

ERITREA ETHIOPIA CLAIMS COMMISSION

FINAL AWARD

**Ports
Ethiopia's Claim 6**

between

The Federal Democratic Republic of Ethiopia

and

The State of Eritrea

The Hague, December 19, 2005

ERITREA ETHIOPIA CLAIMS COMMISSION

phone: +31 (0) 70 302 4165
fax: +31 (0) 70 302 4167
Email: claimscommission@pca-cpa.org

c/o International Bureau
Permanent Court of Arbitration
Peace Palace - Carnegieplein 2
2517 KJ The Hague - The Netherlands

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By the Claims Commission, composed of:

Hans van Houtte, President

George H. Aldrich

John R. Crook

James C.N. Paul

Lucy Reed

**FINAL AWARD – Ports – Ethiopia’s Claim 6
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

Counsel and Consultants

Professor David D. Caron, Boalt Hall School of Law, University of California at Berkeley; Member of the State Bar of California

Ms. Anastasia Telesetsky, Consultant, Briscoe Ivester & Bazel LLP (at present); Member of the State Bar of California; Member of the State Bar of Washington

Mr. Amir Shafaie, Consultant

**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

Mr. Abrham Tesfay Haile, Esq.

Ms. Lori Danielle Tully, Esq.

Ms. Cristina Villarino Villa, Esq.

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I. INTRODUCTION

1. The independence of the State of Eritrea (“Eritrea”) in 1993 left the Federal Democratic Republic of Ethiopia (“Ethiopia”) without a direct outlet to the sea. Following Eritrea’s independence, most of Ethiopia’s export and import cargo continued to be shipped via the Eritrean ports of Assab, and to a much lesser extent, Massawa. Ethiopian cargo was transported to and from the ports by truck. Ethiopia contended that prior to the hostilities, about 250–270 trucks were loaded at the port of Assab each day. While Ethiopia initially asserted that Eritrea violated international law by taking measures in May 1998 to deny Ethiopia continued use of Eritrean ports, the claim as pleaded at the hearing focused on the fate of cargo bound to or from Ethiopia that was stranded in Eritrea when hostilities began in 1998, primarily import cargo located at the port of Assab.

2. 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. This Claim was filed on December 12, 2001, pursuant to Article 5, paragraph 8, 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”). 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. Eritrea’s Reply was filed on March 10, 2005. The claim was addressed in hearings on liability held during the week of April 11–15, 2005.

II. JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

3. Ethiopia’s Claim 6 is a Government-to-Government claim predicated upon injuries allegedly suffered by Ethiopia due to the closings of Eritrean ports to Ethiopian trade and to takings of the property of Ethiopia and of Ethiopian nationals by Eritrea, in violation of international law and in circumstances related to the 1998–2000 conflict between the Parties. A claim for such injuries is within the Commission’s jurisdiction under Article 5 of the Agreement.

4. A significant proportion of the property allegedly taken by Eritrea consisted of bulk food aid and other material shipped to Ethiopia by foreign donors as drought relief or development assistance. Eritrea contended that much of this cargo remained the property of the foreign donor organizations and governments, and that claims for its loss were outside the Commission’s jurisdiction under Article 5 of the Agreement. That Article limits the Commission’s jurisdiction to claims for loss, damage or injury suffered by one of the Parties or its nationals, as well as to claims by certain other persons not relevant here.

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5. The Commission’s review of the multiple volumes of claims forms included in Ethiopia’s evidence suggests that at least some foreign donors of food and assistance continued to own these goods at the relevant times, and that ownership had not passed to the Government of Ethiopia or to Ethiopian nationals whose claims would be within the Commission’s jurisdiction. The extent of this was not clear. At the hearing, the Commission sought to clarify the legal ownership of food aid and other assistance cargoes at Assab, but the matter remained unsettled.

6. The Commission finds that it does not have jurisdiction over Ethiopia’s claim for the loss of property in Eritrea’s ports to the extent that it is based on property not owned by Ethiopia or Ethiopian nationals.

B. Applicable Law

7. The Commission’s jurisdiction under Article 5 of the Agreement is limited to claims for violations of international law. Eritrea devoted considerable attention in its pleadings and at the hearing to its domestic legislation regulating port and warehouse operators and defining their rights and responsibilities. Such domestic legislation may in some situations provide a relevant reference in assessing compliance with international law. Nevertheless, the law applicable to this claim remains international law.

III. THE PARTIES’ POSITIONS

A. Ethiopia’s Claims

8. Ethiopia stated at the April 2005 hearing that the essence of its claim is the contention that Eritrea illegally confiscated large amounts of property belonging to the Ethiopian Government, Ethiopian nationals and international aid organizations in Eritrean ports in May 1998.¹ Ethiopia described the claim as “a classic claim for property lost as a result of actions attributable to a foreign government. ... [T]his is a claim for property lost primarily at the port of Assab. ... [A]t least 90 per cent and ... perhaps as much as 95 per cent of Ethiopia’s claim concerns property lost at the port of Assab.”²

9. The alleged takings of property were said to violate the customary international law rules barring takings of property by a State except under limited conditions, and requiring compensation for takings that do occur. Ethiopia also contended that the takings violated other applicable principles of international law, including the 1993 Transit and Port Services

¹ Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2005, Peace Palace, The Hague, at pp. 623–624 (Apr. 11, 2005) [hereinafter Ports Hearing Transcript].

² *Id.* at p. 625.

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Agreement between the Parties,³ customary obligations related to Ethiopia’s rights as a landlocked state, and provisions of international humanitarian law bearing on shipments of humanitarian goods.⁴

10. Ethiopia contended at the hearing that the property allegedly expropriated included 135,000 tons of dry cargo, including aid shipments of 81,000 tons and 1,400 new vehicles, as well as 33 million liters of fuel.⁵ It claimed that 95 percent of this cargo had arrived and been unloaded within 180 days of the events in question. Eritrea maintained that Ethiopia significantly overstated the amounts of cargo remaining in Eritrean ports after hostilities began. As noted above, it also contended that much of the aid cargo, primarily bulk food, did not belong to Ethiopia or to Ethiopian nationals, citing in this regard agreements concluded between Eritrea and donor countries resolving claims in respect of such aid cargos. Eritrea also contended that Ethiopia’s claims for losses of fuel included much fuel involved in intra-company transfers between Eritrean and Ethiopian subsidiaries of international oil companies. Eritrea contended that this fuel remained the property of the companies concerned, and that no economic loss was suffered in respect of it.

11. As described in the Commission’s Partial Award relating to alleged violations of the *jus ad bellum*, an international armed conflict between the Parties began on May 12, 1998.⁶ The next day, Ethiopia’s Parliament expressed Ethiopia’s determination to resist Eritrea’s actions. Thereafter, hostilities began in several locations along the Parties’ common border. However, active fighting did not begin on the Bure front (on the main road connecting Assab with points in Ethiopia) until the second week of June 1998.⁷

12. Both Parties’ evidence showed that on May 12, 1998, Ethiopia’s national shipping line instructed its vessels in Eritrean ports to leave port without unloading. Instructions were also given to carriers bound for Eritrean ports carrying goods bound for Ethiopia not to call at Eritrean ports and instead to unload at the port of Djibouti. These actions cut the flow of inbound Ethiopian cargoes to Eritrean ports.

13. Ethiopia claimed that Eritrean actions on three key dates in May 1998 gave rise to takings of Ethiopian property located at Assab when hostilities began. First, it alleged that on May 8, Eritrean officials directed Ethiopia’s Maritime and Transit Service Enterprise (“MTSE”) to close its office in Assab. (MTSE served as the organizing entity for movements of Ethiopian cargo. It created and handled shipping documentation and performed other

³ *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.

⁴ Ports Hearing Transcript, *supra* note 1, at pp. 625 and 632.

⁵ *Id.* at pp. 630–631.

⁶ 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), para. 14.

⁷ See Partial Award, Western and Eastern Fronts, Ethiopia’s Claims 1 & 3 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005), para. 60.

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functions supporting movement of Ethiopian import and export cargo through Eritrean ports.) Second, Ethiopia alleged that Eritrea blocked access by trucks seeking to pick up bulk fuel from fuel depots on May 14. Third, Ethiopia alleged that on May 22, Eritrea finally closed the border to freight traffic. At the hearing, Ethiopia described this action as “the last act, this is the perfection of the taking of the property, the denial of access.”⁸

B. Eritrea’s Responses

14. Eritrea vigorously disputed this claim, and devoted much time at the April 2005 hearings to its defense. Eritrea insisted that the port of Assab remained available to handle cargo to and from Ethiopia in the days after hostilities began, that Ethiopian export cargo continued to be loaded onto ships, and that it did not prevent import cargo from being loaded onto trucks for carriage to Ethiopia. Eritrea presented evidence showing continued movements of large numbers of trucks carrying Ethiopian import cargo from the port of Assab until the border was finally closed in the last week of May 1998, including cargo destined for the Ethiopian Ministry of Defense and other Ethiopian government entities. Eritrea contended that Ethiopia’s own actions prevented delivery of its goods, and that “anyone who showed up [at the port] with the proper documentation ... was able to pick up the goods in a timely manner.”⁹

15. Eritrea denied Ethiopia’s claims that the events of May 8, 14 and 22, 1998 resulted in takings of Ethiopia’s property. In answer to the claim that Eritrea’s May 8 direction to close MTSE’s Assab office significantly hindered movement of Ethiopian cargo, Eritrea cited documents in Ethiopia’s evidence indicating substantial MTSE activity related to cargo operations at Assab after that date, including some as late as mid-June 1998. As to the contention that Eritrea blocked oil deliveries after May 14, Eritrea acknowledged that some deliveries were halted. However, it attributed this to short supplies resulting from Ethiopia’s actions diverting the tanker *Pacific Hunter* from Assab, preventing it from making a fuel delivery there. Eritrea contended that Ethiopia’s diversion of the tanker deprived Eritrea of fuel to which it was contractually entitled and cut supplies available for Ethiopian customers. Finally, Eritrea denied that it closed the border on May 22, 1998 and claimed that Ethiopia was responsible for the cessation of freight movements. It cited in this connection Ethiopia’s seizures of large numbers of Eritrean trucks and its decision to terminate Ethiopian Airlines flights to and from Addis Ababa to Assab, thereby cutting off the movement of shipping documents required to clear and deliver goods. Eritrea also presented evidence indicating that Ethiopian consular officials directed many trucks to leave Assab empty, and to go instead to Djibouti to pick up Ethiopian cargo from vessels diverted there.

16. The Parties agreed that following the events of May 1998, a significant amount of material belonging to Ethiopian consignees remained at the port of Assab, although they

⁸ Ports Hearing Transcript, *supra* note 1, at p. 630.

⁹ *Id.* at p. 893 (Apr. 13, 2005).

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disagreed as to how much there was. The stranded goods were of varying kinds. Some were consigned to government agencies and to businesses. There were individuals’ household goods. Some material was perishable, including large amounts of food aid.¹⁰ There were millions of dollars worth of telecommunications equipment intended for the expansion of the Ethiopian telecommunications system. There were goods for which there was no market or commercially reasonable use in Eritrea. And, there were goods, including trucks and other vehicles, which were usable in Eritrea.

17. Eritrea denied that it wrongfully expropriated Ethiopian property stranded at Assab. It contended that it acted in a reasonable and deliberate manner to deal with the property, taking account of Assab’s hot climate, wartime demands for the port’s facilities, and other relevant factors. Some perishable cargo, particularly bulk food, was sold or diverted to government use, as was some other property usable in Eritrea. A large amount of remaining property, still in the ocean freight containers in which it arrived at the port, was moved to Asmara, where it apparently remains in storage. Eritrea’s evidence included a video showing a large open storage yard and a covered storage facility, said to be in or near Asmara. These facilities held a large number of containers still containing stranded cargo from Assab. Much of the stored material appeared to be undisturbed and in its original packaging, although some types of cargo (for example rubber sneakers) were shown to be badly deteriorated due to heat and the passage of time.

18. In its written pleadings and at the hearing, Eritrea indicated that it was prepared to enter into a process under which it would transfer to Ethiopia the property in storage and the value derived by Eritrea from other property that was sold or converted to Eritrean government use, subject to adjustments reflecting costs incurred by Eritrea in transporting and storing the property, including associated environmental costs.

IV. THE MERITS

19. Taking into account the totality of the record, the Commission is not persuaded that the events of May 8, 14 and 22, 1998 cited by Ethiopia in fact resulted in takings of Ethiopian property. The evidence showed that the port of Assab remained open to movements of Ethiopian cargo for a number of days after hostilities began. It further indicated that during this period, Ethiopian cargo at Assab continued to be loaded either onto ships for export or onto trucks for transit to Ethiopia, including import cargo for Ethiopian government and military consignees. These circumstances are not consistent with the claim that there was a taking of Ethiopian property resulting from closing of the port. Further, the evidence and the representations made to this Commission indicated that a significant volume of Ethiopian property stranded by the events of May 1998 remains available for delivery to Ethiopia, if the Parties can agree on terms to bring this about.

¹⁰ The Commission’s jurisdiction over claims involving food and development aid is contingent on title to the property involved having passed to Ethiopia or to Ethiopian nationals before the claim arose. *See supra*, para. 6.

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20. Nor does the record establish other violations of international law involving the stranded property. At some point late in May 1998, movements of cargo to Ethiopia did end, leaving a large amount of Ethiopian property stranded at Assab. The reasons for the final end of cargo movements, and precisely when this occurred, are disputed. But in any case, by the time they ended, it was apparent that the Parties were engaged in an international armed conflict. The right of a party to an international armed conflict to restrict or terminate trade and commerce between itself and an opposing party to the conflict has been clearly established, and is evidenced by extensive State practice during the twentieth century.¹¹ In the course of such a conflict, it was lawful for Eritrea to terminate Ethiopia’s access to the port of Assab and the movement of Ethiopian cargo from Assab to Ethiopia, notwithstanding any prior peacetime agreements or understandings between them regarding access to Eritrean ports.

21. Thus, the Commission faces two possibilities with regard to the cessation of movements of cargo. First, as contended by Eritrea, Ethiopian cargo may have been stranded at the port of Assab as the result of actions taken by Ethiopia. If so, Eritrea is not responsible for any breach of international law. Alternatively, as Ethiopia contends, the stranding could have resulted from actions taken by Eritrea. If so, Eritrea would have acted within the scope of its rights as a belligerent, and did not violate international law by halting cargo movements.

22. A separate comment is necessary regarding shipments of humanitarian aid. Ethiopia contended that Eritrea violated international humanitarian law, in particular Article 23 of Geneva Convention IV,¹² by blocking the shipment of humanitarian food cargoes present at Assab in May 1998. The record does not establish any such violation. Article 23 requires the free passage of consignments of medical and hospital stores and religious objects, as well as of certain supplies “for children under fifteen, expectant mothers and maternity cases.” However, this obligation is conditional upon the permitting party being satisfied “that there are no serious reasons for fearing” that the goods may be diverted, will not be effectively controlled, or may provide a definite military or economic advantage to the opposing belligerent. While some medical supplies may have been included in the mass of property remaining at Assab in May 1998, the record did not show that any meaningful proportion was potentially subject to Article 23, that Ethiopia requested the passage of any such goods, or that Ethiopia had any control measures in place to prevent their diversion.

23. A belligerent’s legal right to prevent commerce from its territory with another belligerent is distinct from the question of belligerent rights to appropriate the property of an

¹¹ *See, e.g.*, VOL. II OPPENHEIM’S INTERNATIONAL LAW pp. 300–335 (Hersch Lauterpacht ed., Longmans, 7th ed. 1952), and JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT pp. 417–511 (Stevens & Sons 1954).

¹² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. p. 3516, 75 U.N.T.S. p. 287.

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enemy State or of its nationals. However, the record does not establish any taking of Ethiopian public or private property in violation of international law.

24. Subject to certain exceptions, a belligerent has broad rights in time of war to confiscate public property of the opposing belligerent found in its territory.¹³ It is not clear from the record whether, or the extent to which, Eritrea may have taken Ethiopian public property in the exercise of such belligerent rights. Indeed, the record indicates that Eritrea is currently storing 23 sea containers containing telecommunications equipment belonging to the Ethiopian Telecommunications Corporation to which Eritrea makes no claim of ownership.

25. Separate rules apply in the case of property of nationals of an enemy belligerent. As the Commission has indicated previously, a belligerent may regulate or freeze the private property of another belligerent’s nationals, with a view to the property’s eventual return or other agreed disposition after hostilities end.¹⁴ McNair and Watts cite “the development of a practice recognized as valid in international law whereby private enemy property, while not being seized and the enemy owner deprived of title, is placed under the administrative control of the State so as to prevent its use for the benefit of the enemy.”¹⁵ A group of distinguished American jurists studying the handling of enemy property during World War II, concluded that:

Any United Nation during hostilities may sequester private property of Axis nationals found on its territory. Such property, or its proceeds in case of sale or liquidation, should be restored after the war to the original owner with appropriate adjustment for improvement and for damage or destruction due to use or negligence during sequestration.¹⁶

¹³ See, e.g., THE POSTWAR SETTLEMENT OF PROPERTY RIGHTS p. 2 (Council on Foreign Relations 1945) (“Any United Nation during hostilities may confiscate all Axis public property found in its territory and moveable Axis public property in its possession or under its control ...”) [hereinafter CFR Report]; Regulations Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. p. 2277, 1 Bevans p. 631, art. 53 (occupying powers have the right to take possession of “generally, all moveable property belonging to the State which may be used for operations of the war”); and SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO CONFLICTS AT SEA p. 205, para. 135 (Cambridge 1995) (“enemy vessels or any category (irrespective of nature of their cargo and their destination) and their cargo are liable to capture if not specially protected”).

¹⁴ Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Dec. 17, 2004), paras. 123–128 and 151–152.

¹⁵ LORD MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR p. 332 (Cambridge 1966). Both the United Kingdom and Argentina froze the assets of enemy nationals during their 1982 conflict. WALTER KOLVENBACH, PROTECTION OF FOREIGN INVESTMENTS: A PRIVATE LAW STUDY OF SAFEGUARDING DEVICES IN INTERNATIONAL CRISIS SITUATIONS pp. 4–5 (Kluwer, Deventer & Boston 1989).

¹⁶ CFR Report, *supra* note 13, at p. 1. The authors of the CFR Report included several notable jurists including, *inter alia*, Edwin Borchard, Henry J. Friendly, Philip C. Jessup and Quincy Wright.

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26. The custodial character of controls on the property of enemy aliens is underscored by the titles countries give to the official exercising such authority: “Custodian of Enemy Property” under the British Trading with the Enemy Act, 1939,¹⁷ and the “Alien Property Custodian” in the United States. States’ custodial powers in relation to enemy nationals’ property extend to the power to sell the property. In British practice, for example, “the Custodian may be given a power to sell property vested in him, the purchase price in such circumstances remaining in his hands under the same conditions as the property for which it has been transferred.”¹⁸ Under Section 12, paragraph 4, of the U.S. Trading with the Enemy Act, the Alien Property Custodian is “vested with all of the powers of a common-law trustee in respect of all property ... which shall come into his possession” pursuant to the Act. The Custodian could dispose of the property, by sale or otherwise, “if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded.”¹⁹

27. As noted above, Eritrea contended that it sought to act in a fair and reasonable manner in relation to the stranded property, and denied that it carried out wide-scale acts of expropriation. Eritrea’s arguments did not distinguish in this regard between property of the Ethiopian State and of Ethiopian nationals. Instead, it urged that all of the stranded Ethiopian property was treated in ways that, at a minimum, complied with Eritrean domestic legislation regulating port and warehouse operations, and that this legislation provided an appropriate benchmark for assessing Eritrea’s action. *Inter alia*, Eritrea’s legislation required consignees to remove cargo from ports and warehouses within specified times, and gave warehousemen extensive rights to sell or otherwise dispose of property not removed within the statutory deadlines. Eritrea indicated that, notwithstanding these rights under its national law to sell or dispose of stranded property, it transferred much Ethiopian property to storage areas at Asmara, where it remains.

28. Eritrea noted that some Ethiopian goods in storage were or had become hazardous, citing a large consignment of a potentially toxic insecticide as an illustration. It contended that such materials had caused or threatened pollution of the storage area, and that their disposition would require costly remedial action.

29. As the Commission indicated above, the law applicable to this Claim is international law, not Eritrean warehouseman’s law. Eritrea’s national legislation defining port and warehousemen’s rights, as with the legislation of many other countries, imposes rigid deadlines for removing cargo, and gives warehousemen broad rights to sell or otherwise dispose of cargo not removed within those deadlines. Such national legislation does not provide an appropriate standard for assessing a State’s conduct under international law,

¹⁷ MCNAIR & WATTS, *supra* note 15, at p. 332.

¹⁸ *Id.* at p. 333.

¹⁹ 50 U.S.C., Ch. 106, 40 Stat. p. 411 (adopted Oct. 6, 1917).

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particularly in a wartime situation, when wartime exigencies may often prevent foreign cargo owners from taking action needed to protect their property.

30. The Parties’ arguments did not address the scope of a belligerent’s rights and responsibilities under international law in relation to the treatment of sequestered property of enemy nationals. As noted above, State practice indicates that a custodian of enemy property may lawfully sell perishable goods, or otherwise act to reduce losses to the property’s owner, provided that the proceeds of such sale or other disposition are then held for eventual return to the property owner or other agreed disposition. The 1945 U.S. Council on Foreign Relations study quoted above suggests that the sequestering belligerent has at least a duty of care in exercising such powers.²⁰

31. The record in the case does not establish that Eritrea acted in an unreasonable or unlawful fashion in relation to the property covered by this claim during the Commission’s jurisdictional period. During the proceedings before the Commission, Eritrea stated that it would be prepared to transfer to Ethiopia the stranded property remaining in Eritrea, to provide an accounting for funds received for property it sold or otherwise disposed of, and to transfer the balance to Ethiopia, subject to adjustments for its own costs of storage and environmental remediation. Ethiopia has not responded to these statements by Eritrea in the present proceedings.

32. Eritrea’s offers in relation to the property subject to this Claim appear to be broadly in line with its belligerent obligations in relation to the property, although many details remain unclear. However, the Commission can make no findings in this respect, as no claims relating to the implementation of the post-war return of the stranded property were filed by the mandatory claims filing date of December 12, 2001, and any such claims would in any event appear to be outside the scope of Commission jurisdiction under Article 5, paragraph 1, of the Agreement and Commission Decision No. 1.²¹

33. Nevertheless, the Commission encourages the Parties to consider some arrangement to bring about the early return or other appropriate disposition of the remaining stranded property, as well as of the proceeds of other property that Eritrea sold or transferred, taking account of any exceptional expenses incurred by Eritrea in relation to the property. In this connection, the Commission notes the potential utility of a survey of the remaining property located in Eritrea, either by a joint survey team acceptable to both Parties, or by a qualified international survey firm which could report to both Parties.

34. The Commission stands ready to assist if jointly requested by the two Parties in connection with this matter.

²⁰ CFR Report, *supra* note 13, at p. 1.

²¹ Commission Decision No. 1: The Commission’s Mandate/Temporal Scope of Jurisdiction, issued July 24, 2001.

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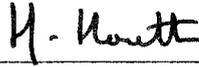
V. AWARD

For the foregoing reasons, Ethiopia’s Claim 6 is dismissed.

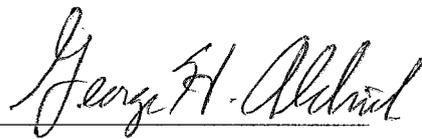
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Done at The Hague, this 19th day of December 2005



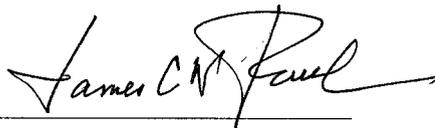
President Hans van Houtte



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James C.N. Paul



Lucy Reed