the earlier log-book records, one of which, for example, while purporting to "record … [a] visit … to Hanish (on August 16) [1977]", merely shows "Hanish" in the Column (13) of the Log under "Soundings Fixes Bearings Observations" as having been sighted by P-203 at 0400 on August 16th, at a bearing of 325° and at a *distance of 20 n.m.* This is not evidence of a "visit", nor of passage through the territorial sea of that island.

295. Additional evidence has been presented describing the Ethiopian/Eritrean sea battle off the island of Zuqar after the capture of the merchant ship *Salvatore* by the ELF on the way to Assab in June 1979, but it is not clear what evidentiary relevance can be ascribed to this incident. Finally, P-203's Log-Book in May 1980 records warning shots at a Canadian and a West German boat; the precise location is not indicated in the log but the incident is noted in an entry which begins "slipped out for patrolling Hanish to Zuqar". The 1980 capture of five wooden boats referred to in the pleadings is not particularized further than occurring "near the islands of Lesser Hanish." In April 1980 some Yemeni fishermen were captured "near Zuqar Island," and others were also captured "in the vicinity of the Zuqar/Hanish islands." This incident was in fact protested by North Yemen.

296. Eritrea states that the "most critical Ethiopian naval event of 1980" was "Operation Julia"; and that it "resulted in twenty four hour surveillance and a blockade of the entire area for the entire three month period of the operation". When the map submitted in evidence is consulted, it shows what appear to be

four areas of patrolling off the Ethiopian/Eritrean coast: two close on shore, one half-way to Greater Hanish from the coast, and one lying approximately 3-4 n.m. west of Near Island and Shark Island on the west side of Jabal Zuqar, and running south across Tongue Island to just north of Marescaux Rock. The context of Operation Julia shows quite clearly that this was a series of grave incidents at sea between the Ethiopian naval forces and the rebel forces, and that the Ethiopian naval forces patrolled their own coastlines, and the sea mainly west of the Islands facing the Eritrean coast; a main purpose of the operation having been to stop rebels "infiltrating into Assab District".

297. **1973-1993:** For the second twenty-year period, Eritrea has also placed substantial evidence before the Tribunal, largely in the form of seven witness statements specially obtained from seven former Ethiopian navy officers and two witness statements obtained from two former EPLF naval fighters. With one exception, the testimony relates only to activities from 1968 on. The testimony, summarized in the written pleadings, largely concerns activities at sea extending over substantial periods between 1964 and 1991.

298. It is however possible only to rely on this testimony for the most general of indications. In ten out of the thirty incidents described by Eritrea the identity of the Ethiopian or Eritrean vessel is not given. The dates of the incidents are given in only nine cases. Their locations are specified in only three, but in those three instances the time frame extends over indeterminate periods of eight months, five years, and one month respectively. There is therefore no evidence of an arrest or stopping by Ethiopian or Eritrean naval forces with *both* a precise location *and* a precise date, for the entire period from 1970-1995.

299. In a close reading of the witness statements provided by Eritrea, three other interesting points emerge with clarity which should assist in evaluating the context and scope of this evidence. These points have not been controverted in the proceedings.

300. The first point is that out of the seven witness statements of former Ethiopian naval officers, three record no landings on the Islands. The remaining four are imprecise with respect to either date or location. There are two witness statements that mention more than isolated landings during the entire period from 1973-1993.

301. The second point relates to the nature of the patrols which, as well as being fast, appear to have taken place at night, and sometimes in conditions of darken ship. These factors bear upon the absence of protest by Yemen.

302. Third, although some of the evidence does recite that the "purpose of these patrols was primarily to apprehend vessels carrying contraband and to keep

foreign fishermen, who were generally from Yemen, out of our territorial waters", it is not clear that a major twenty-year military operation increasing in intensity can be viewed as primarily related to fishing. There is certainly some validity to the argument that checking fishing boats on a regular basis was an essential part of checking for insurgents and contraband weapons. Just as checking ELF dhows for small arms and ammunition was essential to defeating the rebels ("[t]he dhows could carry hundreds of sheep and goats, so they would hide the supplies underneath the livestock where it was impossible or us to search") so was checking fishermen ("… we would often see Dankali fishermen further east, in the area of the islands …. We would check the identification papers for the boat, captain and crew and look for contraband and armaments.") However, normal fisheries surveillance does not require checking for "contraband and armaments".

303. There also appears to be, in this evidence, a discrepancy in Eritrean witness statements as to the presence of Yemeni fishermen. While some witnesses state that "Yemeni fishermen were almost never reported to be in the area of Zuqar and Hanish at this time" (the late 1980's) and "I never encountered a Yemeni fishermen [*sic*] in the waters around Zuqar and Hanish", others state: "[w]e patrolled east of the Dahlaks as well as the Hanish islands" and "[s]ometimes, our patrols would find Yemeni fishermen fishing in Ethiopian waters, including around Zuqar/Hanish."

304. **1983-1991:** These witness statements were also intended to supplement the documentary evidence put in by Eritrea as to activities from 1983 through 1991 but this evidence is imprecise. Speaking almost consistently in terms such as "around Hanish and Zuqar," "the environs of Hanish," "in the vicinity of Jabal A'Tair," these operations and reports and sailing orders are sparse chronologically: May 1983, October 1984, September 1984, May 1986, July 1984, and August 1987. Even if this evidence were precise as to location and relevance to the Islands, it could still hardly provide a demonstration of a "continuous Ethiopian naval presence around the disputed islands" as it covers only six months out of ninety-six and leaves out four years entirely of that continuous naval presence.

305. Nevertheless, the extent of this evidence and its homogeneity do suggest the conclusion that the Ethiopian Navy, during the period in question, did in fact conduct widespread surveillance and military reconnaissance activities in the waters around the islands. It is uncontroverted that these patrols were frequent and, in the course of the Ethiopian war against the ELF and the EPLF, of steadily increasing intensity. Elements of the Ethiopian Navy anchored frequently off the Islands, sent details ashore for reconnaissance missions, and even bombarded suspected rebel facilities on the Islands.

306. With the exception of the 1976 incident discussed above (which was protested to the Security Council of the United Nations), North Yemen (and, later, the Republic of Yemen) did not protest any of these Ethiopian naval activities. Although such a lack of protest would normally appear to suggest a degree of acquiescence, four elements need to be weighed by the Tribunal in considering the evidence: the location of the Islands, the fact that they were not settled, and the fact that there was no normal line of communication from persons on or near the Islands to the mainland; the fact that many of the Ethiopian patrols appear to have been conducted at night under conditions of darken ship; the fact that many of those patrols were conducted at high speed; and the fact that civil hostilities were in progress.

307. At the same time, the failure of Yemen to protest the considerable presence of Ethiopian naval forces around and sporadically on the Islands over a period of years is capable of other interpretations. If Yemen did not know of that presence, that belies Yemeni claims that there were Yemeni settlements of fishermen on the Islands and that Yemen patrolled the waters of the Islands and indeed maintained garrisons on them. If Yemen did know of this Ethiopian presence, and if, as the record shows, did not protest it, that could be interpreted as an indication that Yemen did not regard itself as having sovereignty over the Islands, or, at any rate, as an acknowledgment by Yemen that it lacked effective control over them.

308. Yemen could take the view that belligerent acts by Ethiopia against insurgents using the Islands were not elements of continuous and peaceful occupation by Ethiopia, or that Ethiopian regulation of Yemeni fishing vessels found within the waters of the Islands was incidental to Ethiopian belligerency. But such acts, belligerent or otherwise, could not normally be reconciled with Yemeni sovereignty over the Islands. Thus, if Ethiopia's naval presence in the Islands over the years does not establish Ethiopia's (and hence Eritrea's) title, it may nonetheless be seen as throwing into question the title of Yemen.

309. The Tribunal has found it necessary to address at some length the Eritrean evidence relating to naval patrolling over a substantial period of time. At the same time it must be noted that Yemen has not suggested to the Tribunal that it conducted more than a very few activities during this entire period of naval operations by Ethiopia. Yemen has not explained its lack of protest.

310. Essentially Yemen relies on two witness statements. In one statement, Yemen asserts that patrols of the Islands were "carried out on a regular basis" – weekly in the summer and "once every month or two" in the winter but the dates are unspecified. A specific date, but a very recent one, is given by this statement for an assignment "to arrest foreign fishermen pirates" (May 1995). This statement also tells of intercepting foreign warships (American, French and Russian) "in

these islands" and requesting them to leave, but no dates are supplied except for an incident with a Russian merchant vessel "on the western side of Zuqar off of Shaykh Ghuthayyan about 1977-78." Interception of an ELF dhow between Zuqar and al-Jah was recorded "about 1974-75."

311. In the other statement, evidence is given that "during the years of 1965 to 1977" the Yemeni naval forces carried out regular patrols around the Islands, saying that "[t]hey always anchored at the anchorages of these islands and patrolled around them" (specifying the anchorages by name), and that "[o]ur soldiers and officers would land onto their shores." The statement adds, without specifying dates, that "[m]any times our officers and naval enlisted personnel would land on the shores of those islands (Zuqar, Greater Hanish, Lesser Hanish, and al-Zubayr) on dismounted reconnaissance missions (on foot), as well as to swim and relax." The period is not specified other than generally from 1965 to 1977.

Environmental Protection

312. Yemen reports having investigated an oil spill reported by a Russian freighter about 10 miles from Lesser Hanish in 1990.

Fishing Activities by Private Persons

313. There was substantial debate between the Parties as to whose fishing community was more important, and as to how important a part fishing and fish played in the economic life of each state. The Tribunal does not find these arguments pertinent, since in any event it may be expected that population, and economic realities, will change inevitably over time. What may be very important today in terms of fishing may be unimportant tomorrow, and the reverse is also true.

314. For Eritrea, the evidence before the Tribunal includes the statement that "[t]here are more than 2,500 Eritrean fishermen, many of whom are artisanal fishermen engaged in small-scale fishing using traditional methods and equipment" and that "[t]he waters around the Zuqar-Hanish islands supply a significant portion of Eritrea's annual catch." For Yemen, the statement has been made that: "[f]ishing communities along the Yemeni Red Sea coast have historically depended on the neighbouring islands of the Hanish Group for their economic livelihood."

315. Numerous witness statements were submitted by both sides as to the longevity and importance of their respective fishing practices and the significance of fishing in the lives of their people. Yet, although substantial evidence of individual fishing practices in the record may be taken as a different form of "*effectivité*" – i.e., one expressive of the generally effective attitude and practice of individual citizens of Eritrea or of Yemen – it is not indicative as such of state

activity supporting a claim for administration and control of the Islands. This varied and interesting evidence, on both sides, speaks eloquently concerning the apparent long attachment of the populations of each coast to the fisheries in and around the Islands, and in particular that around the Zuqar-Hanish islands. However it does not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*. For state activity capable of establishing a claim for sovereignty, the Tribunal must look to the state licensing and enforcement activities concerning fishing described above.

316. Yemen has put into evidence a substantial number of arrests of commercial fishing vessels in the past few years in the waters around the Islands. These arrests have been accompanied by legal proceedings, expulsion of the vessels from the waters, and substantial fines. The arrested vessels appear to have borne foreign registries other than Ethiopian or Eritrean and in most cases seem to have been Egyptian. No protests of these activities have been recorded from Ethiopia or Eritrea. Eritrea also produced a witness who related that "between 1992 and 1993" while a commercial captain in the Zuqar-Hanish waters he reported about 20 Egyptian trawlers. "Some of these trawlers were confiscated..." He further stated that in his job at the Department of Marine Transport it is his current responsibility "to determine what should be done with them."

Other Jurisdictional Acts Concerning Incidents at Sea

317. A lost dhow was searched for off the Islands, and an investigation conducted by Yemeni authorities in 1976; a drowning at sea at Greater Hanish was investigated by Yemeni authorities in 1992.

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Activities on the Islands

318. In order to examine the performance of jurisdictional acts on the Islands, the Tribunal must consider evidence of activities on the land territory of the Islands as well as acts in the water surrounding the Islands. This evidence includes: landing parties on the Islands; the establishment of military posts on the Islands; the construction and maintenance of facilities on the Islands; the licensing of activities on the land of the Islands; the exercise of criminal or civil jurisdiction in respect of happenings on the Islands; the construction or maintenance of lighthouses; the granting of oil concessions; and limited life and settlement on the Islands.

Landing Parties on the Islands

319. The direct evidence presented shows little or no landing activities on the Islands by either side.

320. Eritrea's evidence shows that during the twenty years of the emergency there was substantial activity onshore and off the Islands by elements of the Ethiopian navy engaged in suppressing the secessionist movements. The record indicates clearly that the Islands were used heavily by rebel forces in connection with their war of independence. As discussed above, in the context of naval operations around the Islands, two substantial patrols and a number of unspecified landing parties by Ethiopian military forces are in evidence for the period between 1970 and 1988.

321. On the part of Yemen, there was an official visit to Jabal Zuqar and the Abu Ali Islands in 1973 following the publicity about possible Israeli presence on those islands. In response to the Tribunal's request for specific information, the Secretary-General wrote to the President of the Tribunal on 28 July 1998, informing him that there had never been "any visit to any of the islands in the red sea by any official delegation of the League of Arab States headed by the secretary general." The letter reported a 1973 meeting between the Secretary General of the Arab League and the Ethiopian foreign minister, to discuss Arab concern about reports of Israeli use of the Dahlak islands and other islands in the bay of Assab. The Ethiopians invited an Arab League delegation to visit the islands in order to confirm that there was no Israeli presence, "but no such visit was ever made." Finally, the Arab League letter states that "in 1971 and 1973, members of the League of Arab States' military committee, including yemeni officers, visited the islands of the hanish group including zuqar as well as the zubair islands with the sole cooperation and assistance of the Governments of the People's Republic of Yemen and the Yemen Arab Republic." According to the Secretary General, no report of these visits had been found in the League's archives.

322. Other Yemeni assertions of military presence on the Islands rely heavily on one witness statement describing unspecified landings over a period of time with unspecified dates, other than generally from 1965 to 1977.

323. Yemen has also placed into evidence information concerning field trips by faculty and students of the Staff and Command College in 1987 and 1990. It does not appear that the trips were for more than a very brief period of time, or left any lasting effects.

Establishment of Military Posts on the Islands

324. The evidence presented shows no permanent military posts on the Islands before 1995. Although Eritrea's statements include the mention of landing parties, it was explained that no garrison had been established and the relevance of such garrisons was denied. Rather, Eritrea emphasized that what was legally relevant were sovereign acts tailored to the character of the territory in question, namely military surveillance and fishing regulation.

325. As to Yemen, although the written pleadings state that "a temporary military garrison" was "established … on Jabal Zuqar at the time of" the 1973 visit, and that "[d]uring the 1970s, the Government placed guard posts on other islands in the Group, including on Greater Hanish", no evidence was submitted to substantiate that statement. Photographs introduced into the record of groups of military personnel standing on the Island do not give the impression of permanence. It is also to be noted that no structure or building is shown in the photographs; one would have expected that, had there been any structure or building available, it would have been captured on film.

326. The Tribunal concludes that it cannot accept that a permanent garrison or military post was established on the Islands until following the outbreak of the dispute in 1995.

Construction and Maintenance of Facilities on the Islands

327. There is no evidence of the construction or maintenance of any type of facilities on the Islands by Eritrea. Eritrea nevertheless claims, as an indication of Ethiopia's "consolidation of sovereign control over the disputed islands," that following the hand-over of Aden in 1967 the lighthouses on Abu Ali and Jabal al-Tayr were managed by a private company then based on Asmara, and that Ethiopian regulations applied to transactions by that company in connection with its management and maintenance of those lighthouses. The Tribunal does not consider this to be persuasive.

328. Yemen has however constructed some lighthouses and has maintained others. The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty. Maintenance on these islands of lighthouses by British and Italian companies and authorities gave rise to no sovereign claims or conclusions. The relevance of these activities and of Yemen's presence at the 1989 Red Sea Lights Conference are examined in Chapter VI.

329. Yemen also points to the siting and installation of two geodetic stations by French companies in 1992 on behalf of the Yemeni Government on Jabal Zuqar and Greater Hanish as examples of state action. Eritrea's response is that these

markers were placed secretly and are in any event modest. The Tribunal cannot give too much weight to such small monuments of this nature, and yet must also note that in fact the markers were installed before the exchange of correspondence between the two heads of state in 1995; that they do exist; and that they are reflected on a map of geodetic stations in the Yemen.

330. The maintenance of shrines and holy places that was also presented in Yemen's materials appears to be of a private nature; no governmental activity is suggested. There is unsubstantiated testimony before the Tribunal that "[o]ur government built an airfield between al-Shura and al-Habal [on Greater Hanish] for helicopters." The airstrip constructed by Total on Greater Hanish with Yemen's authorization in relation to the 1985 Total concession and subsequently dedicated to rest and recreational visits by Total employees is discussed in Chapter IX.

331. Although evidence concerning the intentions in May 1995 of the Yemeni General Investment Authority is recent, and although such indications are only of state action without specific object, it nevertheless demonstrates that on a high governmental level the Yemeni authorities were seriously considering that investment should be encouraged for tourism on Greater Hanish, Lesser Hanish, Abu Ali, Jabal al-Tayr and al-Zubayr; thus official government policy implicitly relied on Yemeni sovereignty over these Islands at that time.

Licensing of Activities on the Land of the Islands

332. Eritrea has suggested that the fact that authorization was required for the private firm Savon & Ries to ship radio transmitters to Abu Ali and Jabal al-Tayr, the islands on which that firm maintained lighthouses, was indicative of the exercise of state control. However the regulation of electronic equipment used by a private firm whose personnel were operating in a zone in which military activities were conducted cannot be viewed as an exercise of sovereign authority with respect to the land territory of the islands concerned.

333. Eritrea has produced evidence of the grant of a licence for the operation of a radio transmitting station on Greater Hanish in connection with petroleum activities to be conducted in the vicinity.

334. As to Yemen, discussion follows concerning its construction and maintenance of lighthouses on the Islands. To the extent that most of the useful economic activity and interest in the Islands is generated by their position in the Red Sea and by their relationship to their surrounding waters (whether for purposes of smuggling, fishing, or tourism), most of the licensing activities that have taken place have all been water-related. One brief but not insignificant use of the land

resources on the Islands that was also water-related was the recent amphibious scientific research expedition of the Ardoukoba Society to Greater Hanish, authorized by Yemen.

Exercise of Criminal or Civil Jurisdiction in Respect of Happenings on the Islands

335. In 1976, a military court of the Ethiopian Government conducted a trial of employees of Savon & Ries, the lighthouse maintenance company servicing the lights on Abu Ali and Jabal al-Tayr, on accusations of leading and training a subversive group on those islands. The resulting execution of the finance officer and expulsion or imprisonment of a head lighthouse keeper and others caused the company to move its offices from Asmara to Djibouti.

336. The examples of contemporary exercises of criminal jurisdiction over matters occurring in the Islands by Yemeni authorities include a 1976 investigation of a missing dhow and, in 1992, the investigation of the loss at sea of a fisherman off Greater Hanish.

337. In addition, Yemen asserts that for many years the local fishermen have used their own customary law system of arbitration of local disputes under the authority of an *aq'il* – "a person known for wisdom and intelligence." There is a senior "*Aq'il* of the Sea" the most noted of whom is said to have "resided part of the year on the Yemeni mainland and part of the year at his settlement ('Izbat al-Sayyid 'Ali) on Greater Hanish." The final authority above village *aq'ils* or the *Aq'il* of the Sea is the "*Aq'il* of the Fishermen," who is a dignitary officially recognized by the Government of Yemen.

338. The *aq'ils* apply what is asserted by Yemen to be a "well-established Yemeni body of customary law, known as the *urf*", to resolve the fishermen's disputes. There is evidence before the Tribunal that the judgments or decisions of *aq'ils* are binding.[23] Indeed, in the man overboard case just referred to, the evidence before the Tribunal is that "[t]he owner and crew members both informed the local official, who is known as the *Aq'il* Sheikh of the Fishermen, and the Department was notified by the *Aq'il*."

339. The existence of this customary law system of arbitration of small disputes does not appear to be contested by Eritrea. There is evidence that the *urf* and the *aq'il*

[23] According to a witness statement submitted by Yemen, ". . . any disputant who seeks to avoid an unfavorable decision of the Council may find himself subject to action by the State, including, under certain circumstances, prison."

system appear to be applicable to Yemenis and non-Yemenis within Yemeni territory, and to be regularly applied to problems occurring on the Islands.

340. In the Tribunal's understanding, the rules applied in the *aq'il* system do not find their origin in Yemeni law, but are elements of private justice derived from and applicable to the conduct of the trade of fishing. They are a *lex pescatoria* maintained on a regional basis by those participating in fishing. This reflects the reality also that the principal market for fish is in Hodeidah, on the Yemeni side, and that the fishing activities in the area of the Islands have long been conducted indiscriminately by fishermen on each side of the Red Sea on a regional basis. The fact that this system is recognized or supported by Yemen does not alter its essentially private character.

Construction or Maintenance of Lighthouses

341. The question of lighthouses has already been discussed above in Chapter VI. The present section examines this material only for the purposes of the present chapter on *effectivités*. The lighthouses as Abu Ali and Jabal al-Tayr were administered by the lighthouse management company, Savon & Ries. This company maintained its operation in Asmara until 1976, when it moved its office to Somalia because of prosecution of its staff by the Ethiopian Government for allegedly subversive operations (see para. 335, above). There is however no legal basis for concluding that the location within a state of the office of a private firm, operating under a management agreement for the maintenance of lighthouse facilities on islands, constitutes an intentional display of power and authority by that state.

342. As to Yemen, starting in 1987 a programme of installation of new lighthouses in the Islands was undertaken, beginning with Centre Peak in 1987 and 1988 , and Jabal Zuqar in 1989.

343. Following the 1989 London Conference on Red Sea Lights, Yemen installed new solar lighthouses on Jabal al-Tayr and Quoin (Abu Ali islands). In 1991, a new lighthouse was constructed on Low Island. Finally, a lighthouse was erected on Greater Hanish in 1991.

344. Yemeni Governmental authorities communicated the construction and identification of each of these lighthouses to the public by means of public notices or Notices to Mariners, as described more fully in paragraph 282 above.

345. The legal effect to be given to the construction and maintenance of lighthouses in this particular case has been dealt with in Chapter VI, above.

Granting of Oil Concessions

346. Because of the significant attention devoted to the legal implications of petroleum agreements and activities in supplemental written and oral pleadings, this topic is treated separately in Chapter IX.

Limited Life on the Islands

347. There is also evidence that some of the Yemeni fishermen have maintained "dwellings" on Greater Hanish, Lesser Hanish, and Zuqar, and have traditionally maintained those structures for a long time; or have "settled" on Greater Hanish for the summer , or on Addar Ail Islets or Lesser Hanish for the summer.

348. Eritrea has advanced some evidence that Eritrean fishermen would stay for brief periods on the Islands during the fishing season, but the assertions of "settlements" do not appear to be as prominent in the evidentiary record as those made on behalf of Yemen. There is evidence by one fisherman however that "the longest that I know of anyone staying on the islands is 7 to 8 months."

349. In the pleadings Yemen states that "some Yemeni fishing families have for generations maintained a permanent presence in the Hanish Group", and refers to "fishing families resident in the Hanish Group" in the same context as its discussion of "temporary dwellings" and other temporary residence by fishermen. No specific evidence has been produced about families living on the Islands.

350. One Yemeni witness statement records that naval landing parties "would meet many Yemeni fishermen … who were settled on some of these islands, salting and drying fish, and staying there for several months."

351. During the fishing seasons the fishermen from each side could be expected to spend days and nights on end fishing in and around the Islands, since returning to port – whether in Ethiopia/Eritrea or in Yemen – would cost a full day's sailing even if the winds were right. Eritrean evidence is that the Yemeni fishermen "would stay around the islands for only three or four days and then go home." Another old Eritrean fisherman recounts that "[w]e would go to the islands twice a year for three months at a time. Some of us preferred to sleep on the islands, and others would sleep on the boats. Since the islands were not inhabited, no one told us we could not sleep there."

352. A Yemeni witness declared in his statement that "[a]t Greater Hanish I would settle at the al-Shura anchorage . . . . There were trees there under which we would seek the shade. We would not have to make dwellings." The statement

continues to describe the anchorages on Greater Hanish, saying that "[n]ear the Jafir anchorage is the dwelling of Capt. Ibrahim Salim and his crew . . . . At the other end of the island many others have settled, such as the anchorage where I am at al-Shura, then the al-Habal dwelling, and beyond is the Ibn 'Alwan anchorage. In the summer many people settle at the Ibn 'Alwan anchorage. From al-Qataba alone there are over 40 *huris* [small boats]."

353. The first conclusion must be that settled life on the Islands does not exist, but that episodic or seasonal habitation occurs, and that it appears to have taken place for many years. Eritrea asserts that its fishermen have been predominant, and Yemen asserts the reverse. There is no evident manner in which the Tribunal can, on the basis of the sparse and conflicting evidence before it, decide the matter one way or another. The likelihood is not that one nationality prevailed and the other was absent, but that both were present on the Islands in varying numbers and at various times – and that any precise calculation of relative use would, over time, reveal what may be perceived as a genuinely common use of the waters and their resources.

354. The second conclusion appears to be that the manner of living on the Islands is equally indiscriminate: some fishermen stay on their boats; others sleep on the beach; some construct small shelters; other use larger shelters; some consider their structures "settlements." The one thing that is clear from the record is that there is no significant and permanent dwelling structure, or in fact any significant and permanent structure of any other kind, that has been built and that has been used to live in.

355. The third conclusion is that it is not clear from the evidence, in spite of occasional references to "families" staying on the Islands, whether any family life is in fact present on the Islands. Inasmuch as the use of the islands is necessarily seasonal, this would seem to be *a priori* inconsistent with family life in the sense of family units migrating to a location where normal community activities continue, as for example with nomadic herdsmen.

356. The final conclusion must be that life on the Islands, such as it is, is limited to the seasonal and temporary shelter for fishermen. The evidence shows that many of them, of both Eritrean and Yemen nationality, appear to stay on the islands during the fishing season and in order to dry and salt their catch, but that residence, although seasonal and regular, is also temporary and impermanent.

357. For the time being however it would appear that there is little question but that this type of activity on the part of nationals of both Yemen and of Eritrea (and Ethiopia) is activity which, in the words of the Court in the *Anglo-Norwegian Fisheries* case of 1951, represents a "consideration not to be overlooked, the

scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."[24]

General Activities

358. Finally, evidence of more general activities has been presented to the Tribunal by the Parties. This evidence includes assertions of conduct relating to overflight and miscellaneous activities.

Overflight

359. The act of overflying a substantially deserted group of islands is not one that would appear to constitute with any cogency an intentional display of power and authority over them. However it may be noted that in its Attachment 2 to the response given by Yemen to Question 18 ("Chronology of Selected Yemeni Acts Manifesting Sovereignty …") a number of overflights are recorded, commencing in April 1982 and proceeding through 1988. Doubtless they were important incidents of watching the unfolding of the Eritrean liberation struggle during that decade, but in any event the Tribunal can accord no substantial weight to these activities.

Miscellaneous Activities

360. Yemen has listed a broad variety of actions and acts in a sixteen-page attachment to its response to the Tribunal's Question 18. A variety of actions of many different categories have been advanced as supporting the respective contentions for consolidation of title over the Islands. The Tribunal has noted the most legally significant acts and positions in its earlier analysis.

361. Considerable emphasis, however, has been placed by Eritrea on an inspection tour conducted by President Mengistu and his staff in 1988. A videocassette of this tour around the Islands was also provided to the Tribunal. The Tribunal is unable to draw any conclusions from this episode, however, as the presidential party passed the Islands at speed and at some distance offshore, and did not stop or go ashore. No question of an intentional display of power and authority over a territory would seem to be raised by such a passage.

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[24] Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116 (Dec. 18) at 133.

CHAPTER VIII – Maps

362. Finally, maps must be considered. It appears to the Tribunal that maps are used by the Parties at different times for different purposes, and that they have relevance to the dispute in several different ways.

Use of Maps by the Parties

363. Older maps, from the eighteenth and early nineteenth centuries, are adduced by Yemen in support of its thesis that the Islands once belonged to Yemen and that Yemen therefore possesses an ancient title which should cause sovereignty in the Islands to revert to it following termination of the Article 16 suspension under the Treaty of Lausanne. Similarly, maps subsequent to 1872 and earlier than 1918 are adduced by Yemen to show that the Islands fell under Ottoman sovereignty during the period in question and fell within the *vilayet* of Yemen. Eritrea then asserts that maps from the early twentieth century through the late 1930s show that Italy claimed to be, or was received as being, the sovereign over the Islands.

364. Both Eritrea and Yemen have introduced maps produced by third parties in order to demonstrate that informed opinion recognized the Islands as respectively forming part of Ethiopia, or of Yemen, during the period from the early 1950s to the early 1990s.

365. Yemen has introduced maps from the period of the early 1950s to demonstrate that the United Nations considered the Islands not to be part of the Province of Eritrea (within Ethiopia). Both Parties have introduced maps from the period of the 1960s onwards, from a variety of sources, respectively indicating that Yemen treated the Islands as non-Yemeni and that Ethiopia treated them as non-Ethiopian – and that third parties and authoritative sources considered them respectively to be one or the other.

366. Finally, Yemen has introduced evidence showing that Ethiopia, the Eritrean liberation movement before independence, and the Eritrean Government after independence have not considered the Islands to be Ethiopian or Eritrean – but rather Yemeni. Eritrea has introduced evidence to show that Yemen has attributed the Islands to Ethiopia or to Eritrea. Each side has also accused the other of waging a deliberate "maps" campaign – from the early 1970s on the part of Yemen to the early 1990s on the part of Eritrea – to alter the designations, labels, and colours on maps so as to "claim" the Islands as a part of the other's territory.

367. In general however the positions of the Parties emerged as quite different overall in the usefulness they attributed to maps. Even whilst seeking to make the points just enumerated, Eritrea's essential position was that map evidence in general

(and the evidence in this case in particular) was contradictory and unreliable and could not be used to establish serious legal positions.

368. Yemen's position was diametrically different; it sought to justify its use of maps in the case for at least four reasons: as "important evidence of general opinion or repute" (in the words of Sir Gerald Fitzmaurice, cited in the oral hearings); as evidence of the attitudes of governments; to reveal the intention of the Parties in respect of state actions; and as evidence of acquiescence or admissions against interest.

The Purposes Claimed to be Served by Maps in the Case

Pre-1872

369. Older maps, from the eighteenth and early nineteenth centuries, are adduced by Yemen in support of its thesis of an ancient or historic title. Most of the maps clearly show the Zuqar-Hanish group and the northern islands as identifiable with the Arabian rather than with the African side of the Red Sea. The Tribunal is not able to judge the extent of the precise territory of the Kingdom of Yemen (*Bilad el-Yemen*). Moreover, in these older maps there is no attribution of the territory of the Islands to Yemen, as such.

370. It appears not unreasonable to infer from the map evidence that rulers (including in particular the Imam of Yemen) of Southern Arabia before the 1872 Ottoman conquest probably did perceive that the Islands fell within their territorial claim as part of Yemen or of the Arabian coast. However this impression must be qualified by the fact that it is not possible to evaluate the *colour* of maps produced during periods when hand-colouring had to be applied to maps at a second stage. These factors are therefore not determinative with regard to the issue of reversionary historic title. Moreover, there is no evidence that Southern Arabian rulers themselves ever saw or authorized these maps. Conclusions based on this material would be tenuous at best.

1872-1918 Period

371. Similarly, maps subsequent to 1872 and earlier than 1918 are adduced by Yemen to show that the Islands fell under Ottoman sovereignty during the period in question and fell within the *vilayet* of Yemen and were administered as part of that *vilayet*. The map evidence appears to confirm the fact that the Ottoman Empire was sovereign over the Islands, upon which fact the Parties are in agreement.

Period Between 1924 and 1939

372. Yemen has introduced a number of maps that appear to prove that Italy in the inter-war period did not officially consider itself as sovereign over the Islands. These maps were produced by the Ministry of Colonies in 1933, 1935, and 1937 and by the Ministry of Italian Africa in 1939, and they show that the Italian colonial authorities did not consider at the time that the Islands formed part of the Italian Colony of Eritrea. Yemen has also submitted other official Italian maps from the Ministry of Colonies (c. 1925 and 1933) and the Ministry of Italian Africa (1939) of which the first two attribute the Islands clearly to *Yemen* as opposed to the Province of Eritrea, and the third merely omits them from territory of Italian East Africa.

373. Eritrea has introduced an official Italian map of the 1920s to a contrary purpose. It is however hard to discern and appears to be done by hand. Weighed against the evidence submitted by Yemen in terms of official Italian maps of the period, it is not as clear as the Ministry of Colonies' 1933 and 1935 Maps. Nor is its date specified.

374. To the extent that these may be viewed as admissions against interest from official Italian sources, which are not controverted by Eritrean evidence, they have relevance to the Eritrean claim that Italy considered herself sovereign over the Islands at the outbreak of the Second World War. The best interpretation of this evidence appears to be that official Italian cartography did not wish formally to portray the Islands as being under Italian sovereignty in the inter-war period – and even went so far as to assign the Islands to Yemen. On balance, the evidence seems to establish that Italy, in the interbellum period, did not consider the Islands to be under Italian sovereignty or at least does not establish that Italy in that period did consider the Islands to be under Italian sovereignty.

375. However, since the Tribunal has arrived at its legal conclusions about the status of the Islands on the basis of the diplomatic record and agreements entered into between 1923 and 1939, the map evidence – whilst supportive of and consistent with the conclusions reached – is not itself determinative. Were there no other evidence in the record concerning the attitude or intentions of Italy, this evidence would be of greater importance.

United Nations Treatment in 1950

376. Yemen has introduced maps from the period of the early 1950s to demonstrate that the United Nations considered the Islands not to be part of the Province of Eritrea (within Ethiopia). The key evidence here is a United Nations Map of 1950. Eritrea has vigorously contested the accuracy of this map, its provenance,

authenticity and effect, saying that "[n]o official map was adopted by the United Nations".

377. It is well accepted that, in the United Nations practice, its publication of a map does not constitute a recognition of sovereign title to territory by the United Nations.

378. Whether the map was attached to the report of the United Nations Commission for Eritrea as an official commission map, or as a compromise – or even as a merely illustrative map – seems to be beside the point. What it bears witness to is that it was used and circulated – and received no objection. No protest was recorded in 1950 or at any later time, and Ethiopia itself voted in favour of the report with full knowledge of the map.

379. The map however cannot affirmatively prove that the Islands were Yemeni, even if they bear the same colour as Yemen. In this instance, the United Nations was not concerned with Yemen. The map did not in fact concern Yemen as such. What it shows is that the United Nations when it acted on the future of Ethiopia and Eritrea did *not* consider the Islands to be Ethiopian or Eritrean. As already mentioned in connection with the Italian map evidence of the 1920s and 1930s, since the Tribunal has reached the conclusion that Italy had not acquired sovereignty over the Islands by 1940, it could not then reach the conclusion that Ethiopia (and thus Eritrea by derivation) could have acquired title ten years later by inheritance from Italy.

Informed Opinion

380. Both Eritrea and Yemen have introduced a number of maps produced by third parties (such as independent or commercial cartographic sources, or the intelligence, mapping and navigational authorities of third states) in order to demonstrate that informed opinion recognized the Islands as respectively forming part of Ethiopia, or of Yemen, during the period from the early 1950s to the early 1990s.

381. Although the Tribunal must be wary of this evidence in the sense that it cannot be used as indicative of legal title, it is nonetheless "important evidence of general opinion or repute" in the sense advanced by Yemen. But while a considerable number of the maps submitted appear in general to confirm an impression that the Islands, from and after 1952 to the present day, are mainly attributed to Yemen, and not to Ethiopia or Eritrea, there are noteworthy exceptions.

382. Although Eritrea, on its part, has introduced some respectable independent cartographic evidence, this evidence appears to be somewhat outweighed by the contrary evidence from the other side. In some instances the Tribunal cannot agree with the characterization of the maps sought by the Party introducing it. Moreover, the Tribunal is unwilling, without specific direction from the map itself, to attribute meaning to dotted lines rather than to colouration or to labelling. The conclusions on this basis urged by Eritrea in relation to a number of its maps are not accepted.

383. There are also Central Intelligence Agency maps introduced by Yemen and the corroborative labelling in the U.S. Defence Department Mapping Agency charts of 1994.

Admissions Against Interest

384. In 1967, the United States Department of State distributed a press package on the occasion of a state visit by Emperor Haile Selassie to Washington together with "Background Notes" that included a map that very clearly showed the Islands as not being Ethiopian. They are clearly shown in black, just as are Kamaran and the Farasan islands; the Dahlaks are also clearly shown in white, as part of Ethiopia.

385. Yemen has introduced evidence showing that Ethiopia, the Eritrean liberation movement before independence, and the Eritrean Government after independence have not considered the Islands to be Ethiopian or Eritrean – but rather Yemeni. Eritrea has also introduced evidence to show that Yemen has itself attributed the Islands to Ethiopia or to Eritrea. The Tribunal is of the view that most of this evidence tends to cancel itself out, except possibly for the Eritrean maps published after 1992.

386. Yemen further contended that a particular map, asserted by Eritrea to have been produced for the Eritrean Ministry of Tourism by a private firm and to contain a number of inaccuracies, had in fact been distributed to foreign missions, including those of Yemen and the United States, and that it also "hung in Eritrean Government offices in Asmara." This statement was not controverted. The Tribunal notes that an early map produced by Eritrea after it became independent did not attribute to Eritrea all of the islands that it now claims.

387. On its part, Eritrea asserts as well that Yemen has authorized the production of maps that can be interpreted against its interest, including a map published in 1975 which clearly appears to ascribe the Islands to Ethiopia.

Conclusions as to Maps

388. On balance, the Tribunal has reached the following conclusions:

As to the period prior to 1872

Although Yemen has shown in general that most ancient and nineteenth-century maps attributed the Islands to the Arabian sphere of influence rather than to the African coast, the precise attribution of the Islands to "Yemen" has not been demonstrated.

For the period from 1872-1918

The maps produced by each side demonstrate without difficulty that the Islands were under Ottoman domination during the last years of the Empire's existence. There is no evidence in the record, nor was there any discussion in the case, about the effect of this widespread recognition on the validity *vel non* of the asserted Yemeni claim to a reversionary interest.

For the period between the Wars

The map evidence is to some extent contradictory, but by and large the official Italian maps of the time demonstrate that even if Italy harboured a desire to annex the Islands after the Treaty of Lausanne, it certainly did not accompany this desire with any outward manifestation of state authority in its official cartography.

For the post-war period

It is not possible to conclude from the history of the 1950 United Nations maps that Ethiopia acquired the Islands after the Second World War, from Italy or otherwise.

For the period between 1950 and 1992

The evidence for this period is beset with contradictions and uncertainties. Each Party has demonstrated inconsistency in its official maps. The general trend is, however, that Yemeni map evidence is superior in scope and volume to that of Eritrea. However, such weight as can be attached to map evidence in favour of one Party is balanced by the fact that each Party has published maps that appear to run counter to its assertions in these proceedings.

For the period from 1992 to 1995

Finally, evidence is in the record showing broadly-publicized official and semi-official Eritrean cartography shortly after independence which shows the Islands as non-Eritrean if not Yemeni. The evidence is, as in all cases of maps, to be handled with great delicacy.

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CHAPTER IX – Petroleum Agreements and Activities

389. It is a singular fact of the proceedings that neither party on its own motion pleaded, described, or relied upon oil contracts and concessions relating to the Red Sea and the disputed Islands. The pleadings of the parties in respect of oil contracts and concessions came in response to questions posed by a Member of the Tribunal at the close of its hearings in February 1998; in the absence of those questions, it appears that those pleadings would not have been made in this phase of the proceedings.

390. Nevertheless, in response to questions put to them, both parties submitted considerable data and argument. In the view of the Tribunal, that data and argument left some questions unanswered. It accordingly called for renewed hearings to be devoted solely to Red Sea petroleum contracts and concessions. Those hearings took place in London from July 6-8, with the benefit of substantial further written pleadings as well as oral argument, in the course of which, and after which, still further material data was introduced. In those hearings, Eritrea largely maintained that these contracts and concessions were probative of little that was relevant to the issues before the Tribunal, whereas Yemen maintained that they were of major significance in support of its position. Yemen contended that the pattern of Yemen's offshore concessions, unprotested by Ethiopia and Eritrea, taken together with the pattern of Ethiopian concessions, confirmed Yemen's sovereign claims to the disputed Islands, acceptance of and investment on the basis of that sovereignty by oil companies, and acquiescence by Ethiopia and Eritrea. Yemen stated that lack of time had been the reason for its not having pleaded the contracts and concessions on its own initiative.

The Provisions of the Pertinent Contracts and Concessions

391. Both Yemen and Eritrea have concluded contracts and concession agreements for oil exploration, development, production, and sale of commercial quantities of petroleum that might be found under the Red Sea. While in the event no such quantities have so far been found, those contracts and concessions merit the Tribunal's consideration for what they show and do not show. Of particular significance for the issues before the Tribunal may be any *effectivités* arising out of or associated with those contracts and concessions.

Contracts and concessions entered into by Yemen

392. Yemen has submitted information on Red Sea contracts and concession agreements as follows.

Shell Seismic Survey, 1972

393. Yemen states that, in 1972, its predecessor, the Yemen Arab Republic, entered into a contract with Shell International Petroleum Company for "a major geophysical scouting survey in the Red Sea". It maintains that the survey, carried out on Shell's behalf by Western Geophysical Company of America in March 1972, involved the shooting of seismic reconnaissance lines in the area of the Red Sea that encompassed the islands of the Zuqar-Hanish group, the Zubayr group and Jabal al-Tayr, and from that fact argues that the survey is supportive of Yemeni sovereignty over those Islands. It states that, as a result of the survey, Shell decided that the southern third of the area surveyed, a substantial zone that encompassed the Zuqar-Hanish group, was not promising, but that it would take up a concession contract for a more northerly block which included Zubayr Island.

394. Yemen has not been in a position to provide a text of the survey contract, whose existence Eritrea questions. It does provide a report of Shell International Petroleum Maatschappij N.V. of January 1977, which refers to an offshore scouting survey whose results were used to select the area of the agreement discussed below. It introduced as well in the course of the hearings on 7 July 1998 the *Final Operations Report, Marine Seismic Survey, Offshore Yemen (Red Sea)* by Western Geophysical Company of March 1972. That report states that the objective of the survey was to provide a preliminary seismic coverage of "the concession area" (though at that stage there was no concession), and notes that the field office and base of operations for the seismic survey were in Massawa, Ethiopia. The report attaches a map of the "approximate area covered by seismic program" (Plate I), which extends right up to the Ethiopian coast.

395. That map indicates that the survey area is irrelevant to questions of title; Yemen hardly is claiming jurisdiction over the territorial waters of Eritrea, and could not have meant to do so by the authorization or performance of the seismic survey in question. The fact that the survey area embraced Islands in dispute accordingly is not probative.

Shell Petroleum Agreement, 1974

396. The Yemen Arab Republic and Deutsche Shell Aktiengesellschaft concluded a Petroleum Agreement on 16 January 1974. The contract area was defined as meaning the specified area and its subsoil and seabed "under the jurisdiction of the Yemen Arab Republic". It comprised a Red Sea block north of the Zuqar and Hanish islands, which islands it names but does not encompass. It does not encompass Jabal al-Tayr, which is to the west of the contract area, nor does it

name it. It names none of the islands it does encompass. It includes the Zubayr group among the unnamed islands within the contract area.

397. A reconnaissance survey was contracted for by Shell that entailed seismic, gravity and magnetic data acquisition in the contract area; the survey report does not state that the survey was carried out within the territorial waters of the Zubayr group. A well was drilled by Shell at a point far from the islands in dispute; oil was not found in commercial quantities; and the agreement was terminated.

398. In a *Final Report on the Exploration Venture of Yemen Shell Explorations GMBH Yemen Arab Republic* of May 1981, it is stated that: "The concession area granted to Deutsche Shell . . . under the terms of the Petroleum Agreement of 16 January 1974 extended from . . . the Yemen mainland in the east to approximately the median line of the Red Sea in the west."

399. In view of that statement and the fact that the concession contract speaks not of an area and its subsoil and seabed under the sovereignty but under the jurisdiction of Yemen, the Tribunal concludes that the 1974 Shell concession was granted and implemented in exercise not of Yemen's claims to sovereignty over the islands and their waters within the contract area but in exercise of its rights to the continental shelf as they then were. It further is of the view, in the light of the foregoing factors, that, since the contract does not name the Zubayr group and since Shell conducted no activities on the islands of the Zubayr group or within their territorial waters, the 1974 Shell Petroleum Agreement was entered into without particular regard to the Zubayr group. Those islands appear to have been included within the contract area because the Zubayr group fell on the Yemeni side of the median line, on a continental shelf over which Yemen could exercise jurisdiction.

400. At the same time, the Petroleum Agreement between Yemen and Shell was known to the industry, was published, and its existence and, with sufficient diligence, its terms, could have been known to Ethiopia had it followed the pertinent publications (such as Barrow's *Basic Oil Laws and Concession Contracts*). Ethiopia may be argued to have had notice, at any rate, constructive notice, of its existence and provisions. It made no protest about the agreement, despite its contract area including the Zubayr group to which Eritrea now lays claim. Eritrea maintains that Ethiopia in fact was unaware of the terms of the agreement; that, as a poor country locked in civil war, Ethiopia cannot be charged with gaining knowledge of it, and that, in any event, since conclusion and publication of a concession contract is not a title-generating act, there was nothing to protest in the absence of concrete and visible activities of Shell or the Yemeni Government on the Zubayr group. Yemen, for its part, attaches significance to the failure of

Ethiopia to protest. Such absence of protest by Ethiopia, and later Eritrea, characterizes all the concessions granted by Yemen in the Red Sea, and will be evaluated below.

401. The area of the 1974 Petroleum Agreement between Yemen and Shell is further reproduced in a map dated December 1976. That map was prepared by Shell, and is found in a Shell Report of January 1977 marked "Confidential". It is not contended that it has been published or could or should have been known to Ethiopia. It shows the area of the agreement and the areas of detailed survey within it (which are not near the Zubayr group). To the west of the area of the agreement, there runs a line which is described as the "Approximate tentative international boundary". That boundary runs west of the Zubayr group and west of Zuqar and the Hanish islands as well. No evidence was offered about the considerations that in the view of the drawer of the line gave rise to it, nor did Eritrea specifically comment upon it. In *Yemen's Comments on the Documents introduced by Eritrea after the Final Oral Argument, 29 July 1998,* maps 5 and 6 prepared by Yemen are described as reproducing the line.

402. It appears to the Tribunal that the author of the Shell map was of the view that the "approximate tentative international boundary" was to be drawn on the basis of Yemeni sovereignty over most of the disputed islands and all of the larger ones. That impression is supported not only by the fact that the "approximate tentative international boundary" runs west of those islands. It is strengthened by the author's having accorded the major disputed islands, including Zuqar and the Hanish islands, an influence on the course of the boundary as drawn.

Tomen-Santa Fe Seismic Permit, 1974

403. A Seismic Permit Agreement was concluded between the Yemen Arab Republic and Toyo Menka Kaisha Ltd. ("Tomen") in 1974, which was extended to include Santa Fe International Corp. The agreement was initially characterized by Yemen in these proceedings as a "concession", which was contested by Eritrea; when its text was later introduced, it was found to be entitled, "Seismic Permit", and to provide for Tomen's conducting a marine seismic survey in the contract area. The contract area is specified by the contract to be outlined in "Exhibit A"; however, Yemen has not placed "Exhibit A" in evidence and has not offered an explanation for its absence from the text of a contract otherwise provided in full. The contract itself gives the coordinates of the contract area and Yemen has placed in evidence maps which it states were prepared for these proceedings on the basis of those coordinates.

404. Yemen affirms on the basis of those coordinates and maps that the contract area embraced the whole of Zuqar and the Hanish islands. However, in an

"Exploration History Map" prepared by the United Nations Development Programme (UNDP) and the World Bank, undated but apparently prepared late in 1991, on whose probative force Yemen repeatedly has relied, the western line differs. The western line appears to run through, rather than to the west of, the southern extremity of Greater Hanish Island (the explanatory block on the map reads, "Tomen & Santa Fe, started 1974, ended 1975, seismic, 2150 km."). It may be that the line on the UNDP map runs through Greater Hanish along a median line, as two other concessions, one concluded by Yemen and another by Eritrea, appear to do.

405. The Tomen-Santa Fe Seismic Permit Agreement recites that Yemen has "exclusive authority to mine for Petroleum in and throughout" the contract area, and that the contract area "means the offshore area within the statutory mining territory of Yemen" described in the permit. The term of the contract is six months (and appears to have been extended to a year). The contract specifies that, "The execution of the work program shall not conflict with obligations imposed on the Government of Yemen by International Law". It provides that the contractor shall have the right of ingress to and egress from the contract area and adjacent areas. It further provides that Tomen shall, within the contract term, have the right to apply for a Petroleum License for all or part of the contract area for the exploration, development and production of petroleum, the terms of which are to be agreed upon guided by the terms of similar licenses in OPEC countries.

406. The Seismic Permit Agreement, while not a concession agreement, accordingly is a petroleum-related contract that looks towards the conclusion of such an agreement in certain circumstances. Its assertion of an exclusive authority of Yemen to mine for petroleum within the contract area, and its reference to the statutory mining territory of Yemen, is consistent with conclusion of a contract for exercise of Yemen's rights on its continental shelf. Decree No. 16 concerning the Continental Shelf of the Yemen Arab Republic of 30 April 1967, in proclaiming Yemeni sovereign rights over the seabed and subsoil of its continental shelf and the continental shelf of its islands, asserts the exclusive right to prospect for natural mineral resources of the shelf. The contractual reference to obligations imposed upon Yemen by international law is also of interest, and may be a reference to limited continental shelf rights. In the view of the Tribunal, the Seismic Permit Agreement of itself does not constitute a claim by Yemen to sovereignty over the islands within its contract area, nor does Eritrea's failure to protest the agreement indicate acquiescence in any such claim. However to some extent it presupposes some measure of title to any islands contained within the contract area. The contract area included the land territory and territorial waters of the islands within its extent; this would have included the land territory and also the territorial waters of some or all of Greater Hanish and all of Zuqar and Lesser Hanish.

407. Eritrea argues that in any event seismic surveys are not indicative of sovereign claims. It relies on the Law of the Sea Convention, Part XIII on "Marine Scientific Research". Article 241 provides: "Marine scientific research shall not constitute the legal basis for any claim to any part of the marine environment and its resources". Article 246 provides for the regulation by coastal states of marine scientific research in the exclusive economic zone and on the continental shelf; research which shall be conducted with the consent of the coastal state. States shall in normal circumstances grant their consent for marine scientific research projects by other states or competent international organizations "in order to increase scientific knowledge of the marine environment for the benefit of mankind." In the view of the Tribunal, these provisions do not relate to the seismic and other explorations for petroleum for commercial purposes carried out by licensees of the Parties in the circumstances of these proceedings.

408. Accordingly, activities undertaken in pursuance of the Tomen-Santa Fe Seismic Permit and other like authorizations by licensees of the Parties have a certain importance, and must be weighed by the Tribunal. In the period between 23 July 1974, when the vessel *Western Geophysical I* departed from Hodeidah, and the completion of its voyage on 9 September 1974, a period of some six weeks, "Of the originally scheduled 1500 miles of program, only 1336 miles were recorded due to . . . dangerous shoaling in the offshore islands area". That suggests that there were difficulties in working close to the islands; there are a number of references in the report to the Zuqar and Hanish islands, but no indication is given that suggests any activity on the islands. It is not easy to deduce from the text and maps provided whether seismic work was performed within the territorial waters of the islands. One, for example, speaks of an aerial survey 2 square miles in extent "East of Little Hanish Island". But how far east – and whether within or without the territorial waters of Little Hanish Island – is not shown, nor was the question precisely pursued by counsel for Yemen, who confined himself to stating that operations were conducted "very close" to the islands. Figure 1 of the Santa Fe Report, "Location map & geophysical map", indicates that the areas of detailed survey avoided the immediate waters of the islands, but the map of itself does not show at what proximity to the islands seismic work was conducted. However, if, for example, the geographic position stated "West side Zuqar Island; southwest intersection Lines 50 and 8" is matched against the survey grid found in Figure 1 – each of the bigger blocks being 10 square kilometres – it appears that seismic activities did extend well into Zuqar's territorial waters. As far as can be determined from a review of the report, it is uncertain whether the same can be said for the waters of the Hanish islands.

409. The Santa Fe Report continues: "During the seismic survey, the Zuqar and Hanish islands were observed from aboard ship by the writer, appearing to be

made entirely of volcanic rocks . . . Later, Mr. Hazem Baker, a geologist with the Yemeni government, went ashore on Zuqar Island and collected samples . . . all basaltic." It seems reasonable to presume that he believed that he was landing on an island at least under Yemeni jurisdiction.

Hunt Oil Company Offshore Production Sharing Agreement, 1984

410. Yemen and Offshore Yemen Hunt Oil Company on March 10, 1984 concluded an Offshore Area Production Sharing Agreement. It recites, "Whereas, all Petroleum in its natural habitat in strata lying within the boundaries of YEMEN is the property of the STATE; and Whereas the STATE wishes to promote the development of potential oil resources in the Area and the CONTRACTOR wishes to join and assist the State in the exploration, development and production of the potential Petroleum resources in the Area . . ." Hunt is appointed Contractor "exclusively to conduct Petroleum Operations in the Area described . . . the STATE shall in its name retain title to the area covered . . .". The agreement provides that Yemeni laws shall apply to the Contractor provided that they are consistent with the agreement, and that the rights and obligations of the parties shall be governed by the agreement and can be altered only with their mutual agreement. The agreement was approved by Government Decree. The coordinates of the area covered by the agreement are set out in Annex A, to which is attached a map at Annex B showing those coordinates but not naming or showing any of the disputed islands. Yemen has prepared and submitted a map to the Tribunal which shows the Hunt concession as running in the west very close to the edge of, but not including, Jabal al-Tayr, and, at the southern end of the contract boundary, just including the Zubayr group.

411. In fulfilment of its exploration obligations under the agreement, Hunt contracted with Western Geophysical to conduct a seismic survey of the concession area. It did so in 1985, "infilling" Shell data collected a decade earlier. That operation included the area of the Zubayr islands and, it is claimed, Jabal al-Tayr even though the latter did not fall within the concession area. Seismic soundings were taken "around the Zubayr islands and Jabal al-Tayr" but it is not claimed or shown that seismic activities were conducted within their territorial waters. No activities on the Islands are alleged or shown. Aeromagnetic surveys in the contract area were conducted by an aircraft flying from Yemen, and consequently permission to fly through Yemeni airspace was sought and accorded; that fact neither supports nor detracts from Yemen's claims about the status of the contract area. Equally neutral is the fact that, in connection with well drilling, permission was sought "to enter YAR territorial waters and conduct offshore drilling operations", which were nowhere near the Islands. Two wells were drilled far from the Islands; neither produced oil in commercial quantities, and the concession was relinquished.

412. The Production Sharing Agreement does not in terms state a claim of sovereignty of Yemen over the concession area, and, as noted, it takes no notice of the Islands within it, verbally or in the annexed map. It could be interpreted as a concession issued within the area demarcated by a median line in implementation of Yemen's rights on its continental shelf, a concession which includes the Zubayr group but stops just short of including Jabal al-Tayr. It may be said that if it was the intention of Yemen in issuing the concession to assert sovereignty over the disputed islands, the concession would have included Jabal al-Tayr. What seems likelier is that this concession, as others, was issued with commercial considerations in mind and without particular regard to the existence of the Islands. The fact that title to the contract area is stated to remain in the State of Yemen is not determinative; Yemen holds title to resources on and under its continental shelf; but since the agreement specifies that Yemen retains title "to the area covered" that may be read as a reservation of sovereign title. The reference to the "boundaries of Yemen" is also suggestive of a claim of sovereignty, though "boundaries" does not exclude continental shelf boundaries. The Hunt Production Sharing Agreement was reported in the petroleum literature and gave rise to no protest on the part of Eritrea.

BP Production Sharing Agreement, 1990

413. Yemen and British Petroleum concluded a Production Sharing Agreement on October 20, 1990, whose terms are very similar and in pertinent respects identical to the foregoing Hunt Agreement. It covers the same Antufash Block offshore Yemen that Hunt operated in earlier, and thus embraces the Zubayr islands but not Jabal al-Tayr. However, and this may reflect the policy of Yemen in respect of potential petroleum blocks offered by it in the 1990s, the BP Agreement's description of the block is more specific than that found in the Hunt Agreement, providing: "Whereas, the State wishes to promote the development of potential Petroleum Resources in the Agreement Area block 8, As-Sakir, Shabwa Province, ROY . . ." The text of the agreement was published in *Barrow's*. It elicited no protest from Eritrea.

414. BP conducted extensive aeromagnetic surveys of the agreement area. Low-level flights, conducted with the permission of the Government of Yemen, covered the Area, including the Zubayr islands, and Jabal al-Tayr though it was outside the Area. A Yemeni military officer accompanied the aircraft during its survey. Survey results were unpromising and BP relinquished its rights in the Area in 1993.

415. The Tribunal does not attach much importance to overflights by either of the parties of the islands in dispute. In the circumstances of the case, it is not clear that overflights of these uninhabited islands are tantamount to a claim of

jurisdiction, still less sovereignty, over the Islands. However the agreement's characterization of the Antufash block as comprising or being within a province of the Republic of Yemen is a factor of significance in favour of Yemen; it indicates a sovereign rather than a jurisdictional claim. At the same time, the fact that the agreement was entered into in 1990 and published about that time is noteworthy. Ethiopia was then locked in its final struggle with the Eritrean liberation movement, the Mengistu regime was close to collapse, and to suggest that Eritrea today should be taxed with Ethiopia's failure during that period to find and protest the terms of the agreement may be unreasonable.

Total Production Sharing Agreement, 1985

416. Yemen and Total-Compagnie Française des Pétroles concluded a Production Sharing Agreement in 1985, to which Texaco later became party. Its terms appear close to those of the Hunt Agreement concluded the year before, summarized in pertinent passages above. It however recites, "Whereas, all Petroleum in its natural habitat in strata lying within the boundaries of Yemen and in the seabed subject to its jurisdiction is the property of the State; . . ." Since the area of the agreement is onshore as well as offshore, this could be read as an indication of an offshore claim only to jurisdiction and not sovereignty, and could be taken as an indication of such a Yemeni assumption in other petroleum agreements. The Area is stated to be described in Annex A and shown on the map labelled Annex B, but neither Annex is attached to the text submitted by Yemen to the Tribunal. However, it is common ground between the parties that the Total Agreement's western line runs to the east of Zuqar and the Hanish islands. There is no ground for concluding that this fact suggests a lack of entitlement of Yemen to enter into agreements embracing the disputed islands. It rather again suggests that the petroleum agreements entered into by Yemen were concluded without regard to the Islands.

417. Since the agreement area does not include any of the islands in dispute, it is of limited interest for these proceedings, except in the following respects. Total commissioned seismic studies, which were concentrated between the agreement's western line (which fell short of the Hanish islands) and the coastline of Yemen. The single well drilled – which proved unproductive and led to the agreement's termination in 1989 – was distant from the Hanish islands and towards the coast. However, less detailed seismic surveys were conducted to the west of the Hanish islands, outside the contract Area, which entered territorial waters of those islands. Yemen acted as if it were entitled to authorize, and Total's agent acted as if it were entitled to conduct, those surveys in Hanish territorial waters.

418. Having come to know the Hanish islands through its offshore concession, Total in 1993 decided to become a sponsor of the French Ardoukoba scientific mission

to the islands to study marine life in the reefs. Total requested and received Yemeni Government permission to establish a landing strip on Greater Hanish so that a Total aeroplane could transport equipment to it. It is also claimed that Total sought and received permission to establish a radio station on Greater Hanish and to permit visiting scientists to use its frequency; evidence in support of this claim has not been provided. Evidence has been provided showing that access to the Hanish islands, described by Total as uninhabited, was subject to authorization delivered by the "Central Operation of the Army". After the conclusion of the Ardoukoba mission, Total produced a report that referred to "les îles Hanish en république du Yemen". Thereafter it sought and received governmental authorization to improve the landing strip and fly Total personnel to Greater Hanish for rest and recreation. For a time, a Total aircraft flew frequently to Greater Hanish, carrying passengers for these purposes.

419. Incidental as it may have been to Total's Petroleum Agreement, the building and use of an airstrip on Greater Hanish is in the view of the Tribunal a material *effectivité*. It demonstrates the exercise by Yemen of jurisdiction over Greater Hanish, a recognition of that jurisdiction by Total, and the conduct of visible indicia of that jurisdiction – an airstrip in active use – over a period of time. Eritrea appears to have been unaware of it and in any event made no protest. However, Eritrea has introduced evidence showing that a report of activities of a French company in the waters around Greater Hanish was received in May 1986, the period when Total was operating in that area; that an Ethiopian patrol vessel was dispatched to the area to investigate, and that nothing was found. This evidence suggests that, in the perspective of Eritrea, sovereignty over Greater Hanish lay with it.

Adair International Production Sharing Agreement, 1993

420. Yemen and Adair International entered into a Production Sharing Agreement in 1993. The text of the agreement has not been offered in evidence and accordingly the Tribunal is not in a position to analyse it. The agreement was not ratified by Yemen and did not come into force. Yemen has, however, provided maps of the agreement area which show it as falling within Block 24 or the Al Kathib block in which the Tomen-Santa Fe area fell. It maintains that Yemen had on offer an offshore block that included the whole of the Hanish islands, and that Adair chose to take a contract area slightly less than the total block on offer. The maps of the Adair area provided by Yemen show the western line to cut through the southern portion of Greater Hanish Island, leaving the larger part, but not all, of Greater Hanish within the area of the agreement. It explains that Adair drew that western line for commercial reasons. As far as the Tribunal can judge, the Adair Agreement's western line roughly runs along a median line between the coasts of Yemen and Eritrea, drawn without regard to the islands in dispute.

Blocks Offered by Yemen

421. Beginning in 1990, Yemen no longer responded to proposals by prospective concessionaires for rights in areas drawn by them, but began offering concession blocks, dividing most of Yemen and its offshore into blocks. It states that the blocks include the Zubayr islands and the Hanish islands – it offers no explanation for not including Jabal al-Tayr – and maintains that this is further evidence of Yemen holding itself out as the sovereign of disputed islands.

422. Such weight as the Tribunal might be disposed to give to that contention may be qualified by the evidence about the western lines of the offshore blocks provided by Yemen. Yemen has submitted not only its depiction of the blocks. It has also submitted and relied upon, as "expert opinion evidence confirming Yemen's exercise of State authority over the Hanish islands and other islands", a number of maps prepared by Petroconsultants S.A. of Geneva, illustrations of Petroconsultants' series, "Foreign Scouting Service, Current Status". The maps are dated from 1989 until November 1997. Three of these maps show a western line of Yemen's relevant block running not to the west of Greater Hanish Island but through it, as the Adair Area line does. The map for 1994 is linked to the Adair Agreement but the maps for 1996 and 1997 are not.

Petroleum Agreements and Activities of Ethiopia and Eritrea

423. Ethiopia in the 1970s entered into a number of offshore concession agreements, which stop short of the deep trough that runs through the middle of the Red Sea. At that time, oil technology was unable to support drilling in so deep a trough. While Yemen maintains that these agreements – which it rather than Eritrea introduced in these proceedings – showed a recognition by Ethiopia and the companies concerned that Ethiopia was not entitled to issue concessions embracing the disputed islands, in the view of the Tribunal these agreements simply reflect technological and commercial realities and carry no implication for the rights of the parties at issue in these proceedings. It is reinforced in this conclusion by the fact that Ethiopian concessions typically contain a formula such as the following (as, *mutatis mutandis*, do maps attached to Yemeni concessions): "The description of the eastern boundary of the contract area does NOT necessarily conform to the international boundaries of Ethiopia and accordingly nothing said herein above is to be deemed to affect or prejudice in any way whatsoever the rights of the Government in respect of its sovereign rights over any of the islands or the seabed and subsoil of the submarine area beneath the high seas contiguous to its territorial waters or areas within its economic zone." The Tribunal also finds unenlightening two Red Sea offshore petroleum contracts concluded by Eritrea as late as 1995 and 1996, which were

promptly protested by Yemen as overlapping its waters. But Ethiopia's contract with International Petroleum/Amoco is important.

International Petroleum /Amoco Production Sharing Agreement, 1988

424. Ethiopia concluded a Production Sharing Agreement with International Petroleum Ltd. of Bermuda on May 28, 1988. The concession covered "the onshore-offshore area known as the Danakil Concession in the PDRE" (People's Democratic Republic of Ethiopia). It recites that, "WHEREAS, the title to all Petroleum existing in its natural condition on, or under the Territory of Ethiopia is vested in the State and people of Ethiopia . . . and the Government wishes to promote the exploration, development and production on, in or under the Contract Area . . .", the Government grants to the Contractor "the sole right to explore, develop and produce Petroleum in the Contract Area . . ." On November 1, 1989, 60% of the contract was assigned to Amoco Ethiopia Petroleum Company. Amoco assumed operative responsibility under the assignment.

425. The map attached to the 1988 Production Sharing Agreement shows "Ethiopia-Red Sea Acreage", onshore and offshore, the latter's eastern line running through the southwest extremity of Greater Hanish Island. The description of the Contract Area runs "To the Offshore point 13 at the intersection of LAT 14 DEG 30 with the international median line between North Yemen and Ethiopia, then along the Offshore median line". The agreement contained a force majeure clause, including wars, insurrections, rebellions and terrorist acts, during which the life of the contract would be prolonged. Apparently in view of the fighting between Ethiopian and Eritrean units, force majeure was declared on 9 February 1990 and as of June 1992 was stated to be still in effect.

426. However there is ambiguity about the extent of the Contract Area, at any rate in depictions of it on maps. Amoco Ethiopia Petroleum Company filed four Annual Reports with the People's Democratic Republic of Ethiopia which are in point.

427. The Annual Report for 1989 recounts that geologic activities were undertaken in 1989, that Delft Geophysical Company was awarded a contract to acquire marine seismic, gravity and magnetic data, and that a scout trip by Delft was completed in December. Preliminary seismic interpretation and mapping was initiated. The map attached to the 1989 Report shows virtually all of Greater and Lesser Hanish within the area of the contract, i.e., considerably more than does the map attached to the Production Sharing Agreement.

428. The Annual Report for 1990 observes that activities were suspended with the advent of force majeure on February 9, 1990; as of the end of 1990, the security situation within the Danakil area was considered to remain unsafe for normal

seismic operations. It reports on considerable geologic and geophysical activity before that time, and lists some $2,000,000 in expenditures under the agreement. While the description of the Contract Area matches that in the 1989 report, two maps are attached to the 1990 Annual Report. The first map of the Danakil Contract Area shows the eastern line as running not through but rather west of the Hanish islands. The second map of that Contract Area shows virtually all of Greater and Lesser Hanish within the Contract Area, duplicating the map attached to the 1989 Annual Report.

429. The 1991 Annual Report notes that force majeure has effectively extended the initial period of the contract. While normal seismic operations were unsafe in 1991, substantial technical evaluation of existing data continued. The map of the Contract Area in the 1991 Annual Report shows virtually all of the Hanish islands within the Contract Area, duplicating the maps to that effect in the 1989 and 1990 Reports.

430. The 1992 Annual Report reports limited reprocessing work. It states that Amoco and International Petroleum representatives met with officials of newly independent Eritrea in Asmara on June 24, 1993, when assurances were received that the Danakil Production Sharing Agreement would be recognized by Eritrea. It attaches a contract summary entitled, "Eritrea Danakil Block" and gives an expiration date of February 9, 1997, "to be delayed because of force majeure". The governing law is now described as Eritrean. The Danakil Block map attached to the 1993 Annual Report shows virtually all of the Hanish islands within the Contract Area, as does a "composite magnetic map of the Danakil concession".

431. A map prepared by Petroconsultants, on whose maps Yemen has repeatedly relied, also shows the Amoco Contract Area as embracing the greater part of Greater Hanish.

432. Yemen, while not denying that it never protested the terms or geographical extent of the International Petroleum-Amoco Production Sharing Agreement, argues that it could not be charged with doing so. It observes that an article in the *Petroleum Economist* of October 1991 presents a map which shows an Amoco concession that does not include the Hanish islands. (The UNDP map, which is an "Exploration History Map", does not name the Amoco concession.) Yemen also maintains that the Amoco contract lasted only some three months and that, by the time it might have come to its attention, force majeure prevailed, which might have induced Yemen to take no action.

433. The Tribunal does not find Yemen's position entirely persuasive. As the Annual Reports summarized above demonstrate, the IPC/Amoco contract was extended well beyond three months and into the days of Eritrean independence; its life

compares with that of the contracts on which Yemen relies. If Yemen had secured and read Amoco's Annual Reports – annual reports of American oil companies are generally publicly available for the asking – and if Yemen had evinced the alertness it did in respect of Eritrea's contracts of 1995 and 1996, it would have seen that Ethiopia claimed the right to contract for the exploration, development and production of oil in an area claimed as its territory that included some or virtually all of Greater Hanish islands. Amoco is a major player on the international petroleum scene, and in the immediate area; indeed, one of the maps introduced into evidence by Yemen, shows Amoco together with BP in the Antufash block and shows the Danakil Amoco concession angling into the Adair area in the Al Kathib block.

434. Yemen in its argument has made a great deal about what it alleges is the failure of Ethiopia or Eritrea to grant any concession contract that included disputed islands, and their failure to protest grants of Yemen that did include those islands. But it has been demonstrated that, in the lately pleaded International Petroleum-Amoco Production Sharing Agreement, Ethiopia did grant a concession including much or virtually all of the Hanish islands, and that Yemen failed to protest that agreement. It is of further interest that the map attached to the Production Sharing Agreement speaks of drawing the boundary along the international median line between Yemen and Ethiopia.

435. Eritrea also claims certain pertinent *effectivités*. It has submitted a copy of an Ethiopian radio transmitting license granted circa 1988-89 (the earlier date on the contract is apparently of the Ethiopian calendar) to Delft Geophysical Co. for the establishment of a station on Greater Hanish Island, presumably in connection with the seismic work which Amoco had contracted with Delft to perform. It has provided the text of a detailed order to the most senior military commanders to provide protection to a petroleum exploration expedition of the Ethiopian Ministry of Mines and Energy to be deployed to areas "including Greater Hanish Island". It has provided an Ethiopian memorandum on oil exploration in the Red Sea carrying the Ethiopian date of April 13, 1982 (which is circa 1989 AD.), stating that Amoco-Ethiopia Petroleum Company "has installed navigation beacons to enable it to conduct seismic study . . . including on Greater Hanish Island". The memorandum continues: "An Amoco professional team of contractors will be available starting 3rd week of December to select areas for the installation as follows:

> For two weeks installation of navigation beacons on the 8 selected locations; At the end of the two-week period, conduct 6 week-long seismic tests . . . ."

and it calls for ensuring the protection of the contractors and their equipment during beacon installation and for the protection of the installed beacons. It further requests protection for the Delft Geophysical ship while it is conducting seismic tests. Another memorandum states that an Amoco contracting team will conduct helicopter patrols to select locations for the installation of navigation beacons, including locations "on Greater Hanish". It is not entirely clear whether these activities were in fact completed, although the Amoco Annual Report for 1989 does corroborate that Delft Geophysical did conduct a scout trip in December of 1989 (see para. 427, above).

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436. In the light of this complex concession history, the Tribunal has reached the following conclusions:

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

438. Those contracts however lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the parties.

439. In the course of the implementation of the petroleum contracts, significant acts occurred under state authority which require further weighing and evaluation by the Tribunal.

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CHAPTER X – Conclusions

440. Having examined and analysed in great detail the extensive materials and evidence presented by the Parties[25], the Tribunal may now draw the appropriate conclusions.

Ancient Title

441. First there is the question of an "ancient title" to which Yemen attaches great importance; moreover the Agreement for Arbitration requires the Tribunal to decide the question of sovereignty "on the basis in particular of historic titles". Yemen contends that it enjoys an ancient title to "the islands", which title existed before the hegemony of the Ottoman Empire and indeed emanates from medieval Yemen. It contends, moreover, that this title still subsisted in international law at the time when the Turks were defeated at the end of the First World War, and that therefore, when the Ottoman Empire renounced their generally acknowledged sway over the islands by the Treaty of Lausanne in 1923, the right to enjoy that title in possession "reverted" to Yemen.

442. This is an interesting argument and one that raises a number of questions concerning the international law governing territorial sovereignty. No one doubts that during the period of the Ottoman Empire – certainly in the second Ottoman period 1872-1918 – the Ottomans enjoyed possession of, and full sovereignty over, all the islands now in dispute, and thus not only factual possession but also a sovereign title to possession. When this regime ceased in 1923, was there a "reversion" to an even older title to fill a resulting vacuum?

443. It is doubted by Eritrea whether there is such a doctrine of reversion in international law. This doubt seems justified in view of the fact that very little support for such a doctrine was cited by Yemen, nor is the Tribunal aware of any basis for maintaining that reversion is an accepted principle or rule of general international law. Moreover, even if the doctrine were valid, it could not apply in this case. That is because there is a lack of continuity. It has been argued by

[25] The Tribunal wishes to note the sheer volume of written pleadings and evidence received from the Parties in this first phase of the arbitral proceedings. Each Party submitted over twenty volumes of documentary annexes, as well as extensive map atlases. In addition, the Tribunal has carefully reviewed the verbatim transcripts of the oral hearings, which together far exceed 1,000 pages. The Tribunal further notes that the majority of documents were submitted in their original language, and the Tribunal has relied on translations provided by the Parties.

Yemen that in the case of historic title no continuity need be shown, but the Tribunal finds no support for this argument.

444. Yemen's argument is difficult to reconcile with centuries of Ottoman rule over the entire area, ending only with the Treaty of Lausanne (see Chapter V, above). This is the more so because, under the principle of intertemporal law, the Ottoman sovereignty was lawful and carried with it the entitlement to dispose of the territory. Accepting Yemen's argument that an ancient title could have remained in effect over an extended period of another sovereignty would be tantamount to a rejection of the legality of Ottoman title to full sovereignty.

445. The Treaty of Lausanne did not expressly provide, as the Treaty of Sèvres would have done, that Turkey renounced her territorial titles in favour of the Allied Powers; which provision would certainly have excluded any possibility of the operation of a doctrine of reversion. Yemen was not a party to the Treaty of Lausanne, which was therefore *res inter alios acta*. Nevertheless, none of the authorities doubts that the formerly Turkish islands were in 1923 at the disposal of the parties to the Lausanne Treaty, just as they had formerly been wholly at the disposal of the Ottoman Empire, which was indeed party to the treaty and in it renounced its sovereignty over them. Article 16 of the Treaty created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties; and this legal position was generally recognised, as the considerable documentation presented by the Parties to the Tribunal amply demonstrates. So, it is difficult so see what could have been left of such a title after the interventions of the Ottoman sovereignty which was generally regarded as unqualified; and its replacement by the Article 16 regime which put the islands completely at the disposal of the "interested parties".

446. There is a further difficulty. Yemen certainly existed before the region came to be under the domination of the Ottomans. But there must be some question whether the Imam, who at that period dwelt in and governed a mountain fortress, had had sway over "the islands". Further, there is the problem of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title, particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen.

447. In keeping with the dictates of the Arbitration Agreement, both Parties, and Yemen especially, have placed "particular" emphasis on historic titles as a source of territorial sovereignty. They have, however, failed to persuade the Tribunal of the actual existence of such titles, particularly in regard to these islands.

448. Eritrea's claims too, insofar as they are said to be derived by succession from Italy through Ethiopia, if hardly based upon an "ancient" title, are clearly based upon the assertion of an historic title. There is no doubt, as has been shown in chapters V, VI and VII above, that Italy in the inter-war period did entertain serious territorial ambitions in respect of the Red Sea islands; and did seek to further these ambitions by actual possession of some of them at various periods. Major difficulties for the Eritrean claims through succession are, as has been shown above in some detail, first the effect of Article 16 of the Treaty of Lausanne of 1923, and later the effects of the provisions of the Italian Peace Treaty of 1947. But there is also the fact that the Italian Government, in the inter-war period, constantly and consistently gave specific assurances to the British Government that Italy fully accepted and recognized the indeterminate legal position of these islands as established by treaty in 1923. No doubt Italy was hoping that the effect of her active expansionist policies might eventually be that "the parties concerned" would be persuaded to acquiesce in a *fait accompli*. But that never happened.

449. So there are considerable problems for both Parties with these versions of historic title. But the Tribunal has made great efforts to investigate both claims to historic titles. The difficulties, however, arise largely from the facts revealed in that history. In the end neither Party has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision. And it must be said that, given the waterless and uninhabitable nature of these islands and islets and rocks, and the intermittent and kaleidoscopically changing political situations and interests, this conclusion is hardly surprising.

450. Both Parties, however, also rely upon what is a form of historic claim but of a rather different kind; namely, upon the demonstration of use, presence, display of governmental authority, and other ways of showing a possession which may gradually consolidate into a title; a process well illustrated in the *Eastern Greenland* case, the *Palmas* case, and very many other well-known cases. Besides historic titles strictly so-called the Tribunal is required by the Agreement for Arbitration to apply the "principles, rules and practices of international law"; which rubric clearly covers this kind of argument very familiar in territorial disputes. The Parties clearly anticipated the possible need to resort to this kind of basis of decision – though it should be said that Yemen expressly introduces this kind of claim in confirmation of its ancient title, and Eritrea introduces this kind of claim in confirmation of an existing title acquired by succession – and the great quantity of materials and evidences of use and of possession provided by both Parties have been set out and analysed in Chapter VII above, together with

chapter VIII on maps and Chapter IX on the history of the petroleum agreements. It may be said at once that one result of the analysis of the constantly changing situation of all these different aspects of governmental activities is that, as indeed was so in the *Minquiers and Ecrehos*[26] case where there had also been much argument about claims to very ancient titles, it is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions. And to the consideration of these materials and arguments this Award now turns.

Evidences of the Display of Functions of State and Governmental Authority

451. These materials have been put before the Tribunal by the Parties with the intention of showing the establishment of territorial sovereignty over the islands, in Judge Huber's words in the *Palmas* case,[27] "by the continuous and peaceful display of the functions of state within a given region." But the kind of actions that may be deployed for this purpose has inevitably expanded in the endeavour to show what Charles de Visscher named a gradual "consolidation" of title. Accordingly, the Tribunal is faced in this case with an assortment of factors and events from many different periods, intended to show not only physical activity and conduct, but also repute, and the opinions and attitudes of other governments (the different classes of materials are set out above in Chapter VII).

452. It is well known that the standard of the requirements of such activity may have to be modified when one is dealing, as in the present case, with difficult or inhospitable territory. As the Permanent Court of International Justice said in the *Legal Status of Eastern Greenland* case, "[I]t is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make a superior claim."[28]

453. This raises, however, a further important question of principle. The problem involved is the establishment of territorial sovereignty, and this is no light matter. One might suppose that for so important a question there must be some absolute minimum requirement for the acquisition of such a right, and that in principle it ought not normally to be merely a relative question.

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[26] Minquiers and Ecrehos (U.K. v. Fr.), 1953 I.C.J. 47.

[27] Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829 (1929).

[28] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53.

454. It may be recalled that this question of principle did arise in the *Palmas* case, but there Huber was able to meet it by appealing to the particular terms of the *compromis*, which, said Huber, "presupposes for the present case that the Island of Palmas (or Miangas) can belong only to the United States or to the Netherlands and must form in its entirety part of the territory either of the one or of the other of these two Powers, parties to the dispute," and "[t]he possibility for the arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the parties to the Special Agreement."

455. The Arbitration Agreement in the present case, however, is in different and even unusual terms. The Tribunal is required only to make "an award on territorial sovereignty" and "to decide the sovereignty". The compromissory provision which led Huber to the possibility of deciding only on the basis of a marginal difference in weight of evidence cannot be said to apply in the present case.

456. There is certainly no lack of materials, evidence, or of arguments in the present case. The materials, on the contrary, are voluminous and the result of skilled research by the teams of both Parties, and of the excellent presentations by their counsel. But what these materials have in fact revealed is a chequered and frequently changing situation in which the fortunes and interests of the Parties constantly ebb and flow with the passage of the years. Moreover, it has to be remembered that neither Ethiopia nor Yemen had much opportunity of actively and openly demonstrating ambitions to sovereignty over the islands, or of displaying governmental activities upon them, until after 1967, when the British left the region. For, as shown above, the British were constantly vigilant to maintain the position effected by the Treaty of Lausanne that the legal position of "the islands" was indeterminate.

457. In these circumstances where for all the reasons just described the activities relied upon by the parties, though many, sometimes speak with an uncertain voice, it is surely right for the Tribunal to consider whether there are in the instant case other factors which might help to resolve some of these uncertainties. There is no virtue in relying upon "very little" when looking at other possible factors might strengthen the basis of decision.

458. An obvious such factor in the present case is the geographical situation that the majority of the islands and islets and rocks in issue form an archipelago extending across a relatively narrow sea between the two opposite coasts of the sea. So there is some presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the state on the opposite coast has been able to demonstrate a clearly better title. This possible further factor

looks even more attractive when it is realised that its influence can be seen very much at work in the legal history of these islands; beginning indeed with the days of Ottoman rule when even under the common sovereignty of the whole region it was found convenient to divide the jurisdiction between the two coastal local authorities (see paras. 132-136, above). Moreover, in the present case, the examination of the activities material itself shows very clearly that there was no common legal history for the whole of this Zuqar-Hanish archipelago; some of the evidence not surprisingly refers to particular islands or to sub-groups of islands.

459. Thus the Tribunal has found it necessary, in order to decide the question of sovereignty, to consider the several subgroups of the islands separately, if only for the reason that the different subgroups have, at least to an important extent, separate legal histories; which is only to be expected in islands that span the area between two opposite coasts. This may seem only a natural or even manifest truth, but Yemen in particular has emphasised the importance it attaches to what it calls a principle of natural unity of the islands, and some comment on this theory is therefore required.

Natural and Physical Unity

460. Yemen's pleadings insist strongly on what it calls "the principle of natural or geophysical unity" in relation to the Hanish group of islands; Yemen uses the name of the "Hanish Group" both in its texts and in its illustrative maps to encompass the entire island chain, including the Haycocks and the Mohabbakahs (the present comments do not of refer of course to the northern islands of Jabal al-Tayr and the Zubayr group, which will be considered separately later on).

461. This "principle" is described in Chapter 5 of the Yemen Memorial, where impressive authority is cited in support of it, including Fitzmaurice, Waldock and Charles de Visscher. That there is indeed some such concept cannot be doubted. But it is not an absolute principle. All these authorities speak of it in terms of raising a presumption. And Fitzmaurice is, in the passage cited, clearly dealing with the presumption that may be raised by proximity where a state is exercising or displaying sovereignty over a parcel of territory and there is some question whether this is presumed to extend also to outlying territory over which there is little or no factual impact of its authority. The Tribunal has no difficulty in accepting these statements of high authority; but what they are saying is in fact rather more than a simple principle of unity. It will be useful to cite Fitzmaurice again:

The question of 'entity' or 'natural unity'

> This question can have far-reaching consequences. Not only may it powerfully affect the play of probabilities and presumptions, but also, if it can be shown that the disputed areas (whether by reason of actual contiguity or of proximity) are part of an entity or unity over which as a whole the claimant State has sovereignty, this may (under certain conditions and within certain limits) render it unnecessary - or modify the extent to which it will be necessary - to adduce specific evidence of State activity in relation to the disputed areas as such - provided that such activity, amounting to effective occupation and possession, can be shown in the principle established by the Island of Palmas case that 'sovereignty cannot be exercised in fact at every moment on every point of a territory'.[29]

462. Thus, the authorities speak of "entity" or "natural unity" in terms of a presumption or of probability and moreover couple it with proximity, contiguity, continuity, and such notions, well known in international law as not in themselves creative of title, but rather of a possibility or presumption for extending to the area in question an existing title already established in another, but proximate or contiguous, part of the same "unity".

463. These ideas, however, have a twofold possible application in the present case. They may indeed, as Yemen would have it, be applied to cause governmental display on one island of a group to extend in its juridical effect to another island or islands in the same group. But by the same rationale a complementary question also arises of how far the sway established on one of the mainland coasts should be considered to continue to some islands or islets off that coast which are naturally "proximate" to the coast or "appurtenant" to it. This idea was so well established during the last century that it was given the name of the "portico doctrine" and recognised "as a means of attributing sovereignty over off-shore features which fell within the attraction of the mainland".[30] The relevance of these notions of international law to the legal history of the present case is not far to seek.

464. Thus the principle of natural and physical unity is a two-edged sword, for if it is indeed to be applied then the question arises whether the unity is to be seen as originating from the one coast or the other. Moreover, as the cases and authorities cited by Yemen clearly show, these notions of unity and the like are

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[29] 32 B.Y.I.L. (1955-56) 73-74.

[30] D. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 185 (1982).

never in themselves roots of title, but rather may in certain circumstances raise a presumption about the extent and scope of a title otherwise established.

465. In spite of unity theories, the fact is that both Parties have tacitly conceded that, for the purposes at any rate of the exposition of their pleadings, it may be accepted that there can be sub-groups within the main group. The nomenclature within common use indicates at least three of the sub-groups: the Mohabbakahs; the Haycocks; and what it will be convenient at least for the moment to call the Zuqar-Hanish group and its many satellite islands, islets, and rocks. These names will all be found in the *British Pilot and Sailing Directions for the Southern Red Sea* (Yemen has cited this publication as authority for regarding all these islands as one group, but of course if one is concerned with them as sailing hazards or landmarks when traversing the Red Sea there is really no other way to do it). There are also the two northern islands: Jabal al-Tayr, and the group of which the biggest island is Jabal Zubayr. The Tribunal will now consider its conclusions in respect of each of the three subgroups and then, finally, the northern islands.

466. Thus, in order to make decisions on territorial sovereignty, the Tribunal has hardly surprisingly found no alternative but to depart from the terms in which both Parties have pleaded their cases, namely by each of them presenting a claim to every one of the islands involved in the case. The legal history simply does not support either such claim.[31] For, as has been explained above, much of the material is found on examination to apply either to a particular island or to a sub-group of islands. The Tribunal has accordingly had to reach a conclusion which neither Party was willing to contemplate, namely that the islands might have to be divided; not indeed by the Tribunal but by the weight of the evidence and argument presented by the Parties, which does not fall evenly over the whole of

[31] In this connection it is interesting to see the statements made in the 1977 "Top Secret" memorandum of the Ministry of Foreign Affairs of The Provisional Military Government of Socialist Ethiopia, discussed above in para. 245. This memorandum refers to islands in the southern part of the Red Sea that "have had no recognized owner", with respect to which Ethiopia "claims jurisdiction" and "both North and South Yemen have started to make claims." South Yemen's position is that the islands were illegally handed over to Ethiopia by the British when Britain was giving up its rights in the protectorate of Aden." It adds "the North Yemen government has now raised the question of jurisdiction over the islands. It goes on to recommend bilateral negotiations which seem in fact to have been entered into before the time of this memorandum for it goes on to say that "[b]oth states . . .. have informally mentioned the possibility of dividing the islands between the two of them. The proposal is to use the median line, which divides the Red Sea equally from both countries' coastal borders, as the dividing line . . . . Ethiopia rejected this proposal as disadvantageous."

the islands but leads to different results for certain sub-groups, and for certain islands.

The Mohabbakahs

467. The Mohabbakah Islands are four rocky islets which amount to little more than navigational hazards. They are Sayal Islet, which is no more than 6 nautical miles from the nearest point on the Eritrean mainland coast, Harbi Islet and Flat Islet; all three of these are within twelve nautical miles of the mainland coast. Finally, there is High Islet, which is less than one nautical mile outside the twelve-mile limit from the mainland coast, and about five nautical miles from the nearest Haycock island, namely South West Haycock.

468. Eritrea has sought to show that Italy obtained title to the Mohabbakahs along with the various local agreements Italy made with local rulers (see para. 159, above), which led to its securing title over the Danakil coast; this was not protested by Turkey and came to be recognized by Great Britain. The diplomatic history has some interest for this case, especially in highlighting the question of whether South West Haycock is a Mohabbakah island, or part of a separate group of Haycocks, or part of a larger "Zuqar-Hanish group" (see para. 215, above, for the 1930 Italian claim to sovereignty over South West Haycock).

469. Eritrea thus contends that the Mohabbakahs were comprised within what was passed to Ethiopia and so to Eritrea after the Second World War and that this is affirmed by the reference in Article 2 of the 1947 Peace Treaty to the islands "off the coast" and by the constitutional arrangements.

470. Yemen claims that the only islands Ethiopia secured jurisdiction over through local rulers were the islands in Assab Bay; and that, because formerly both coasts of the Red Sea fell under Ottoman rule; and because after the end of the First World War Yemen reverted to its "historic title"; and also because the Mohabbakahs are properly to be perceived as a unity with the Haycocks and the Zuqar-Hanish group, title to all these islands lies with Yemen. The Tribunal rejects this argument.

471. The Tribunal has already noted that there is no evidence that the Mohabbakah islands were part of an original historic title held by Yemen, even were such a title to have existed and to have reverted to Yemen after the First World War. And, even if it were the case that only the Assab Bay islands passed to Eritrea by Italy in 1947, no serious claims to the Mohabbakahs have been advanced by Yemen since that time, until the events leading up to the present arbitration.

472. The Tribunal need not, however, decide whether Italian title to the Mohabbakahs survived the Treaty of Lausanne, and passed thereafter to Ethiopia and then to Eritrea. It is sufficient for the Tribunal to note that all the Mohabbakahs, other than High Islet, lie within twelve miles of the Eritrean coast. Whatever the history, in the absence of any clear title to them being shown by Yemen, the Mohabbakahs must for that reason today be regarded as Eritrean.[32] No such convincing alternative title has been shown by Yemen. It will be remembered indeed that Article 6 of the 1923 Treaty of Lausanne already enshrined this principle of the territorial sea by providing expressly that islands within the territorial sea of a state were to belong to that state. In those days the territorial sea was generally limited by international law and custom to three nautical miles, but it has now long been twelve, and the Ethiopian territorial sea was extended to twelve miles in a 1953 decree.

473. At this point it will be convenient to look at the ingenious theory enunciated by Eritrea, based on the undoubted rule that the territorial sea extends to twelve miles not just from the coast but may also extend from a baseline drawn to include any territorial islands within a twelve-mile belt of territorial sea. Thus the baseline can lawfully be extended to include an entire chain, or group of islands, where there is no gap between the islands of more than twelve miles; the so-called leapfrogging method of determining the baseline of the territorial sea. As already mentioned, the entire chain or group of these islands consists of islands, islets, or rocks proud of the sea and therefore technically islands, with no gap between them of more than twelve miles. The only such gap is the one between the easternmost island (the Abu Ali islands) and the Yemen mainland coast.

474. The difficulty with leapfrogging in the instant case is that it begs the very question at issue before this Tribunal: to which coastal state do these islands belong? There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state, unless there is a fully-established case to the contrary (as, for example, in the case of the Channel Islands). But there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue. The ownership over adjacent islands undoubtedly generates a right to a corresponding territorial sea, but merely extending the territorial sea

[32] See D. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW 48 (1978), where he says of islands lying within the territorial sea of a state, "Here the presumption is that the island is under the same sovereignty as the mainland nearby"; and he also interestingly quotes LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 7 (1926), writing, it may be noted, in the mid-1920s that "An uninhabited island within territorial waters is under the dominion of the Sovereign of the adjoining mainland."

beyond the permitted coastal belt, cannot of itself generate sovereignty over islands so encompassed. And even if there were a presumption of coastal-state sovereignty over islands falling within the twelve-mile territorial sea of a coastal-belt island, it would be no more than a presumption, capable of being rebutted by evidence of a superior title.

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475. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that the islands, islet, rocks, and low-tide elevations forming the Mohabbakah islands, including but not limited to Sayal Islet, Harbi Islet, Flat Islet and High Islet are subject to the territorial sovereignty of Eritrea. It is true that High Islet is a small but prominent rocky islet barely more than twelve miles (12.72 n.m.) from the territorial sea baseline. But here the unity theory might find a modest and suitable place, for the Mohabbakahs have always been considered as one group, sharing the same legal destiny. High Islet is certainly also appurtenant to the African coast.

The Haycocks

476. The Haycocks are three small islands situated along a roughly southwest-to-northeast line. They are, from south to north, South West Haycock, Middle Haycock and Northeast Haycock. South West Haycock is some 6 nautical miles from the nearest point of Suyul Hanish, though there is the very small Three Foot Rock about midway between them.

477. As already mentioned above, the Haycocks do have a peculiar legal history and it is for this reason mainly that they need to be discussed separately here. That legal history is very much bound up with the story of the Red Sea lighthouses. But one might begin the salient points of this legal history by recalling the 1841, 1866 and 1873 *firmans* of the Ottoman Sultan (see para. 97, above), by which the African coast of the Red Sea and the islands off it were placed under the jurisdiction and administration of Egypt, though of course the whole of this part of the world was then under the sovereignty of the Ottoman Empire. There seems little doubt that this African-coast administration would have extended to the Mohabbakahs and the Haycocks. At this time the territorial sea was limited to three miles, and there were still grave doubts about the nature and extent of the territorial waters regime. Nevertheless there was a feeling, based upon considerations of security as well as of convenience, that islands off a particular coast would, failing a clearly established title to contrary, be under the jurisdiction of the nearest coastal authority. As mentioned above, this was sometimes called the "portico doctrine".

478. Another stage in this legal history is at the end of the nineteenth century, when the British Government was interested in the possibility of establishing an alternative western shipping channel through the Red Sea, which needed lighting if it was to be used at night. Various islands were considered as sites for a light (see paras. 203, 204, above), including South West Haycock, which is in the end proved to be the successful candidate. This involved inquiries about the "jurisdiction" under which the island would come, and the British Board of Trade satisfied itself that South West Haycock was subject to Italian jurisdiction and at any rate probably not Ottoman.

479. In 1930, when the Italians were constructing a lighthouse on South West Haycock, there was an instructive correspondence between the Italian and British Governments. An internal Foreign Office memorandum reveals the opinion that "the establishment of the Italian colony of Eritrea makes it difficult, therefore, to resist the claim that the islands off the coast of Eritrea are to be considered as an appendage of that colony"[33]. This was the official reaction to a letter from the Royal Italian Government of 11 April, claiming South West Haycock, *inter alia* for reasons of its "immediate vicinity" to the Eritrean Red Sea coast.

480. Eritrea employs these arguments to support its claim to the Haycocks, but puts it in the form of a succession derived from the Italian colony of Eritrea, and by way of the subsequent federation of Ethiopia and Eritrea, through to Eritrean independence in 1993. There are difficult juridical problems with this theory of succession, not least the terms of the Italian armistice of 1943 and the peace treaty of 1947, whereby Italy surrendered her colonial territories for disposition by the Allies and in default of agreement amongst them, to disposition by the United Nations, which of course is what actually happened to Eritrea. However this may be, the geographical arguments of proximity to the Eritrean coast remain persuasive and accord with the general opinion that islands off a coast will belong to the coastal state, unless another, superior title can be established. Yemen has failed, in this case, to establish any such superior claim.

481. The Eritrean claim to the Haycocks also finds some support in the material provided by both Parties for the supplementary hearing on the implications of petroleum agreements. None of the Yemen agreements extends as far to the southwest as the Haycocks; the 1974 Tomen-Santa Fe agreement appears to encompass the Hanish group, but stops short of the Haycocks. On the other hand, the fully documented agreements of the Eritrean Government and Shell, Amoco and BP do cover the areas of the Haycocks, and of course the

[33] Foreign Office Memorandum dated 10 June 1930, prepared by Mr. Orchard.

Mohabbakahs. There was no protest from Yemen, though Yemen did protest when an agreement with Shell appeared to it to trespass upon its claim to the northern islands.

482. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that the islands, islet, rocks, and low-tide elevations forming the Haycock Islands, including, but not limited to, North East Haycock, Middle Haycock, and South West Haycock, are subject to the territorial sovereignty of Eritrea. It follows that the like decision will, apart from other good reasons noted above, apply to High Islet, the one island of the Mohabbakah sub-group that is outside the Eritrean territorial sea.

483. There remains a question whether the South West Rocks should for these purposes be regarded as going along with the Haycocks. No doubt South West Rocks are so called because they lie southwest of Greater Hanish and there is no other feature between them and that island. There is some evidence that South West Rocks were, at various times, considered to form the easternmost limit of African-coast jurisdiction. While the British Foreign Office documentation relied on by both Parties reflects divergent views (referring in at least one case to Italian jurisdiction over South West Rocks as "doubtful"), the Parties agree that in the early 1890s, Italy responded to direct British inquiries concerning potential lighthouse sites with assertions of jurisdiction over all of the proposed sites, including South West Rocks. Furthermore, Italy did not object to the subsequent British suggestion that the Sublime Porte be informed of the Italian position. This thinking surfaced again in 1914, in Great Britain's initial proposal for a post-war distribution of relinquished Ottoman territory, which would have placed everything east of South West Rocks under the sovereignty of "the independent chiefs of the Arabian mainland."

484. In light of this, it seems reasonable that South West Rocks should be treated in the same manner as the other islands administered from the African coast: the Mohabbakahs and the Haycocks. South West Rocks are therefore unanimously determined by the Tribunal to be subject to the territorial sovereignty of Eritrea.

The Zuqar - Hanish Group

485. There remains to be determined the sovereignty over Zuqar and over the Hanish islands, and their respective satellite islets and rocks, including the island of Abu Ali, to the east of the northern end of Zuqar, which was for long a principal site for a lighthouse.

486. This has not been an easy group of islands to decide on, one reason for this being that, positioned as they are in the central part of the Red Sea, the appurtenance factor is bound to be relatively less helpful. 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 line.

487. The Parties have put before the Tribunal many aspects of the local legal history which are said to point the decision one way or the other. These have all been examined in detail in the chapters above. It is however already apparent from that examination that any expectation of a clear and definite answer from that earlier legal history is bound to be disappointed. The Yemeni idea of a reversionary ancient title has been discussed earlier in this chapter and found unhelpful in regard to these islands. More helpful perhaps is the material which suggests that, when the Ottomans decided in the later nineteenth century to grant to Egypt the jurisdiction over the African coast, this possibly included islands appurtenant to that coast, and according to some respectable authorities this did not include this central group of islands, both Zuqar and Hanish being regarded as still within the jurisdiction of the *vilayet* of Yemen. If this was so, though that position can hardly have been carried over to the present time in spite of Article 16 of the Treaty of Lausanne, it would constitute an impressive historical precedent. Hertslet's opinion about the proper distribution of jurisdiction over the islands of the Red Sea clearly impressed the British Foreign Office, but it seems to be Hertslet's view of what should be done about all the islands in the Red Sea rather than evidence of existing titles.

488. There are some echoes of the idea of Yemeni title to be found in the earlier part of the present century in for example the record of the negotiations between the Imam and a British envoy, Colonel Reilly, in which talk the Imam is said to have referred to the need to return to him certain Yemeni islands. But there is no doubt that the main grievance the Imam had in mind was the island of Kamaran and its surrounding islets, which was then occupied by the British. There was also a claim which an internal Foreign Office memorandum referred to as the Imam's claim to "unspecified islands". The British civil servants were quite prepared themselves to speculate that these islands might have included Zuqar and Hanish, which had been temporarily occupied by the British in 1915. But it is in the end difficult to attach decisive importance to a claim which could not be specified with any certainty.

489. Eritrea seeks to derive an historical title by succession, through Ethiopia, from Italy. There is no doubt that Italy had serious ambitions in respect of these central islands in the nineteen thirties and did establish a presence there. But as has been seen above that position was constantly neutralised by assurances to

the British Government that Italy fully accepted that the legal status of the islands was still governed by Article 16 of the Treaty of Lausanne. And then there is also the difficulty of deriving a title from Italy in view of the provisions of the Italian Peace Treaty of 1947.

490. Then of course there are the maps. These islands are large enough to find a place quite often – though by no means always – on even relatively small-scale maps of the region. It is fair to assert that, thanks to the efforts of counsel and especially those of Yemen, the Tribunal will have seen more maps of every conceivable period and provenance than probably have ever been seen before, and certainly a very much larger collection than will have been seen at any time by any of the principal actors in the Red Sea scene. In fact, the difficulty is not so much the interpretation of a plethora of maps of every kind and provenance, as it is the absence of any kind of evidence that these actors took very much notice of, or attached very much importance to, any of them. The Tribunal is of the opinion that in quite general terms Yemen has a marginally better case in terms of favourable maps discovered, and looked at in their totality the maps do suggest a certain widespread repute that these islands appertain to Yemen.

491. As to the other aspects of the legal history of this central group, it does inevitably reflect the ebb and flow of the interest, or the neglect, as the case may be, of both sides, varying from time to time, and qualified always by the unattractive nature of these islands, relieved from time to time by occasional usefulness, as for siting navigational lights, or by their sometimes perceived or imagined strategic importance; for they have never been considered "remote" in the sense of Greenland or the Island of Palmas. Accordingly, in the Tribunal's opinion, although some of this older historical material is important and generally helpful and indeed essential to an understanding of the claims of both Parties, neither of them has been able on the basis of the historical materials alone to make out a case that actually compels a decision one way or the other. Accordingly the Tribunal has looked at events in the last decade or so before the Agreement of Arbitration for additional materials and factors which might complete the picture of both Parties' cases and enable the Tribunal to make a firm decision about these two islands and their satellite rocks and islets. The Tribunal is confirmed in this approach by the fact that both Parties have anticipated the need for such material by providing supplementary data in connection with the hearings held in July 1998. It should be added, however, that the more recent legal history of these islands shows in some respects differences between Zuqar and Hanish. Because this is so, the islands should be, and will be, considered separately. It would be wrong to assume that they must together go to one Party or the other. In this extent the Tribunal rejects the Yemen theory that all the islands in the group must in principle share a common destiny of sovereignty.

492. Of the recent events perhaps the first heading to look at is that of the Red Sea lighthouses which have featured in the arguments of both Parties. It is evident from the lighthouse history, again dealt with in detail in chapter VI above, that the undertaking by a government of the maintenance of one of these lights has generally been regarded as neutral for the purpose of the acquisition of territorial sovereignty, although it should also be remembered that, when Great Britain wished in 1892 to secure the building of a light for the proposed western shipping channel, the British Government was anxious to know which government had "jurisdiction" over the chosen site on South West Haycock, and Italy not only made a claim but had its claim to jurisdiction recognised by the British Government. Four lights have been constructed by and appear to be maintained by Yemen in the area now being dealt with (though it should be added that such lights are of course no longer manned). These are sited as follows: on the island of Abu Ali, which is some 3 nautical miles west of the northern tip of Zuqar, on the south-eastern tip of Zuqar itself; on Low Island which is off the north-eastern tip of Lesser Hanish; and on the north-eastern tip of Greater Hanish. The latter was constructed in July 1991 by Yemen and there is in evidence a picture of it with an inscription giving the name of the Republic of Yemen. It can hardly be denied that these lights, clearly intended to be permanent installations, are cogent evidence of some form of Yemen presence in all these islands.

493. Of relatively recent events, Eritrea attaches much importance to the history of Ethiopian naval patrols and the log books which evidence their occurrence, and which involved in particular the islands of Zuqar and Hanish; and this is indeed a possible factor where the islands must be taken as a group; for these were patrols in these waters generally rather than voyages to particular islands. There is no doubt that these patrols occurred on a large scale, and they are fully examined in Chapter VII and it is well known that these islands were used by the rebels, probably mainly as staging posts and relatively safe anchorages for vessels attempting to convey supplies to the rebel armies fighting on the mainland of Ethiopia, some of them possibly from Yemen, which is known to have sympathised with the rebel cause.

494. A strange aspect of these naval patrols possibly over a matter of several years – though the actual evidence Eritrea has been able to provide leaves a number of blank periods – is the lack of protest from Yemen. If Ethiopia had been patrolling the islands on the assumption that it was merely patrolling its own territory, then the lack of Yemen protest is all the more remarkable and calls for some explanation which Yemen has not altogether provided. Yemen was of course preoccupied with its own civil war between 1962 and 1970; and a good deal of this naval patrolling must have been on the high seas rather than in the territorial seas of the islands. Eritrea claims that the Ethiopian naval patrols were also enforcing fishing regulations. This seems credible for it would have provided cover for

inspecting the papers of vessels even on the high seas and the rebels would hardly have confined their supply operations to ships flying the Ethiopian flag.

495. And yet these logbooks of naval patrols give relatively little evidence of activity on or even near to the islands. It is interesting to consider in this context the press statement issued by the Yemen Embassy in Mogadishu on 3 July 1973 stating "the Y.A.R. always maintains its sovereignty over its islands in the Red Sea, with the exception of the islands of Gabal Abu Ali and Gabal Attair which were given to Ethiopia by Britain when the latter left Aden and surrendered power in our Southern Yemen". This surmise was of course mistaken. But it does amount to a statement that Yemen at this time had no presence in either of these two mentioned islands and had little idea what was happening there. This, however, was the time of the Arab press rumours of Ethiopia having allowed Israel the use of certain Red Sea islands. This same press release stated that Yemen had, accompanied by journalists and press correspondents, investigated the position on "Lesser Hanish, Greater Hanish, Zuqar, Alzubair' Alswabe', and several other islands at the Yemeni coast". These were found to be "free from any foreign infiltration whatsoever". Presumably this was also the inspection by the military committee of the Arab League (see para. 321, above). This statement has the ring of truth. It most probably was the position that these islands, including Zuqar and both Hanish islands, were then normally empty of people or activity other than that of small coastal fishermen plying their traditional way of life and calling at the islands when their work took them there. But it is significant that Yemen could apparently take the above inspection party without any repercussions from Ethiopia.

496. There is much that is ambiguous and unexplained on both sides in this evidence of naval patrols. On balance the episode appears to the Tribunal to lend some weight to the Eritrean case. But again it is a matter of relative weight. There is no compelling case here for either Party. And again it is very difficult on the basis of this material to give it great weight in claims to land territory.

497. The petroleum agreements made by Yemen and by Ethiopia (and then by Eritrea) from 1972 onwards do surprisingly little to resolve the problem, for these agreements, in so far as they extended to offshore areas, were not really concerned with the islands at all, but with either the outer boundary formed by the extent of the then exploitable depths of seabed, or by the coastal median line, which was the temporary boundary actually contemplated for such agreements by the 1977 Yemeni continental shelf legislation. As was reflected by the questions put to the Parties in the closing moments of the July 1998 hearings, the agreements seemed almost to ignore the islands; not surprisingly, considering that the volcanic geological nature of the islands meant that they were totally uninteresting to the oil companies.

498. As already stated above, the Tribunal attaches little importance to the agreements by both Parties with Shell for geological investigations. The area covered by the contract activities likely traversed these islands. But the Tribunal has little doubt that Shell was operating with the permission of both Parties, and was getting information primarily for its own use, in order to decide about which areas of the continental shelf it might be worth making production agreements.

499. When it comes to actual agreements for exploitation, whether in the form of full petroleum production-sharing agreements or less than that, two of the agreements made by Yemen encompassed the Zuqar-Hanish Islands totally (one with Adair, which was very short-lived and never went into effect, and one with Tomen-Santa Fe), while the agreements made by Ethiopia (Ethiopia/Shell) avoided extending to these islands or, in the instance of the Ethiopia-IPC/Amoco agreement of 1989, cuts across Greater Hanish, the division apparently depending on precisely how one plots the coastal median line.

500. After the careful examination of the contract areas of the oil agreements of both Parties, the conclusions to be drawn from this material seem to be reasonably clear. Eritrea can and does point to the IPC/Amoco agreement with Ethiopia which cuts the Island of Hanish. There are various versions. In some versions of the attempts to draw the contract area on a map, only the tip of Hanish is within the Eritrean side of the line; in others the line appears to portray most of the island as Eritrean, leaving only a relatively small portion of it to Yemen. It is surely apparent that the contract area was defined simply in terms appropriate for the essentially maritime interests of the contracting party, and that this, in conformity with normal practice where there is no agreed and settled maritime boundary, was made the coastal median line, ignoring the possible effect of islands. It seems in effect to have been agreed and drawn on the illustrative map of the contract simply ignoring the islands. If Ethiopia had had it in mind to use the agreement for the purpose of illustrating a claim to the island of Hanish, Ethiopia would surely not have given itself only two-thirds of the island; it would have had the line make an excursion round and embrace the whole island. As it is, it seems to the Tribunal that the Ethiopian and Eritrean agreements are in effect neutral as far as the present task of the Tribunal is concerned; as indeed Eritrea argued. This does not mean that the Eritrean claim to these islands is unfounded; but it does mean that the oil agreements do little to assist that claim, except in so far as the IPC/Amoco Agreement tends to neutralize the Yemeni argument that petroleum agreements as such provide confirmation of sovereignty.

501. Yemen, besides the unconvincing suggestion that the Shell Company's seismic investigation of a large area right across the southern Red Sea somehow confirms the Yemeni claims to the Zuqar and Hanish islands, has in the Tomen-Santa Fe

seismic agreement of 1974-75 referred to an agreement in which the contract does apparently embrace both Zuqar and Hanish, or most of Greater Hanish Island. This also resulted in certain activities by the company, including a collection of samples from Zuqar (see para. 409, above). This again does not establish that Yemen has validated its claim to both these islands. But as concluded above, the agreements produced by both parties fail to establish evidence of sovereignty. Perhaps it helps to see these petroleum agreements of the seventies in perspective to remember that in 1973 there was a Yemeni inspection of the islands, with journalists and representatives of the Arab League military committee, that found all these islands empty.

502. It was later that there was more activity; notably the construction in 1993 by the Total Oil Company of an air landing strip on Hanish, for the recreational visits of their employees, and as a by-product of their concession agreement with Yemen. That agreement did not encompass either Zuqar or Hanish. Nevertheless, the fact that there were regular excursion flights constitutes evidence of governmental authority and the exercise of it. Nor did it apparently attract any kind of protest from Eritrea; though of course by this time the civil war was over and Eritrea was established as an independent state.

503. As neither Party has in the opinion of the Tribunal made a convincing case to these islands on the basis of an ancient title in the case of Yemen, or, of a succession title in the case of Eritrea, the Tribunal's decision on sovereignty must be based to an important extent upon what seems to have been the position in Zuqar and Hanish and their adjoining islets and rocks in the last decade or so leading up to the present arbitration. Anything approaching what might be called a settlement, or the continuous display of governmental authority and presence, of the kind found in some of the classical cases even for inhospitable territory, is hardly to be expected. For very few people would wish to visit these waterless, volcanic islands except for a special reason and probably a temporary one. Nevertheless, it is clear from the documents mentioned earlier in this Award that both Yemen and Ethiopia had formulated claims to both islands at least by the late eighties and had indeed it would seem held secret negotiations on the claims; which negotiations, at least according to the Eritrean "Top Secret" internal report, had at first promised a compromise solution on the basis of a median line which would presumably have given Zuqar and Little Hanish to Yemen and Greater Hanish to Ethiopia. But this came to nothing. So now one must look at the *effectivités* for the solution.

504. Yemen has been able to present the Tribunal with a list of some forty-eight alleged Yemeni happenings or incidents in respect of "the islands", which occurred in the period between early 1989 and mid-1991. This list is not confined to the central group, for there is included for example the decisions of the 1989

London Conference on the lighthouses, and the building of a lighthouse on al Tayr in July 1989. It is evident though that Zuqar features very prominently in the list. It is also evident that Eritrea has relatively very little to show in respect of Zuqar. The Tribunal has no doubt that the island of Zuqar is under the sovereignty of Yemen.

505. In respect of Hanish the matter is not so clear cut. The Eritrean claim is well established as a claim and is clearly of great importance to that very newly-independent country. The refusal to agree to a Yemeni aerial survey of the Islands and Ethiopia's responsive claim of title to some of them is significant. So also is its arrest of Yemeni fishermen on Greater Hanish and its assertion, in response to Yemen's protest to the Security Council, that the area was within Ethiopian jurisdiction.

506. There was some emphasis by Eritrea on a scheme to put beacons on Hanish to assist Amoco's seismic testing; there is no clear evidence that they were actually installed. Any such installation of beacons covered several locations, of which Greater Hanish Island was only one, and would have been short-lived: the evidence provided by Eritrea mentions two weeks, and provides for removal of the beacons on completion of the seismic work. Moreover, the beacons were placed by the oil company, Amoco, with only a limited role for the Ethiopian government in protecting the oil company personnel and the temporary beacons from the attentions of "random individuals". Finally, there is evidence of the issuance, in 1980, of an Ethiopian radio transmitting licence to Delft Geophysical Company, which provided for a station to be located at "Greater Hanish Island, Port of Assab vicinity".

507. Yemen has more to show by way of presence and display of authority. Putting aside the lighthouse in the north of the island, there was the Ardoukoba expedition and campsite which was made under the aegis of the Yemeni Government. There is the air landing site, as well as the production of what appears to be evidence of frequent scheduled flights, no doubt mainly for the off-days of Total employees; and there is the May 1995 license to a Yemeni company (seemingly with certain German nationals associated in a joint venture scheme) to develop a tourist project (recreational diving is apparently the possible attraction to tourism) on Greater Hanish.

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508. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal finds in the present case that, on balance, and with the greatest respect for the sincerity and foundations of the claims of both Parties, the weight of the evidence supports Yemen's assertions of the exercise

of the functions of state authority with respect to the Zuqar-Hanish group. The Tribunal is further fortified in finding in favour of Yemen by the evidence that these islands fell under the jurisdiction of the Arabian coast during the Ottoman Empire; and that there was later a persistent expectation reflected in the British Foreign Office papers submitted in evidence by the Parties that these islands would ultimately return to Arab rule. The Tribunal therefore unanimously finds that the islands, islet, rocks, and low-tide elevations of the Zuqar-Hanish group, including, but not limited to, Three Foot Rock, Parkin Rock, Rocky Islets, Pin Rock, Suyul Hanish, Mid Islet, Double Peak Island, Round Island, North Round Island, Quoin Island (13°43'N, 42°48'E), Chor Rock, Greater Hanish, Peaky Islet, Mushajirah, Addar Ail Islets, Haycock Island (13°47'N, 42°47'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Low Island (13°52'N, 42°49'E) including the unnamed islets and rocks close north, east and south, Lesser Hanish including the unnamed islets and rocks close north east, Tongue Island and the unnamed islet close south, Near Island and the unnamed islet close south east, Shark Island, Jabal Zuquar Island, High Island, and the Abu Ali Islands (including Quoin Island (14°05'N, 42°49'E) and Pile Island) are subject to the territorial sovereignty of Yemen.

Jabal al-Tayr and the Zubayr Group of Islands

509. Both the lone island of Jabal al-Tayr, and the Zubayr group of islands and islets, call for separate treatment, as they are a considerable distance from the other islands as well as from each other. They are not only relatively isolated, but also are both well out to sea, and so not proximate to either coast, though they are slightly nearer to the Yemeni coastal islands than they are to the coast and coastal islands of Eritrea. Both are well eastward of a coastal median line. Here again, the Tribunal has had to weigh the relative merits of the Parties' evidence, which has been sparse on both sides, of the exercise of functions of state and governmental authority.

510. The traditional importance of both groups has been that they have been lighthouse islands (the Zubayr light was on Centre Peak, the southernmost islet of the group). It will be clear from the history of the Red Sea lighthouses (see Chapter VI, above) that, although, or perhaps even because, lighthouses were so important for nineteenth and early twentieth century navigation, a government could be asked to take responsibility or even volunteer to be responsible for them, without necessarily either seeming to claim sovereignty over the site or acquiring it. The practical question was not one of ownership, but rather of which government was willing, or might be persuaded, to take on the responsibility, and sometimes the cost, if not permanently then at least for a season.

511. It will be recollected that Centre Peak in the Zubayr group was an island in which Italy, in its 1930s period of colonial expansion, had taken a great interest; the Centre Peak light was abandoned by the British in 1932, but reactivated by Italy the following year. The British sought and obtained the usual assurances about the Treaty of Lausanne status of the island (see paras. 216-218 above). So for a time at least this group fell under the jurisdiction of the authority on the African coast.

512. Yet during the Second World War and the subsequent British occupation of Eritrea, it was decided that Great Britain was under no obligation to maintain the Centre Point light or indeed the Haycock light.

513. An important turning point in the history of the northern islands of Jabal al-Tayr and the Zubayr group was the 1989 London conference about lighthouses. This was rather different from previous conferences. This conference was to be the last of its kind, because its main purpose was to liquidate the former international arrangements for administration of the lights and the sharing of costs. The final arrangements made for the lights (which were then still of the greatest importance for navigation) were therefore intended to be permanent. No further conference was envisaged.

514. It will be remembered that Yemen was invited to the conference as an observer on the plea to the British Government that the two lighthouse islands of Abu Ali and Jabal al-Tayr, "lie within the exclusive economic zone of the Yemen Arab Republic," and that because of this Yemen was willing to take on the responsibility of managing and operating the lights. It was also the fact that Yemen had already installed new lights on both of these sites. The offer from Yemen was gratefully accepted by the conference. There had been hopes that Egypt might take on the work but Egypt was not willing to do so.

515. The matter of sovereignty was not on the agenda of the conference, nor was it discussed. Yemen's own request to be invited to the conference had wisely avoided raising the matter. Moreover, there were at the conference the usual references to the Treaty of Lausanne formula concerning indeterminate sovereignty.

516. Nevertheless, the decision of the conference to accept the Yemeni offer over the lights does reflect a confidence and expectation of the member governments of the conference of a continued Yemeni presence on these lighthouse islands for, at any rate, the foreseeable future. Repute is also an important ingredient for the consolidation of title.

517. There is also another matter where Yemen is able to show what amounts to important support for its case over these northern islands, and that is the substantially new information on petroleum agreements that was made available to the Tribunal at the supplementary hearings held for this purpose in July 1998. There are two such agreements which appear to be relevant for the islands presently under discussion.

518. First, there is the agreement made by the Yemeni Government with the Shell company on 20 November 1973. The western boundary of the contract area in this agreement is drawn so as to include within it the Zubayr group. It does not include Jabal al-Tayr, but passes at a distance which might encompass the territorial sea of that island, depending on the breadth of the territorial sea allowed to it for the purposes of a maritime delimitation.

519. The second is the Hunt Oil production sharing agreement ratified on 10 March 1985. The western contract area boundary of this agreement again includes the Zubayr group, but also appears from the illustrative map to brush the island of Jabal al-Tayr, and of course plainly includes a part of its territorial sea.

520. These agreements were not protested by Ethiopia (though it should be remembered that the Hunt agreement was made at a time when the Ethiopian civil war was still raging).

521. Neither Ethiopia nor Eritrea has made any petroleum agreements encompassing these islands. Eritrea did, however, make agreements in 1995 and 1997 with the Anadarko Oil Company, which extended in the direction of these islands and towards what appears to be an approximate median line between coasts. Yemen protested this line on 4 January 1997 as a "blatant" violation of the territorial waters of both groups and of her economic rights "in the region". This was, of course, some time after the signature of the Agreement on Principles and indeed the Arbitration Agreement initiating these proceedings.

522. The legal history of these northern and isolated islands has been mixed and varied. It has been seen that even as late as 1989 it was assumed that their sovereign status was still indeterminate in accordance with the status impressed upon them, until it should be changed in a lawful way, by the Treaty of Lausanne. Nevertheless, by 1995 it was doubtful whether any dispute over Yemen's claim to them would be agreed to be submitted to this Tribunal. Even Eritrea at one point made a proposal for an agreement in which these islands were not mentioned.

523. The Tribunal has not found this particular question an easy one. There is little evidence on either side of actual or persistent activities on and around these

islands. But in view of their isolated location and inhospitable character, probably little evidence will suffice.

524. Therefore, after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that, on the basis of the foregoing, the weight of the evidence supports the conclusion that the island of Jabal al-Tayr, and the islands, islets, rocks and low-tide elevations forming the Zubayr group, including, but not limited to, Quoin Island (15°12'N, 42°03'E), Haycock Island (15°10'N, 42°07'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Rugged Island, Table Peak Island, Saddle Island and the unnamed islet close north west, Low Island (15°06'N, 42°06'E) and the unnamed rock close east, Middle Reef, Saba Island, Connected Island, East Rocks, Shoe Rock, Jabal Zubayr Island, and Centre Peak Island are subject to the territorial sovereignty of Yemen.

The Traditional Fishing Regime

525. In making this award on sovereignty, the Tribunal has been aware that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law. Moreover, appreciation of regional legal traditions is necessary to render an Award which, in the words of the Joint Statement signed by the Parties on 21 May 1996, will "allow the re-establishment and the development of a trustful and lasting cooperation between the two countries."

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

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CHAPTER XI – Dispositif

527. Accordingly, **THE TRIBUNAL**,

taking into account the foregoing considerations and reasons,

UNANIMOUSLY FINDS IN THE PRESENT CASE THAT

i. the islands, islet, rocks, and low-tide elevations forming the Mohabbakah islands, including but not limited to Sayal Islet, Harbi Islet, Flat Islet and High Islet are subject to the territorial sovereignty of Eritrea;

ii. the islands, islet, rocks, and low-tide elevations forming the Haycock Islands, including, but not limited to, North East Haycock, Middle Haycock, and South West Haycock, are subject to the territorial sovereignty of Eritrea;

iii. the South West Rocks are subject to the territorial sovereignty of Eritrea;

iv. the islands, islet, rocks, and low-tide elevations of the Zuqar-Hanish group, including, but not limited to, Three Foot Rock, Parkin Rock, Rocky Islets, Pin Rock, Suyul Hanish, Mid Islet, Double Peak Island, Round Island, North Round Island, Quoin Island (13°43'N, 42°48'E), Chor Rock, Greater Hanish, Peaky Islet, Mushajirah, Addar Ail Islets, Haycock Island (13°47'N, 42°47'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Low Island (13°52'N, 42°49'E) including the unnamed islets and rocks close north, east and south, Lesser Hanish including the unnamed islets and rocks close north east, Tongue Island and the unnamed islet close south, Near Island and the unnamed islet close south east, Shark Island, Jabal Zuquar Island, High Island, and the Abu Ali Islands (including Quoin Island (14°05'N, 42°49'E) and Pile Island) are subject to the territorial sovereignty of Yemen;

v. the island of Jabal al-Tayr, and the islands, islets, rocks and low-tide elevations forming the Zubayr group, including, but not limited to, Quoin Island (15°12'N, 42°03'E), Haycock Island (15°10'N, 42°07'E; not to be confused with the Haycock Islands to the southwest of Greater Hanish), Rugged Island, Table Peak Island, Saddle Island and the unnamed islet close north west, Low Island (15°06'N, 42°06'E) and the unnamed rock close east, Middle Reef, Saba Island, Connected Island, East Rocks, Shoe Rock, Jabal Zubayr Island, and Centre Peak Island are subject to the territorial sovereignty of Yemen; and

vi. the sovereignty found to lie with Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.

528. Further, whereas Article 12.1(b) of the Arbitration Agreement provides that the Awards shall include the time period for their execution, the Tribunal directs that this Award should be executed within ninety days from the date hereunder.

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Done at London this 9th day of October, 1998

The President of the Tribunal

/s/ Professor Sir Robert Y. Jennings

The Registrar

/s/ P.J.H. Jonkman