

DECISION REGARDING DELIMITATION OF THE BORDER

CHAPTER I – PROCEDURAL INTRODUCTION

1.1 The Eritrea-Ethiopia Boundary Commission (hereinafter the “Commission”) was established pursuant to an agreement dated 12 December 2000, alternately entitled “Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia” and “Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea” (hereinafter the “December Agreement”).

1.2 Article 4 of the December Agreement provides as follows:

1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.

3. The Commission shall be located in The Hague.

4. Each party shall, by written notice to the United Nations Secretary-General, appoint two commissioners within 45 days from the effective date of this agreement, neither of whom shall be nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed commissioners within the specified time, the Secretary-General of the United Nations shall make the appointment.

5. The president of the Commission shall be selected by the party-appointed commissioners or, failing their agreement within 30 days of the date of appointment of the latest party-appointed commissioner, by the Secretary-General of the United Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.

6. In the event of the death or resignation of a commissioner in the course of the proceedings, a substitute commissioner shall be appointed or chosen pursuant to the procedure set forth in this paragraph that was

applicable to the appointment or choice of the commissioner being replaced.

7. The UN Cartographer shall serve as Secretary to the Commission and undertake such tasks as assigned to him by the Commission, making use of the technical expertise of the UN Cartographic Unit. The Commission may also engage the services of additional experts as it deems necessary.

8. Within 45 days after the effective date of this Agreement, each party shall provide to the Secretary its claims and evidence relevant to the mandate of the Commission. These shall be provided to the other party by the Secretary.

9. After reviewing such evidence and within 45 days of its receipt, the Secretary shall subsequently transmit to the Commission and the parties any materials relevant to the mandate of the Commission as well as his findings identifying those portions of the border as to which there appears to be no dispute between the parties. The Secretary shall also transmit to the Commission all the evidence presented by the parties.

10. With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures.

11. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Option Rules for Arbitrating Disputes Between Two States. Filing deadlines for the parties' written submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.

12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to make its decision concerning delimitation of the border within six months of its first meeting. The Commission shall take this objective into consideration when establishing its schedule. At its discretion, the Commission may extend this deadline.

13. Upon reaching a final decision regarding delimitation of the borders, the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation.

14. The parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control. Each party shall accord to the Commission and its employees

the same privileges and immunities as are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party.

16. Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory.

17. The expenses of the Commission shall be borne equally by the two parties. To defray its expenses, the Commission may accept donations from the United Nations Trust Fund established under paragraph 8 of Security Council Resolution 1177 of 26 June 1998.

- 1.3 By 26 January 2001, within the time limits provided in Article 4, paragraph 4, of the December Agreement, and by written notice to the United Nations Secretary-General as further provided therein, Eritrea appointed as Commissioners Mr. Jan Paulsson and Judge Stephen M. Schwebel, and Ethiopia appointed as Commissioners His Excellency Prince Bola Adesumbo Ajibola and Sir Arthur Watts.
- 1.4 By virtue of Article 4, paragraph 7, of the December Agreement, Dr. Hiroshi Murakami, Chief of the Cartographic Section of the Secretariat of the United Nations, acted as Secretary of the Commission (hereinafter the “Secretary”) at all material times and rendered important cartographical and other technical assistance to the Commission. He was assisted principally by Ms. Alice Chow and Ms. Hélène Bray. On 26 January 2001, the Parties submitted to the Secretary their claims and evidence relevant to the mandate of the Commission, as required by Article 4, paragraph 8, of the December Agreement.
- 1.5 In accordance with Article 4, paragraph 5, of the December Agreement, the party-appointed Commissioners selected as President of the Commission Professor Sir Elihu Lauterpacht, who accepted his appointment on 20 February 2001.
- 1.6 By a letter to the Secretary dated 2 March 2001, the Permanent Representative of Ethiopia lodged a challenge to the appointment by Eritrea of Mr. Paulsson. The Secretary transmitted this letter to the Commissioners, the Permanent Representative of Eritrea and the Secretary-General of the United Nations.
- 1.7 On 2 March 2001, Ethiopia informally notified the International Bureau of the Permanent Court of Arbitration of the designation of His Excellency Seyoum Mesfin, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, as Agent, and of His Excellency Ambassador Fisseha Yimer, Per-

manent Representative of the Federal Democratic Republic of Ethiopia to the United Nations at Geneva, as Co-Agent.

- 1.8 On 14 March 2001, Eritrea informally notified the International Bureau of the Permanent Court of Arbitration of the designation of His Excellency Ali Said Abdella, Foreign Minister of Eritrea, as Agent, and of Professor Lea Brilmayer as Co-Agent.
- 1.9 Article 4, paragraph 9, of the December Agreement charged the Secretary with, *inter alia*, making findings identifying those portions of the border as to which there appeared to be no dispute between the Parties. On 12 March 2001, the Secretary transmitted his findings to the Parties and to the Commissioners. On 23 March 2001, the Government of Ethiopia reserved its position with respect to those findings. The Secretary's findings were based entirely on the materials theretofore made available to him by the Parties, and were not intended to be dispositive of any aspects of the delimitation. According to Article 4, paragraph 10, of the December Agreement, the Parties' subsequent submissions to the Commission were to address those portions of the border about which there appeared to be controversy, as well as any portions of the border identified by the Secretary with respect to which either Party believed there to be controversy.
- 1.10 The Commission met in The Hague on 25 March 2001. On 26 March 2001, an informal meeting was held between the Commission and representatives of the Parties to discuss procedural matters, without prejudice to the position of the Parties pending the resolution of the outstanding challenge to Mr. Paulsson. The Secretary was also present. At this meeting, the Parties agreed that, in addition to the Secretary provided for in the December Agreement, there should be appointed to assist the Commission a legally-qualified Registrar. Ms. Bette E. Shifman, Deputy Secretary-General of the Permanent Court of Arbitration, was accordingly appointed, and she has so acted throughout the proceedings, with the assistance principally of Mr. Dane Ratliff and of the staff of the Permanent Court of Arbitration.
- 1.11 Among the matters discussed and tentatively agreed on at the meeting of 26 March 2001 was a schedule for the first phase of the Commission's work (the delimitation of the border), according to which the Parties would simultaneously file written Memorials on 30 June 2001 and Counter-Memorials on 22 September 2001. Consideration would then be given to whether the Parties would exchange Replies. A pre-hearing consultation between the Commission and the Parties was scheduled for 6 November 2001. It was tentatively agreed that hearings would be held in The Hague between 10 and 21 December 2001. Although Article 4, paragraph 12, of the December Agreement stipulates that the Commission is to "endeavor to make its decision concerning delimitation of the border within six months of its first meeting," it was accepted by the Parties and the Commission that this was not practicable.

- 1.12 On 5 April 2001, the President of the Commission signed an Order, adopting an “Interim Rule of Procedure” as follows:

Whereas Article 4, paragraph 11, of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of 12 December, 2000, requires the Commission to adopt its own Rules of Procedure;

whereas one of the Commissioners has been challenged by a Party, thus occasioning an immediate need for a Rule of Procedure to regulate the matter;

and whereas the Commission has not as yet prepared a complete set of Rules of Procedure including a rule relating to challenge;

the Commission has adopted the following Interim Rule of Procedure limited to one aspect of this matter and without prejudice to the adoption in due course of a full set of Rules of Procedure within which this Rule (subject to any necessary amendment) will be incorporated:

CHALLENGE OF COMMISSIONERS – A challenge to a member of the Commission shall be decided by those members of the Commission whose appointments are not challenged. If they cannot reach a decision, the President shall refer the challenge to the Secretary-General of the United Nations for decision.

This Order was duly communicated to the Parties by the Registrar.

- 1.13 Also on 5 April 2001, the President of the Commission informed the Secretary-General of the United Nations of the contents of the Order, and of the fact that the four Commissioners whose appointments had not been challenged had been unable to reach a decision on the challenge to Mr. Paulsson, and accordingly referred the challenge to the Secretary-General for decision.
- 1.14 By a letter dated 15 May 2001, Mr. Paulsson tendered his resignation as a member of the Boundary Commission, it being understood that this resignation did not imply any acceptance of the validity of the alleged grounds for the challenge. In accordance with Article 4, paragraph 6, of the December Agreement, Eritrea appointed, on 12 June 2001, Professor W. Michael Reisman to fill the vacancy created by Mr. Paulsson’s resignation.
- 1.15 On 20 June 2001, the Commission adopted its Rules of Procedure (hereinafter the “Rules”), based, as required by Article 4, paragraph 11, of the December Agreement, on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Article 16(2) of the Rules sets forth the schedule for written submissions tentatively agreed at the meeting of 25 March 2001, i.e., a Memorial to be filed by each Party by 30 June 2001, a Counter-Memorial to be filed by each Party not later than 22 September 2001, and any other pleading that the Commission deemed necessary after consulting

the Parties, to be filed not later than one month after filing of the Counter-Memorials.

- 1.16 Both Parties filed their Memorials with the Registrar within the time limits provided in the Rules. On 16 July 2001, the President held an informal meeting with the representatives of the Parties in order to discuss various matters relating to the ongoing work of the Commission.
- 1.17 The Parties filed their Counter-Memorials on 30 September 2001 and, pursuant to Article 16(2) of the Rules, the Commission decided, after consulting the Parties, to authorize an exchange of Replies. These were duly filed with the Registrar on 29 October 2001.
- 1.18 As provided in Article 16(4) of the Rules, the written phase of the pleadings was closed upon the filing of the Replies. A pre-hearing consultation was held with the Parties on 6 November 2001, at the premises of the Permanent Court of Arbitration in The Hague, at which procedural details relating to the hearings were settled. At that meeting, the Commission requested the Parties to provide to the Commission, as expeditiously as possible, originals or full-scale copies of all maps that had been produced in evidence, and these were subsequently submitted by the Parties.
- 1.19 Hearings were held at the Peace Palace in The Hague from 10 through 21 December 2001, during which oral arguments and replies were heard from the following:

For Eritrea: His Excellency Ali Said Abdella, Foreign Minister of Eritrea, Agent
Professor Lea Brilmayer, Co-Agent
Mr. O. Thomas Johnson
Professor James Crawford, SC

For Ethiopia: His Excellency Seyoum Mesfin, Minister of Foreign Affairs of Ethiopia, Agent
Mr. B. Donovan Picard
Mr. Ian Brownlie, CBE, QC
Mr. Rodman R. Bundy
Ms. Loretta Malintoppi
Mr. Dylan D. Cors

1.20 In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Eritrea,

in the Memorial:

For the reasons set out in this Memorial, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.1 above and in Map 1 in Eritrea's Atlas.

in the Counter-Memorial:

For the reasons set out in this Counter-Memorial, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.01 in Eritrea's Memorial and in Map 1 in Eritrea's Memorial Atlas.

in the Reply:

For the reasons set out in this Reply, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.01 in Eritrea's Memorial and in Map 1 in Eritrea's Memorial Atlas.

On behalf of Ethiopia,

in the Memorial:

On the basis of the facts and legal arguments presented in this Memorial; and *Considering that* Article 4 of the 12 December 2000 Agreement provides in the relevant part of paragraph 2 that –

The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law;

and in paragraph 10 that –

With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their

written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures;

The Federal Democratic Republic of Ethiopia, while reserving the right to supplement or amend these Submissions in the light of further pleadings in the case, respectfully requests the Commission to adjudge and declare:

- That the boundary in accordance with the Treaty of 1900 is constituted by the line described in Chapter 4, paragraph 4.7 above;
- That the boundary in accordance with the Treaty of 1902 is constituted by the line described in Chapter 4, paragraph 4.8 above;
- That the boundary in accordance with the Treaty of 1908 is to be delimited and demarcated on the basis of the *modus operandi* described in Chapter 3, paragraphs 3.216 to 3.223 and Chapter 4, paragraph 4.9 above.

in the Counter-Memorial:

On the basis of the facts and legal arguments presented in Ethiopia's Memorial and Counter-Memorial; and

Rejecting the Submissions of Eritrea set forth in her Memorial;

The Federal Democratic Republic of Ethiopia, while reserving its right to supplement or amend these Submissions in the light of further pleadings in the case, respectfully requests the Commission to adjudge and declare:

- That the boundary in accordance with the Treaty of 1900 is constituted by the line described and illustrated in Chapter 2 of this Counter-Memorial;
- That the boundary in accordance with the Treaty of 1902 is constituted by the line described and illustrated in Chapter 3 of this Counter-Memorial; and
- That the boundary in accordance with the Treaty of 1908 is constituted in accordance with the methodology and considerations described and illustrated in Chapter 4 of this Counter-Memorial.

in the Reply:

On the basis of the foregoing, and rejecting Eritrea's contentions to the contrary, Ethiopia confirms the Submissions as set out at the end of her Counter-Memorial.

In the oral proceedings, the following submissions were presented by the Parties:

On behalf of Eritrea,

at the hearing of 20 December 2001:

It is respectfully submitted that the boundary between the two parties is that depicted in map 1 of Eritrea's memorial atlas, the coordinates of which are more fully described in the 1:50,000 map that Eritrea has deposited with the Secretary.

On behalf of Ethiopia,

at the hearing of 21 December 2001:

The Federal Democratic Republic of Ethiopia respectfully requests the Commission to adjudge and declare, first, that the boundary, in accordance with the treaty of 1900, is constituted by the line described and illustrated in chapter 2 of the counter-memorial; secondly, that the boundary in accordance with the treaty of 1902 is constituted by the line described and illustrated in chapter 3 of the counter-memorial; and, thirdly, and finally, that the boundary, in accordance with the treaty of 1908, is constituted in accordance with the methodology and considerations described and illustrated in the oral hearings.

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