

ERITREA-ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

Economic Loss Throughout Ethiopia
Ethiopia's Claim 7

between

The Federal Democratic Republic of Ethiopia

and

The State of Eritrea

By the Claims Commission, composed of:

Hans van Houtte, President
George H. Aldrich
John R. Crook
James C.N. Paul
Lucy Reed

The Hague, December 19, 2005

**PARTIAL AWARD—Economic Loss Throughout
Ethiopia —Ethiopia's Claim 7
between the Claimant,
The Federal Democratic Republic of Ethiopia, represented by:**

Government of Ethiopia

Ambassador Fisseha Yimer, Permanent Representative of the Federal Democratic Republic of Ethiopia to the United Nations, Geneva, Co-Agent

Mr. Habtom Abraha, Consul General, Ethiopian Mission in The Netherlands

Mr. Ibrahim Idris, Director, Legal Affairs General Directorate, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa

Mr. Reta Alemu, First Secretary, Coordinator, Claims Team, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa

Mr. Yared Getachew, Esq., Legal Advisor; Member of the State Bar of New Jersey

**and the Respondent,
The State of Eritrea, represented by:**

Government of Eritrea

His Excellency, Mohammed Suleiman Ahmed, Ambassador of the State of Eritrea to The Netherlands

Professor Lea Brilmayer, Co-Agent for the Government of Eritrea, Legal Advisor to the Office of the President of Eritrea; Howard M. Holtzmann Professor of International Law, Yale Law School

Ms. Lorraine Charlton, Deputy Legal Advisor to the Office of the President of Eritrea

Counsel and Advocates

Professor James R. Crawford, SC, FBA, Whewell Professor of International Law, University of Cambridge; Member of the Australian and English Bars; Member of the Institute of International Law

Mr. Robert Volterra, Latham & Watkins

Counsel and Consultants

Ms. Michelle Costa

Ms. Julie Frey

Ms. Diane Haar, Esq.

Ms. Amanda Costikyan Jones

Mr. Kevin T. Reed

TABLE OF CONTENTS

I. INTRODUCTION	450
II. PROCEEDINGS	450
III. JURISDICTION AND ADMISSIBILITY	451
A. Violation of the <i>Jus Ad Bellum</i>	451
B. Admissibility of Damages Claims for Violation of the <i>Jus Ad Bellum</i>	451
IV. THE MERITS	452
A. Loss, Damage and Injury to Ethiopia's National Airline	452
B. Other Claims for Economic Damage	453
C. Violation of Bilateral Agreements	454
V. AWARD	455

Mr. Abrham Tesfay Haile, Esq.

Ms. Lori Danielle Tully, Esq.

Ms. Cristina Villarino Villa, Esq.

I. INTRODUCTION

1. Ethiopia's Claim 7 has been brought before the Commission by the Claimant, the Federal Democratic Republic of Ethiopia ("Ethiopia"), against the Respondent, the State of Eritrea ("Eritrea"), pursuant to Article 5 of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of December 12, 2000 ("the Agreement"). This Claim seeks compensation for a wide range of economic damage allegedly suffered by Ethiopia between 1998 and 2000 as the result of unlawful conduct by Eritrea. Ethiopia seeks compensation for:

1. Loss, damage and injury to Ethiopia's national airline, Ethiopian Airlines;
2. Disruption of Ethiopia's international trade;
3. Substantial losses to Ethiopian tourism;
4. Losses to Ethiopia's international development assistance;
5. Damage, loss or injury to projects run by Ethiopia's Road Authority;
6. Losses of tax revenue;
7. Declines in Ethiopia's foreign and domestic investment; and
8. Costs incurred for the reconstruction and rehabilitation of areas damaged or destroyed as a result of Eritrea's violations of international law.

2. Ethiopia relies on two different legal bases in support of Claim 7. Ethiopia asserts that Eritrea is liable on account of alleged violations of:

1. The *jus ad bellum*, that is, as a result of Eritrea's allegedly unlawful use of force against Ethiopia, and
 2. Five bilateral agreements regulating trade and commercial relationships between the Parties.
3. Eritrea denies liability.

II. PROCEEDINGS

4. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability, and second, if liability is found, concerning damages. The Statement of Claim in Ethiopia's Claim 7 was filed on December 12, 2001, pursuant to Article 5, paragraph 8, of the Agreement. Eritrea's Statement of Defense was filed on October 15, 2002. Ethiopia's Memorial was filed on November 1, 2004 and Eritrea's Counter-

Memorial on January 17, 2005. The Claim was addressed in hearings on liability held during the week of April 11-15, 2005.

III. JURISDICTION AND ADMISSIBILITY

A. Violation of the *Jus Ad Bellum*

5. As discussed more fully in the Commission's Partial Award of today's date on the portions of Ethiopia's Claims 1-8 alleging Eritrea's violation of the *jus ad bellum*,¹ Ethiopia contended that Eritrea initiated the 1998-2000 conflict with a series of unlawful attacks on Ethiopia. It asked the Commission to find Eritrea liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by Ethiopia as a result of the alleged use of force in violation of the *jus ad bellum*.

6. Eritrea responded that claims relating to alleged breaches of the *jus ad bellum* fall outside the jurisdiction of the Commission, because responsibility for initiation of the conflict should be addressed by the "independent and impartial body" provided for by Article 3 of the Agreement. In its Partial Award in Ethiopia's Claims 1-8, the Commission rejected this argument, deciding that it was the only body with the duty under the Agreement of deciding claims of liability for violations of international law.² The Commission thus has jurisdiction to decide alleged violations of international law relating to a breach of the *jus ad bellum*.

B. Admissibility of Damages Claims for Violation of the *Jus Ad Bellum*

7. In its Partial Award on the *jus ad bellum* elements of Ethiopia's Claims 1-8, the Commission decided that Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations in May 1998 by resorting to armed force to attack and occupy the town of Badme, then under peaceful administration by the Claimant, as well as territory in the Claimant's Tahtay Adiabo and Laelay Adiabo Weredas. The Commission held Eritrea liable to compensate Ethiopia for the damages caused by that violation of international law. The Commission also held that Ethiopia had failed to establish violation of the *jus ad bellum* in relation to subsequent events along other parts of the common border.

8. In the *dispositif* of that Partial Award, the Commission stated "[t]he scope of damages for which the Respondent is liable because of its violation of the *jus ad bellum* will be determined in the damages phase of these

¹ See Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1-8 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005).

² *Id.* at para. 4.

proceedings.”³ Paragraph 19 of that Partial Award provided “the Commission will request further briefing in the damages phase concerning the scope of the damages for which Eritrea is liable by reason of that attack in addition to those damages following from the Commission’s other Partial Awards.”

9. In light of these findings, Ethiopia’s claims for economic damages allegedly suffered as the legal consequence of Eritrea’s violation of the *jus ad bellum* in May 1998 are not admissible at this stage of the Commission’s proceedings. Those claims will be considered at the next stage of the Commission’s proceedings, following further briefing by the Parties as indicated above. Insofar as Ethiopia’s claims in this Claim 7 are based upon alleged violations of agreements between the Parties or upon violations of customary law principles, and not upon claimed breaches of the *jus ad bellum*, they are admissible, and will be addressed in this Partial Award.

IV. THE MERITS

A. Loss, Damage and Injury to Ethiopia’s National Airline

10. Ethiopia claimed compensation for several different types of losses allegedly suffered by Ethiopian Airlines (“EAL”), Ethiopia’s national airline. These include costs incurred due to the relocation of EAL activities in Addis Ababa to Nairobi during the conflict; loss of revenue resulting from the disruption of EAL’s Asmara operations due to the interruption of the flights to Asmara from May 13, 1998 on; bad debt losses stemming from EAL’s inability to collect on pre-war obligations owed by several Eritrean entities; and the loss of a cash balance at the Bank of Eritrea. EAL’s other claims include compensation for lost revenue due to the suspension of domestic flights to the north and northwestern parts of Ethiopia. Finally, Ethiopia claimed compensation for additional costs incurred by EAL due to flight detouring and the associated costs of aviation fuel.

11. The international legal basis for several of these claims of damage allegedly suffered by EAL is not clearly articulated. They appear to rest upon Ethiopia’s general contention that Eritrea is legally required to provide compensation for wartime injury to Ethiopia’s economy resulting from Eritrea’s violation of the *jus ad bellum*. As the scope of Eritrea’s legal responsibility in that regard will be determined in the next stage of the Commission’s proceedings, these claims for damages to EAL are not admissible at this stage.

12. Claims for Takings of EAL’s Property. Ethiopia also claimed compensation for office furniture and equipment contained in EAL’s offices in Asmara and Assab that was allegedly lost, damaged and confiscated. The record regarding this claim is sparse; it includes one letter and two witness statements offered by Ethiopia describing some harassment of EAL per-

³ *Id.* at Part IV.B., para. 3.

sonnel and alleging confiscation of EAL property in Asmara and Assab. Eritrea generally denied responsibility for the claim, and presented a letter from Ethiopia's Embassy in Eritrea indicating that as of September 1999, EAL's office property had not been confiscated. This aspect of Ethiopia's claim was not examined in detail in the Parties' written submissions or at the April 2005 hearing. Under the Commission's Rules of Procedure, the Claimant bears the burden of proving its claim.⁴ The record is insufficient to establish that this property was lost on account of any actions attributable to Eritrea, and this portion of the Claim is accordingly dismissed for failure of proof.

B. Other Claims for Economic Damage

13. Ethiopia also alleged several other forms of large-scale economic damage stemming from the 1998-2000 conflict. *Inter alia*, Ethiopia contended that:

1. International import and export trade were significantly disturbed by the conflict, causing significant economic injury;
2. Tourism is an important sector of Ethiopia's economy, and there was a general decrease in tourism during the wartime period;
3. Development assistance provided by the international community significantly declined due to the conflict;
4. Ethiopia's Road Authority suffered significant loss, damage and injury, mainly through the interruption or suspension of several road rehabilitation projects affected by the outbreak of the war;
5. Significant tax revenues were lost, including custom duties lost due to the confiscation and seizure of imported goods in Asmara and Assab;
6. Ethiopia's foreign and domestic investment significantly declined, including as a result of actions by foreign companies renouncing their initial commitments to invest in Ethiopia;
7. Reconstruction and rehabilitation expenses. Finally, Ethiopia claimed for significant amounts of resources spent on the reconstruction and rehabilitation of areas damaged or destroyed by Eritrea, including compensation for humanitarian assistance to displaced and deported persons and other victims of the war.

14. The legal basis for all of these elements of Ethiopia's Claim 7 again appears to be Ethiopia's general contention that Eritrea bears responsibility for wartime injury to its economy as a result of Eritrea's violation of the *jus ad bellum*. As noted above, the Commission will address questions regarding the scope of Eritrea's potential liability for breach of the *jus*

⁴ Eritrea-Ethiopia Claims Commission Rules of Procedure, art. 14(1).

ad bellum at the next stage of its proceedings, following additional briefing by the Parties. Accordingly, Ethiopia's claims for these types of damage are not admissible at this stage.

C. Violation of Bilateral Agreements

15. Ethiopia alleged that five bilateral agreements regulating trade and commercial relationships between the Parties were violated by Eritrea. These were:

1. the Transit and Port Services Agreement of September 27, 1993,⁵
2. the Protocol Agreement of September 27, 1993 on traffic between Ethiopia and Eritrea,⁶
3. the Air Services Agreement of September 27, 1993,⁷
4. the Trade Agreement of September 27, 1993⁸ and its Protocol of September 27, 1993 (on trade in goods and services),⁹ and
5. the Commercial Road Agreement of September 27, 1993.¹⁰

16. Ethiopia contended that the eruption of the war did not *ipso facto* terminate these agreements, and that according to the principle of *rebus sic stantibus* "if a state is the author of that radical change of circumstance, it shall be responsible for its termination of the agreement."¹¹ Thus, Ethiopia concluded that "Eritrea was responsible for the violations of agreements it

⁵ *Transit and Port Services Agreement between the Transitional Government of Ethiopia and the Government of the State of Eritrea* (Sept. 27, 1993), Ethiopia's Statements of Claim, filed by Ethiopia on December 12, 2001, Statement of Applicable International Law Common to Ethiopia's Claims, Documentary Annexes, TAB 8 [hereinafter Ethiopia's Statement of Applicable International Law Common to Ethiopia's Claims].

⁶ *Protocol Agreement on Transport and Communications between the Transitional Government of Ethiopia and the Government of the State of Eritrea* (Sept. 27, 1993), Ethiopia's Statement of Applicable International Law Common to Ethiopia's Claims, *supra* note 5, TAB 16.

⁷ *Air Services Agreement between the Transitional Government of Ethiopia and the Government of the State of Eritrea* (Sept. 27, 1993), Ethiopia's Statement of Applicable International Law Common to Ethiopia's Claims, *supra* note 5, TAB 22.

⁸ *Trade Agreement between the Transitional Government of Ethiopia and the Government of the State of Eritrea* (Sept. 27, 1993), Ethiopia's Statement of Applicable International Law Common to Ethiopia's Claims, TAB 28.

⁹ *Trade Protocol between the Transitional Government of Ethiopia and the Government of the State of Eritrea for the Year 1993/94* (Sept. 27, 1993), Ethiopia's Statement of Applicable International Law Common to Ethiopia's Claims, *supra* note 5, TAB 30.

¹⁰ *Commercial Road Transport Services Agreement between the Transitional Government of Ethiopia and the Government of the State of Eritrea* (Sept. 27, 1993), Ethiopia's Statement of Applicable International Law Common to Ethiopia's Claims, *supra* note 5, TAB 20.

¹¹ Ethiopia's Claim 7, Economic Loss, Damage or Injury throughout Ethiopia, Memorial, filed by Ethiopia on November, 1, 2004, pp. 53-54, paras. 5.58-5.61.

had entered into with Ethiopia when it unleashed [sic] its unlawful aggression against Ethiopia.”¹²

17. Eritrea responded that those treaties were not in force during the conflict, because their binding effect was limited in time, or because they contained a denunciation clause (as in the case of the Air Services Agreement). Moreover, Eritrea argued that Ethiopia failed to prove any violations of the agreements. Indeed, Eritrea contended that the losses and damages cited by Ethiopia in fact resulted from Ethiopia's own decisions, and not from Eritrea's breach of treaties. Finally, Eritrea considered that Ethiopia claimed for damages or losses for which causality is too remote to be compensated by the Commission.

18. The issue of the automatic termination of bilateral agreements with the outbreak of a conflict is currently debated in the literature.¹³ Nevertheless, there is a broad consensus that bilateral treaties, especially those of a political or economic nature, are at the very least suspended by the outbreak of a war.¹⁴ Taking into account the nature and objectives of the five agreements cited by Ethiopia to support its economic claims, the Commission cannot but consider that they fall within the category of treaties which become ineffective in time of war (either through termination, or suspension). Consequently because of the war, the treaties ceased to be operative. Ethiopia thus cannot claim compensation for economic losses because of violation of the treaties, and Ethiopia's claims in this regard are dismissed on the merits.

V. AWARD

In view of the foregoing, the Commission determines as follows:

1. The Commission has jurisdiction to decide alleged violations of international law relating to a breach of the *jus ad bellum*.
2. Ethiopia's claims for economic damages allegedly suffered as the legal consequence of Eritrea's violation of the *jus ad bellum* in May 1998 are not

¹² *Id.* at p. 54, para. 5.61.

¹³ See, e.g., Vol. II, *Oppenheim's International Law* p. 302 (Hersch Lauterpacht ed., Longmans, 7th ed. 1952). See also, Ian Brownlie, *Principles of Public International Law* p. 592 (Oxford University Press, 6th ed. 2003).

¹⁴ See, e.g., Brownlie, *supra* note 13, at p. 592; *Oppenheim's International Law*, *supra* note 13, at pp. 303-304; Paul Reuter, *Droit international public* p. 158 (Presses Universitaires de France, 1983); Lord McNair, *The Law of Treaties* pp. 703, 718 (Clarendon Press, 1986); Charles Rousseau, *Droit international public* pp. 71-74 (Dalloz, 11th ed. 1987); IV *Encyclopaedia of Public International Law* p. 1371 (Rudolf Bernhardt ed., Elsevier 2000); Pierre-Marie Dupuy, *Droit international public* p. 611 (Dalloz, 6th ed. 2002); Patrick Dailier & Alain Pellet, Nguyen Quoc-Dihn's *Droit international public* p. 974 (L.G.D.J., 7th ed. 2002).

admissible at this stage of the Commission's proceedings and will be considered at the next stage of the proceedings. Accordingly, Ethiopia's claims for the following types of damages are not now admissible:

- a. for damage allegedly suffered by Ethiopian Airlines, except for claims involving alleged takings of property;
 - b. for damage allegedly associated with loss of tourism;
 - c. for declines in international development assistance;
 - d. for loss, damage and injury allegedly suffered by Ethiopia's Road Authority;
 - e. for loss of tax revenues;
 - f. for decline in foreign and domestic investment; and
 - g. for reconstruction and rehabilitation expenses.
3. The claim for taking of office furniture and equipment contained in Ethiopian Airlines' offices in Asmara and Assab is dismissed for failure of proof.
4. The five agreements invoked by Ethiopia were at the least suspended because of the war, and Ethiopia's claims for economic losses because of alleged violations of those treaties are dismissed on the merits.

Done at The Hague, this 19th day of December 2005

[Signed] PRESIDENT HANS VAN HOUTTE

[Signed] GEORGE H. ALDRICH

[Signed] JOHN R. CROOK

[Signed] JAMES C.N. PAUL

[Signed] LUCY REED