International Court of Arbitration
International Chamber of Commerce

ICC Arbitration No. 10623/AER/ACS

SALINI COSTRUTTORI S.P.A.
(Italy)

Claimant

vs/

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA,
ADDIS ABABA WATER AND SEWERAGE AUTHORITY
(Ethiopia)

Respondent

Award Regarding the Suspension of the Proceedings
and Jurisdiction

December 7, 2001
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ICC ARBITRATION NO. 10623/AER/ACS

AWARD REGARDING THE SUSPENSION OF THE PROCEEDINGS AND JURISDICTION

A partial award made in accordance with the Rules of Arbitration of the International Chamber of Commerce (effective as of January 1, 1998) (the “ICC Rules”)

Introduction

1. The Claimant in this arbitration is Salini Costruttori S.p.A., a company organised under the laws of Italy, with its registered office at Via della Dataria, 22, IT-00187 Rome, Italy (the “Claimant”). The Claimant is represented in this arbitration by its duly authorised attorneys:

   Professor Antonio Crivellaro
   Bonelli Erede Pappalardo
   Via Barozzi, 1
   IT-20122 Milano
   Italy

2. The Respondent is the Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, with the postal address of P.O. Box 1505, Addis-Ababa, Ethiopia (the “Respondent”). The Respondent is represented in this arbitration by its duly authorised attorneys:

   Eric A. Schwartz, Esq.
   Freshfields
   69 Boulevard Haussmann
   FR-75008
   France

3. On August 12, 1999, the Claimant commenced the present arbitral proceedings against the Respondent by delivering to the ICC International Court of Arbitration (the “ICC Court”) a request for arbitration (the “Request for Arbitration”) made pursuant to Article 4 of the ICC Rules. The Request for Arbitration was dated August 11, 1999. This Arbitral Tribunal was subsequently constituted pursuant to the ICC Rules and the present proceedings were set in motion.
4. For the reasons stated herein, the Arbitral Tribunal has decided to issue a partial award regarding two issues.

a. The first issue is whether these arbitral proceedings should be suspended as a result of certain decisions taken by the Federal Supreme Court and Federal First Instance Court of The Federal Democrat Republic of Ethiopia, which are described in more detail in Sections I.G and III below.

b. The second issue is whether this Arbitral Tribunal, constituted under the ICC Rules, has jurisdiction in these proceedings (see paragraph 43(i) of the Terms of Reference, February 17, 2000).

5. The award will first set out the history of the disputes between the parties to the arbitration and these proceedings before analysing and deciding these two issues.

I. THE HISTORY OF THE DISPUTES AND THE PROCEEDINGS RELEVANT TO THIS AWARD

A. The Contract of August 7, 1996

6. On August 7, 1996, the Respondent (as Employer) and the Claimant (as Contractor) entered into a contract (the “Contract”) for the construction and completion of the Emergency Dire Dam and Raw Water Transmission Line Project (the “Project”).

7. The Contract was for the construction of an emergency raw water sewerage reservoir for the city of Addis Ababa in Ethiopia, together with a connected 10km “Transmission Main” to the water treatment facility located at the existing Legadagi Reservoir. The “Contract Price” was Ethiopian Birr 30,149,510 and US$ 25,856,774.32, equivalent at that time in total to Ethiopian Birr 193,564,324 or US$ 30,627,266.41.

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1 It should be noted that there is a dispute between the parties about which precise entity entered into the Contract with the Claimant as the Employer and, therefore, about which entity is the correct Respondent. See paragraph 31, below. Accordingly, references in this award to the “Respondent” in the capacity of the Employer under the Contract are made without prejudice to the question of which entity was the party to the Contract.
8. The time for completion of the Project was 22 months. The Contractor was ordered to commence the Works by September 14, 1996.

9. Part 1 of the Contract contained the "General Conditions of Contract", which were taken from the 4th Edition of the Conditions of Contract for Works of Civil Engineering Construction as published by the Fédération Internationale des Ingénieurs-Conseils ("FIDIC") in 1987. Part 2 of the Contract contained the "Special Conditions of Particular Application". Further provisions were also agreed as a result of pre-award negotiations between the parties.

B. The Initiation of the Present Arbitration

10. Certain disputes arose between the parties in relation to the Contract. On August 12, 1999, the Claimant commenced the present arbitral proceedings against the Respondent by delivering its Request for Arbitration to the ICC Court.

11. The Claimant invoked Clause 67 of the General Conditions (in Part 1 of the Contract), as amended by the Special Conditions of Particular Application (in Part 2 of the Contract), as the relevant agreement to arbitrate. Sub-Clause 67.3 in Part 1 of the Contract provides:

"67.3 Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from

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2 Claimant’s Request for Arbitration, August 11, 1999, ¶3.
being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.\(^3\)

12. The Special Conditions of Particular Application in Part 2 of the Contract state in relevant part:

"SETTLEMENT OF DISPUTES"

Clause 67 - Settlement of Dispute - Arbitration

Add the following new sub clauses to Clause 67.3 of Part I.

67.3.1 The place of arbitration shall be Addis Ababa, Ethiopia

67.3.2 The language of arbitration shall be English

67.3.3 The substantive law(s) applicable shall be the Ethiopian law

67.3.4 The rules for arbitration shall be the Civil Code of Ethiopia under Article 3325 et seq. (Arbitral Submission).\(^4\)

13. On the basis of certain alleged breaches of contract by the Engineer and Respondent,\(^5\) described more fully below, the Claimant sought global compensation in the order of US$ 26,700,000, together with interest and costs.\(^6\)

14. The Claimant requested the appointment of a three-member arbitral tribunal and nominated Professor Piero Bernardini as arbitrator. The language of the arbitration was said by the Claimant to be English. The seat of the arbitration was said to be Addis Ababa. The substantive law of the Contract was said to be that of the Federal Democratic Republic of Ethiopia.\(^7\)

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\(^3\) General Conditions of the Contract, Sub-Clause 67.3. See Exhibit R1 to AAWSA’s Memorial on Jurisdiction, April 7, 2000.


\(^5\) Claimant’s Request for Arbitration, August 11, 1999, ¶¶ 4.1-5.7.


\(^7\) Claimant’s Request for Arbitration, August 11, 1999, ¶¶ 7.1, 7.3, 8, 9, 10.
15. The Request for Arbitration was forwarded to the Respondent by the ICC Court under cover of a letter dated August 17, 1999.

C. The Respondent’s Objection to Jurisdiction

16. In a letter to the Secretariat of the ICC Court dated August 27, 1999, the Respondent acknowledged receipt of the Claimant’s Request for Arbitration on August 23, 1999. However, the Respondent objected that there was no relevant agreement between the parties to arbitrate disputes between them under the ICC Rules. Rather, in the Respondent’s submission, the parties had agreed to submit their disputes under the Contract to ad hoc arbitration under Article 3325 et seq. of the Civil Code of Ethiopia. The Respondent referred, in particular, to the language of Sub-Clause 67.3.4 of the Special Conditions of Particular Application and the provision of Sub-Clause 67.3 of the General Conditions that, “unless otherwise specified in the Contract”, disputes would be finally settled “under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules”. The Respondent requested that the ICC Court decide, pursuant to Article 6(2) of the ICC Rules, that the arbitration should not proceed.

17. Further correspondence was then exchanged between the parties and the ICC regarding the Respondent’s objection. Particular reference is made to the letters from the Respondent to the Secretariat of the ICC Court dated September 25 and October 5, 1999 and from the Claimant to the Secretariat of the ICC Court dated September 22 and 30, and October 8, 1999.

18. On October 13, 1999, notwithstanding the Respondent’s jurisdictional objection, the ICC Court decided to set this arbitration in motion pursuant to Article 6(2) of the ICC Rules. The ICC Court further decided that the matter would be submitted to three arbitrators.

19. By a letter dated November 5, 1999, the Secretariat of the ICC Court granted the Respondent until November 30, 1999 to submit its Answer to the Claimant’s Request for Arbitration. In a letter to the Secretariat of the ICC Court dated November 30, 1999, the Respondent stated that its Answer was, for the time being, confined to the jurisdictional objections set forth in its earlier correspondence with
the Secretariat. Notwithstanding its jurisdictional objections, the Respondent denied the substance of the Claimant’s claims.

D. The Constitution of the Arbitral Tribunal and the Agreement of the Terms of Reference

20. On December 1, 1999, the Secretary General of the ICC Court confirmed Professor Piero Bernardini’s appointment as co-arbitrator upon the proposal of the Claimant and Dr. Nael Bunni’s appointment as co-arbitrator upon the proposal of the Respondent, pursuant to Article 9(2) of the ICC Rules.

21. The two co-arbitrators subsequently jointly proposed Professor Emmanuel Gaillard as Chairman of the Arbitral Tribunal, pursuant to an agreement of the parties’ counsel memorialised in an exchange of letters dated November 30, 1999 from the Claimant and December 1, 1999 from the Respondent. On January 7, 2000, the Secretary General of the ICC Court confirmed Professor Gaillard’s appointment as Chairman, pursuant to Article 9(2) of the ICC Rules.


23. The parties then exchanged correspondence regarding the contents of the Terms of the Reference. Particular reference is made to the letters to the Arbitral Tribunal from the Claimant dated January 13 and 21, 2000 and to the Arbitral Tribunal from the Respondent dated January 20, 2000. In its letter to the Arbitral Tribunal dated January 20, 2000, the Respondent argued that its objection to the Tribunal’s jurisdiction should be decided by the Tribunal as a preliminary issue.

24. In a letter dated January 26, 2000, the Chairman of the Arbitral Tribunal invited the parties to a meeting to discuss the Terms of Reference. The Chairman stated:

“I would like to organise a meeting to discuss the Terms of Reference in this matter. I would propose the dates of February 15 or February 17 at 2 pm.
For the sake of convenience, I would suggest that the meeting be held in Paris. This would be strictly without prejudice to the place of arbitration, which is understood to be Addis Ababa.\(^8\)

25. On January 28, 2000, the Arbitral Tribunal circulated a draft of the Terms of Reference to the parties for their review and comments. The parties gave their written comments in letters from the Respondent dated January 31 and February 15, 2000 and in a letter from the Claimant dated February 8, 2000.

26. With regard to the place of arbitration, the draft Terms of Reference stated:

"**VIII. PLACE OF THE ARBITRATION**

38. In accordance with Sub-Clause 67.3.1 of the Contract, added by the Conditions of Particular Application, Addis Ababa (Ethiopia) is the place of arbitration.

39. However, the Arbitral Tribunal may decide to conduct hearings or meetings at any other appropriate place. Neither such decision nor the participation of the parties in any such hearing shall be construed as a departure from the choice of Addis Ababa as the place of arbitration.

40. Irrespective of the place of signing, the award(s) shall be deemed to have been made in Addis Ababa (Ethiopia).\(^9\)

27. In its letter of February 8, 2000, the Claimant commented on this aspect of the draft as follows.

"**(8) Place of the Arbitration.**

Comparing Articles 39 and 40 of the draft ToR, the Claimant assumes that the Arbitral Tribunal intends to conduct all hearings in Paris. If the assumption is correct, the issue should be discussed during the meeting of 17 February."\(^10\)

28. The Respondent replied in its letter of February 15, 2000 as follows:

"**(8) Place of the Arbitration**

We fail to see how the Claimant can assume that Articles 39 and 40 of the draft Terms of Reference mean that all hearings are to be conducted in

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\(^8\) Letter from the Arbitral Tribunal to the parties dated January 26, 2000.


\(^10\) Letter from the Claimant to the Arbitral Tribunal dated February 8, 2000.
Paris. In our view, Articles 39 and 40 are clear and do not give rise to any such assumption. We therefore do not consider that this issue requires further discussion.\footnote{Letter from the Respondent to the Arbitral Tribunal dated February 15, 2000.}

29. A meeting was duly held in Paris on February 17, 2000 to review and finalise the Terms of Reference, in accordance with Article 18 of the ICC Rules. The meeting was attended by the parties and by the three arbitrators. (The parties were represented by their respective counsel, who were duly authorised by powers of attorney submitted to the Arbitral Tribunal.) After discussion and the making of certain amendments to the draft text, the Terms of Reference were agreed and signed by Professor Antonio Crivellaro of Bonelli Erede Pappalardo on behalf of the Claimant, by Eric A. Schwartz, Esq. of Freshfields on behalf of the Respondent, and by the three members of the Arbitral Tribunal.

30. In Sections I to III, the Terms of Reference identified the parties and the arbitrators and made provision for notifications and communications in relation to the arbitral proceedings. In Section IV, the relevant background facts were summarised.

31. Section V of the Terms of Reference stated the position regarding the jurisdiction of the Arbitral Tribunal. The provisions relied upon by the Claimant as constituting the relevant agreement to arbitrate were set out. The Terms of Reference then stated:

\begin{quote}
"21. The Respondent has objected that there is no agreement between the parties to arbitrate disputes under the ICC Rules. The Respondent’s arguments in this respect are set out principally in its telefaxes to the Secretariat of the ICC Court dated: August 27, 1999; September 25, 1999; and October 5, 1999. In essence, the Respondent argues that through the addition of Sub-Clause 67.3.4 to Sub-Clause 67.3 of the General Conditions of Contract, the Parties have agreed to submit their disputes to ad hoc arbitration under the terms of the Civil Code of Ethiopia, rather than to arbitration under the ICC Rules.

22. The Claimant’s arguments in response are set out principally in the Claimant’s telefaxes to the Secretariat of the ICC Court dated September 22, 1999 and September 30, 1999. In essence, the Claimant argues that the reference to the arbitration rules of the Civil Code of Ethiopia in Sub-Clause 67.3.4 is supplementary to the reference to the ICC Rules in Sub-Clause 67.3 of the General Conditions of Contract."\end{quote}
Conditions of the Contract and does not affect the jurisdiction of the Arbitral Tribunal appointed under the ICC Rules of Arbitration.

23. In its session of October 13, 1999, the ICC Court decided to set this arbitration in motion pursuant to Article 6(2) of the ICC Rules. The Arbitral Tribunal will accordingly be required to rule on the question of whether it has jurisdiction in this arbitration.

24. The Respondent also argues that the party to the Contract and to the arbitration agreement is the Addis Ababa Water and Sewerage Authority rather than The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority. The Respondent states that, pursuant to Proclamation No. 10 and Regulation No. 5 of 1995 of the Addis Ababa City Government, the Addis Ababa Water and Sewerage Authority is an autonomous public authority having an independent judicial personality under Ethiopian law, while remaining under the supervision of the Addis Ababa City Government. See the Respondent’s letters to the Tribunal dated January 31, 2000 and February 15, 2000.

25. The Claimant argues that the party to the Contract and to the arbitration agreement is “The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority”, as identified in the Request for Arbitration. The Claimant denies that Proclamation No. 10 of 1995 confers independent financial liability on the Addis Ababa Water and Sewerage Authority. The Claimant argues that it has contracted with The Federal Democratic Republic of Ethiopia through one of its governmental organs, and that any payment which is found to be due to the Claimant as a result of this arbitration will be enforceable against The Federal Democratic Republic of Ethiopia. See the Claimant’s telefax to the Tribunal dated February 8, 2000.12

32. Section VI of the Terms of Reference summarised the parties’ respective claims and the relief sought by each of them, as follows.

a. The Claimant had made claims based on allegations of: (i) a late coming into force of the Contract; (ii) a failure to provide the design of the Works; (iii) exceptionally adverse weather conditions; (iv) a failure to certify and pay for work completed under the Contract; and (v) other miscellaneous matters.13

b. The Claimant alleged that the Respondent had breached its obligations under the following sub-clauses of the Contract: 11.1; 81.1; 20.4; 47.1; 67.1; and

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12 Terms of Reference, February 17, 2000, ¶¶21-25.
69.1. The Claimant further alleged that the Respondent had breached the Contract by failing to provide permanent materials for installation in the Works in a timely manner. The Claimant further alleged that the Engineer had breached the Engineer's obligations under the following sub-clauses of the Contract: 41.1; 46.1; 2.6; 44.1 and 44.3; 45.1; 52.1; 53.1, 60.5; 56.1; and 60.2. The Claimant had stated its intention to supplement these allegations in future submissions.\textsuperscript{14}

c. The Claimant had also notified the Respondent of its intention to submit further disputes to be resolved in the present arbitration.\textsuperscript{15}

d. The Claimant was seeking relief in the order of US$ 26,700,000 based on these claims, together with interest and costs.\textsuperscript{16}

e. The Respondent's answer was confined, at that time, to its jurisdictional objections that: (i) the parties had not agreed to submit their disputes to arbitration under the ICC Rules but rather had agreed to submit their disputes to ad hoc arbitration under Article 3325 et seq. of the Civil Code of Ethiopia; and (ii) the Respondent was not the correct party to the Contract and the arbitration agreement. The Respondent nevertheless denied the substance of the Claimant's claims and denied that any additional claims that the Claimant proposed to bring before the Tribunal fell within the Terms of Reference.\textsuperscript{17}

f. The Respondent requested that the Claimant's claims be dismissed for lack of jurisdiction or, failing that, on the merits. The Respondent sought reimbursement of its legal and other costs incurred for the arbitration.\textsuperscript{18}

33. In Section VII, the Terms of Reference set out the issues to be determined in the arbitration, given the parties' respective claims and the relief sought:

"43. The Arbitral Tribunal shall decide upon all issues arising from the submissions, statements and pleadings of the Parties that are..."
relevant to the adjudication of the Parties' respective claims and defences. In particular, it will decide upon the following issues.

i. Whether the Arbitral Tribunal has jurisdiction in respect of this arbitration.

ii. If the Arbitral Tribunal does have jurisdiction, whether the Claimant is entitled to any relief in respect of its claim and, if so, in what amount.

iii. Whether interest is payable on any amount awarded by the Arbitral Tribunal and, if so, in what amount.

iv. The extent to which each Party should bear the costs of this arbitration."\(^{19}\)

34. Section VIII of the Terms of Reference recorded that the place of arbitration was Addis Ababa in Ethiopia. However, the parties agreed that the Arbitral Tribunal could decide to conduct hearings or meetings at any other appropriate place, without prejudice to Addis Ababa remaining the place of arbitration:

"44. In accordance with Sub-Clause 67.3.1 of the Contract, added by the Conditions of Particular Application, Addis Ababa (Ethiopia) is the place of arbitration."

45. However, the Arbitral Tribunal may, after consultation of the parties, decide to conduct hearings or meetings at any other appropriate place. Neither such decision nor the participation of the parties in any such hearing shall be construed as a departure from the choice of Addis Ababa as the place of this arbitration.

46. Irrespective of the place of signing, the award(s) shall be deemed to have been made in Addis Ababa (Ethiopia).\(^{20}\)

35. Section IX of the Terms of Reference recorded that the law of the Contract is the law in force in the Federal Democratic Republic of Ethiopia.

"47. In accordance with Sub-Clause 5.1.a of the Contract, as modified by the Conditions of Particular Application, the law of the Contract is the law in force in the Federal Democratic Republic of Ethiopia.\(^{21}\)"

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\(^{19}\) Terms of Reference, February 17, 2000, §43.

\(^{20}\) Terms of Reference, February 17, 2000, §§44-46.

\(^{21}\) Terms of Reference, February 17, 2000, §47.
36. Section X of the Terms of Reference set out the procedural rules to be followed by the Arbitral Tribunal:

"48. The Arbitral Tribunal shall resolve this dispute in accordance with the procedures prescribed by the Procedural Rules issued by the Arbitral Tribunal this day and, if applicable, by the ICC Rules, and by the rules of arbitration of the Civil Code of Ethiopia under article 3325 et seq. (Arbitral Submission). If these provisions do not address a specific procedural issue, the Arbitral Tribunal shall, after consulting the Parties, determine the applicable procedure." \(^{22}\)

37. Section X also recorded the following points, *inter alia*. \(^{23}\)

   a. The language of the arbitration would be English.

   b. The Arbitral Tribunal would be free to decide any issue by way of a partial or interim award, or by its final award.

   c. The parties had no reservations to express with regard to the constitution of the Arbitral Tribunal.

38. The Tribunal decided, after hearing the parties at the procedural meeting on February 17, 2000, immediately following the agreement and signature of the Terms of Reference, that the jurisdiction issue would not be considered as a preliminary issue but would be decided with the merits. On February 22, 2000, the Tribunal issued Procedural Order No. 1, setting forth the procedural timetable for the parties' written submissions regarding both the jurisdiction issue and the merits. It provided as follows.

   a. By Friday, April 7, 2000, the Respondent was to submit a memorial on the issue of the jurisdiction of the Arbitral Tribunal.

   b. By Tuesday, May 23, 2000, the Claimant was to submit a Statement of Claims on the merits and an answer on the issue of jurisdiction.

\(^{22}\) Terms of Reference, February 17, 2000, ¶48.

\(^{23}\) Terms of Reference, February 17, 2000, ¶¶49-50, 53, 54.
c. By Wednesday, August 23, 2000, the Respondent was to submit an Answer to the Claimant’s Statement of Claims on the merits and a rejoinder on the issue of jurisdiction.

d. By Monday, October 9, 2000, the Claimant was to submit a Rejoinder to the Respondent’s Answer on the merits and a rebuttal on the issue of jurisdiction.

e. By Friday, November 24, 2000, the Respondent was to submit a Rebuttal to the Claimant’s Rejoinder on the merits.

f. The Tribunal reserved a one-day hearing on December 15, 2000 for the resolution of further procedural issues.

g. The Tribunal also reserved the following dates for a hearing, at a place to be confirmed: January 22-26, 2001 and February 19-23, 2001.

39. At its session of March 8, 2000, the ICC Court took note of the Terms of Reference and the procedural timetable set out in Procedural Order No. 1.

E. The Written Submissions and the Organisation of Hearing(s)

40. Pursuant to the direction recorded in paragraph 38(a) above, the Respondent duly submitted, under cover of a letter dated April 7, 2000, ‘AAWSA’s Memorial on Jurisdiction’, being a 17-page memorial together with 8 supporting exhibits and a witness statement by Mr. Tadesse Kebede.

41. Pursuant to the direction recorded in paragraph 38(b) above, the Claimant duly submitted, under cover of a letter dated May 23, 2000, the ‘Claimant’s Statement of Claim’. As part of this submission, the Claimant submitted its answer on the issue of jurisdiction, comprising 22 pages of the memorial, together with witness statements from Ing. Claudio Lautizi and Ing. Bruno Fabbri.

42. In a letter dated July 27, 2000, the Respondent advised the Arbitral Tribunal that the parties had agreed to an extension of time for submission of the Respondent’s Answer to the Statement of Claims on the merits and rejoinder on the issue of jurisdiction from August 23, 2000 to August 31, 2000. The Arbitral Tribunal
confirmed this extension in a letter dated July 28, 2000, on the basis of the agreement of the parties.

43. Under cover of a letter dated August 31, 2000, the Respondent duly submitted its ‘Answer on the Merits’. At the same time, the Respondent submitted ‘AAWSA’s Rejoinder on Jurisdiction’, comprising 8 pages, together with a supplementary witness statement from Mr. Tadesse Kebede.

44. In a letter dated October 6, 2000, the Claimant requested, on the basis of an agreement of the parties, an extension of time for submission of its Rejoinder to the Respondent’s Answer on the merits and rebuttal on the issue of jurisdiction from October 9, 2000 to October 24, 2000, with a consequential extension of time for submission of the Respondent’s Rebuttal to the Claimant’s Rejoinder on the merits from November 24, 2000 to December 8, 2000. In a letter dated the same day, the Arbitral Tribunal granted both extensions, noting that the date of December 15, 2000 for the procedural hearing remained unchanged.

45. Under cover of a letter dated October 24, 2000, the Claimant duly submitted the ‘Claimant’s Rejoinder’. As part of this submission, the Claimant submitted its rebuttal on the issue of jurisdiction, comprising 10 pages.

46. In a letter dated November 28, 2000, the Respondent requested a further extension of time for submission of its Rebuttal to the Claimant’s Rejoinder on the merits from December 8, 2000 to December 22, 2000. After considering further correspondence from both parties, the Arbitral Tribunal granted the requested extension of time in a letter dated December 1, 2000. As a consequence, the Tribunal cancelled the scheduled procedural meeting of December 15, 2000 on the ground that it was not appropriate to hold such a procedural meeting before the written submissions had been completed.

47. In its letter of December 1, 2000, the Arbitral Tribunal invited the parties to address the following three points: (a) whether it was still appropriate to hold the hearing scheduled to begin on January 22, 2001, given that the Respondent’s Rebuttal on the merits would not be submitted until December 22, 2000; (b) the estimated time required for the hearing of the parties’ disputes, including the issue of jurisdiction; and (c) the appropriate venue for the hearing. The Tribunal then stated:
"The Tribunal would stress its concern to avoid unnecessary disruption to the scheduled hearing dates, which have been in place since February of this year. The Tribunal hopes that the parties will be able to agree a timetable and format for the hearing that allows it to be completed within either or both of the two scheduled weeks."

48. The Respondent addressed these issues in a letter dated December 7, 2000, in which it made the following submissions.

   a. The Respondent submitted that the hearing scheduled to begin on January 22, 2001 should go ahead.

   b. However, the Respondent doubted that one week would be sufficient for the hearing, given the large number of witnesses involved. Accordingly, in the Respondent's submission, the hearing dates beginning on February 19, 2001 should continue to be reserved.

   c. The Respondent submitted that the appropriate venue for the hearing was Addis Ababa. In the Respondent's view, the choice of Addis Ababa as the place of arbitration created a presumption in favour of Addis Ababa as the venue for the hearing and there were no compelling considerations of convenience to overcome that presumption. To the contrary, there were good reasons to hold the hearing in Addis Ababa: (i) it would allow the Arbitral Tribunal to make a visit to the site of the project; and (ii) there were no obvious alternative venues to Addis Ababa.

49. The Claimant responded in a letter dated December 11, 2000 as follows.

   a. The Claimant submitted that, taking into account the holiday season, there was insufficient time after receipt of the Respondent's Rebuttal on December 22, 2000 for the parties to prepare for a hearing beginning on January 22, 2001. Those hearing dates should, in the Claimant's submission, be cancelled.

   b. The Claimant estimated that the witnesses could be heard within four days, with one or two days reserved for legal submissions.

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24 Letter from the Arbitral Tribunal to the parties dated December 1, 2000.
c. The Claimant submitted that, taking into account that the majority of the participants in the hearing were based in Europe, it would be more appropriate to hold this hearing in Paris.

"The February hearings will be intermediate hearings, mainly devoted to examination of the witnesses. The Claimant recommends that they be held in Paris, reserving the next pleadings for a final hearing in Addis Ababa, the legal venue of the present arbitration."\(^{25}\)

50. The Respondent replied in a letter sent the same day, December 11, 2000. The Respondent objected to holding the hearing in Paris. The Respondent also doubted the Claimant’s estimate that the witnesses could be heard in one week, stating that there was a “serious risk” that more than one week would be required. Accordingly, in the Respondent’s view, either the dates beginning on January 22, 2001 would have to be maintained or additional hearing time would have to be reserved after the week of February 19, 2001.

51. In a letter dated December 19, 2000, the Arbitral Tribunal informed the parties that it had decided not to use the dates of January 22 to 26, 2001 previously reserved for the hearing. That decision was made on the ground that, taking into account the holiday season, there would be insufficient time between the receipt of the Respondent’s Rebuttal to the Claimant’s Rejoinder on December 22, 2000 and the beginning of the hearing on January 22, 2001 for either the parties or the Arbitral Tribunal to prepare adequately for the hearing.

52. This left the hearing dates scheduled for the week of February 19-23, 2001. Taking into account the Respondent’s view that the hearing would likely take longer than a week, the Arbitral Tribunal proposed that the hearing be divided into two meetings. The first meeting would be held in the week of February 19-23, 2001 and would deal with all the witness evidence. The second meeting, on dates to be determined, would be reserved for legal argument. The Tribunal requested the parties to make submissions by January 12, 2001, regarding the organisation of the hearing.

53. As for the venue for the hearing, the Arbitral Tribunal stated:

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\(^{25}\) Letter from the Claimant to the Arbitral Tribunal dated December 11, 2000.
"With regard to the venue, the Tribunal currently takes the view that it would be more convenient to hold at least the first meeting in Paris, without prejudice to Addis Ababa remaining the place of the arbitration. The Tribunal understands that at least fourteen witnesses would attend the first meeting, together with the parties, their counsel, and the Arbitral Tribunal. The majority of participants in the hearing are based in Europe. Taking into account the significant travel time to and from Addis Ababa, holding such a hearing there is likely to substantially curtail the time available for the hearing itself and make the coordination of attendance by witnesses more difficult. The Tribunal would also find it easier to arrange transcript facilities appropriate to a witness hearing if the venue were Paris.

The Tribunal will take a final decision on this question after having considered the parties’ proposals regarding the duration and format of the hearing. It may prove to be more appropriate to hold at least the second meeting in Addis Ababa."  

54. Shortly thereafter, under cover of a letter dated December 22, 2000, the Respondent submitted ‘AAWSA’s Rebuttal on the Merits’.

55. In a letter dated January 12, 2001, the Respondent expressed its strong objections to holding the hearing anywhere other than in Addis Ababa. The Respondent made its objections on the mistaken understanding that the Arbitral Tribunal was relying upon Article 14(2) of the ICC Rules, which had been introduced in 1998 after the parties had entered into their contract. That article permits the Arbitral Tribunal to hold hearings and meetings in venues other than the place of arbitration, in certain circumstances. In fact, the Arbitral Tribunal was not relying upon Article 14(2) but upon an express agreement of the parties, recorded in paragraph 45 of the Terms of Reference, that the Arbitral Tribunal could, after consultation of the parties, decide to hold hearings at appropriate places other than Addis Ababa, without prejudice to Addis Ababa remaining the place of arbitration.

56. As regards jurisdiction, the Respondent stated:

“The Respondent leaves it to the Tribunal to decide what further submissions, if any, it requires from the Tribunal [sic] on the matter of jurisdiction. In the Respondent’s submission, little hearing time is

26 Letter from the Arbitral Tribunal to the parties dated December 19, 2001 (emphasis added).
required to be devoted to this subject as the matter has been fully
briefed."\textsuperscript{27}

57. The Respondent further submitted that it was unnecessary to divide the hearing into
two meetings, for the reason that the majority of the hearing would be devoted to
witness evidence. Instead, the Respondent requested that the Tribunal reserve 10
days, preferably in one block, for the hearing of witness evidence and for opening
and closing submissions. The Claimant did not at that time make any submission on
these issues, despite having been invited by the Arbitral Tribunal to do so.

58. Taking into account the Respondent’s submission of January 12, 2001, the Arbitral
Tribunal asked the parties, in a letter dated January 19, 2001, to reserve the
following dates for a hearing, in case they were required: April 17-19, May 21-22,
and May 28 to June 6, 2001, inclusive. These were the first dates after the already
scheduled dates of February 19-23, 2001 upon which all three members of the
Arbitral Tribunal would be available for a hearing.

59. In a letter dated January 19, 2001, the Respondent indicated that it was not available
for the dates of April 17-19, 2001 but was available for the other dates indicated by
the Arbitral Tribunal. The Claimant did not at that time give any response in this
respect.

60. The Arbitral Tribunal held a meeting on January 24, 2001, in the absence of the
parties, to discuss the organisation of the hearing. The meeting was attended by
Professor Gaillard and Dr. Bunni in person and by Professor Bernardini by
teleconference. The following day, January 25, 2001, the Tribunal issued
Procedural Order No. 2, which decided the following matters.

a. Given that the Respondent had objected to the Arbitral Tribunal’s proposal of
dividing the hearing on the merits into two meetings, and that the Claimant
had previously indicated that the merits could be resolved in a single meeting,
the Arbitral Tribunal decided that the merits would now be resolved in a single
meeting.\textsuperscript{28}

\textsuperscript{27} Letter from the Respondent to the Arbitral Tribunal dated January 12, 2001.
\textsuperscript{28} Procedural Order No. 2, January 25, 2001, p. 3, ¶1.
b. Given that it appeared from the parties' submissions that the five hearing days reserved from February 19-23, 2001 would likely be insufficient, and given that it was not possible for the Arbitral Tribunal to schedule additional hearing days in close proximity to those dates, the Tribunal decided that it was no longer appropriate to use the dates of February 19-23, 2001 for the hearing.\textsuperscript{29}

c. Taking into account the Arbitral Tribunal's availability and the Respondent's letters of January 12 and 19, 2001, the Tribunal decided to fix new hearing dates from Monday, May 28 to Friday, June 1, 2001 and from Monday, June 4 to Tuesday, June 5, 2001, with the possibility that the Tribunal would also sit on Sunday, June 3, 2001 if necessary, giving a total of eight available hearing days.\textsuperscript{30}

d. In order to simplify and shorten the hearing on the merits, the Arbitral Tribunal decided to hold a separate, one-day hearing to resolve the issue of jurisdiction. That hearing was to be held on either May 21 or May 22, 2001, depending on the preference of the parties. The Respondent was given the option of choosing to have this hearing in the period from April 17-19, 2001 if it preferred.\textsuperscript{31}

e. The Arbitral Tribunal decided, pursuant to Articles 44-46 of the Terms of Reference, that the appropriate venue for these hearings was Paris:

"15. Under Articles 44-46 of the Terms of Reference, the Tribunal is empowered to decide to hold hearings or meetings at appropriate places other than Addis Ababa, without prejudice to Addis Ababa remaining the place of the arbitration.

16. The Tribunal has carefully considered the parties' submissions regarding the appropriate venue for the hearings. The Tribunal has decided that it is more appropriate to hold the hearings, including the separate hearing on jurisdiction, in Paris.

17. In reaching this decision, the Tribunal has taken particular account of the fact that the majority of the participants in the hearing are based in Europe. Given the significant travel time from Europe to Addis Ababa, and the relative difficulty of coordinating travel arrangements for the non-Ethiopian party, counsel, the arbitrators,

\textsuperscript{29} Procedural Order No. 2, January 25, 2001, p. 3, ¶¶3-4.
and particularly the non-Ethiopian witnesses, it will greatly simplify matters if the hearings take place in Paris. This is especially the case given the Respondent’s estimation that the hearing might take up to 10 days.

18. Of course, this decision has no effect on Addis Ababa remaining the place of arbitration.

19. The Tribunal leaves open the question of whether any further hearing(s), if required, should be held in Addis Ababa.”

61. In a letter dated February 7, 2001, the Claimant made its proposals for the organisation of the hearing, as directed in Procedural Order No. 2. The Claimant submitted, *inter alia*, that it was unnecessary to hear oral evidence in order to decide the jurisdiction issue:

“The Claimant believes that the Tribunal is in a position to decide the issue of jurisdiction on the basis of the written evidence that has already been produced by the parties. With respect, it is submitted that the taking of oral testimony in relation to this issue, as requested by the Respondent, would be inappropriate and unnecessary in the presence of such exhaustive written evidence.”

62. The same day, February 7, 2001, the Respondent sent a letter to the Arbitral Tribunal that strongly criticised the Tribunal’s decision to hold the upcoming hearing in Paris. The Respondent asserted that the decision was evidence of a lack of impartiality on the part of the decision, that the Tribunal was insensitive to the legitimate concerns and expectations of the Respondent, and that the Tribunal had accorded greater weight to the Claimant’s and the Tribunal’s own convenience over that of the Respondent. The Respondent also complained about the Tribunal’s decision not to hear jurisdiction as a preliminary issue and suggested that this indicated a lack of fair-mindedness or impartiality on the Tribunal’s part.

63. The Arbitral Tribunal firmly rejected these allegations in a letter to the Respondent dated February 12, 2001. The Tribunal pointed out that the Respondent had failed to refer to the fact that, in paragraph 45 of the Terms of Reference, the parties had specifically agreed that the Arbitral Tribunal could, after consulting the parties,

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decide to conduct hearings or meetings in appropriate places other than Addis Ababa. The Tribunal’s decision was entirely appropriate:

“In compliance with the Terms of Reference, as well as Article 15(2) of the ICC Rules, the Arbitral Tribunal invited both parties to make submissions on the issue of the appropriate venue for the hearing. Having received and reviewed submissions from both parties, the Tribunal then held a meeting, in the absence of the parties, at which it deliberated on the question before reaching its decision to hold the hearings in Paris.

Ultimately, the Tribunal had regard to the fact that the majority of witnesses as well as the arbitrators and counsel for the parties reside in Europe. The Tribunal investigated the schedules and duration for airline travel from Europe to Addis Ababa and, taking into account the concerns of maximising the time available for the hearing and coordinating the examination of witnesses, decided that it was more appropriate to hold the hearing in Paris. This is consistent with the agreement of the parties expressed in the Terms of Reference.

Accordingly, while we appreciate that the Respondent may disagree with the Tribunal’s decision, we must stress that the decision was taken for appropriate reasons, following a fair procedure.”

64. The Arbitral Tribunal noted that, contrary to an allegation made by the Respondent in its letter of February 7, 2001, the Tribunal had not yet decided whether it was necessary to conduct a visit to the project site in order to decide any of the issues in dispute. The Tribunal then added:

“On a separate point, we would stress that the Tribunal’s decision not to consider the Respondent’s challenge to the Tribunal’s jurisdiction as a preliminary issue, which you also raise as a ground of complaint in your letter, was a decision that was taken by the Tribunal after receiving written submissions from both parties and after conducting an oral hearing on the point.

The Tribunal cannot accept your suggestion that this decision indicates a lack of fair-mindedness or impartiality on the Tribunal’s part. The Tribunal only decided that it was not appropriate to hear the jurisdiction challenge as a preliminary issue. This decision was taken on the merits of the arguments presented to us and was not in any way motivated by partiality in favour of one or other party. We remain ready to hear both parties on the jurisdiction question and will decide this issue with an open

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mind according to the appropriate legal principles, taking into account the facts and the written and oral submissions of both parties.”

65. The Respondent maintained its complaints regarding the decision to hold the hearing in Paris in a letter to the Arbitral Tribunal dated February 13, 2001. The Respondent argued that the Tribunal had abused its discretion under paragraph 45 of the Terms of Reference because: (a) it had allegedly given insufficient weight to the parties’ choice of Addis Ababa as the place of arbitration and to the Respondent’s interests; and (b) it had taken into account matters the Respondent considered irrelevant, particularly the location of the arbitrators and the parties’ counsel.

66. In a letter dated February 14, 2001, the Claimant argued that the Respondent’s reaction was both disproportionate in nature and unjustified on the merits, given that the Respondent’s counsel had freely consented in the Terms of Reference to allow the Arbitral Tribunal to decide to hold hearings in other appropriate places, without prejudice to Addis Ababa remaining the place of arbitration.

67. On February 15, 2001, the Arbitral Tribunal confirmed to the parties that it would not revisit its decision to hold the next hearing in Paris. On February 16, 2001, the Arbitral Tribunal issued directions organising the hearing. In particular, the Tribunal directed that, in light of the views expressed by the parties that it was not necessary to hold a separate hearing on jurisdiction, the issue of jurisdiction would be addressed in the course of the hearing on the merits, scheduled to begin on Monday, May 28, 2001.

F. The Respondent’s Challenge of the Three Arbitrators

68. On February 23, 2001, the Respondent submitted to the ICC Court a challenge of all three members of the Arbitral Tribunal, pursuant to Article 11 of the ICC Rules. The Respondent stated:

“1. The present challenge is being submitted on behalf of the Addis Ababa Water & Sewerage Authority (the “Respondent”) in accordance with Article 11 of the ICC Rules of Arbitration in order to request the removal and replacement of the three arbitrators,

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Professor Emmanuel Gaillard (Chairman), Professor Piero Bernardini and Dr. Nael Buni, who constitute the Arbitral Tribunal in the above-reference arbitration. The challenge is submitted with considerable reluctance and regret but has become unavoidable. In its Procedural Order No. 2 of January 25, 2001 (Attachment 1 hereto), the Arbitral Tribunal refused to hold a hearing on the merits (scheduled for May 28-June 6, 2001 for the purpose of oral argument and the examination of all of the witnesses) at the agreed place of arbitration, which is Addis Ababa, and decided to conduct it instead in Paris. In refusing to conduct the hearing at the place of arbitration, the Arbitral Tribunal has:

(i) failed to perform its functions in accordance with the Rules, contrary to Article 12 thereof;

(ii) failed to act "fairly and impartially," in violation of Article 15(2); and

(iii) abused the discretion that it enjoys under Article 14(2) to hold hearings at "appropriate" locations other than the place of arbitration."36

69. The Respondent alleged, inter alia, that, in deciding to hold the May 28-June 6, 2001 hearing in Paris rather than in Addis Ababa, the Tribunal had "improperly" and "abusively" had regard to its own convenience and to the convenience of the Claimant and its witnesses, and had disregarded the convenience of the Respondent and its witnesses.37

70. The Respondent further alleged, in respect of the power contained in paragraph 45 of the Terms of Reference (which the Respondent claimed was to the same effect as Article 14(2) of the Terms of Reference), that it was not "appropriate" to hold a hearing in a venue other than the place of arbitration when "this will significantly inconvenience one of the parties and there is no obstacle to proceeding with the hearing at the place of arbitration".38

71. The Arbitral Tribunal submitted its comments in response to the Respondent's challenge, pursuant to Article 11(3) of the ICC Rules, in a letter to the Secretariat of the ICC Court dated March 1, 2001. The Arbitral Tribunal stated that the Respondent's challenge was unjustified:

"Indeed, by deciding to hold hearings in this arbitration in a location other than the place of arbitration, the Arbitral Tribunal has not disregarded the arbitration agreement concluded by the parties stipulating that the place of arbitration shall be Addis Ababa, Ethiopia, nor has it failed to comply with any of its duties under the ICC Rules. The Arbitral Tribunal has merely exercised the discretion granted to it under paragraph 45 of the Terms of Reference of the arbitration, signed by counsel on behalf of the parties and by the arbitrators on February 17, 2000:

"However, the Arbitral Tribunal may, after consultation of the parties, decide to conduct hearings or meetings at any other appropriate place. Neither such decision nor the participation of the parties in any such hearing shall be construed as a departure from the choice of Addis Ababa as the place of this arbitration."

This power granted to the Arbitral Tribunal under the Terms of Reference renders the situation entirely different, from a legal perspective, from that if the right to hold hearings elsewhere had resulted only from the ICC Rules, for in such a case the parties could argue that their arbitration agreement derogated from the Rules. In the present case, however, there can be no debate as to whether the Arbitral Tribunal enjoys the discretion to hold hearings elsewhere, given the subsequent express grant of this power by the Terms of Reference.

As for the Arbitral Tribunal’s exercise of this discretion in deciding to conduct the hearings in Paris, the Arbitral Tribunal concedes that reasonable individuals acting in good faith may have diverging views as to the relative convenience of various potential venues at which hearings could be held. However, the decision of the Arbitral Tribunal in the present case was based on considerations of convenience and costliness, not on any form of bias or partiality in favor of one party or the other. The Arbitral Tribunal has, moreover, left open the question of where future hearings will take place, thus allowing ample possibility for such hearings - including final argument and the rendering of the award - to take place in Addis Ababa (see paragraph 19 of Procedural Order No. 2).

In a given arbitration, the Arbitral Tribunal will be led to take any number of decisions, from minor procedural points up to the rendering of an award on the merits. Each of these decisions is likely to satisfy one party more than the other; this is inherent in the very role of the Arbitral Tribunal as adjudicator of a dispute. This obviously does not signify that in each instance the Arbitral Tribunal has shown bias vis-à-vis the less satisfied party.

In the present case, the Arbitral Tribunal must reject any allegations of bias in connection with its decision to hold hearings in Paris, which was
taken on the basis of objectively legitimate considerations after consulting the parties.”

72. Professor Bernardini and Dr. Bunni confirmed that this was the Arbitral Tribunal’s position in letters to the Secretariat of the ICC Court dated March 2 and 5, 2001, respectively.

73. Subsequently, the parties gave further comments on the Respondent’s challenge.40

74. The Respondent’s challenge of the three arbitrators was rejected by the ICC Court at its Plenary Session of March 30, 2001.

G. The Respondent’s Applications to the Ethiopian Courts and the Events Leading to the Hearing of May 28, 2001

75. In a letter dated April 19, 2001, the Respondent informed the Secretariat of the ICC Court that, on April 9, 2001, the Respondent had initiated appeal proceedings before “the Addis Ababa Court of Appeal” in respect of the ICC Court’s decision of March 30, 2001, “pursuant to Article 3342(3) of the Ethiopian Civil Code”.

76. In a letter dated May 4, 2001, the Respondent further informed the Secretariat of the ICC Court as follows:

“We wish to inform you of the latest developments before the Supreme Court and, in particular, of the Supreme Court’s Order of yesterday, May 3, 2001. We understand that the Supreme Court, composed of a panel of three judges, has reached the following decisions:

(i) The Supreme Court has satisfied itself that it enjoys jurisdiction to hear the Respondent’s appeal pursuant to Article 3342(3) of the Ethiopian Civil Code.

(ii) The Supreme Court has summoned the Claimant in this arbitration to appear before it on June 27, 2001, in order to present its case in response to the Respondent’s appeal.

(iii) The Supreme Court has issued a temporary injunction against the Arbitral Tribunal ordering the suspension of the arbitration

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39 Letter from the Arbitral Tribunal to the Secretariat of the ICC Court dated March 1, 2001.
40 See the Respondent’s letters to the Secretariat of the ICC Court dated March 2 and 6, 2001 and the Claimant’s letter to the Secretariat of the ICC Court dated March 6, 2001.
proceedings with immediate effect pending its determination of the Respondent’s appeal.\textsuperscript{41}

77. The Respondent further stated that it had commenced a separate action before the Federal First Instance Court of The Federal Democratic Republic of Ethiopia (the “Federal First Instance Court”) for the purposes of obtaining a judgment that the Tribunal lacks jurisdiction over this arbitration.

"Further, given that the Tribunal has failed to rule on the Respondent’s objection on jurisdiction, first raised in this arbitration in September 1999, and given the Tribunal’s determination to move this arbitration from Addis Ababa to Paris in violation of the Respondent’s reasonable expectations, the Respondent has initiated a suit at the Federal First Instance Court of Ethiopia ("the First Instance Court") in order to obtain a judgment that the Tribunal has no jurisdiction over this arbitration. We understand that the First Instance Court has satisfied itself that it enjoys jurisdiction to hear the Respondent’s application and, moreover, it has summoned the parties to appear before it on June 11, 2001."\textsuperscript{42}

78. In a separate letter of the same date, the Respondent told the Arbitral Tribunal that the Federal Supreme Court of The Federal Democratic Republic of Ethiopia (the “Federal Supreme Court”) had issued an order the previous day “suspending the arbitration and temporarily enjoining the Arbitral Tribunal from proceeding with the case”. The Respondent threatened that, under Article 156(1) of the Ethiopian Code of Civil Procedure, a court could attach the property of, or sentence for contempt of court, any person breaching such a temporary injunction. The Respondent asserted that the hearing scheduled to begin on May 28, 2001 would, therefore, have to be adjourned.

79. At the request of the Arbitral Tribunal, the Claimant gave its comments on the Respondent’s actions, in a letter dated May 10, 2001. The Claimant submitted that the Tribunal was entitled to continue to prosecute the arbitration, for the following reasons.

a. The arbitration is an ICC arbitration and the Respondent’s applications to the Ethiopian courts contravened the ICC Rules. In particular, Article 7(4) of the

\textsuperscript{41} Letter from the Respondent to the Secretariat of the ICC Court dated May 4, 2001.
\textsuperscript{42} Letter from the Respondent to the Secretariat of the ICC Court dated May 4, 2001.
b. The Federal First Instance Court has no authority to decide upon the jurisdiction of the Arbitral Tribunal over the arbitration, which is a matter for the Tribunal itself. This follows from the principle of competence-competence, which is observed by the ICC Rules and recognised by Article 3330(2) of the Civil Code of Ethiopia. In any event, the Federal First Instance Court had not taken any decision purporting to suspend the arbitration.

c. The order issued by the Federal Supreme Court was invalidly made. In particular, it was made without notifying or hearing the Claimant. The order was not, in any event, directed to the Arbitral Tribunal and had not yet been served on the Claimant.

d. As an ICC tribunal in an international arbitration, the Arbitral Tribunal should give precedence to the decision of the ICC Court over any suspension order from an Ethiopian court.

80. The Claimant also submitted that the Arbitral Tribunal could now decide the jurisdiction issue:

"As an alternative, and still on the assumption that the Order of the Supreme Court is ineffective and does not affect the arbitration, if prior to proceeding with the hearings the Tribunal wishes to resolve the objection raised by AAWSA as to its jurisdiction, the Tribunal has collected all needed information to make an award on this issue.

It has not done it so far because the Respondent offered the evidence of witnesses on the same issue who were to be heard at the scheduled hearings. The Respondent does now refuse and boycott those hearings, and the Claimant has constantly argued that the jurisdictional issue can be properly decided upon the contract documents and the parties’ pleadings, completely exhausted on this matter also by admission of the Respondent, who however blames the Tribunal for having arbitrarily delayed its decision on jurisdiction [...].

The Claimant invites the Tribunal to consider the possibility to amend the Procedural Orders, also in view of the most recent events, and to firstly
make an award on jurisdiction, so that the future destiny of this arbitration shall depend on this award."\(^{43}\)

81. The Respondent replied on May 11, 2001, as follows.

a. It had not yet been decided whether this arbitration is an ICC arbitration. The Respondent had never accepted that this is an ICC arbitration.

b. In any event, even if it were an ICC arbitration, the arbitration would still be subject to the supervising jurisdiction of the Ethiopian courts to the extent allowed under Ethiopian law, including their authority to hear appeals of ICC decisions rejecting the challenge of arbitrators during the course of the arbitration proceedings.

c. The principle of competence-competence does not necessarily prevent national courts deciding upon the arbitrators’ jurisdiction before the arbitrators themselves do so.

d. The Federal Supreme Court is entitled to issue temporary injunctions *ex parte* where it is warranted in the circumstances.

e. The Arbitral Tribunal must comply with the rulings of the Ethiopian courts: (i) to ensure as far as possible, pursuant to Article 35 of the ICC Rules, that any award issued by the Tribunal would be enforceable in Ethiopia; and (ii) since, if it did not, the arbitrators would be in contempt of court and would then be unwilling to travel to Ethiopia, preventing them from fulfilling their functions under the ICC Rules and necessitating their replacement.

82. The Respondent concluded:

"In the circumstances, the Arbitral Tribunal obviously has no choice but to respect the Orders of the Ethiopian Supreme Court and, accordingly, to suspend the arbitration proceedings. The Claimant’s proposed alternative of an early award on jurisdiction obviously is no longer feasible as it could not be effected without violating the Ethiopian court’s Order."\(^{44}\)

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\(^{43}\) Letter from the Claimant to the Arbitral Tribunal dated May 10, 2001.

83. The Respondent supplied with its letter a copy of an English translation of the relevant order of the Federal Supreme Court, authenticated by the Addis Ababa City Government and the Ethiopian Ministry of Foreign Affairs. The Respondent stated its understanding that steps had been taken to serve the order on the arbitrators.

84. In a letter dated May 14, 2001, the Claimant made the following points, inter alia, on the basis of the English translation of the order of the Federal Supreme Court provided by the Respondent.

a. The Court had retained provisional jurisdiction over the appeal on the basis of a unilateral declaration of the appellant (the Addis Ababa Water and Sewerage Authority) that this is an ad hoc arbitration exclusively governed by Ethiopian procedural law.

b. The respondent in the appeal before the Federal Supreme Court was Salini Costruttori S.p.A. and the order had been sent to the arbitrators for information only.

85. The Claimant argued that the Arbitral Tribunal’s authority accordingly remained unaffected by the order.

86. On May 14, 2001, the Arbitral Tribunal advised the parties of its position regarding the above-described developments:

"The Tribunal is unwilling to take any decision or step in relation to the injunction issued by the Federal Supreme Court of Ethiopia, or in relation to the Respondent’s initiation of an action before the Federal First Instance Court of Ethiopia challenging the Tribunal’s jurisdiction, without hearing the parties and without having considered the issue in full. These matters will, accordingly, be addressed at the outset of the hearing beginning on May 28, 2001.

Until these issues are properly reviewed and appropriate decisions are taken, the parties should assume that the hearing on jurisdiction and the merits of the disputes may proceed on May 28, 2001 and should prepare accordingly. The Tribunal would emphasise that, as confirmed by Article 6(2) of the ICC Rules, the Tribunal has the jurisdiction to decide whether it has jurisdiction in this dispute."  

87. The Tribunal further stated that it had no difficulty in principle with issuing an award on jurisdiction after completion of the oral argument and witness evidence regarding the jurisdiction issue, provided this was practicable. However, this would depend upon what decision was reached regarding the effect of the order issued by the Federal Supreme Court of Ethiopia.

88. In a letter dated May 16 but sent on May 18, 2001, the Respondent informed the Tribunal that the Federal First Instance Court of Ethiopia had issued an order “enjoining the Claimant from proceeding with the arbitration pending its decision on the Tribunal’s jurisdiction”. The Respondent made clear that it would not attend the hearing scheduled to begin on May 28, 2001 and that it considered that any such hearing would be a contempt of court and illegal. In a separate letter to the Claimant, also dated May 16 but sent on May 18, 2001, the Respondent threatened that the Claimant would be in contempt of court if it attended the hearing beginning on May 28, 2001.

89. On May 21, 2001, the Respondent sent the Arbitral Tribunal a copy of the injunction issued by the Federal First Instance Court on May 14, 2001, together with an English translation. The Arbitral Tribunal subsequently received a copy by mail, apparently sent by the Federal First Instance Court or by an agency of the Federal Democratic Republic of Ethiopia. In the injunction, the applicant was identified as the Addis Ababa Water and Sewerage Authority. The respondent was Salini Costruttori S.p.A.

90. In a letter sent later on May 21, 2001, the Claimant maintained that the decisions of the Ethiopian courts could not have the effect of suspending the arbitration and, accordingly, the Claimant would attend the hearing. Taking into account the recent developments, the Claimant invited the Arbitral Tribunal to restrict the hearing beginning on May 28, 2001 to a consideration of: (a) the effect of the decisions recently issued by the Ethiopian courts; and (b) jurisdiction. The witness hearing on the merits would, in that event, be held at a later stage.

91. In a letter to the parties dated May 23, 2001, the Tribunal stated:

"The Tribunal remains of the view, stated in its letter of May 14, 2001, that it would be inappropriate to take any decision suspending the
arbitration, on the basis of the Respondent’s actions before the Ethiopian courts, without having the benefit of hearing the parties. Accordingly, this issue will be considered at the outset of the hearing on May 28, 2001. The Respondent, if it attends, will be invited to address the Tribunal on its actions before the Federal Supreme Court of Ethiopia and the Federal First Instance Court of Ethiopia. The Claimant will then be given a chance to respond.

Depending upon the views the Tribunal reaches on the suspension issue, the Tribunal may then consider in the same hearing the Respondent’s challenge to its jurisdiction in this matter.

In its letter of May 21, 2001, the Claimant has indicated that it does not wish to proceed with the hearing on the merits at this stage. In light of this and of the position taken by the Respondent in its letter of May 16, 2001, the merits will not be considered in this hearing in any event.

In case the Tribunal proceeds to consider the Respondent’s jurisdictional challenge, the Tribunal is prepared to hear the parties’ witnesses on jurisdiction. However, the Tribunal considers that, in the event that the Respondent declines to attend, it would be inappropriate to hear the Claimant’s witnesses. In that event, and in light of the positions taken by the parties on this issue, the Tribunal would address the Respondent’s jurisdictional challenge on the basis of the written and oral submissions of the parties alone.46

92. In response, the Respondent maintained that it would not attend the hearing and that the Claimant and the Arbitral Tribunal would be in contempt of the Ethiopian courts if they proceeded.47

H. The Hearing of May 28, 2001 and Procedural Order No. 3

93. A hearing was duly held on May 28, 2001, at which both parties had the opportunity to make oral submissions regarding the Respondent’s application to suspend the arbitration and to make oral submissions and present witness evidence regarding the Respondent’s jurisdictional challenge. The Respondent declined to attend this hearing or to present its witnesses.

94. The proceedings of the hearing are recorded in the ‘Minutes of the Hearing Held in Paris on May 28, 2001’, dated June 1, 2001. They are also set out in the transcript of the hearing, a copy of which was sent to the parties on June 1, 2001, and in

“II. PROCEEDINGS

1. The Chairman welcomed the Claimant and its representatives and expressed the Arbitral Tribunal’s regret that the Respondent and its representatives had chosen not to attend the hearing, even to discuss the issue of whether this Arbitral Tribunal should suspend its proceedings in light of the decisions taken by the Federal Supreme Court and Federal First Instance Court of the Federal Democratic Republic of Ethiopia as a result of procedural steps taken by the Respondent in Ethiopia.

2. The Claimant made its submissions regarding the effect of the injunctions issued by the courts of the Federal Democratic Republic of Ethiopia.

3. In the course of its submissions, the Claimant distributed three documents identified by the letters ‘A’, ‘B’ and ‘C’, copies of which are attached.

4. After deliberation, the Arbitral Tribunal announced its conclusions, which are recorded in the transcript of the hearing and are confirmed by Procedural Order No. 3 of today’s date.\footnote{See the Respondent’s letter to the Arbitral Tribunal dated May 25, 2001.}

95. The transcript of the hearing records that, at the outset of the hearing, the Chairman made the following statement:

“Before we start this hearing I would like to make three comments on behalf of the Arbitral Tribunal; one is we very much regret that the Defendant has decided not to appear before us today, because we would have been very interested in their views orally on the issue which we want to address today, including the issue of suspension of the proceedings.

However, we have received their written submissions on this issue, and will study that carefully.

The second comment is that we feel compelled to make two remarks on the status of the situation we face today.

It has been stated in some of the documents that we, the Arbitral Tribunal, have decided that the venue of this arbitration is Paris, and this is factually incorrect.
The venue of this arbitration is Addis Ababa, and we have never said anything to the contrary.

What we have said is that we have decided, pursuant to the language agreed by the parties in the Terms of Reference, that we will have one hearing in Paris, and that is very different.

The second remark in this respect is that we did, we took this decision on the basis of the Terms of Reference which were specifically agreed by the parties and their representatives, and which state unequivocally that we are granted by the parties the power to have hearings in a place other than Addis Ababa, and we can decide that after having heard the views of the parties in this respect.

What we did is we did hear the parties in this respect, and after careful consideration we have decided that we will have one hearing in Paris, not ruling out the possibility to have further hearings in Addis Ababa, and in any case the place of arbitration remaining Addis Ababa as agreed by the parties.™

96. At the invitation of the Chairman, the Claimant then made its submissions regarding the issue of whether the proceedings should be suspended.™

a. The Claimant noted that it had not yet been formally served with any order from the Ethiopian courts suspending the arbitration.

b. During the course of its submissions, the Claimant referred to three new documents in Amharic relevant to the suspension issue, copies of which were distributed at the hearing and which are appended to the ‘Minutes of the Hearing Held in Paris on May 28, 2001’ and marked ‘A’, ‘B’, and ‘C’, respectively.

c. The Claimant also stated that it would attend hearings before the Federal Court of First Instance on June 11, 2001 and before the Federal Supreme Court on June 27, 2001, at which it would correct alleged misrepresentations made by the Respondent to those courts and apply for the revocation of the orders granted by those courts. The alleged misrepresentations were that: (i) the Arbitral Tribunal had changed the venue of the arbitration to Paris; and (ii) the Arbitral Tribunal had refused to rule on the issue of its own jurisdiction.

™ Transcript of the hearing of May 28, 2001, p. 3, l. 17 to p. 5, l. 2.
During the course of the Claimant’s submissions, it was noted that it was difficult to understand the nature and effect of the orders issued by the Ethiopian courts without having the submissions made by the Respondent (as appellant and applicant, respectively) to those courts to obtain the orders. It was also noted that all decisions taken by those courts to date had been *ex parte*.

The Arbitral Tribunal interrupted the hearing after the Claimant had made its submissions on the issue of suspension, to deliberate on the appropriate steps to be taken next. The Tribunal then issued its decision, which is set out in the transcript of the hearing and memorialised in Procedural Order No. 3:

"6. [...]"

Regrettably, because the Respondent failed to attend the hearing, the Arbitral Tribunal did not receive any explanation from the Respondent of the basis on which it had obtained the two injunctions. Furthermore, it emerged from the Claimant’s submissions at the hearing, during which the Claimant submitted documents in Amharic identified as ‘A’, ‘B’, and ‘C’, which are attached to the Minutes of the Hearing issued today, that the Arbitral Tribunal is not in possession of a number of documents that could clarify the motivation and effect of the injunctions, which might be relevant to its decision.

Therefore, the Arbitral Tribunal could not reach a definitive conclusion at the hearing on May 28, 2001 on the question of suspension.

**THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:**

1. Both parties are given one week from the date of receipt of the transcript of the May 28, 2001 hearing to submit their comments on the issue of suspension discussed at the hearing.

2. The Respondent is to submit by June 13, 2001 to the Arbitral Tribunal, with a copy to the Claimant, the complete file of the documents that it has submitted to the Federal Supreme Court of the Federal Democratic Republic of Ethiopia, with an English translation of any documents in Amharic.

3. The Claimant is to submit by June 13, 2001 to the Arbitral Tribunal, with a copy to the Respondent, an English translation of the documents referred to in the May 28, 2001 hearing as documents ‘A’, ‘B’, and ‘C’, copies of which are attached to the Minutes of the Hearing, issued today.

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See transcript of the hearing of May 28, 2001, p. 63, l. 14 to p. 66, l. 10.
4. The Arbitral Tribunal would appreciate being kept informed by both parties of any developments in the proceedings before the Federal Supreme Court and the Federal First Instance Court of the Federal Democratic Republic of Ethiopia.

5. The Arbitral Tribunal will issue a decision regarding the suspension of the arbitration once it has received and considered the documents identified above and has better information regarding the facts relating to the Respondent’s applications before the Ethiopian courts.\textsuperscript{52}

99. Given this decision, the Arbitral Tribunal did not proceed at the May 28, 2001 hearing to hear witnesses or oral submissions regarding the issue of jurisdiction. The Claimant had confirmed during its submissions on the suspension issue that the jurisdictional issue could be decided without hearing any witnesses.\textsuperscript{53} The Claimant had also confirmed that it did not need to make any oral submissions to supplement its written submission on this point.\textsuperscript{54} The Tribunal clarified that this was the Claimant’s position.\textsuperscript{55}

100. The Arbitral Tribunal issued Procedural Order No. 3 on June 1, 2001. In that order, the Tribunal referred to the expected upcoming hearings before the two Ethiopian courts and stated:

"4. To avoid any confusion in the proceedings before the Ethiopian courts, the Arbitral Tribunal would like to make the following points clear, as to what has always been and still is its own position:

a. The seat of this arbitration is, and always has been, Addis Ababa. This is made clear by the parties’ original arbitration agreement (Sub-Clause 67.3.1 of the Conditions of Particular Application of the Contract dated August 7, 1996). This is further made clear by Section VII of the Terms of Reference, signed by Bonelli Erede Pappalardo on behalf of the Claimant, by Freshfields on behalf of the Respondent, and by the Arbitral Tribunal, on February 17, 2000. Neither party disputes that Addis Ababa is the seat of this arbitration.

b. The Arbitral Tribunal decided to hold the hearing beginning on May 28, 2001 in Paris rather than Addis

\textsuperscript{52} Procedural Order No. 3, June 1, 2001, pp. 2-3.
\textsuperscript{53} See transcript of the hearing of May 28, 2001, p. 43, l. 24 to p. 45, l. 3.
\textsuperscript{54} See transcript of the hearing of May 28, 2001, p. 46, ll. 2-22.
\textsuperscript{55} See transcript of the hearing of May 28, 2001, p. 48, l. 8 to p. 49, l. 10.
Ababa, without displacing Addis Ababa as the legal seat of this arbitration. This decision was taken after due consultation of the parties and due deliberation by the Arbitral Tribunal. The decision was based on considerations of practicality. Nevertheless, the Arbitral Tribunal has made clear that subsequent hearings may be held in Addis Ababa. Furthermore, the Arbitral Tribunal has not ruled out the prospect of visiting the site of the project that is the subject of the dispute, near Addis Ababa, as requested by the Respondent.

c. The Arbitral Tribunal's decision to hold the May 28, 2001 hearing in Paris was based on a specific agreement freely entered into by both parties at the Terms of Reference hearing on February 17, 2000. This agreement was embodied in the Terms of Reference, which were signed six months after the submission of the dispute to arbitration under the Rules of Arbitration of the International Chamber of Commerce, and three and a half years after the signature of the contract containing the arbitration agreement. The parties expressly agreed that the Arbitral Tribunal could hold hearings in places other than Addis Ababa. Indeed, the Terms of Reference provide (pp. 12-13):

"44. In accordance with Sub-Clause 67.3.1 of the Contract, added by the Conditions of Particular Application, Addis Ababa (Ethiopia) is the place of arbitration.

45. However, the Arbitral Tribunal may, after consultation of the parties, decide to conduct hearings or meetings at any other appropriate place. Neither such decision nor the participation of the parties in any such hearing shall be considered as a departure from the choice of Addis Ababa as the place of this arbitration." 56

101. The Arbitral Tribunal noted that the Tribunal was now ready to issue an award in respect of the issue of jurisdiction.

"5. The parties are in dispute as to whether they have agreed to submit their disputes to ad hoc arbitration under Articles 3325 et seq. (Arbitral Submission) of the Civil Code of Ethiopia (as the Respondent contends), or to institutional arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, supplemented where appropriate by Articles 3325 et seq. of the Civil Code of Ethiopia (as the Claimant contends).

This Arbitral Tribunal, set up under the auspices of the ICC, will thus have to determine, pursuant to the principle of compétence–compétence embodied in Article 3330 of the Civil Code of Ethiopia, whether it has jurisdiction to rule in the dispute submitted to it. This issue has now been fully briefed by both parties and the Arbitral Tribunal is ready to issue an award in this respect.

Both parties will, of course, have an opportunity to institute an action to set aside any award on jurisdiction issued by this Arbitral Tribunal, through an application to the competent Ethiopian courts. Accordingly, both parties will be in a position to ensure that any award rendered by this Arbitral Tribunal is fully compliant with the laws of the Federal Democratic Republic of Ethiopia.”57

102. Also on June 1, 2001, the Arbitral Tribunal sent both parties a copy of the transcript of the hearing, so that the Respondent, in particular, could comment if it chose to do so. Notwithstanding its position that it was no longer participating in the arbitral proceedings, the Respondent gave its comments in a letter dated June 8, 2001.

a. The Respondent denied that it had represented to the Federal Supreme Court that the Arbitral Tribunal had changed the venue of the arbitration to Paris.

b. The Respondent also argued that, contrary to submissions made by the Claimant at the May 28, 2001 hearing, the Federal Supreme Court’s order was binding on the Arbitral Tribunal.

c. The Respondent argued that the effect of the order of the Federal First Instance Court was that the Claimant was restrained from pursuing its claims before this Arbitral Tribunal.

103. The Respondent declined, however, to provide a copy, with an English translation as appropriate, of the file it had submitted to the Federal Supreme Court. This constituted a breach of Procedural Order No. 3.

104. On June 12, 2001, in compliance with Procedural Order No. 3, the Claimant provided the English translation of the documents marked ‘A’, ‘B’, and ‘C’, the Amharic versions of which had been distributed at the hearing. The Claimant also reported that the June 11, 2001 hearing before the Federal First Instance Court of Ethiopia had been adjourned to June 19, 2001.
In a letter dated July 4, 2001, the Claimant informed the Arbitral Tribunal of developments in the proceedings before the Federal First Instance Court and the Federal Supreme Court.

The Claimant submitted with its letter the following documents, which had been submitted by the Respondent (as applicant) to the Federal First Instance Court, in Amharic, with an English translation: (a) a “Statement of Claim” dated April 23, 2001; (b) an “Annex” listing written and oral evidence submitted by the Respondent to the court; and (c) an “Affidavit” dated May 8, 2001. Based on these documents, the Claimant alleged that the Respondent had failed to present to the Federal Court of First Instance: (a) the parties’ full arbitration agreement or the evidence of the preceding negotiations; and (b) the Terms of Reference. The Claimant further alleged that the affidavit submitted to that court contained significant misrepresentations.

The Claimant noted that the June 19, 2001 hearing before the Federal First Instance Court had been further adjourned and the Respondent (as applicant) had been given until July 27, 2001 to respond to the Claimant’s brief, which had requested the removal of the injunction and the dismissal of the Respondent’s claims.

As for the action before the Federal Supreme Court, the Claimant reported that it had made written submissions to the court and the Respondent had been given until August 1, 2001 to reply. Whether a further hearing would be held and, if so, when, was unclear. The Claimant requested, by the same letter of July 4, 2001, that the proceedings not be suspended and that an award on jurisdiction be issued.

The Respondent reported to the Arbitral Tribunal in a letter dated August 3, 2001 that the Federal First Instance Court had adjourned the proceedings until February 1, 2002, continuing the injunction against the Claimant in the meantime. The Respondent added that it understood that contempt proceedings had been commenced against the representatives of the Claimant who participated in the May 28, 2001 hearing in these arbitral proceedings. As for the proceedings before the Federal Supreme Court, these had been adjourned until November 7, 2001, the

57 Procedural Order No. 3, June 1, 2001, p. 5, ¶5.
injunction remaining in place in the interim. Those proceedings were subsequently further postponed.

II. THE SCOPE OF THIS AWARD

110. Taking into account the events set out in Section I above, the Arbitral Tribunal is now in a position to issue a preliminary award on the issues of: (a) whether these arbitral proceedings should be suspended as a consequence of the decisions taken, at the Respondent's behest, by the Federal Supreme Court and Federal First Instance Court; and (b) whether this Tribunal has jurisdiction over the present proceedings notwithstanding the objection raised by the Respondent.

111. Both parties have made clear in their respective submissions that they consider that the jurisdiction issue is ripe for decision, subject, in the Respondent's case, to the objection that the arbitral proceedings should be suspended. The issue has been fully briefed and both parties have been given the opportunity to make oral submissions on the jurisdiction issue. The Arbitral Tribunal is accordingly ready to render an award on this issue, subject to the decision on the issue of suspension.

112. One of the issues originally identified as being in dispute between the parties concerned the correct identification of the Respondent. The Terms of Reference refer to this dispute in the following terms:

"24. The Respondent also argues that the party to the Contract and to the arbitration agreement is the Addis Ababa Water and Sewerage Authority rather than The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority. The Respondent states that, pursuant to Proclamation No. 10 and Regulation No. 5 of 1995 of the Addis Ababa City Government, the Addis Ababa Water and Sewerage Authority is an autonomous public authority having an independent judicial personality under Ethiopian law, while remaining under the supervision of the Addis Ababa City Government. See the Respondent's letters to the Tribunal dated January 31, 2000 and February 15, 2000.

25. The Claimant argues that the party to the Contract and to the arbitration agreement is "The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority", as identified in the Request for Arbitration. The Claimant denies that Proclamation No. 10 of 1995 confers independent financial liability on the Addis Ababa Water and Sewerage Authority. The
Claimant argues that it has contracted with The Federal Democratic Republic of Ethiopia through one of its governmental organs, and that any payment which is found to be due to the Claimant as a result of this arbitration will be enforceable against The Federal Democratic Republic of Ethiopia. See the Claimant’s telefax to the Tribunal dated February 8, 2000.  

113. In AAWSA’s Memorial on Jurisdiction of April 7, 2001, at paragraphs 34 to 36, the Respondent affirmed its argument that the proper party to the Contract with the Claimant is the Addis Ababa Water and Sewerage Authority, rather than The Federal Democratic Republic of Ethiopia. The Respondent then stated:

“37. If Salini’s claim is intended at joining a third party to the current proceedings, i.e. the Federal Democratic Republic of Ethiopia, then Salini must first obtain the consent of AAWSA and the Arbitral Tribunal, as well as the consent of the party it wishes to join. If, however, Salini’s claim is properly clarified as an issue with respect to its ability to enforce a future award against a proper party, then the claim concerns the issue of enforcement and is therefore not an issue for this Arbitral Tribunal.”

114. In turn, the Claimant affirmed that it had correctly identified the Respondent. The Claimant submitted, however, that the issue was better addressed at the stage of enforcement and was not properly an issue to be decided in this arbitration.

115. In AAWSA’s Rebuttal on Jurisdiction of August 31, 2000, the Respondent replied:

“22. […] Salini has now accepted to leave the matter out of the issues to be decided in this arbitration and has characterized the issue as one to be more properly decided at the enforcement stage. AAWSA is in agreement with Salini and concurs with its view that the issue should be abandoned with respect to this arbitration.”

116. The parties appear to agree that this is not an issue to be addressed by the Arbitral Tribunal. Accordingly, this particular issue is not resolved by this partial award.

117. Thus, only two issues – suspension and jurisdiction – will be addressed in this award.

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58 Terms of Reference, February 17, 2000, ¶¶24-25.
59 AAWSA’s Memorial on Jurisdiction, April 7, 2001, ¶37.
60 Claimant’s Statement of Claim of May 22, 2000, pp. 29-30.
62 AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶22.
118. The injunctions issued by the Ethiopian courts purport to prevent the Arbitral Tribunal from continuing with the arbitral proceedings, which must include consideration of the Tribunal’s jurisdiction. Accordingly, the issue of suspension should be considered first, before any consideration of the Tribunal’s jurisdiction.

119. Given that the Tribunal has been constituted under the ICC Rules, and an objection to jurisdiction has been made, the tribunal will have to decide the question of its jurisdiction. In the meantime, the Tribunal is entitled to decide whether or not to suspend the proceedings.

120. Accordingly, we will now address the issues of suspension and jurisdiction in turn.

III. THE ARBITRAL TRIBUNAL’S ANALYSIS OF THE SUSPENSION ISSUE

121. It appears from the face of the decision of the Federal Supreme Court of May 3, 2001 that that court has issued an injunction purporting to stay the arbitral proceedings pursuant to Article 332 of the Ethiopian Civil Procedure Code, pending the determination of the Respondent’s appeal to the Federal Supreme Court against the decision of the ICC Court rejecting the Respondent’s challenge of the three arbitrators.63

122. It appears from the face of the decision of the Federal First Instance Court of May 14, 2001 that that court issued an injunction to prevent an alleged breach by the Claimant (the respondent before the Federal First Instance Court) of Clause 67 of the Special Conditions of Particular Application (Part 2 of the Contract), pending the determination of the issues under the relevant file or the giving of a revised order.64 The conclusion that the Claimant is in breach of Clause 67 is apparently founded on the Respondent’s submission that the parties agreed to submit their disputes to arbitration under the arbitration provisions of the Civil Code of Ethiopia rather than under the ICC Rules.

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64 See the English translation of the order of the Federal First Instance Court, May 14, 2001, attached to the Respondent’s letter to the Arbitral Tribunal dated May 21, 2001.
123. There is presently no indication of how long it will take before the proceedings before these two courts are brought to an end.\textsuperscript{65} It is also unclear when, if ever, the injunctions will be lifted.

124. The Arbitral Tribunal accords the greatest respect to the Ethiopian courts. Nevertheless, for the reasons set out below, the Tribunal considers that it is not bound to suspend the proceedings as a result of the particular injunctions issued by the Federal Supreme Court and the Federal First Instance Court and that, in the particular circumstances of the case, it is under a duty to proceed with the arbitration.

A. The Primary Duty of the Arbitral Tribunal Is Owed to the Parties

125. This tribunal is an ICC arbitral tribunal, constituted under the ICC Rules. Pending the decision of the Arbitral Tribunal on the question of jurisdiction, which is given below, it must be assumed that the parties have agreed to resolve their disputes through ICC arbitration with a seat in a particular country, namely, Ethiopia. Indeed, the Tribunal has found, for the reasons set out in Section IV below, that it does have jurisdiction.

126. Against this background, the decision whether or not to suspend these arbitral proceedings presents an issue of great practical and theoretical importance. That issue is whether the Arbitral Tribunal must defer to a judicial order to halt the arbitral proceedings where that order has been issued in the country in which the parties have agreed to hold their arbitration.

127. For the reasons set out below, the finding of the Tribunal on this issue is that an arbitral tribunal constituted in such circumstances has a discretion as to whether or not it should comply with such an order.

128. An international arbitral tribunal is not an organ of the state in which it has its seat in the same way that a court of the seat would be. The primary source of the Tribunal’s powers is the parties’ agreement to arbitrate. An important consequence of this is that the Tribunal has a duty \textit{vis à vis} the parties to ensure that their

\footnote{65 See below at paragraph 139.}
arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfilment of the Tribunal's larger duty to the parties.

129. Of course, this is not to say that a contract, including an arbitration agreement, has a validity that is independent of any legal order. Indeed, a contract derives its binding force from its recognition by one or more legal orders. However, an agreement to submit disputes to international arbitration is not anchored exclusively in the legal order of the seat of the arbitration. Such agreements are validated by a range of international sources and norms extending beyond the domestic seat itself.

130. Among other sources, agreements to submit disputes to international arbitration are validated through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (the "New York Convention"), which has been ratified or acceded to by 128 States to date. The overwhelming consent of States to the New York Convention is strong evidence that the principles embodied therein are principles of general recognition. A central principle in this respect, recorded in Article II(1), is that States shall recognise arbitration agreements:

"Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

(New York Convention, Article II(1))

131. A correlative principle, recorded in Article II(3), is that a State's courts shall recognise and give effect to arbitration agreements:

"Article II

[...]

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the
parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

(New York Convention, Article II(3))

132. It should be noted that, although Ethiopia has not yet ratified or acceded to the New York Convention, it does recognise the validity of arbitration agreements under the provisions of the Civil Code of Ethiopia, which is a notable example of a modern statute of international arbitration. This renders moot, in many respects, the issue of Ethiopia’s non-ratification of the New York Convention. Indeed, if anything, certain articles of the Civil Code of Ethiopia might be considered more liberal than the somewhat dated provisions of the New York Convention.

133. A number of other countries recognise, in a similar fashion, the validity of international arbitration agreements under their own domestic laws or under other multilateral or bilateral instruments.

134. Given that all of these countries are prepared to recognise the validity of arbitration agreements that meet certain basic conditions, it is clear that the Arbitral Tribunal’s duty in respect of the parties’ arbitration agreement is not founded exclusively in the Ethiopian legal order.

135. The Ethiopian legal order is important nonetheless and must be taken into account, especially given that the parties have expressly referred to it by making Addis Ababa the seat of arbitration. In particular, the Arbitral Tribunal is perfectly aware that an action to set aside an award rendered by the Tribunal can be brought before the Ethiopian courts.

136. On the other hand, the Tribunal has no reason to doubt that, once an Ethiopian court has reviewed this matter, has the benefit of a full and balanced account of the facts, and has given due consideration to the positions of both parties, it will recognise both that the Arbitral Tribunal has jurisdiction and that the Tribunal is capable of resolving the parties’ disputes in an impartial and fair way, in a manner consistent with the legitimate expectations of the parties.
In particular, the Tribunal is confident that an Ethiopian court would not set aside an award on the basis of the misconceived complaint of bias that has been made by the Respondent against the Tribunal, relying on the Tribunal’s decision to hold a hearing in Paris. That decision was made expressly without prejudice to Addis Ababa remaining the seat of arbitration, on the basis of an express agreement of both parties. Both parties entered into this agreement, in the Terms of Reference, long after the signature of the original Contract, at a time when the parties had the benefit of the advice of leading counsel in the field of international arbitration. Indeed, their counsel signed the Terms of Reference on their behalf. The parties could have been under no mistake as to the precise meaning and consequences of their agreement. See also the Tribunal’s comments below at paragraphs 146-150. In these circumstances, it is extremely difficult to see how any tribunal could find evidence of bias on the part of the arbitrators.

However, even if it could be expected that an Ethiopian court would set aside the Arbitral Tribunal’s award on such a misconceived basis, it would not follow that the proper course of action for the Tribunal would be to halt its proceedings in deference to the judgment of the Ethiopian courts. The Tribunal owes a duty to the parties to ensure that their agreement to submit disputes to international arbitration is rendered effective even where that creates a conflict with the courts of the seat of the arbitration.

The most recent information from the parties indicates that there is no prospect of the Ethiopian courts issuing early decisions regarding the Respondent’s applications. The proceedings before the Federal Supreme Court have been adjourned several times over recent months and the proceedings before the Federal First Instance Court have been adjourned until February 1, 2002. There is no indication of what process will follow these hearings. To wait for the decisions of the Ethiopian courts would, in any event, be inconsistent with the Arbitral Tribunal’s duty to render an award in due time.
B. The Arbitral Tribunal’s Duty to Make Every Effort to Render an Enforceable Award

140. A generally accepted principle of international arbitration, reflected in Article 35 of the ICC Rules, compels the Arbitral Tribunal to make every effort to ensure that any award it renders is enforceable at law. In this context, complying with the law and the judicial decisions of the seat is clearly an important objective, in light of the fact that the courts have the power to set aside an award rendered in their country.

141. Even if certain countries may be prepared to enforce awards despite the fact that they have been set aside by the courts of the seat, as contemplated in French law, in certain decisions in the United States, and in the European Convention on International Commercial Arbitration (Geneva, April 21, 1961) (the “1961 Geneva Convention”), and as is advocated by certain leading commentators in the field (see, in particular: Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)”, ICC Bulletin, Vol. 9, No. 1, at 14 (1998); Philippe Fouchard, *La portée internationale de l’annulation de la sentence arbitrale dans son pays d’origine*, 1997 Rev. Arb. 329) (see also Emmanuel Gaillard, “The Enforcement of Awards Set Aside in the Country of Origin”, 14 ICSID Review 16 (1999); *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage, eds., 1999) 133-136, 913-916, 978), the fact remains that the law of the seat and the decisions of the courts of the seat are important factors that must be taken into account. The Tribunal would be slow to render an award that is likely to be set aside at the seat, taking into account the principle according to which the Tribunal must make every effort to render an enforceable award.

142. This does not mean, however, that the arbitral tribunal should simply abdicate to the courts of the seat the tribunal’s own judgment about what is fair and right in the arbitral proceedings. In the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal’s understanding of its duty to the parties, derived from the parties’ arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with a court order.
To conclude otherwise would entail a denial of justice and fairness to the parties and conflict with the legitimate expectations they created by entering into an arbitration agreement. It would allow the courts of the seat to convert an international arbitration agreement into a dead letter, with intolerable consequences for the practice of international arbitration more generally.

This conclusion is consistent with principles that are already well established in international arbitration. In particular, it is clear from arbitral case law that the obligation to make every effort to render an enforceable award does not oblige an arbitral tribunal to render awards that are fundamentally unfair or otherwise improper. An arbitral tribunal should not go so far as to frustrate the arbitration agreement itself in the interests of ensuring enforceability. Such an outcome would be, to say the least, a paradox.

In ICC Case No. 4695, involving parties from Brazil, Panama, and the United States as claimants, and a Brazilian party as defendant, with the seat of arbitration in Paris, the defendant argued that a Brazilian court would refuse to enforce any award rendered by the arbitral tribunal because the submission to arbitration was allegedly invalid under Brazilian law. On this basis, the defendant argued that the tribunal would breach its obligation to render an enforceable award if it found that it had jurisdiction. The tribunal disagreed:

"Art. 26 of the ICC Rules [the predecessor of the current Article 35] must be understood as requiring every arbitral tribunal to avoid any grounds of nullity, since if the award is unenforceable the whole arbitration proceeding will have been a waste of time and energy.

But this requirement of Art. 26 is not relevant to the question of jurisdiction. It is obvious that if a tribunal would decline to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all, susceptible of being enforced in other jurisdictions.

In this case there may be difficulties, perhaps not insuperable, in the enforcement of this tribunal [sic] awards, in some national jurisdictions.
But if the tribunal finds, as it does, that it has jurisdiction, it cannot fail to exercise it. Otherwise, it would be concurring in a failure to exercise jurisdiction and could even be accused of a denial of justice."


146. The value of this approach is illustrated strongly by the present case. The reasons that are being advanced to justify the suspension of the arbitration are wholly misconceived and, if sustained, would undermine the parties' agreement to submit their disputes to international arbitration and would constitute a denial of justice.

147. The injunction issued by the Federal Supreme Court is based upon a wholly unfounded allegation of bias made against the three arbitrators. The principal evidence of this alleged bias is the decision of the Arbitral Tribunal to hold a hearing in Paris, without prejudice to Addis Ababa remaining the seat of the arbitration. That decision was made pursuant to a specific agreement of both parties, which the Respondent freely acceded to when its legal counsel signed the Terms of Reference on February 17, 2000. The Terms of Reference were signed: five and a half years after the arbitration agreement itself was signed; after the disputes in question had arisen; and after the Arbitral Tribunal had been constituted. Paragraphs 44-46 of the Terms of Reference clearly state:

"44. In accordance with Sub-Clause 67.3.1 of the Contract, added by the Conditions of Particular Application, Addis Ababa (Ethiopia) is the place of arbitration.

45. However, the Arbitral Tribunal may, after consultation of the parties, decide to conduct hearings or meetings at any other appropriate place. Neither such decision nor the participation of the parties in any such hearing shall be construed as a departure from the choice of Addis Ababa as the place of this arbitration.

46. Irrespective of the place of signing, the award(s) shall be deemed to have been made in Addis Ababa (Ethiopia)."

148. The Arbitral Tribunal reached its decision to hold a hearing in Paris after due consultation of the parties and after conducting deliberations. The Tribunal took

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66 Terms of Reference, February 17, 2000; ¶44-46 (emphasis added).
into account the relative practicalities of holding a complex and lengthy witness hearing in Addis Ababa or Paris, given the location of the participants in the hearing. The decision was made in good faith and on a reasonable basis. There are absolutely no grounds for suggesting that this decision somehow constitutes evidence of bias on the part of the Tribunal.

149. The Respondent may now choose to disagree with the Tribunal’s decision. However, there can be no doubt that the Respondent specifically empowered the Tribunal to make such a decision and that the Respondent has no legitimate grounds for complaint.

150. As we have already stated, the Tribunal is confident that the Federal Supreme Court of Ethiopia will reach the same conclusion, once it has properly reviewed the matter. In any event, it would subvert the parties’ arbitration agreement if the parties were compelled to halt the arbitration so that the Federal Supreme Court could consider and decide the issue.

151. The Federal First Instance Court’s injunction was issued on the basis that that court is competent to decide the issue of the Arbitral Tribunal’s jurisdiction, to the exclusion of the Arbitral Tribunal itself. The injunction states:

"From the reading of the evidence attached with the file and the translation of Article 67 of the Contract, which the Respondent [Salini] agreed and signed thereto, shows that should a dispute arises between the Applicant and the Respondent, it has been expressly provided that the place of Arbitration being Addis Ababa and the Applicable laws being the Ethiopian Civil Code Art. 3325 and addition (Arbitral Submission). While the situation being so, the Court is so convinced, as submitted by the Applicant’s [AAWSA’s] affidavit number 3(a) and (c), that the initiation of an arbitration proceeding against the Applicant and the continuation of the same in Paris before the Arbitral Tribunal, will cause damages to the Applicant which can not be compensated in money. Therefore, until the determination of the issues under this File or the giving of a revised order, the Court in accordance with Article 155 of the Civil Procedure Code hereby issued an injunction order against the Respondent to stop the breach of its obligation under Article 67 of the Special Conditions of the Contract signed on August 6, 1996." 67

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152. It would be a clear breach of the fundamental principle of competence-competence if an international arbitral tribunal were obliged to stay its proceedings in deference to a court proceeding which had specifically been instituted to determine the question of the tribunal’s jurisdiction. The principle of competence-competence is recognised in numerous international and national sources, including in the Civil Code of Ethiopia itself in Article 3330(2), which states: “It [the arbitral submission] may in particular authorise the arbitrator to decide disputes relating to his jurisdiction.” The principle is also reflected in Article 6(2) of the ICC Rules.

153. The appropriate occasion for the Ethiopian courts to consider the issue of jurisdiction is in the context of an action to set aside the Tribunal’s award, after the Tribunal has determined its own jurisdiction. The courts cannot, in the meantime, pre-empt the Tribunal’s decision on its own jurisdiction.

154. More generally, if respondents were able to stay the proceedings in this way, through applications made to the courts of the seat during the course of the proceedings, it would have disastrous consequences for international arbitration in general. It would create an intolerable precedent inviting parties to arbitration agreements to attempt to frustrate those agreements.

155. Accordingly, the Arbitral Tribunal considers itself compelled to proceed with its duty to determine whether or not it has jurisdiction in this case.

C. A State or State Entity Cannot Resort to the State’s Courts to Frustrate an Arbitration Agreement

156. These principles carry even more force in an arbitration between a state or state entity and a private party, where the seat of the arbitration is in the country of the state involved in the dispute and it is the state party that is attempting to frustrate the arbitration agreement. If the state or state entity were permitted to halt the proceedings in this context, it would effectively make the arbitration agreement optional for that party, through the device of resorting to the state’s own courts. For the reasons stated below (see paragraphs 165-173), the Respondent, as a state entity, must be equated with the state itself for the purposes of this analysis. Accordingly,
in the discussion that follows, references to the "state" should be taken to include reference to the Respondent as a state entity.

157. In analysing this question, we will assume that the parties did enter into a valid agreement to submit their disputes to international arbitration under the ICC Rules. This assumption is justified since, for the reasons set out in Section IV below, we have concluded that the parties did enter into such an agreement.

158. Against that background, the Respondent’s ‘appeal’ to the Federal Supreme Court and the Respondent’s application to the Federal First Instance Court have clearly been made improperly, for at least the following reasons.

159. First, by agreeing to the ICC Rules, the Respondent agreed that any challenge of the arbitrators would be decided by the ICC Court under Article 11(3) of the ICC Rules. As a matter of fact, the Respondent has challenged the members of this Arbitral Tribunal before the ICC Court which, however, has rejected the challenge. The decision of the ICC Court in this respect is final under Article 7(4) of the ICC Rules. Nevertheless, the Respondent is purporting to bring an “appeal” against the ICC Court’s rejection of its challenge before the Federal Supreme Court. This is clearly an attempt to disrupt or frustrate the parties’ arbitration agreement, in contravention of the rules of arbitration that the Respondent freely agreed to.

160. Second, by entering into an ICC arbitration agreement, the Respondent equally agreed that the Arbitral Tribunal would have the power to determine whether it has jurisdiction. See Article 6(2) of the ICC Rules. Article 3330(2) of the Civil Code of Ethiopia recognises the validity of such an agreement. Nevertheless, the Respondent has sought to have the Federal First Instance Court decide that it has jurisdiction, to the exclusion of the Arbitral Tribunal, and to have that court compel the Tribunal to bring these arbitral proceedings to a halt. Again, this application has clearly been made improperly, in breach of the agreed principle of competence-competence.

161. There is a substantial body of law establishing that a state cannot rely on its own law to renege on an arbitration agreement. This principle was famously elaborated in ICC case No. 1939 in 1971. That case, by coincidence, involved the same
Claimant as in the present case and a predecessor of the present Respondent, and concerned an earlier dam project in the same area. The tribunal stated:

"L'ordre public international s'opposerait avec force à ce qu'un organe étatique, traitant avec des personnes étrangères au pays puisse passer ouvertement, le sachant et le voulant, une clause d'arbitrage qui met en confiance le cocontractant et puisse ensuite, que ce soit dans la procédure arbitrale ou dans la procédure d'exécution, se prévaloir de la nullité de sa propre parole."


"International public policy would be strongly opposed to the idea that a public entity, when dealing with foreign parties, could openly, knowingly, and willingly, enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during the arbitral proceedings or on enforcement of the award, that its own undertaking was void."

(translation)

162. In the 1982 award in Framatome v. Atomic Energy Organization of Iran, the respondent argued that Article 139 of the Iranian Constitution, which makes the submission to arbitration of disputes concerning state property conditional upon the approval of the Council of Ministers and notification to Parliament, rendered the relevant arbitration agreement void. The tribunal disagreed:

"Il est superflu d'ajouter qu'un principe général, aujourd'hui universellement reconnu tant dans les rapports interétatiques que dans les rapports internationaux privés (que ce principe soit considéré comme d'ordre public international, comme appartenant aux usages du commerce international ou aux principes reconnus tant par le droit des gens que par le droit de l'arbitrage international ou la "lex mercatoria") interdirait de toute façon à l'Etat iranien – même s'il en avait eu l'intention, ce qui n'est pas le cas – de renier l'engagement d'arbitrage qu'il aurait souscrit lui-même ou qu'un organisme public comme l'AEOI aurait souscrit précédemment. La position du droit positif contemporain des relations internationales est bien résumée par le Juge Jimenez de Arechaga, ancien Président de la Cour internationale de Justice, qui écrit (dans une étude des Mélanges Gidel (1961) p. 367 s.) qu'un gouvernement engage par la clause arbitrale – et l'observation vaut aussi bien pour les engagements pris directement que pour ceux qui ont été pris par l'intermédiaire d'un organisme public, comme en l'espèce – "ne peut pas se libérer validement
de cette obligation par le fait de sa propre volonté, comme par exemple par un changement de son droit interne ou par une résiliation unilatérale du contrat”.


“It is superfluous to add that there is a general principle, which today is universally recognized in relations between states as well as in international relations between private entities (whether the principle be considered a rule of international public policy, an international trade usage, or a principle recognized by public international law, international arbitration law or lex mercatoria), whereby the Iranian state would in any event – even if it had intended to do so, which is not the case – be prohibited from reneging on an arbitration agreement entered into by itself or, previously, by a public entity such as AEOI. The position of the current positive law of international relations is summarised well by Judge Jimenez de Arechaga, the former President of the International Court of Justice, who wrote (in a study in Mélanges Gidel (1961) p. 367 s.) that a government bound by an arbitration clause – and this observation applies equally to obligations assumed directly and those assumed through an intermediary of a public organ, as in this case – “cannot validly free itself from that obligation by an act of its own will, for example, by a change in its internal law or by a unilateral repudiation of the contract”.”

(translation)

163. Similarly, in the 1982 award in Elf Aquitaine Iran v. NIOC, the arbitrator stated:

“It is a recognized principle of international law that a state is bound by an arbitration clause contained in an agreement entered into by the State itself or by a company owned by the State and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes.”

(Ad hoc preliminary award of January 14, 1982 by Mr. B. Gomard, sole arbitrator, Elf Aquitaine Iran v. NIOC, XI Y. B. Com. Arb. 97, ¶24 at 104 (1986))

164. The same principle was affirmed in the 1983 award in Benteler v. Belgium. While the tribunal based its decision that the arbitration agreement in question was valid upon an interpretation of the 1961 Geneva Convention, it found support for its conclusion in more general principles applying to international arbitration:
"Une troisième formule, très largement utilisée par les arbitres du commerce international, consiste à tenir la prohibition de l'arbitrage comme contraire à l'ordre public international [...].

Sans aller aussi loin, on peut également concevoir que l'arbitre international écarte le moyen pris de cette prohibition lorsque les circonstances de la cause sont telles que l'Etat irait contra factum proprium en la soulevant."


"A third formula, very widely used by international commercial arbitrators, consists in considering the prohibition on arbitration as being contrary to international public order [...].

Without going that far, one can also conceive that the international arbitrator should dismiss the argument based on this prohibition when the circumstances of the case are such that the State would act contra factum proprium in raising it."

(translation)

165. The question of whether a state can resort to its own courts, as opposed to its own law, to renego on an arbitration agreement that it has freely entered into, has not given rise to a similarly well established body of case law. Nevertheless, the question is really in the same terms.

166. In effect, there is no difference between a state unilaterally repudiating an international arbitration agreement or changing its internal law in an attempt to free itself from such an agreement, on the one hand, and a state going before its own courts to have the arbitral proceedings suspended or terminated (whether on the basis of alleged nullity of the arbitration agreement, alleged bias on the part of the arbitral tribunal, or some other ground), on the other hand. Both amount to the state reneging on its own agreement to submit disputes to international arbitration.

167. This principle does not depend in any way on a suggestion that the courts of a state would be unduly influenced in their actions by the executive power, would misapply the law in the interests of the state, or would otherwise act improperly. To the contrary, we naturally assume, both in general and specifically in this case, that the courts would strictly observe their duties and act in good faith.
From the perspective of an international arbitral tribunal in this context, the state must be regarded as one entity. When the state seeks to renege upon an arbitration agreement or to frustrate its fulfilment by resorting to its own courts it is, in effect, unilaterally reneging upon or frustrating that agreement. To use the language of the award in *Elf Aquitaine Iran v. NIOC*, quoted above at paragraph 163, the state party cannot "unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes".

This conclusion is supported by reference to public international law, which treats the organs of a state as the state itself for the purposes of determining state responsibility, irrespective of whether or not those organs are independent or separate for the purposes of a state’s internal law.


However, the principle has also been approved in a broader context. For example, The International Court of Justice affirmed the relevant principle in its recent advisory opinion in *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission of Human Rights*, which concerned the conduct of the judicial power of the Government of Malaysia:

"62. The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of an organ of a State must be regarded as an act of that State.

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This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

“The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.” (Yearbook of the International Law Commission, 1973, Vol. II, p. 193)"


172. Similarly, Daillier and Pellet make the following general statement regarding the conception of a ‘government’ in public international law:

“Appartiennent au « gouvernement », au sens du droit international, non seulement les autorités exécutives de l’État, mais l’ensemble de ses « pouvoirs publics ». C’est tout l’ordre politique, juridictionnel et administratif qui est visé (cf. l’article 5 du Project d’articles de la C.D.I. sur la responsabilité des États).”

(Patrick Daillier & Alain Pellet, Droit international public (6e éd., 1999), p. 413, ¶271)

“Not only the executive authorities of the State but all of its “public powers” belong to the “government” in the public international law sense. The entire political, judicial and administrative power is implicated (cf. Article 5 of the draft articles of the I.L.C. on the responsibility of States).”

(translation)

173. For the same reason, the Respondent, as a state entity, must be considered part and parcel of the state itself for the purposes of addressing the present question. The Claimant has contended that The Federal Democratic Republic of Ethiopia is in fact a party to the Contract and the arbitration agreement. Whether or not that is the case, which we do not decide in this partial award, the Respondent clearly is considered to be part of the Ethiopian state for the purposes of analysing the present question.
174. The principle that equates the organs of a state with the state itself reinforces our conclusion that we should proceed with our own duties to determine whether or not we have jurisdiction in this case. The Respondent should not be permitted to renege upon an agreement to submit disputes to international arbitration by the device of resorting illegitimately to its own courts, just as it should not be permitted to do so by resorting to its own law.

175. This finding is not unprecedented in international arbitration. An example of a case where an international arbitral tribunal declined to defer to the courts of the seat in a comparable situation can be found in ICC arbitration No. 7934/CK. That case involved an Italian company (as claimant) and an entity of the Republic of Bangladesh (as respondent), with the seat in Dhaka, Bangladesh. The arbitral tribunal declined to comply with an order of a Bangladeshi court that purported to revoke the tribunal’s authority. The court had apparently upheld an application from the respondent in that case challenging the tribunal. However, the tribunal concluded that, according to the applicable ICC rules, the only mechanism for challenging the tribunal was a challenge submitted to the ICC Court, which had exclusive jurisdiction in this respect. The tribunal accordingly disregarded the court’s order. We consider that the tribunal’s ruling was sound and we have reached a similar conclusion in the present case.

176. For the avoidance of doubt, we do not mean to suggest that any application by a state party to its own courts, in their capacity as the courts of the seat in arbitral proceedings, would be objectionable. The courts of the seat retain their usual valid role in supervising arbitral proceedings. The problem arises in this particular case from the fact that a state entity is resorting to the state’s own courts in an illegitimate effort to renege upon the arbitration agreement. It is unacceptable for a state party to invoke its own law in an effort to avoid the effect of an arbitration agreement that it has freely entered into. For similar reasons, it is unacceptable for a state party to resort to its own courts for the same purpose.

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68 The Claimant provided the Arbitral Tribunal and the Respondent with a copy of the relevant procedural order rendered in that case.
Conclusion

177. The Arbitral Tribunal accords great respect to the Ethiopian courts, both in their own right and as the courts of the seat. Nevertheless, in this case, we are of the view that it would be improper, in light of our primary duty to the parties, to observe the injunctions issued by those courts, which have already significantly delayed these proceedings, given that they have the effect of frustrating the parties’ agreement to submit disputes to international arbitration.

178. These arbitral proceedings will not be suspended, notwithstanding the injunctions issued by the Federal Supreme Court and the Federal First Instance Court. Faced with the present situation, the Arbitral Tribunal will continue to prosecute these arbitral proceedings in accordance with its duty to the parties, in a manner consistent with their arbitration agreement. Thus, further proceedings pertaining to the merits of the case will be set in motion by means of a procedural order, following appropriate consultation with the parties regarding the organisation of those proceedings.

IV. THE ARBITRAL TRIBUNAL’S ANALYSIS OF THE JURISDICTION ISSUE

179. The parties are in dispute as to whether they have agreed to submit their disputes to ad hoc arbitration under Articles 3325 et seq. of the Civil Code of Ethiopia, as submitted by the Respondent, or to institutional arbitration under the ICC Rules, supplemented where appropriate by Articles 3325 et seq. of the Civil Code of Ethiopia, as submitted by the Claimant.

180. In essence, the parties’ jurisdictional dispute concerns the interpretation of Sub-Clause 67.3 of the General Conditions (Part 1 of the Contract) (“Sub-Clause 67.3”), read together with Sub-Clause 67.3.4 of the Special Conditions of Particular Application (Part 2 of the Contract) (“Sub-Clause 67.3.4”). These provisions have been quoted above in Section I, paragraphs 11 and 12.

181. The Respondent’s jurisdiction challenge and the Claimant’s response have been fully briefed in writing. Both parties were given an opportunity to make oral submissions and present witness evidence on this point at the hearing on May 28,
2001. The Respondent declined to attend that hearing and the Claimant has stated, in its submissions at the hearing of May 28, 2001, that it does not consider it necessary to make oral submissions or present witness evidence on this issue.

182. The Arbitral Tribunal is accordingly in a position to issue an award on this issue now. A consideration strongly militating in favour of a partial award on this issue is the fact that the Respondent has initiated concurrent actions before the Ethiopian courts implicating the Tribunal’s jurisdiction. It may well be that a partial award issued by this Tribunal on the issue of jurisdiction will help to avoid confusion in the proceedings before the Ethiopian courts.

A. Summary of the Respondent’s Challenge

183. The Respondent’s jurisdiction challenge is set out in AAWSA’s Memorial on Jurisdiction of April 7, 2000 at paragraphs 1 to 41 and in AAWSA’s Rejoinder on Jurisdiction of August 31, 2000 at paragraphs 1 to 23. In essence, the Respondent’s makes three arguments in support of its challenge.

a. The parties’ arbitration agreement unambiguously provides for *ad hoc* arbitration under the Civil Code of Ethiopia and not for arbitration under the ICC Rules.

b. The Claimant’s contrary interpretation would deprive the language of the parties’ arbitration agreement, specifically Sub-Clause 67.3.4, of any meaning.

c. On a subsidiary basis, the history of the precontract negotiations supports the Respondent’s interpretation of the arbitration agreement.

184. For each of these three arguments, the Arbitral Tribunal will first summarise the Respondent’s submissions and then the Claimant’s response, before setting out the Tribunal’s analysis. The Tribunal will then state its conclusions regarding the Respondent’s jurisdiction challenge overall.
B. The Respondent’s Argument that the Parties’ Arbitration Agreement Provides for *Ad Hoc* Arbitration Under the Civil Code of Ethiopia

1. The Respondent’s Argument

185. The Respondent’s principal argument is that the parties agreed, as evidenced by Sub-Clause 67.3 of Part 1 of the Contract, read together with Sub-Clause 67.3.4 of Part 2 of the Contract, to resolve their disputes by way of *ad hoc* arbitration in accordance with the Articles 3325 *et seq.* of the Civil Code of Ethiopia, rather than by arbitration under the ICC rules.\(^69\)

186. Sub-Clause 67.3.4 of the Special Conditions of Particular Application (Part 2 of the Contract) states that: “The rules for arbitration shall be the Civil Code of Ethiopia under Article 3325 et seq. (Arbitral Submission).” The Respondent submits that this overrides the reference in Sub-Clause 67.3 of the General Conditions (Part 1 of the Contract) to the Rules of Conciliation and Arbitration of the International Chamber of Commerce, for at least the following reasons.

a. Clauses 2 and 3 of the Contract Agreement of August 7, 1996 provide, *inter alia*, that the Special Conditions of Particular Application (Part 2) take precedence over the General Conditions (Part 1) in the event of “ambiguities or discrepancies.”\(^70\) As a result, the mandatory language of Sub-Clause 67.3.4 displaces the standard language of Sub-Clause 67.3 in favour of *ad hoc* arbitration pursuant to the Civil Code of Ethiopia.\(^71\)

b. Sub-Clause 67.3 states that, “unless otherwise specified in the Contract”, all qualifying disputes shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. In the Respondent’s submission, the parties did ‘otherwise specify’ in this case by adding Sub-Clause 67.3.4.\(^72\)

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\(^{69}\) AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶2; AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶¶4-11.


\(^{71}\) AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶12.

\(^{72}\) AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶12; AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶5.
187. According to the Respondent, the parties’ arbitration agreement is clear and unambiguous in this respect. Under the principles of interpretation set out in the Civil Code of Ethiopia (see Article 1733), it is unnecessary to go beyond the language of the arbitration agreement itself and have regard to extrinsic evidence.\footnote{AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶¶8, 10-11.}

188. In its rebuttal, the Respondent argues, against the Claimant, that it was not necessary for the parties to “delete” the reference to the ICC Rules and “substitute” the arbitration rules under the Civil Code of Ethiopia, as recommended by the FIDIC guidelines published in 1987, in order to choose arbitration under the rules of the Civil Code of Ethiopia. In the Respondent’s submission, the method suggested by FIDIC is simply an example of a possible way of stipulating for arbitration under rules different from the ICC Rules; the method used by the parties here is equally effective.\footnote{AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶7.}

189. The Respondent rejects the Claimant’s argument that the method proposed in the FIDIC guidelines is the only way for parties to ‘otherwise specify’ in terms of Sub-Clause 67.3:

“There is no basis for such an assumption. Indeed, Salini merely points to a sample clause contained in the Guidelines for Preparation of Part II Clauses issued by FIDIC in 1987 (‘the FIDIC Guidelines’), which Salini wrongly asserts the parties incorporated into their agreement by reference. But the FIDIC Guidelines have no binding authority, and the sample clause in question is no more than an example. The parties are not precluded from expressing their intentions in another manner.”\footnote{AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶8.}

190. The Respondent also argues in its rebuttal, against the Claimant, that the parties necessarily chose \textit{ad hoc} arbitration because they chose arbitration under the rules of the Civil Code of Ethiopia and, even if institutional arbitration is envisaged under those rules, the parties did not specify any institutional rules for this purpose.\footnote{AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶7.}

2. The Claimant’s Response

191. The Claimant denies each and all of these arguments and contends that the parties agreed to adopt arbitration under the ICC Rules, with the precision that the
arbitration rules of the Civil Code of Ethiopia would apply on a supplementary basis.

192. The Claimant argues that the parties’ arbitration agreement clearly provides for arbitration under the ICC Rules. The reference to the arbitration rules of the Civil Code of Ethiopia in Sub-Clause 67.3.4 is, in the Claimant’s submission, supplementary.

193. The Claimant draws this conclusion from the fact that, in the Special Conditions of Particular Application, the parties did not delete the reference to the ICC Rules in Sub-Clause 67.3 of the General Conditions and substitute it with a reference to the arbitration rules under the Civil Code of Ethiopia. Instead, they agreed “to add” Sub-Clauses 67.3.1 to 67.3.4 as “new additional Sub-clauses to Clause 67.3 of Part I” (emphasis added). By contrast, in the initial tender documents, the Respondent had deleted the entire Sub-Clause 67.3 and substituted it by four new sub-clauses.77

194. The Claimant notes that the Conditions of Contract, particularly the Special Conditions of Particular Application, were prepared in accordance with the guidelines published by FIDIC in 1987.78 Addendum No. IV, ‘Answers to Questionaries by the Bidders’, which formed part of the Contract, stated:

1. USE OF (FIDIC) AND PARTICULAR CONDITION

The Contract Condition for Dire Dam Project between the Contractor and the Client is subject to the provisions of (FIDIC) fourth edition, 1987. Furthermore, the special and particular condition was also prepared on the bases of the guideline for preparation of particular conditions issued by FIDIC in 1987. Therefore there will not be any negotiation on any clause of the conditions of the Contract.”79

195. The guide published by FIDIC in relation to the standard conditions states in this respect:

76 AAWSA’s Rejoinder on Jurisdiction, August 31, 2000, ¶¶8-11.
77 Claimant’s Statement of Claim of May 22, 2000, p. 11.
78 Claimant’s Statement of Claim of May 22, 2000, p. 11.
79 ‘Addendum No. IV – Answers to Questionaries by the Bidders’, paragraph 1. See Enclosure B to the Claimant’s letter of September 22, 1999 to the Secretariat of the ICC Court; Exhibit R5 to AAWSA’s Memorial on Jurisdiction of April 7, 2000.
“Clause 67

Where it is decided that a settlement of dispute procedure, other than that of the International Chamber of Commerce (ICC), should be used the Clause may be varied.

Sub-Clause 67.3 – Arbitration

EXAMPLE

Following paragraph (b), delete the words ‘shall be finally settled ...
International Chamber of Commerce’ and substitute ‘shall be finally settled under the UNCITRAL Arbitration Rules as administered by a (insert name of administering authority)’.

Where alternatives to ICC are considered care should be taken to establish that the favoured alternative is appropriate for the circumstances of the Contract and that the wording of Clause 67 is checked and amended as may be necessary to avoid any ambiguity with the alternative. 80

196. The Claimant argues that, if the parties had intended to achieve the result claimed by the Respondent, it would have been stated in the Special Conditions of Particular Application that the reference to the ICC Rules should be deleted and substituted by the arbitration rules of the Civil Code of Ethiopia. The Claimant notes that this is what the Respondent did in the original version of Clause 67 of the Special Conditions of Particular Application, in the tender documents. However, this was changed in the final version of the clause. 81

197. The Claimant refers also to the ‘Pre-Award Minutes of the Meeting for Emergency Dire Dam Contract DDI’ of August 5 and 6, 1996, which form part of the Contract. Minute II.3 states:

“3. Arbitration

The participants had agreed to undertake arbitration process in accordance with Clause 67 of particular conditions. But the following statements should be deleted “the whole of Clause 67 is deleted and the following substituted therefore” and the addition to


81 Claimant’s Statement of Claim of May 22, 2000, pp. 11-14.
Clause 67.3 should be numerated as 67.3.1; 67.3.2; 67.3.3 and 67.3.4.\textsuperscript{82}

198. The Claimant notes that, according to Clauses 2 and 3 of the Contract Agreement of August 7, 1996,\textsuperscript{83} these minutes take precedence even over the Special Conditions of Particular Application. In the Claimant’s submission, Minute II.3 makes clear that the parties decided not to delete the reference to the ICC Rules but instead reinstated Sub-Clause 67.3 in its entirety and added the reference to the rules under the Civil Code of Ethiopia in Sub-Clause 67.3.4.\textsuperscript{84}

199. In the Claimant’s submission, the words “unless otherwise specified in the Contract” have a precise meaning given to them by the FIDIC guidelines issued in 1987. If the parties wish to ‘otherwise specify’, they must use the ‘delete […] and substitute by […]’ formula set out in the guidelines.\textsuperscript{85}

200. The Claimant further argues, against the Respondent’s argument that the parties agreed to \textit{ad hoc} arbitration under the Civil Code of Ethiopia, that the rules of that code regarding arbitration are not exclusively reserved for \textit{ad hoc} arbitration but are applicable in the context of institutional arbitrations as well. In this connection, the Claimant points to Article 3346 of the Civil Code of Ethiopia, which reads as follows:

“As used in this Chapter, the terms ‘arbitral submission’ or stipulation of the parties’ include the provisions of the arbitral code to which the parties may have referred.”\textsuperscript{86}

201. The Claimant thereafter interprets the above-cited provision as support for the proposition that the ICC Rules may co-exist with the arbitration rules of the Civil Code of Ethiopia as follows:

“The words \textit{arbitral code} clearly refer to \textit{institutional arbitration rules} that the parties may have jointly selected. Article 3346 assures the prevalence and priority of same rules whenever the parties’ autonomy (the so-called

\textsuperscript{82} Pre-Award Minutes of the Meeting for Emergency Dire Dam Contract DDI of August 5 and 6, 1996, Minute II.3. See Annex 4 to Request for Arbitration, August 11, 1999.

\textsuperscript{83} See Annex 1 to the Request for Arbitration of August 11, 1999.

\textsuperscript{84} Claimant’s Statement of Claim, May 22, 2000, pp. 12-13; Claimant’s Rejoinder, October 24, 2000, pp. 2-3.

\textsuperscript{85} Claimant’s Rejoinder, October 24, 2000, pp. 2-3.

\textsuperscript{86} Claimant’s Statement of Claim, May 22, 2000, p. 15 (emphasis added by Claimant).
The arbitral submission or stipulation of the parties) is admitted by the law. Hence, the Ethiopian provisions recalled in Sub-clause 67.3.4 clearly also apply to institutional arbitrations, and established the validity of their choice made by the parties.

202. The Claimant further notes that a great many of the arbitration rules of the Civil Code of Ethiopia expressly provide that parties to an arbitration agreement may derogate from the terms of these rules if they so desire. In this respect, the ICC Rules take precedence over the rules of the Civil Code of Ethiopia.

203. Finally, the Claimant argues that its interpretation is supported by Ethiopian principles of contractual interpretation.

3. The Arbitral Tribunal’s Analysis

204. The Tribunal has been called upon to decide, taking into account the relevant principles of contractual interpretation, whether the parties intended to adopt the arbitration rules of the Civil Code of Ethiopia to the exclusion of the ICC Rules, as contended by the Respondent, or whether, in contrast, they intended that the arbitration rules of the Civil Code of Ethiopia would supplement the ICC Rules, as contended by the Claimant. Both parties argue that the interpretation of their arbitration agreement is clear, although their interpretations are in stark conflict with each other.

205. The issue for decision is, in the end, relatively narrow. There is no doubt that Sub-Clause 67.3 provides that qualifying disputes “shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules”. There is also no doubt that the Special Conditions of Particular Application add the following new sub-clause to Sub-Clause 67.3: “67.3.4 The rules for arbitration shall be the Civil Code of Ethiopia under Article 3325 et seq. (Arbitral Submission).” The central issue is whether the reference to the arbitration rules of the Civil Code of Ethiopia in Sub-Clause 67.3.4 is meant to override and

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89 Claimant’s Statement of Claim of May 22, 2000, pp. 18-20.
exclude the reference to the ICC Rules in Sub-Clause 67.3 or, alternatively, is meant to supplement the reference to the ICC Rules.

206. As a preliminary point, the Tribunal notes that the fact that the reference to the arbitration rules of the Civil Code of Ethiopia is contained in the Special Conditions of Particular Application, while the reference to the ICC Rules is contained in the General Conditions, is not, in itself, determinative. According to Clauses 2 and 3 of the Contract Agreement of August 7, 1996, the Special Conditions of Particular Application only take priority over the General Conditions in the event that there are “ambiguities or discrepancies”. 90 This leaves open the question of whether there are any ambiguities or discrepancies between Sub-Clause 67.3 and Sub-Clause 67.3.4, i.e., whether the addition of Sub-Clause 67.3.4 was meant to override the reference to ICC arbitration in Sub-Clause 67.3 or, alternatively, was meant to supplement it.

207. As a subsidiary point, the Tribunal does not accept the Claimant’s contention that Sub-Clause 67.3 is itself part of the Special Conditions of Particular Application, for the reason that it was reinstated into the conditions during the precontract negotiations, at the same time that Sub-Clauses 67.3.1-67.3.4 were added. 91 It seems clear that Sub-Clause 67.3 was reintroduced as part of the General Conditions.

208. Similarly, the fact that Sub-Clause 67.3 itself states that, “unless otherwise specified in the Contract”, disputes will be finally settled under the ICC Rules, is not determinative. The question remains whether it is “otherwise specified in the Contract”, i.e., whether Sub-Clause 67.3.4 was meant to override the reference to ICC arbitration in Sub-Clause 67.3.

209. Therefore, it is necessary to have regard to the language of the two provisions to determine whether they were meant to be exclusive or supplementary.

210. The parties have chosen to refer in their arbitration agreement both to the ICC Rules (in Sub-Clause 67.3) and to the arbitration rules of the Civil Code of Ethiopia (in Sub-Clause 67.3.4). This is obviously permissible, and even desirable, as a matter

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91 Claimant’s Rejoinder, October 24, 2000, pp. 7-8.
of principle. Indeed, it is not unusual for parties to identify in their arbitration agreements both a set of institutional rules that will govern the arbitration and the procedural rules that will supplement those institutional rules, where appropriate.

211. For Sub-Clause 67.3.4 to override the reference to ICC arbitration in Sub-Clause 67.3 there would have to be a clear indication in the Contract. There is no such indication.

a. Sub-Clause 67.3.4 states that “the rules for arbitration shall be the Civil Code of Ethiopia under Article 3325 et seq. (Arbitral Submission)” but does not state that these rules will operate in place of the ICC Rules invoked in Sub-Clause 67.3.

b. Sub-Clause 67.3.4 is the fourth of four new sub-clauses, the first three of which are clearly meant to supplement rather than override Sub-Clause 67.3. Sub-Clause 67.3.4 is not marked out as being any different from the earlier sub-clauses in this respect.

c. The Special Conditions of Particular Application clearly state that they “add” Sub-Clauses 67.3.1-67.3.4 to Sub-Clause 67.3. This suggests that those sub-clauses supplement, rather than override, Sub-Clause 67.3.

212. It is not necessary for the Arbitral Tribunal to decide whether the Claimant is right in its contention that the only permissible way to override the provision for ICC arbitration in Sub-Clause 67.3 is to use the ‘delete [...] and substitute by [...]’ formula mentioned in the FIDIC guidelines, which explain the operation of the standard FIDIC Conditions of Contract. Certainly, the above formula has the great advantage that it makes clear that the parties do not intend to adopt ICC arbitration. Sub-Clause 67.3.4, by contrast, does not make it clear at all that the parties intended to override Sub-Clause 67.3 in this respect.

213. It is significant that, in the tender documents originally sent to the Claimant, the Respondent did use the ‘delete [...] and substitute [...]’ formula, deleting Sub-Clause 67.3 altogether and substituting the four sub-clauses that are now Sub-Clauses 67.3.1-67.3.4. The parties abandoned this formula in the final version of
the agreement, which instead reinstated Sub-Clause 67.3 and added to it Sub-
Clauses 67.3.1-67.3.4.

214. Both parties have invoked in support of their respective interpretations Minute II.3
of the ‘Pre-Award Minutes of the Meeting for Emergency Dire Dam Contract DDI’
of August 5 and 6, 1996, which form part of the Contract, quoted above in Section
IV.B.2. According to Clauses 2 and 3 of the Contract Agreement of August 7,
1996, these minutes take precedence over both the Special Conditions of Particular
Application and the General Conditions. Those clauses provide:

"2. The following documents shall be deemed to form and read and
construed as part of this Agreement, viz:

(a) The Contract Agreement (Volume I)
(b) Letter of Acceptance (Volume I)
(c) Minutes of Meeting (Volume I)
(d) The Said Bid (Offer) (Volume I)
(e) Addendum No. 1-6 (Volume I)
(f) The Special Conditions of Contract (Part II) (Volume I)
(g) The General Conditions of Contract (Part I) (Volume I)
(h) The Technical Specifications (Volume II)
(i) The Bill of Quantities (Volume I)
(j) The Drawings (Volume III)
(k) The Schedules of Supplementary Information (Volume IV)

3. The aforesaid document shall be taken as complementary and
mutually explanatory of one another, but in the case of ambiguities
or discrepancies shall take precedence in the order set out
above."

215. However, Minute II.3 does not throw any great light on the matter, since it simply
describes mechanically the parties’ decision to amend the Special Conditions of
Particular Application, as they were in the tender. While the minute does state that
the parties “had agreed to undertake arbitration process in accordance with Clause
67 of particular conditions”, it also records that the parties had decided to
reintroduce Sub-Clause 67.3 and add the four new sub-clauses to that provision.
Sub-Clause 67.3, of course, provides for arbitration of the parties’ disputes under
the ICC Rules. Minute II.3 does not itself explain the thinking behind the change.

216. The Arbitral Tribunal would add at this point that, contrary to the Claimant’s
submission, the Arbitral Tribunal does not consider it significant that the arbitration
rules of the Civil Code of Ethiopia might themselves contemplate institutional arbitration, since this begs the question of whether or not the parties have chosen to arbitrate their disputes under the ICC Rules.

217. The Arbitral Tribunal also does not consider it significant, again contrary to the Claimant’s submission,\(^93\) that the contracts entered into by the Claimant in Ethiopia regularly or even universally contain ICC arbitration clauses. Even if this were established, it does not follow that, in the present case, the Claimant entered into an agreement to arbitrate disputes under the ICC Rules.

218. In the end, this is a question of interpretation of this contract and this arbitration agreement. It is a generally accepted principle of contract interpretation (also reflected in Article 1736 of the Civil Code of Ethiopia) that contracts should be interpreted as a whole, so that their provisions make sense together. The Contract itself recognizes the same principle by stating, at paragraph 3 of the Contract Agreement, that the various parts of the Contract “shall be taken as complementary and mutually explanatory of one another”. The Tribunal is thus required to interpret Sub-Clause 67.3 and Sub-Clause 67.3.4, as well as other related provisions, as a whole. In particular, the Tribunal has the duty not to upset the parties’ bargain in this respect, and in the absence of any indication to the contrary, must give meaning to both Sub-Clause 67.3 and Sub-Clause 67.3.4. The Tribunal concludes that these two provisions must be read in a complementary way, so that the reference to the arbitration rules of the Civil Code of Ethiopia as local procedural rules supplements the choice of ICC arbitration in Sub-Clause 67.3.

C. The Respondent’s Argument that the Claimant’s Interpretation Deprives the Language of the Arbitration Agreement of Meaning

1. The Respondent’s Argument

219. Without prejudice to its primary submissions, described above in Section III.B.1, the Respondent submits that the Claimant’s interpretation of the arbitration agreement is untenable because it conflicts with the language of the agreement and

\(^92\) See Annex 1 to the Request for Arbitration of August 11, 1999 (emphasis added).
\(^93\) Claimant’s Statement of Claim, May 22, 2000, p. 22.
deprives that language of meaning. Such an interpretation is, in the Respondent’s submission, impermissible by virtue of Article 1737 of the Civil Code of Ethiopia. 94

220. The Respondent’s reasoning in this respect is as follows. According to Article 15(1) of the ICC Rules, ICC arbitrations are to be governed by the ICC Rules. Reference may only be made to other rules in the event that the ICC Rules are silent. Article 15(1) states:

“The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”

221. According to the Respondent, the mandatory terms of Sub-Clause 67.3.4 are in contradiction with the hierarchy of rules established by Article 15(1) of the ICC Rules. On this basis, the Respondent concludes that the mandatory language of Sub-Clause 67.3.4, which states that “[t]he rules for arbitration shall be the Civil Code of Ethiopia under Article 3325 et seq. (Arbitral Submission)” (emphasis added), overrides the application of the ICC Rules under Sub-Clause 67.3. This excludes the possibility that the parties could have intended that the arbitration rules of the Civil Code of Ethiopia would supplement the ICC Rules, as contended by the Claimant. 95

222. The Respondent further submits that the Claimant’s interpretation depends upon a mistaken assertion that the procedural rules of the seat of the arbitration are always applied as supplementary rules to the ICC Rules. In fact, in the Respondent’s submission, only mandatory local rules are usually applicable. 96

223. The Respondent further submits that, in any event, the arbitration rules of the Civil Code of Ethiopia cover the same matters as the ICC Rules so that it is not possible for the rules of the Civil Code of Ethiopia to supplement the ICC Rules in the manner proposed by the Claimant. If the parties had intended to refer their disputes to ICC arbitration, there would have been no reason for referring specifically to the

94 AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶¶14-17.
95 AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶¶18-19.
96 AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶21.
rules of the Civil Code of Ethiopia, which cover the same ground as the ICC Rules and contradict them. 97

224. For these reasons, in the Respondent's submission, Sub-Clause 67.3.4 would be rendered unnecessary on the Claimant's interpretation, contrary to the express wording of that sub-clause and to the principles of contract construction in Ethiopian law. 98

225. In its rebuttal, the Respondent notes that the Claimant had failed to identify a single non-mandatory provision of the arbitration rules of the Civil Code of Ethiopia that is not otherwise the subject of a corresponding provision in the ICC Rules. It follows, according to the Respondent, that there was no purpose in referring to the rules of the Civil Code of Ethiopia unless it was to displace the reference to the ICC rules in Sub-Clause 67.3. 99

226. In its rebuttal, the Respondent also rejects the Claimant's contention that an agreement to arbitrate the present dispute under the rules of the Civil Code of Ethiopia would be null and void, due to the fact this would be an administrative contract. The Respondent states that it has never contended that an arbitration under the rules of the Civil Code of Ethiopia would not be an international arbitration. 100

2. The Claimant's Response

227. The Claimant contends that the addition of Sub-Clauses 67.3.1-67.3.4 of the Special Conditions of Particular Application to Sub-Clause 67.3 of the General Conditions is both meaningful and logical.

"Notwithstanding Sub-clause 67.3.4 makes reference to the Ethiopian law provisions for arbitration, it must be emphasized that also this Sub-clause is placed under the language "Add the following (...) to Cl. 67.3"", which means that the Ethiopian law on arbitration has been added to the ICC Rules.

The result is that the reference to the ICC Rules in the first part of Sub-Clause 67.3 stands, and that the Ethiopian law on arbitration must be applied in addition to them. This means that the Ethiopian law provisions

97 AAWSA's Memorial on Jurisdiction, April 7, 2000, ¶¶22-24.
98 AAWSA's Memorial on Jurisdiction, April 7, 2000, ¶25.
100 AAWSA's Rejoinder on Jurisdiction, August 31, 2000, ¶¶20-21.
are applicable by way of integration, when the ICC Rules do not provide otherwise.

The parties having agreed that the place of arbitration is Addis Ababa, the above result is not surprising, but in accordance with the common practice. Whether or not the specific reference to the local procedural law has been made by the parties, the Arbitral Tribunals constituted under the ICC Rules refer - as procedural rules - first to the ICC Rules themselves and then to the procedural rules of the venue as "lex loci arbitri", for whatever matter not governed by and not in contrast with the ICC Rules.

Of course, as the Respondent observes and the Claimant accepts, this hierarchy applies to local law provisions which are not mandatory. As seen above, however, the majority of the Ethiopian law provisions are not such and, on the contrary, give prevalence to the autonomy of the parties.\textsuperscript{101}

228. The Claimant rejects the Respondent's argument that the reference in Sub-Clause 67.3.4 would be meaningless on this view because the two sets of rules cover the same ground. The Claimant submits that, to the extent the two sets of rules coincide, the ICC Rules can be applied with no departure from Ethiopian law. Where the ICC Rules conflict with the rules of the Civil Code of Ethiopia and the rules of the latter code are not mandatory, the ICC Rules will take precedence.\textsuperscript{102} In its rebuttal, the Claimant added that:

"By referring to both sets of rules, they intended to pay respect also to the local rules to the maximum possible extent. The compliance with the local procedural rules – either because mandatory, or because non-mandatory but in harmony with the ICC Rules – was the genuine Parties' will when they agreed on a ICC arbitration held in Ethiopia."\textsuperscript{103}

229. In its rebuttal, the Claimant argues that it is quite normal for arbitration agreements to refer to both the ICC Rules and to the local procedural rules, in the way done in this case. In such cases, in the Claimant's submission, the parties do not inquire in advance about the extent to which the local rules will, in practice, supplement the ICC Rules.\textsuperscript{104}

\textsuperscript{101} Claimant's Statement of Claim, May 22, 2000, p. 17.
\textsuperscript{102} Claimant's Statement of Claim, May 22, 2000, pp. 17-18.
\textsuperscript{103} Claimant's Rejoinder, October 24, 2000, p. 6 (emphasis in original). The Claimant notes that the parties referred to both sets of rules in the Terms of Reference, without any objection from the Respondent: Claimant's Rejoinder, October 24, 2000, pp. 6-7.
\textsuperscript{104} Claimant's Rejoinder, October 24, 2000, pp. 4-5.
230. The Claimant argues that, by contrast, the Respondent’s interpretation would render the parties’ arbitration agreement null and void. In the Claimant’s view, arbitration of disputes arising out of administrative contracts would not be permitted under the rules of the Civil Code of Ethiopia because of a prohibition against arbitration in administrative contracts contained in Article 315(2) of the Ethiopian Civil Procedure Code.\(^{105}\)

3. The Arbitral Tribunal’s Analysis

231. The Respondent’s first argument under this heading is that the mandatory language of Sub-Clause 67.3.4 is inconsistent with the hierarchy of rules set out in Article 15(1) of the ICC Rules.

232. The Tribunal has already concluded, however, that Sub-Clause 67.3.4 is meant to complement Sub-Clause 67.3, such that the arbitration rules of the Civil Code of Ethiopia will supplement the ICC Rules as appropriate. Given this conclusion, there is no question of a conflict with Article 15(1), which envisages a comparable hierarchy.

233. The Tribunal is also unable to accept the Respondent’s contention that its interpretation must be preferred because, on the Claimant’s interpretation, Sub-Clause 67.3.4 would be redundant.

234. The Respondent bases its contention on an allegation that there are no non-mandatory provisions of the articles 3325 et seq. (Arbitral Submission) of the Civil Code of Ethiopia that do not address matters already covered by the ICC Rules so that, as a practical matter, if the parties had chosen ICC arbitration it would have been unnecessary for the parties to invoke the arbitration rules of the Civil Code of Ethiopia in Sub-Clause 67.3.4.

235. The Arbitral Tribunal is not convinced that there are no circumstances in which, in practice, non-mandatory arbitration rules of the Civil Code of Ethiopia would supplement the ICC Rules or otherwise form part of the operation of the ICC Rules. In any event, the Respondent mistakenly assumes that, if the arbitration rules of the

Civil Code of Ethiopia and the ICC Rules were coextensive in the issues they address, this would render Sub-Clause 67.3.4 redundant.

236. The meaning of the arbitration agreement is a function of the intention of the parties. The interpretative principle invoked by the Respondent, whereby contractual provisions should be given effect to the extent possible, is simply a mechanism for discovering the intention of the parties; it is not a conflicting principle. The parties are free to choose the arbitration rules of the Civil Code of Ethiopia as local rules supplementing the ICC Rules notwithstanding this principle. The Respondent confuses two things: whether the parties saw a purpose for adopting a provision and whether there was, in fact, any purpose for adopting a provision.

237. Moreover, the Respondent assumes, without justification, that the parties have examined the interrelationship between the two sets of rules in depth in advance of entering into the Contract, conceiving of every possible permutation in which the two sets of rules might apply. In reality, it is unlikely that the parties entered into any such inquiry. Indeed, they may never have given significant thought to the precise interrelationship of the two sets of rules, instead agreeing at a more general level that, to the extent that any rules should supplement the ICC Rules or otherwise form part of the operation of the ICC Rules, it should be the local procedural rules of the seat of the arbitration. That the local rules would not, in practice, have any great effect, even if true, should not invalidate their choice.

238. In any event, even if the arbitration rules of the Civil Code of Ethiopia and the ICC Rules covered exactly the same issues, there would still be an obvious reason for adopting Sub-Clause 67.3.4, since it would make clear that the parties had chosen the procedural rules of the seat of the arbitration, and not of some other jurisdiction, to supplement the ICC Rules. In the absence of an express agreement of the parties of this kind, it would not follow from the fact that the parties have chosen Ethiopian law as the law of the Contract, or from the fact that Addis Ababa is the seat of the arbitration, that Ethiopian procedural rules would be used to supplement or inform the ICC Rules. See Article 15(1) of the ICC Rules.
239. Accordingly, the Arbitral Tribunal does not accept the Respondent’s contention that its interpretation must be preferred because, on the Claimant’s interpretation, Sub-Clause 67.3.4 would supposedly be redundant.

240. Given the conclusion that the parties did agree to submit their disputes to arbitration under the ICC Rules, it is not necessary to decide in this partial award the question of whether arbitration of this dispute would otherwise be prohibited by Article 315(2) of the Ethiopian Civil Procedure Code, as the Claimant has suggested.

D. The Respondent’s Argument that the Parties’ Precontract Negotiations Support the Respondent’s Position

1. The Respondent’s Argument

241. On a subsidiary basis, the Respondent argues that the history of the precontract negotiations support the Respondent’s interpretation of the arbitration agreement. The Respondent alleges the following facts.\textsuperscript{106}

a. From the outset of the negotiations, the Respondent made clear that it wished to preclude ICC arbitration and provide for \textit{ad hoc} arbitration instead.

b. The Respondent maintained this position throughout the negotiations and explicitly advised the Claimant that it would not be awarded the Contract if it insisted on ICC arbitration.

c. The Claimant initially proposed arbitration under the ICC Rules. However, it is not true, contrary to the Claimant’s allegation, that the Claimant refused to enter into the Contract unless it provided for ICC arbitration.

d. At the pre-award meeting on August 5-6, 1996, the parties agreed to submit their disputes to \textit{ad hoc} arbitration under the arbitration rules of the Civil Code of Ethiopia. This agreement is recorded in Minute II.3 of the ‘Pre-Award Minutes of the Meeting for Emergency Dire Dam Contract DDI’ of August 5 and 6, 1996 (Annex 4 to the Request for Arbitration, August 11, 1999).

\textsuperscript{106} AAWSA’s Memorial on Jurisdiction, April 7, 2000, ¶28-30.
242. The Respondent provided a witness statement from Mr. Tadesse Kebede with AAWSA’s Memorial on Jurisdiction of April 7, 2000, in support of its account of the precontract negotiations. The Respondent provided a supplementary witness statement from Mr. Kebede with AAWSA’s Rejoinder on Jurisdiction of August 31, 2000.

2. The Claimant’s Response

243. According to the Claimant, it was agreed during the precontract negotiations that the reference to ICC arbitration in Sub-Clause 67.3 would be reinstated and the reference to the Civil Code of Ethiopia rules, instead of replacing the reference to the ICC Rules, would be added as a new sub-clause. The Claimant asserts that had Sub-Clause 67.3 of the Contract, particularly the reference to ICC arbitration, not been re-introduced as part of the parties’ agreement, the Claimant would not have signed the Contract.

“In substance, [the Claimant’s witness statements] confirm that what happened was simply the following: the Claimant required as a condition for signing the Contract that, amongst others, Sub-clause 67.3 referring to ICC arbitration be reinstated in the Particular Conditions; the Respondent accepted but wished to maintain the set of sub-clauses from 67.3.1 to 67.3.4; after negotiation, the parties agreed to reinstate reference to ICC arbitration by reintroducing the standard text of Sub-clause 67.3 in the Particular Conditions and to add thereto the set of sub-clauses wished by the Respondent.

Both witnesses point out that the Claimant has been working in Ethiopia since the early 1960’s and that their numerous contracts regularly contained an ICC arbitration clause in the standard FIDIC form of Clause 67.”

244. In summary, the Claimant interprets the precontract events as follows:

“It is thus established that the parties, prior to signing the Contract, agreed to:

1. erase the deletion and substitution of Clause 67 made by the Respondent in the tender documents initially issued by him;

2. reinstate Clause 67 in its entirety (from Sub-clause 67.1 to 67.4) of FIDIC standard form of General Conditions, including Sub-clause

107 Claimant’s Statement of Claim, May 22, 2000, p. 22.
67.3 which refers to ICC arbitration unless otherwise agreed in the Contract;

3. **renumber** the four additional provisions requested by the Respondent as additional clauses to Sub-clause 67.3 (from 67.3.1 to 67.3.4).''

3. **The Arbitral Tribunal’s Analysis**

245. The Arbitral Tribunal considers that the history of the negotiations leading up to the signature of the Contract does not provide any great assistance in the interpretation of the parties' arbitration agreement. For the most part, the history could be consistent with either of the parties' interpretations. On the central matter of fact that might be of assistance, i.e., the events of the precontract meeting of August 5-6, 1996, there is a straightforward conflict of evidence between the parties, which the Arbitral Tribunal is not in a position to resolve.

246. It is clear that in the draft contract delivered to the tenderers with the tender documents, the Respondent proposed to delete Sub-Clause 67.3 and replace it with four new sub-clauses, including the present Sub-Clause 67.3.4. From this it may be deduced that the Respondent initially envisaged that the parties’ disputes would be submitted to arbitration under the Civil Code of Ethiopia arbitration rules and not the ICC Rules. Indeed, this appears to be accepted by both parties.

247. It is also clear that, in the cover letter to its tender, dated June 14, 1996, the Claimant stated that it wished to discuss with the Respondent a possible contradiction in the wording of the new Clause 67 of the Special Conditions of Particular Application:

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109 Enclosure A to the Claimant’s letter of September 22, 1999 to the Secretariat of the ICC. See Exhibit R5 to AAWSA’s Memorial on Jurisdiction of April 7, 2000.
"IX. Clause 67

We’ve noticed a possible contradiction in the wording of the new Clause 67 of the Special Conditions of Contract and we would like to clarify the matter during the eventual negotiation phase."

248. However, it is unclear both what the precise contradiction was that the Claimant was referring to and what position the Claimant was adopting in this respect.

249. It is accepted by both parties that the arbitration provision(s) of the draft contract were discussed at a precontract meeting held on August 5-6, 1996 and that, as a result, the draft Special Conditions of Particular Application were amended in so far as they applied to Sub-Clause 67.3. However, there is a sharp conflict between the parties about what was discussed and agreed at this meeting and, consequently, why the Special Conditions of Particular Application were amended.

250. This leads to the issue of the weight, if any, that should be given to the witness statements provided by both parties in support of their memorials regarding the jurisdiction issue.

251. The Respondent has provided a witness statement and a supplementary witness statement from Mr. Tadesse Kebede, who was the General Manager of the Respondent throughout the relevant period. The Claimant argued, in response, that Mr. Kebede’s statement was inadmissible and should be disregarded. The Claimant further argued that the jurisdiction issue should be decided on the basis of the text of the arbitration agreement and the documents exchanged between the parties prior to award, leading to the final agreed version of the arbitration agreement.

252. On a subsidiary basis, the Claimant itself provided witness statements from Ing. Claudio Lautizi, who was the Claimant’s Deputy General Manager at the time the Contract was entered into, and Ing. Bruno Fabbri, who was the Claimant’s Technical Director throughout the relevant period.

110 Letter from the Claimant to the Respondent dated June 14, 1996, a copy of which is contained in Enclosure D to the Claimant’s letter of September 22, 1999 to the Secretariat of the ICC, a copy of which was provided as Exhibit R5 to AAWSA’s Memorial on Jurisdiction of April 7, 2000.


112 Claimant’s Rejoinder, October 24, 2000, p. 9.
Ultimately, the Arbitral Tribunal did not consider the issue of jurisdiction at the hearing of May 28, 2001. Accordingly, the Tribunal did not hear these witnesses and their statements were not tested through cross-examination. Both parties were given the opportunity to present their witnesses for examination at the hearing of May 28, 2001. The Respondent declined to appear with its witnesses. In the absence of the Respondent’s witnesses, the Claimant did not consider it necessary to offer the testimony of its own witnesses in response.

Given that the witness statements have not been tested through oral examination, the Arbitral Tribunal should not pay any significant regard to those statements.

In any event, the statements themselves do not provide substantial assistance to the Arbitral Tribunal in resolving the present issue. For the most part, they do not add to the documentary materials that are already before the Arbitral Tribunal.

Mr. Kebede’s statements consist principally of: (a) general information pertaining to the Contract and the parties; and (b) Mr. Kebede’s opinions regarding the issues to be decided by the Tribunal. The witness statements of Ing. Claudio Lautizi and Ing. Bruno Fabbri give only a brief and general account of the key meeting of August 5-6, 1996. On the central relevant matter of fact, i.e., what was discussed and agreed at the meeting on August 5-6 1996, there is a fundamental dispute on the evidence between the Claimant’s and the Respondent’s witnesses.

Mr. Kebede gives the following statement regarding the meeting:

"13. This confusion [concerning the wording of Clause 67 of the Special Conditions of Particular Application in the tender], amongst other miscellaneous contractual issues, was discussed at the pre-award meeting which commenced on August 5, 1996. I, as well as the other representatives of AAWSA, and the Consultant, explained to Salini how AAWSA had made a mistake in the wording of Clause 67 of the Conditions of Particular Application in its tender documents. It had not intended to delete the whole of Clause 67 but wished to retain the references to the role of the Engineer, the possibility of amicable settlement and the timing of submission to arbitration. What it did not wish to retain was the reference to ICC arbitration.

[...]

113 Witness Statement of Ing. Claudio Lautizi, ¶¶2.3-2.5; Witness Statement of Ing. Bruno Fabbri, ¶¶3.1-3.4.
15. At the meeting of August 5, 1996, Salini also expressed some reservation about ad hoc arbitration, preferring that the Contract provide for ICC arbitration. AAWSA emphasized its disagreement with this and that it wished to maintain the existing provision in the draft Clause 67 of the Conditions of Particular Application of Contract stipulating ad hoc arbitration. AAWSA explained that if Salini were unwilling to accept ad hoc arbitration, AAWSA would not award the Contract to Salini. After making its position on Clause 67 crystal clear to Salini, the meeting was adjourned until the following day, with Salini promising to inform us then of their response.

16. On August 6, 1996, when the meeting reconvened, Salini informed us that it had decided to accept ad hoc arbitration.

17. Representatives of AAWSA and the Consultant presented to Salini a revised draft of Clause 67 of the Conditions of Particular Application, which was exactly the same as the previous draft Clause 67 of Conditions of Particular Application contained in AAWSA’s tender, but was to be added to (rather than to completely substitute) Clause 67 of the General Conditions of the Contract, and was renumbered. The draft was reviewed and agreed by Salini and was subsequently included in the signed Contract.114

258. By contrast, Ing. Bruno Fabbri gives the a very different account:

“3.3 Salini requested that the FIDIC Part I Conditions be reinstated inasmuch as the Contract would be awarded to an international contractor and that the deletion of the Clause by the Part II provisions would have removed the procedures of the Engineer’s Decisions and the international arbitration provided therein.

3.4 I recall that these discussions were low-keyed and were carried out as a matter of ordinary administration.

AAWASA accepted to reintroduce ICC arbitration as part of the wholly reintroduced Clause 67, particularly Sub-Clause 67.3, and wished to maintain the particular conditions as already issued and placing them as an addition to that sub-clause.”115

259. In light of this conflict, the Arbitral Tribunal considers that it cannot accord any weight to the witness statements.

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114 Witness Statement of Mr. Tadesse Kebede, ¶¶13-17. Mr. Kebede states in his supplementary statement that the Respondent had rejected a tender from another tenderer in part because that tenderer would not agree to an ad hoc arbitration in accordance with the rules of the Civil Code of Ethiopia. See Supplementary Witness Statement of Mr. Tadesse Kabebe, ¶9. The Claimant argues that this contention is irrelevant. See Claimant’s Rejoinder, October 24, 2000, pp. 9-10.

115 Witness Statement of Ing. Bruno Fabbri, ¶¶3.3-3.4.
The more reliable evidence of what was agreed at the meeting is contained in the minutes, which, it was agreed, were to form part of the Contract. Minute II.3 of the ‘Pre-Award Minutes of the Meeting for Emergency Dire Dam Contract DDI’ of August 5 and 6, 1996 has already been quoted above at paragraph 185. However, as the Arbitral Tribunal has already noted in Section IV.B.3 above, this minute does not significantly clarify the events of the meeting and might be regarded as consistent with either party’s interpretation.

Equally, the parties’ assertions that they would not have signed the Contract unless the parties agreed to arbitration under the Civil Code of Ethiopia rules, in the Respondent’s case, and the ICC Rules, in the Claimant’s case, do not clarify the matter. Clearly, only one of the parties can be right and, even if the parties did take the positions they claim in the negotiations preceding the Contract, which is by no means clear, the history of the negotiations themselves does not plainly indicate which party prevailed. The Arbitral Tribunal accordingly must go back to the language of the parties’ arbitration agreement, discussed in Section IV.B above.

In short, the precontract history does not explain why the parties agreed that Sub-Clause 67.3, providing for ICC arbitration, should be reinstated and added to by Sub-Clauses 67.3.1 to 67.3.4. Accordingly, the Arbitral Tribunal does not consider the precontract history as providing any significant assistance in resolving the jurisdiction issue.

In Sub-Clause 67.3 of the General Conditions (Part 1 of the Contract), the parties agreed that their qualifying disputes would be finally settled under the ICC Rules by one or more arbitrators appointed under such rules. In adding Sub-Clause 67.3.4 of the Special Conditions of Particular Application (Part 2 of the Contract) to Sub-Clause 67.3, the parties agreed that the ICC Rules would be supplemented, as appropriate, by the arbitration rules of the seat of the arbitration, articles 3325 et seq. (Arbitral Submission) of the Civil Code of Ethiopia. Sub-Clause 67.3.4 is not redundant in this respect and does not conflict with Sub-Clause 67.3.
264. It follows that this Arbitral Tribunal was properly constituted according to the parties' arbitration agreement and has jurisdiction over the disputes that have been submitted to it.

V. DECISION OF THE ARBITRAL TRIBUNAL

265. For the reasons stated above in Section III, the Arbitral Tribunal concludes that these arbitral proceedings should not be suspended.

266. For the reasons stated above in Section IV, the Tribunal concludes that it has jurisdiction over the present dispute as an ICC tribunal properly constituted in accordance with the ICC Rules.

267. The costs relating to this award are reserved. The Tribunal duly notes, for future purposes, that the Claimant has been successful in respect of both issues decided by this award.

268. For the avoidance of doubt, the Arbitral Tribunal’s previous procedural orders and decisions are incorporated by reference into this award, in so far as they are relevant.

269. Also for the avoidance of doubt, and with specific reference to paragraph 45 of the Terms of Reference, this award is deemed to be made in Addis Ababa, Ethiopia.

Professor Piero Bernardini  
Co-Arbitrator

Dr. Nael Georges Bunni  
Co-Arbitrator

Professor Emmanuel Gaillard  
Chairman