

**UNCITRAL ARBITRATION**  
**PERMANENT COURT OF ARBITRATION**

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AKGUN INSAAT MAKINA SANAYII VE DIS TICARET LTD. STI.  
*Claimant*

v.

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA  
*Respondent*

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**Claimant's Statement of Claim**

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# 1. INTRODUCTION

- 1.1. In this Statement of Claim Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti.<sup>1</sup> (“Akgun Construction,” “Akgun,” or “Claimant”) will set out in full its claims against the Federal Democratic Republic of Ethiopia (“Ethiopia,” “FDRE,” the “Government” or “Respondent”), relating to Akgun’s project to develop a large industrial city, the Ethio-Turk Industrial Zone (“ETIZ”), and arising out of the Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments dated 16 November 2000<sup>2</sup> and in force from 10 March 2005 (the “Treaty,” “BIT” or “Turkey-Ethiopia BIT”).<sup>3</sup>
- 1.2. Claimant’s Statement of Claim proceeds in the following Sections:
- 1.2.1. In Section 2 (paragraphs 2.1 to 2.129): Claimant will discuss the factual background of the case and in doing so will discuss the ample evidence proving Respondent’s misconduct in its treatment of Claimant and the resulting destruction of Claimant’s investments in Ethiopia.
  - 1.2.2. In Section 3 (paragraphs 3.1 to 3.27): Claimant explains the basis of this Tribunal’s jurisdiction over the claims in this arbitration, each of which arises under the BIT.
  - 1.2.3. In Section 4 (paragraphs 4.1 to 4.4): Claimant describes the law applicable to this arbitration.
  - 1.2.4. In Section 5 (paragraphs 5.1 to 5.82): Claimant will demonstrate why, as a matter of international law, Respondent breached its obligations under the Treaty by i) expropriating Claimant’s investment; ii) failing to

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<sup>1</sup> For ease of reference, all Turkish characters have been transliterated to the English alphabet. Terms defined in the Claimant’s Notice of Arbitration carry the same meaning in this Statement of Claim unless otherwise indicated.

<sup>2</sup> **CLA-001**, Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, signed 16 November 2000 (in force on 10 March 2005) (“Turkey-Ethiopia BIT”).

<sup>3</sup> **CLA-001**, Turkey-Ethiopia BIT, cover page.

treat Claimant fairly or equitably; iii) impairing Claimant's right of use of its investment and iv) breaching the specific obligations it entered into with Claimant.

- 1.2.5. In Section 6 (paragraphs 6.1 to 6.89): Claimant will show that as a result of Respondent's breaches, it has suffered serious harm and must be compensated accordingly.
- 1.2.6. In Section 7 (paragraphs 7.1 to 7.2): Claimant sets out its Claims for Relief.
- 1.2.7. In Section 8 (paragraphs 8.1 to 8.2): Claimant sets out its Reservation of Rights.
- 1.3. In short, Akgun demonstrates below that this Tribunal has jurisdiction over each of Akgun's claims, that Respondent breached the obligations it owed to Claimant under the BIT and that as a result of these breaches, Respondent has caused great harm to Claimant for which it now owes Claimant compensation.
- 1.4. This Statement of Claim is supported by two witness statements:
  - 1.4.1. Mr. Yusuf Akgun, Claimant's founder and former controlling shareholder will recount his personal recollection of Akgun's investment in Ethiopia and his many interactions with Ethiopian officials from the time they recruited him to Ethiopia through the suspension of ETIZ and continuing through Ethiopia's attempts to relocate ETIZ from the site that the Ethiopian government had allocated to Claimant for ETIZ.<sup>4</sup>
  - 1.4.2. Mr. Yunus Akgun, a shareholder of Claimant and son of Mr. Yusuf Akgun, will also provide details as to his personal experience with Akgun's investments in Ethiopia and of his many interactions with Ethiopian officials.<sup>5</sup>

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<sup>4</sup> Witness Statement of Yusuf Akgun dated 19 November 2020 ("Yusuf Akgun Statement").

<sup>5</sup> Witness Statement of Yunus Akgun dated 19 November 2020 ("Yunus Akgun Statement").

1.5. This Statement of Claim is also supported by one expert report:

1.5.1. Laura Hardin of Alvarez & Marsal (“A&M”) will testify as to the quantum of harm suffered by Claimant as a result of Respondent’s actions.<sup>6</sup>

## **2. BACKGROUND FACTS**

### **A. Summary of Dispute**

- 2.1. Ethiopia recruited Akgun to develop a large industrial city, ETIZ. However, as a result of intragovernmental conflict, Respondent ultimately decided that the groundwater resources in the area it had allocated to Akgun to construct ETIZ were insufficient to support both ETIZ and residential water consumption needs and in particular the needs of a large government-sponsored residential development.<sup>7</sup>
- 2.2. Akgun was not aware of any such intragovernmental conflict when it agreed to undertake ETIZ or commenced work on ETIZ. When Akgun did finally become aware of this issue, officials at the highest levels of government, including the President and the Prime Minister’s office, each assured Akgun that Ethiopia would continue to support and promote ETIZ.
- 2.3. Based on these assurances, Akgun continued to advance ETIZ at the site that the Ethiopian government allocated only for Ethiopia to halt Akgun’s work and destroy its investment. As will be demonstrated below, the evidence proves that Respondent determined that it had made, in its own words, a “mistake” in its allocation of the ETIZ site – a “mistake” for which Akgun bore no responsibility.
- 2.4. The effect of Respondent’s mistake and corresponding decision to halt the development of ETIZ was to destroy Akgun’s investment without any compensation to Akgun.

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<sup>6</sup> Expert Witness Report of Laura Hardin of Alvarez & Marsal dated 19 November 2020 (“A&M Report”).

<sup>7</sup> **C-016**, Letter from Ministry of Industry to Akgun Construction dated 24 July 2014 (“Suspension Letter”).

## **B. Dramatis Personae**

2.5. The individuals and entities listed below acted for Claimant during the events of this case:

2.5.1. **Yusuf Akgun:** Founder of Claimant and the Akgun Group of companies. Mr. Akgun was recruited by Ethiopian authorities to develop an industrial zone in Ethiopia.

2.5.2. **Yunus Akgun:** The son of Yusuf Akgun and a shareholder of Claimant. During the events of this case, Yunus Akgun shared the duties of managing ETIZ on the ground in Ethiopia with his brother, Ufuk Akgun.

2.5.3. **Ufuk Akgun:** The son of Yusuf Akgun and a shareholder of Claimant. During the events of this case, Ufuk Akgun shared the duties of managing the ETIZ project on the ground in Ethiopia with his brother, Yunus Akgun.

2.5.4. **GOTA Management and Development Consultancy (“GOTA”):** Expert consulting firm hired by Claimant to perform an Environmental Impact Assessment of ETIZ (“GOTA EIA”).

2.5.5. **Hagos Sequar:** Local employee of Claimant and former employee of the Ministry of Industry. Mr. Hagos’s responsibilities included day-to-day interaction with Ethiopian authorities and with GOTA.<sup>8</sup>

2.5.6. **Professor Ismail Toroz:** Istanbul Technical University Expert in strategies to mitigate environmental harm. Professor Toroz prepared a supplement to the GOTA EIA.

2.6. The individuals and entities listed below acted for Respondent during the events of this case. Each of these individuals and entities is a state actor whose actions are attributable to Respondent.

2.6.1. **Ministry of Trade and Industry (“Mol” or “Ministry of Industry”):** Entered into the 2012 ETIZ Agreement on behalf of Respondent.

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<sup>8</sup> In keeping with Ethiopian tradition, Ethiopian individuals are referred to by forenames where appropriate.

- 2.6.1.1. **State Minister Tadesse Haile:** State Minister, Ministry of Trade and Industry during the relevant period who was Claimant's main point of contact at the Ministry until 2015.
- 2.6.1.2. **Minister Ahmed Abetew:** Minister of Trade and Industry from 2013 through 2015.
- 2.6.1.3. **Minister Girma Birru,** Minister of Trade and Industry at the time of the signing of the 2010 ETIZ Agreement.
- 2.6.2. **Office of the Prime Minister:** Head of Ethiopian government chosen by the Ethiopian Parliament and holding the executive power of the State.
  - 2.6.2.1. **H.E. Meles Zenawi:** Prime Minister of Ethiopia from August 1995 until his death in August 2012 who personally met with Akgun and encouraged Akgun to enter into the 2012 ETIZ Agreement.
  - 2.6.2.2. **H.E. Hailemeriam Desalegn:** Prime Minister of Ethiopia from August 2012 until August 2019 and Deputy Prime Minister of Ethiopia from August 2010 to August 2012.
  - 2.6.2.3. **Dr. Arkebe Oqubay:** Senior Minister and Special Advisor to the Prime Minister of Ethiopia and former mayor of Addis Ababa who regularly interacted with Claimant and encouraged Claimant to continue development of ETIZ from June 2012 until the Prime Minister's office suddenly changed course by ordering the suspension of ETIZ in July 2014. Dr. Arkebe attributed the need for this suspension to a mistake of the State arising from the State's choice of the ETIZ site.
- 2.6.3. **Office of the President of Ethiopia:** Ethiopian Head of State.
  - 2.6.3.1. **President Mulatu Teshome:** President of Ethiopia from 2012 to 2018 and former Ambassador of Ethiopia to Turkey who regularly interacted with Claimant and encouraged development of ETIZ.

2.6.4. **Addis Ababa Water and Sewer Authority (“AAWASA”)**: Municipal authority which objected to the location of ETIZ due to the strain the Project would put on the limited water resources in the area.

2.6.5. **Ministry of Environment and the Forestry (“MoEF”)**: Ministry tasked with reviewing Akgun’s EIA submissions at the request of the Ministry of Industry and who concluded that ETIZ was incompatible with the land allocated for it by the MoI due to the strain the project would put on the water resources in the area.

### **C. Timeline of Key Events**

2.7. **October 2008**: Mr. Abadula Gemed, the President of Oromia Regional State of the FDRE, visited İkitelli Organized Industrial Zone in Istanbul, Turkey.

2.8. **13 October 2008**: Mr. Abadula Gemed and Claimant sign the Memorandum of Understanding to work together to build an industrial zone within Ethiopia.

2.9. **August 2009**: Akgun presents its pre-feasibility study to government officials in Addis Ababa. It is well-received and the officials, which included the Minister of Industry Girma Birru, stated that they would support ETIZ.

2.10. **December 2009**: Akgun submits its full feasibility study.

2.11. **11 June 2010**: Akgun Construction and Ethiopia execute the 2010 ETIZ Agreement for the development of an Industrial Zone in the Oromia Regional State.

2.12. **8 June 2012**: Claimant and Respondent execute the 2012 ETIZ Agreement, which replaced the 2010 ETIZ Agreement.

2.13. **31 July 2012**: Claimant pays compensation in the amount of ETB 14,717,476.15 to the Oromia Regional State for the relocation of farmers (and/or settlers) and the expropriation of the first 100ha of the ETIZ site.

2.14. **2 January 2013**: Claimant obtains a Land Lease Certificate for the first 100ha of land on the ETIZ site.

2.15. **6 March 2013**: The first 100ha of the land on the site is physically handed over to Akgun and Akgun begins mobilization and construction work at the site.

2.16. **May 2013**: The MoI requests Claimant to prepare an EIA.

- 2.17. **4 October 2013:** Akgun submits the first draft of its EIA report, prepared by a local firm, GOTA, to the Mol.
- 2.18. **November 2013:** The Mol provides comments to Claimant, requests revisions to the EIA and seeks to convene a workshop.
- 2.19. **January-March: 2014:** Three workshops are conducted by Akgun, GOTA, and local stakeholders, including representatives from AAWASA and the MoEF. At these workshops AAWASA and MoEF representatives state their opposition to the location of ETIZ and insist that it be moved. The Mol verbally requests Akgun to stop work at the ETIZ site and to revise the EIA. Akgun does so.
- 2.20. **5 March 2014:** Akgun submits the revised GOTA EIA.
- 2.21. **April 2014:** The Special Adviser to the Prime Minister, Dr. Arkebe, informs Akgun that it should resume work and the work resumes. The Mol assists Akgun in Akgun's efforts to obtain energy at the site.
- 2.22. **14 April 2014:** The MoEF informs the Mol that it has concluded that ETIZ should be moved and should not be constructed on the allocated site due to water use conflicts and the environmentally sensitive nature of the project site. This information is not disclosed to Akgun at the time.
- 2.23. **24 July 2014:** All work at the ETIZ site is suspended via letter from the Mol at the direction of the Prime Minister. The Mol cites a resource use conflict with the local municipality over the groundwater resources in the area in ordering the suspension.
- 2.24. **15 October 2014:** Akgun submits a supplement to the GOTA EIA prepared by the Istanbul Technical University.
- 2.25. **20 November 2014:** The Mol forwards Akgun the MoEF's critique of Akgun's EIA submissions. The MoEF's critique indicates that it had previously concluded in April 2014 that ETIZ should not be built on the allocated land.
- 2.26. **11 December 2014:** Special Adviser to the Prime Minister, Dr. Arkebe informs Akgun that Respondent made a mistake in allocating the land for ETIZ; however, no new site was ever formally allocated to Akgun.

- 2.27. **27 March 2015:** Claimant sends a notice letter invoking its rights under the BIT and seeking amicable negotiation.
- 2.28. **17 June 2015:** The Mol informs Akgun that ETIZ should be moved to a new site.
- 2.29. **20 August 2015:** A meeting is held at the Mol with Ministry and Akgun representatives. Ministry representatives indicate that they would allocate a new site.
- 2.30. **7 September 2015:** Akgun writes to the Mol requesting the Mol to take steps to allocate new land as promised in the August 2015 meeting. Akgun receives no response and Respondent does not allocate new land.

#### **D. Ethiopia Recruits Akgun and the Parties Execute the 2010 ETIZ Agreement**

- 2.31. Respondent actively recruited Akgun to develop and operate ETIZ, induced Akgun to invest in ETIZ and allocated and handed over land to Akgun for the purpose of developing ETIZ. Thus, this is not the typical case of an investor who seeks out and secures an investment opportunity from a State; rather, it is the reverse.
- 2.32. A high-level delegation of Ethiopian officials visited Mr. Akgun in Istanbul to tour the Ikitelli Industrial Zone in Istanbul in 2008. Mr. Akgun was and is the President of this zone.<sup>9</sup>
- 2.33. The officials were impressed with what they saw and expressed a desire to build an industrial zone similar to Ikitelli in Ethiopia. They immediately asked Mr. Akgun if he would consider using his expertise to develop a similar industrial zone in Ethiopia. Mr. Akgun had not sought out the opportunity to develop an industrial zone in Ethiopia but he was receptive to the idea:

After the tour [of Ikitelli], I gave the Ethiopian delegation a video presentation of the zone, and I invited the delegation leader, President Gemedu, to sign the visitors' book. He said that he was very impressed with Ikitelli and wanted me

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<sup>9</sup> Yusuf Akgun Statement, ¶¶ 2.4-2.7.

to develop a similar industrial zone in Ethiopia. He said that he did not want to leave Istanbul without executing a memorandum of understanding as a first step towards implementing the project.<sup>10</sup>

2.34. These initial discussions culminated in the Memorandum of Understanding (“MoU”) entered into between Claimant and the Oromia Regional State on 13 October 2008.<sup>11</sup>

2.35. A key feature of the MoU is point three, which provides that the location of the industrial zone “will be shown by the Oromia State.”<sup>12</sup> Thus, it was clear from the outset that Respondent possessed the sole authority to identify and allocate land for ETIZ. Mr. Akgun advised the Ethiopian authorities that based on his experience, if ETIZ was to be successful, it would have to be sited on land with three key qualities:

Because the location of ETIZ was critical to its success, I told President Gemedu and his team that the land must have specific characteristics: it must be located near a major population center like Addis Ababa, be connected to major transportation links, and have adequate water and energy resources.<sup>13</sup>

2.36. President Gemedu then appointed a committee of experts to find suitable land in Oromia State.<sup>14</sup> As Mr. Yusuf Akgun describes in his statement, he visited three possible sites with the Ethiopian authorities, after which they proposed to him a site on the outskirts of Addis Ababa near Sendafa town.<sup>15</sup>

2.37. In the meantime, Akgun took preliminary steps for the realization of ETIZ. First, Claimant established an Ethiopian branch through which it intended to

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<sup>10</sup> Yusuf Akgun Statement, ¶ 4.3 (internal citation omitted).

<sup>11</sup> **C-007**, Memorandum of Understanding between the Oromia State and Akgun Construction dated 13 October 2008 (“MoU”).

<sup>12</sup> *Id.*

<sup>13</sup> Yusuf Akgun Statement, ¶ 4.6.

<sup>14</sup> Yusuf Akgun Statement, ¶ 4.7.

<sup>15</sup> Yusuf Akgun Statement, ¶¶ 4.7-4.8.

conduct ETIZ-related business.<sup>16</sup> Second, in February 2009, Akgun applied for and obtained an investment permit for construction.<sup>17</sup> Next, in March 2009, Akgun applied for and was issued a taxpayer registration number.<sup>18</sup> Akgun was then issued the requisite investment license for “Real Estate Development” from the Investment Agency on 18 May 2009.<sup>19</sup>

- 2.38. In parallel to its efforts to obtain the necessary licenses and permits needed to pursue ETIZ, Akgun prepared a pre-feasibility study and project designs. Akgun formally presented the pre-feasibility study and the initial designs to the Cabinet of Ministers in a meeting held at the Hilton Hotel in Addis Ababa on 17 August 2009.<sup>20</sup> Akgun’s presentation was well-received and the government attendees met its presentation with great enthusiasm.<sup>21</sup> Akgun’s presentation was highlighted in Ethiopia’s press, in which the project was characterized as “exemplary” for Ethiopia.<sup>22</sup> The Ethiopian officials are reported to have promised “continued public and government support” for ETIZ to make sure it was implemented “soon.”<sup>23</sup>
- 2.39. Throughout this period, senior Ethiopian officials continued to travel to Istanbul to meet with Akgun, tour the Ikitelli Industrial Zone and express their support for ETIZ. For example, following his February 2009 visit to Ikitelli, Mr. Seyoum

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<sup>16</sup> **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009.

<sup>17</sup> **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009.

<sup>18</sup> **C-040**, Taxpayer Registration Certificate issued by FDRE Ministry of Revenue Federal Inland Revenue Authority dated 4 March 2009.

<sup>19</sup> **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009.

<sup>20</sup> **C-003**, K. Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*, The Reporter, 22 August 2009 (“K. Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*”); **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*, The Ethiopian Herald, 18 August 2009 (“*Turkish firm proposes feasibility study to establish large industrial zone*”); **C-043**, *Ethio-Turkish Industrial Zone Pre-feasibility Study* by Casta dated August 2009. See also Yusuf Akgun Statement, ¶¶ 4.9-4.11; Yunus Akgun Statement, ¶¶ 3.2-3.3.

<sup>21</sup> **C-003**, Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*; **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*. See also Yusuf Akgun Statement, ¶ 4.10; Yunus Akgun Statement, ¶ 3.3.

<sup>22</sup> **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*.

<sup>23</sup> *Id.*

Mesfin, then-Foreign Minister of Ethiopia wrote Mr. Akgun a personal note expressing his enthusiasm for establishing an industrial zone in Ethiopia:

I'm looking forward to seeing the commencement of your project in Ethiopia. In conclusion, I wish to assure you my Government's fullest cooperation and support to you and your group to have firmly established such visionary project in our country.<sup>24</sup>

- 2.40. In October 2009, the then-Ethiopian Minister of Finance and Economic Development, Mr. Sufian Ahmed, echoed the Foreign Minister's sentiments in a statement of appreciation to Akgun following his visit to Ikitelli: "I am very much impressed by this industrial zone, it is a perfect model for attracting investors. I hope we can have one of this kind in Ethiopia."<sup>25</sup>
- 2.41. It was in this context and with the encouragement of numerous Ethiopian officials that Akgun moved forward with the preparation of the final feasibility study for ETIZ. Akgun presented this feasibility study to representatives of the Ministry of Industry and the Oromia State in December 2009.<sup>26</sup>
- 2.42. Thus, by the end of 2009, Akgun had responded to Ethiopia's invitation to develop an industrial zone in Ethiopia, obtained the requisite permits and licenses and had completed and presented both a pre and a full feasibility study and preliminary designs. For its part, Ethiopia had identified a site on the outskirts of Addis Ababa that it considered suitable for ETIZ.
- 2.43. At this point, Akgun and Ethiopia, represented by the Ministry of Industry, began negotiating the terms of the initial Agreement on the Lease of Land and Development of an Organized Industrial Zone. After a period of negotiation,

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<sup>24</sup> See **C-044**, Akgun personal guest book showing numerous messages of support from high level government officials starting from the first meeting held in 2008 through 2014, p. 2 ("Akgun Guest Book").

<sup>25</sup> *Id.* p. 5.

<sup>26</sup> **C-045**, Ethio-Turkish Industrial Zone Feasibility Study by Casta dated December 2009; Yusuf Akgun Statement, ¶ 4.11.

Akgun and Respondent entered into the Agreement for the development of ETIZ on 11 June 2010 (the “2010 ETIZ Agreement”).<sup>27</sup>

- 2.44. Unlike the later 2012 ETIZ Agreement at issue in the Arbitration, the 2010 ETIZ Agreement provided that the entire site that Respondent chose and allocated would be developed at one time and that the Mol would pay thirty percent of the infrastructure costs of ETIZ.<sup>28</sup> Moreover, the 2010 ETIZ Agreement required Akgun to secure outside financing.<sup>29</sup>
- 2.45. In May 2011, at the request of Prime Minister Meles Zenawi, Akgun agreed to re-negotiate the 2010 ETIZ Agreement to relieve the Mol of its obligation to contribute thirty percent of the infrastructure costs, to relieve Akgun of its obligation to secure outside financing and to introduce a phasing mechanism which would allow Akgun to develop ETIZ in a self-funded fashion, as Ikitelli had been developed, without outside or government financing.<sup>30</sup> However, the ultimate objective remained the same, namely to develop ETIZ, a large scale industrial city.

#### **E. The 2012 ETIZ Agreement**

- 2.46. The Parties then began another round of negotiations, resulting in the Agreement for the development of ETIZ signed on 8 June 2012 (“2012 ETIZ Agreement” or “2012 Agreement”).<sup>31</sup> This Agreement remains in effect to date.

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<sup>27</sup> **C-008**, Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia and Akgun Construction for the Lease of Land and Development of an Industrial Zone dated 11 June 2010 (“The 2010 ETIZ Agreement”).

<sup>28</sup> *Id.* Art. 11(7).

<sup>29</sup> *Id.* Arts. 7(2), 9(1) and 9(2).

<sup>30</sup> Yusuf Akgun Statement, ¶ 4.19; Yunus Akgun Statement, ¶¶ 4.1-4.2; **C-046**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2011.

<sup>31</sup> **C-009**, Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia, Oromia Regional State and Akgun Construction for the Lease of Land and the Development of an Industrial Zone dated 8 June 2012 (“The 2012 ETIZ Agreement”).

- 2.47. As in the 2010 ETIZ Agreement and the MoU, the 2012 ETIZ Agreement obligates Ethiopia to “deliver and allocate the Land ... for the Project.”<sup>32</sup>
- 2.48. Art. 10.10 provides that Akgun “shall” be entitled to use the allocated land and begin construction immediately upon handover.<sup>33</sup> Multiple articles require Akgun to develop the land allocated for ETIZ and to do so without delay. Arts. 8.6 and 9.5 obligate Akgun to begin activities on the site — i.e., mobilization and construction — within six months from the date of handover.<sup>34</sup> Art. 9.2 obligates Akgun to complete infrastructure construction on the first 100ha within 18 months from the date of handover.<sup>35</sup> Furthermore, Art. 7.5 states that the MoI shall take back the land allocated for ETIZ without any notice if Akgun does not start construction of infrastructure within six months from the date of handover.<sup>36</sup> Akgun’s right of use and obligations to construct are triggered by Ethiopia’s handover of the allocated land.
- 2.49. Art. 8.14 requires Akgun to give priority to “leather products, goods and articles, textile and garment, chemicals and plastic, pharmaceutical, electric and electronics, printing, packing, automotive, metal and agro-processing Industries.”<sup>37</sup> This is a change from the 2010 ETIZ Agreement and was introduced by the MoI with a view towards promoting the Ethiopia Growth and Transformation Plan that had been promulgated in November 2010.<sup>38</sup> This Growth and Transformation Plan identifies both industrial zones and small and medium sized enterprises in the exact industries mentioned in Art. 8.14 as strategically important to the success of the Growth and Transformation Plan.<sup>39</sup>

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<sup>32</sup> *Id.* Art. 7(1).

<sup>33</sup> *Id.* Art. 10(10).

<sup>34</sup> *Id.* Arts. 8(6), 9(5).

<sup>35</sup> *Id.* Art. 9(2).

<sup>36</sup> *Id.* Art. 7(5).

<sup>37</sup> *Id.* Art. 8(14).

<sup>38</sup> **C-047**, Ministry of Finance and Economic Development, *Growth and Transformation Plan for 2010/11 – 2014/15, Volume I: Main Text*, November 2010 (“GTP I”).

<sup>39</sup> *Id.* s. 5.2.1.

- 2.50. Art. 8.10 contains a specific obligation for Akgun to “protect the environment from pollution by using appropriate methods and technologies. The Developer has to take maximum care to safeguard the Legegadi and Dire Dams underground water basin from pollution and carry out the necessary studies in this regard.”<sup>40</sup> For its part, Akgun had planned from ETIZ’s inception to take all steps necessary to protect the nearby water resources and did not object to the inclusion of Art. 8.10 in the 2012 ETIZ Agreement.<sup>41</sup>

#### **F. Ethiopia and Akgun Prepare for the Handover of the Land**

- 2.51. The Parties agreed that ETIZ would be developed in stages and that if it met certain conditions precedent, Akgun would have a right under the 2012 ETIZ Agreement to develop 1460ha of land with an option to develop another 2000ha. The first stage of development was to be 660ha divided into five subphases of development as reflected in the figure below.

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<sup>40</sup> **C-009**, The 2012 ETIZ Agreement, Art. 8(10).

<sup>41</sup> Yusuf Akgun Statement, ¶¶ 5.1-5.4; Yunus Akgun Statement, ¶¶ 5.12-5.13.

| Total area of the land to be handed over                                                                                                                     | 1.460 hectares           |                          |                          |                          |                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
|                                                                                                                                                              | 1 <sup>st</sup><br>Phase | 2 <sup>nd</sup><br>Phase | 3 <sup>rd</sup><br>Phase | 4 <sup>th</sup><br>Phase | 5 <sup>th</sup><br>Phase |
| STAGE I: 660 ha<br><br>Akgun must achieve 50 % occupancy rate on each land transferred to be able to proceed to the next phase.                              | 100 ha                   | 100 ha                   | 100 ha                   | 100 ha                   | 260 ha                   |
| STAGE II: 800 ha<br><br>Akgun must achieve 50 % occupancy rate on 660 hectares of the land transferred within five years starting from the date of handover. |                          |                          |                          |                          |                          |

2.52. In early 2012, in anticipation of the execution of the revised Agreement and the commencement of ETIZ, the local authorities in Oromia valued the first phase of 100ha at the instruction of the Mol.

2.53. The local Oromia authorities issued their valuation report in April 2012.<sup>42</sup> The report describes the valuation process in detail and states that numerous officials from various agencies, including the local environmental agency, were involved in that process.<sup>43</sup> In particular, the valuation report explains that workshops were held with the residents and

professionals from [the] Land and Environmental Protection [Bureau] of Oromia Regional State and Oromia Special Zone, which enabled [sic] to build consensus

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<sup>42</sup> C-048, Compensation Payment Proposal Report dated April 2012.

<sup>43</sup> *Id.* pp. 1-2.

regards the overall benefits of the project and how it will improve their livelihoods by transforming the industrial sector through the use of local labor resources thereby organizing and training members of society.<sup>44</sup>

- 2.54. The report states that in order to “get started with the work” the compensation needs to be paid.<sup>45</sup> This document confirms that the local authorities, including representatives from the Oromia Land and Environmental Protection Bureau, were aware of ETIZ, its scope and its location, and assisted in its commencement.
- 2.55. Akgun executed the agreement on 12 June 2012 and paid the lease amount for the first 100ha on 31 July 2012.<sup>46</sup> The Oromia Bureau of Rural Land and Environmental Protection accepted this payment and acknowledged receipt thereof.<sup>47</sup> At this point, Akgun was ready to accept handover of the first 100ha and commence mobilization and infrastructure construction.
- 2.56. However, the local officials were not immediately able to hand over the first 100ha.<sup>48</sup> In a letter dated 20 August 2012, the MoI explained that although Akgun had paid for the land, it could not be handed over until the local farmers’ crops then growing on the land could be harvested.<sup>49</sup>

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<sup>44</sup> *Id.* pp. 1-2.

<sup>45</sup> *Id.* p. 1.

<sup>46</sup> **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012; Yunus Akgun Statement, ¶ 4.8.

<sup>47</sup> **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012.

<sup>48</sup> Yusuf Akgun Statement, ¶ 4.23; Yunus Akgun Statement, ¶ 4.9.

<sup>49</sup> **C-049**, Letter from Ministry of Industry to Akgun Construction dated 20 August 2012.

2.57. The Investment Board of Oromia<sup>50</sup> then wrote to Akgun on 17 September 2012<sup>51</sup> and sent a nearly identical letter to the local authority in Sendafa on 18 September 2012.<sup>52</sup> The Investment Board writes:

Accordingly, we hereby strongly urge the company to undertake the work of its **industrial zone for establishment of different industries project** in accordance with the rules and regulations in force.<sup>53</sup> (emphasis added)

2.58. The Investment Board then informs Akgun that it must “commence” development of ETIZ within six months under threat of losing its right of use of the allocated land. It states:

we herewith urge Oromia Investment Commission contract administration work process to conclude and sign up lease contract agreements with the said company within a period of seven days. Further, we notify the company to settle the due farmers compensation payment, make effect lease advance payment **and commence the work of the projects** within a period of six months for otherwise we are mandated to snatch the land without any precondition and transfer it to other investors.<sup>54</sup> (emphasis added)

2.59. On 2 January 2013, Akgun obtained the Land Lease Certificate (also referred to as a title deed) to the first 100ha of the ETIZ site.<sup>55</sup> This Certificate was issued by the Oromia Bureau of Rural Land and Environmental Protection which stated in the cover letter: “we hereby strongly urge you to undertake the

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<sup>50</sup> The “Investment Board of Oromia” and “Oromia Investment Commission” appear to be alternate translations of the name of the same entity.

<sup>51</sup> **C-050**, Letter from Investment Board of Oromia to Akgun Construction and Finfine Area Oromia Special Zone Administration dated 17 September 2012 (“Letter dated 17 September 2012”).

<sup>52</sup> **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012.

<sup>53</sup> **C-050**, Letter dated 17 September 2012.

<sup>54</sup> *Id.*

<sup>55</sup> **C-012**, Land Lease Certificate issued by Oromia Bureau of Rural Land and Environmental Protection dated 2 January 2013.

work of your project.”<sup>56</sup> Thus, by 2 January 2013, Akgun had fulfilled all of the requirements to take over the first 100ha and was ready to commence development.

#### **G. Akgun Commences Construction and the Mol Requests Akgun’s Assistance in Preparing an EIA**

- 2.60. In the lead up to the handover of the first 100ha of land allocated for ETIZ, the Mol informed the Prime Minister’s office that “there is no legal framework to manage the subleasing of plots of land within industry zones developed by private investors.”<sup>57</sup>
- 2.61. The Prime Minister’s office then instructed numerous government agencies to establish this legal framework such that the subleases could proceed and they did so.
- 2.62. On 6 March 2013, after several months of delay occasioned by efforts to relocate settlers from the ETIZ site, Ethiopia formally handed over the first 100ha to Akgun.<sup>58</sup> Akgun submitted its work program to the Mol six days later on 12 March 2013 and immediately commenced mobilization work.<sup>59</sup>
- 2.63. On the next day, Akgun wrote to the Mol and asked it to write a letter in support of its application to renew its investment license.<sup>60</sup> A few days later, on 18 March 2013, the Mol did as Akgun requested and wrote to the Investment Agency with reference to the development of the investment zone and requested the Investment Agency to renew Akgun’s investment license.<sup>61</sup>

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<sup>56</sup> *Id.*, cover letter.

<sup>57</sup> **C-052**, Letter from Office of the Prime Minister to Ministry of Finance and Economic Development et al. dated 14 February 2013.

<sup>58</sup> **C-013**, The protocol executed between Akgun Construction and Bureau of Rural Land and Environmental Protection of Oromia Regional State for the handover of the land dated 6 March 2013.

<sup>59</sup> **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013. See also Yusuf Akgun Statement, ¶¶ 4.24-4.25; Yunus Akgun Statement, ¶¶ 5.3, 5.5-5.6.

<sup>60</sup> **C-054**, Letter from Akgun Construction to Ministry of Industry dated 13 March 2013.

<sup>61</sup> **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013.

Two weeks later, on 9 April 2013 the Investment Agency renewed Akgun's investment license.<sup>62</sup>

- 2.64. By this point, Ethiopian authorities at all levels of government had assisted with the commencement of ETIZ, issued and renewed multiple licenses to Akgun in furtherance of ETIZ, accepted payment for and handed over state-owned land to Akgun and changed Ethiopian domestic laws and regulations to establish a legal framework for subleasing within ETIZ.
- 2.65. In May 2013, soon after Akgun finally took possession of the first 100ha and nearly a year after Ethiopia accepted payment for it, the Mol requested that Akgun prepare an EIA.<sup>63</sup> As Mr. Akgun describes:

In or around mid-2013, the Ministry of Industry verbally asked Akgun to prepare an Environmental Impact Assessment ("EIA"). As the full-scale EIA proposed by the Ministry of Industry exceeded the scope of the studies we had undertaken on how to protect the nearby watershed from pollution that were required by Art. 8(10) of the 2012 ETIZ Agreement, I expressed concern about undertaking such an EIA and the delay it might cause. Minister Ahmed Abetew told me that the Ministry could prepare the EIA, but it would take even longer and cause even greater delay. He also assured me that the project's implementation would not be halted or slowed by the EIA preparation process.<sup>64</sup>

- 2.66. In an act of good will, Akgun then set out to hire a local firm to prepare an EIA and eventually settled on the GOTA firm suggested by a former Mol official who worked for Akgun on ETIZ, Mr. Hagos Sequar.<sup>65</sup>

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<sup>62</sup> **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

<sup>63</sup> **C-016**, Suspension Letter.

<sup>64</sup> Yusuf Akgun Statement, ¶ 5.5.

<sup>65</sup> Yunus Akgun Statement, ¶ 5.15.

- 2.67. The Mol's actions show that it did not consider the EIA issue to be a legally required predicate to the commencement of ETIZ. Rather, it continued to encourage Akgun to develop ETIZ while GOTA prepared the EIA.
- 2.68. Notably, neither the Mol nor any other representative of the Ethiopian government instructed Akgun to stop work pending the completion of the EIA. Over the next several months, Claimant continued infrastructure construction and mobilization and informed the Mol of this in progress reports it submitted to the Mol.<sup>66</sup> In parallel, Akgun worked with GOTA to prepare the requested EIA. Akgun submitted the GOTA EIA to the Mol on 4 October 2013.<sup>67</sup>
- 2.69. On 13 November 2013, the Mol provided Claimant its comments on the GOTA EIA.<sup>68</sup> Akgun asked GOTA to revise the EIA in line with the Mol's comments and GOTA began to do so.<sup>69</sup>
- 2.70. On 28 November 2013, the AAWASA wrote to the Mol (but not to Claimant) providing its comments on the GOTA report.<sup>70</sup> In this letter, AAWASA articulated its concerns about the amount of water that ETIZ would consume and its effect on well production.<sup>71</sup> This is the first indication of the resource allocation concern that would ultimately doom ETIZ. AAWASA then proposed to hold a workshop to discuss the issue with government representatives from various agencies and Akgun.<sup>72</sup>

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<sup>66</sup> See, e.g., **C-014**, Letter from Akgun Construction to Ministry of Industry dated 12 June 2013; **C-057**, Akgun's work report dated 6 August 2013; **C-058**, Akgun's work report dated 5 September 2013. See also Yunus Akgun Statement, ¶¶ 5.5-5.11, 5.17.

<sup>67</sup> **C-059**, Letter from Akgun Construction to Ministry of Industry dated 4 October 2013.

<sup>68</sup> **C-060**, Letter from Ministry of Industry to Akgun Construction dated 13 November 2013 and the attached "Comments on Ethio-Turkish International Industry Zone."

<sup>69</sup> Yunus Akgun Statement, ¶ 5.19; **C-061**, Letter from GOTA Management and Development Consultancy to Akgun Construction dated 22 February 2014 (summarizing work done by GOTA and requesting payment) ("Letter from GOTA dated 22 February 2014").

<sup>70</sup> **C-062**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 28 November 2013.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

- 2.71. The very next day on 29 November 2013, Ethiopia issued Claimant's Ethiopia branch a Commercial Registration Certificate, which describes the company's business as "Industrial Zone development and leasing."<sup>73</sup>
- 2.72. On 9 December 2013, the MoI, who was then on notice of the concerns raised by AAWASA, but had not yet shared those concerns with Akgun, wrote to Akgun regarding Akgun's 22 November 2013 progress report.<sup>74</sup> The 22 November progress report clearly states that Akgun was continuing to do construction work on the site.<sup>75</sup>
- 2.73. The MoI begins the letter by noting its appreciation for Akgun's "effort in developing and promoting ETIZ."<sup>76</sup> The MoI then reiterates the importance of the broader industrial development strategy and reminds Akgun that this strategy must be taken into account when recruiting investors to ETIZ.<sup>77</sup>
- 2.74. Finally, on 18 December 2013, nearly one month after AAWASA sent its letter concerning ETIZ to the MoI, the MoI communicated AAWASA's concerns to Akgun.<sup>78</sup> In this letter, the MoI informs Akgun for the first time that there are water resource allocation concerns about ETIZ. The allocation of state-controlled natural resources, water in this case, is a purely governmental act that is exclusively in the control of the State.
- 2.75. Two weeks later, on 2 January 2014, Akgun, GOTA and numerous government officials, including representatives from AAWASA and the MoEF, held a formal workshop to discuss the EIA, as AAWASA had proposed in its November 2013 letter.<sup>79</sup> Ufuk Akgun, Hagos Sequar, and experts from GOTA

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<sup>73</sup> **C-063**, Commercial Registration Certificate of Akgun Construction's Ethiopia Branch issued by Ethiopian Investment Agency dated 29 November 2013.

<sup>74</sup> **C-064**, Letter from Ministry of Industry to Akgun Construction dated 9 December 2013.

<sup>75</sup> **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

<sup>76</sup> **C-064**, Letter from Ministry of Industry to Akgun Construction dated 9 December 2013.

<sup>77</sup> *Id.*

<sup>78</sup> **C-026**, Letter from Ministry of Industry to Akgun Construction dated 18 December 2013.

<sup>79</sup> **C-066**, List of attendees to Ethio Turkish Industry Zone Environmental Assessment Meeting dated 2 January 2014 (note that there is a mistake in the date in the original document. The meeting took place in 2014, not 2013).

represented Akgun at this workshop. The workshop was constructive and following the workshop GOTA endeavoured to revise the EIA.

- 2.76. Several weeks later, with a view towards completing the EIA process, Akgun hosted a second informal workshop at its office with local officials and the experts from GOTA.<sup>80</sup> However, rather than engage in constructive discussion, AAWASA representatives demanded that ETIZ be relocated. As GOTA later recounted:

It is also to be recalled that the second round discussion was held at AKGUN Construction and Machinery PLC head office with some of the concerned stake holders emphasizing on the impact of the project on the water resources in the area, even though, it concluded without agreement due to the demanding of the representative from Addis Ababa water supply and sewerage authority for relocation of the project.<sup>81</sup>

- 2.77. Yunus Akgun recalls that an official from the MoEF stated in no uncertain terms that Akgun would never receive approval for its EIA. This was the first time anyone ever raised the possibility of relocating ETIZ and it took Akgun by surprise:

One of the officials, whom I believe was an official from the MoEF, told us that no EIA would change their opinion, even if Akgun brings an EIA report “from another planet.” I was shocked by this statement. I stated during the meeting that the Ministry of Industry had already allocated the land for the project so the issue must be discussed with the Ministry of Industry.<sup>82</sup>

## **H. Change of Course and Suspension of ETIZ**

- 2.78. After the first workshop, the Mol, after years of consistently supporting ETIZ and championing it within the government, verbally advised Akgun to stop

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<sup>80</sup> Yunus Akgun Statement, ¶¶ 6.3-6.4.

<sup>81</sup> **C-061**, Letter from GOTA dated 22 February 2014.

<sup>82</sup> Yunus Akgun Statement, ¶ 6.4.

work at the site pending resolution of the EIA issue.<sup>83</sup> This was after several months of encouraging Akgun's efforts to develop ETIZ.

- 2.79. On 22 February, GOTA sent Akgun its revised EIA. In its cover letter GOTA explains that it held multiple meetings with the local authorities and incorporated those authorities' comments in the revised report. However, GOTA stressed that it could not reach final agreement with those authorities due to AAWASA's demand to re-locate ETIZ.<sup>84</sup>
- 2.80. Akgun submitted the revised GOTA report to the Mol on 5 March 2014.<sup>85</sup>
- 2.81. On the same date, Akgun sought the help of President Mulatu.<sup>86</sup> In its cover letter, Akgun recounts all of the difficulties it had faced and states that the Mol orally instructed Akgun to stop "any activity" at the site until a final decision on the EIA was made.<sup>87</sup>
- 2.82. On 15 March 2014, Akgun submitted a progress report to the Mol confirming that it had stopped work at the site as the Mol requested and urging the Mol to solve the EIA and electricity problems so that work could continue.<sup>88</sup>
- 2.83. In response, the Mol organized another workshop held on 25 March 2014. Ufuk Akgun and Hagos Sequar attended this workshop on behalf of Akgun.<sup>89</sup>

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<sup>83</sup> Yusuf Akgun Statement, ¶ 5.10; Yunus Akgun Statement, ¶ 6.2. See also **C-067**, Letter from Akgun Construction to President Dr. Mulatu Teshome dated 3 February 2014.

<sup>84</sup> **C-061**, Letter from GOTA dated 22 February 2014.

<sup>85</sup> **C-068**, Letter from Akgun Construction to Ministry of Industry et al. dated 5 March 2014. See also **C-069**, Environmental Impact Assessment Plan of ETIZ by GOTA dated 3 March 2014 (Main Document) ("GOTA's EIA"); **C-070**, Environmental Impact Assessment Plan of ETIZ by GOTA dated 3 March 2014 (Summary Document). This is an internal review copy. The final version was submitted to Ethiopia and Claimant does not have a copy of it. However, the submitted version is substantively the same as the exhibited version. See Yunus Akgun Statement, note 44.

<sup>86</sup> **C-071**, Letter from Akgun Construction to President Dr. Mulatu Teshome dated 5 March 2014.

<sup>87</sup> *Id.*

<sup>88</sup> **C-072**, Letter from Akgun Construction to Ministry of Industry dated 15 March 2014.

<sup>89</sup> Yusuf Akgun Statement, ¶ 5.11; Yunus Akgun Statement, ¶ 6.10.

- 2.84. At this workshop the government’s representatives proposed two alternatives: 1) relocate the site; or 2) limit the industries operating in ETIZ.<sup>90</sup> Recall that Respondent had chosen the site and defined the industries to be located in ETIZ. Thus, either of these proposals would amount to an effective repudiation of the terms of the 2012 ETIZ Agreement.
- 2.85. Days later, on 27 March 2014, Yusuf and Ufuk Akgun met with H.E. Dr. Arkebe Oqubay, a Senior Minister and a Special Advisor to the Prime Minister. Akgun’s internal report detailing the events of this meeting recounts that the meeting began with a presentation from Mr. Yusuf Akgun setting out all of the problems Akgun encountered and informing Dr. Arkebe of the current status of ETIZ.<sup>91</sup> Mr. Akgun also reiterated the company’s commitment to protect against contamination. Mr. Hagos, Akgun’s local manager, then reported that at the workshop held on 25 March 2014, the government’s EIA experts stated that no EIA would ever be approved and proposed to either relocate the site or limit the industries operating in ETIZ.<sup>92</sup>
- 2.86. Dr. Arkebe then assured Akgun that ETIZ had the full support of the government and would not be relocated.<sup>93</sup> He stated that the Prime Minister’s office had the ultimate decision-making authority regarding ETIZ and that it would direct the MoI to immediately supply energy to the ETIZ site so that construction could resume.<sup>94</sup>
- 2.87. Akgun representatives and Dr. Arkebe held a second meeting the following week on 3 April 2014.<sup>95</sup> Akgun’s contemporaneous report of this meeting indicates that Dr. Arkebe again informed Akgun that ETIZ would not be relocated and asked Akgun to continue the development at “full capacity” and

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<sup>90</sup> **C-073**, Report of Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 27 March 2014 (“Report on March Meeting with Dr. Arkebe Oqubay”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> **C-074**, Report of Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 3 April 2014 (“Report on April Meeting with Dr. Arkebe Oqubay”).

promised government support.<sup>96</sup> Dr. Arkebe then visited the site with Mr. Akgun and while there suggested that Akgun hire international consultants to prepare a supplement to the EIA.<sup>97</sup>

2.88. On 10 April 2014, Akgun wrote to the MoI and reported on its meetings with the Prime Minister's Office and noted that it had been "encouraged by the prime minister's office to resume work."<sup>98</sup> In keeping with this, Akgun then asked the MoI to send supportive letters to the local authorities for permission to erect billboards. The MoI sent the letter Akgun requested the next day.<sup>99</sup>

2.89. Unbeknownst to Akgun, on 14 April 2014, the MoEF notified the MoI of its conclusion that ETIZ was incompatible with the site.<sup>100</sup> Akgun has never been provided with a copy of the MoEF's 14 April 2014 letter, but as the MoEF recounts in a subsequent letter, by April 2014 it had concluded:

the establishment of the industry zone in Sendafa area [is] very difficult and we recommended that the company should get a replacement site considering the importance and significance of the industry zone.<sup>101</sup>

2.90. The MoEF's conclusions, which echo the statement made by a MoEF official to Yunus Akgun that no EIA would ever be accepted,<sup>102</sup> show that the MoEF considered the issue to be with the site itself, not with Akgun as a contractor.

2.91. Yunus Akgun testifies:

After the second workshop we knew, because they told us explicitly at that workshop, that the MoEF, AAWASA and other government agencies did not want our project to be

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* See also Yusuf Akgun Statement, ¶¶ 5.12-5.13; Yunus Akgun Statement, ¶ 6.11.

<sup>98</sup> **C-075**, Letter from Akgun Construction to Ministry of Industry dated 10 April 2014.

<sup>99</sup> **C-076**, Letter from Ministry of Industry to Addis Ababa City Government Mayor's Office dated 11 April 2014 ("Letter dated 11 April 2014").

<sup>100</sup> **C-029**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 13 November 2014 ("Letter dated 13 November 2014").

<sup>101</sup> *Id.*

<sup>102</sup> Yunus Akgun Statement, ¶ 6.4.

built on the land Ethiopia had allocated for ETIZ. The Ministry of Industry, with whom we had dealt for years since the very beginning of ETIZ, however, continued to tell us that we should simply revise the EIA report to address AAWASA's concerns communicated in its November 2013 comments and during the workshops. We therefore understood that certain elements within the government opposed our project while others still supported it.<sup>103</sup>

- 2.92. Despite the MoEF's 14 April letter, on 23 April 2014, the Mol instructed the Ministry of Finance and Development to disburse funds from the industrial development fund budget to cover costs associated with supplying electricity to ETIZ.<sup>104</sup> The Mol's April 2014 letters, in conjunction with Dr. Arkebe's statements as recorded in the meeting notes,<sup>105</sup> confirmed to Akgun that Dr. Arkebe's assurances that the Prime Minister's Office had ultimate authority over ETIZ and that the Prime Minister's Office would instruct the Mol to facilitate ETIZ were true.

#### **I. July 2014: Conflict with Residential Development and Final Suspension**

- 2.93. On 24 July 2014, the Mol wrote to Akgun to formally notify Akgun that "any type of construction activity is prohibited until the EIA is conducted and approved."<sup>106</sup>
- 2.94. The Mol cites a letter (or letters) written by the Addis Ababa Municipality in which the Municipality expresses its concern over the "viability" of ETIZ and bases the suspension on the rationale that the groundwater is needed to supply water to 35,000 condominium units being constructed by the Municipality.<sup>107</sup> The Mol also describes a letter from the Municipality to the

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<sup>103</sup> Yunus Akgun Statement, ¶ 6.7.

<sup>104</sup> **C-077**, Letter from Ministry of Industry to Ministry of Finance and Economic Development dated 23 April 2014 ("Letter dated 23 April 2014").

<sup>105</sup> **C-073**, Report on March Meeting with Dr. Arkebe Oqubay.

<sup>106</sup> **C-016**, Suspension Letter.

<sup>107</sup> *Id.*

Office of the Prime Minister in which the Municipality informed the Prime Minister's office (as paraphrased by the Mol) that the

Legedadi deep well groundwater will supply 40,000m<sup>3</sup> water per day starting in April 2015 to the condominium houses under construction by the City Government. The City Government requested the Prime Minister to consider the matter very seriously and find an alternative site to the industrial zone to protect the basin from pollution.<sup>108</sup>

- 2.95. In direct response to the Municipality's concern regarding a competing need for the water resources, the Office of the Prime Minister apparently informed the Mol that "no construction shall take place before the EIA is presented and approved."<sup>109</sup>
- 2.96. The Mol opens the letter with a passive statement that at the time of handover "the EIA had not been received" and later refers to a "law" that "requires that the EIA shall be completed and approved before the commencement of the construction at any place let alone near the Legegadi basin and Dire Dawa groundwater."<sup>110</sup> Recall, however, that Ethiopia knowingly allocated the ETIZ site, effectuated handover of the first 100ha of the site, possessed the contractual right to take the land back and actually threatened to do so if construction did not commence within six months<sup>111</sup> and allowed Akgun to continue construction before any "EIA had been completed and approved."<sup>112</sup>
- 2.97. Further, the Mol makes material misstatements of fact in its 24 July 2014 letter. While the Mol acknowledges, in its letter, that Akgun submitted an EIA at the Mol's request in October 2013 and that it asked for revisions to this report in November and December 2013, the Mol does not mention the fact that Akgun had submitted the revised GOTA report in March 2014, more than two months

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<sup>108</sup> *Id.* p.2.

<sup>109</sup> *Id.* (referring in its penultimate paragraph to a letter from the Addis City Government to the Prime Minister).

<sup>110</sup> *Id.*

<sup>111</sup> **C-009**, 2012 ETIZ Agreement, Art. 7(5); **C-050**, Letter dated 17 September 2012.

<sup>112</sup> **C-016**, Suspension Letter. *See supra* ¶¶ 2.67-2.73.

prior. Rather, the Mol suggests that Akgun did not reply to the December 2013 critique “after 6 months” until a 17 July 2014 letter in which Akgun informed the Mol that it was hiring a new consultant to prepare a supplemental environmental study.<sup>113</sup> This is incorrect. As discussed at paragraphs 2.74-2.80 above, Akgun submitted the revised GOTA EIA in March 2014. This revised GOTA EIA took into account the comments raised by the Mol and in the numerous workshops and meetings held with the concerned authorities.

- 2.98. The Mol also states that the GOTA report indicates that certain wastes including heavy metals and cyanide will be released from the zone.<sup>114</sup> This is also incorrect. The GOTA report explicitly explains that there would be a separate treatment process for cyanide and heavy metals.<sup>115</sup> Moreover, as discussed further in paragraph 2.100 below, in response to this letter, Akgun wrote to the Mol on 19 August 2014 and addressed these specific concerns.
- 2.99. Finally, and in contradiction to the statements referencing the Municipality’s insistence that ETIZ be moved to an alternative site, the Mol then instructed Akgun to stop construction “until the EIA is conducted and approved by the appropriate governmental body.”<sup>116</sup>

#### **J. Akgun Responds to the Suspension Letter**

- 2.100. Akgun replied to the 24 July 2014 suspension letter on 19 August 2014.<sup>117</sup> Akgun provided additional details about its waste treatment plan with regard to each of the wastes identified in the 24 July 2014 letter (heavy metal, cyanide, medical, oil and grease and domestic).<sup>118</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> **C-069**, GOTA’s EIA, pp. 16-19.

<sup>116</sup> **C-016**, Suspension Letter.

<sup>117</sup> **C-025**, Letter from Akgun Construction to Ministry of Industry dated 19 August 2014.

<sup>118</sup> *Id.*

- 2.101. On 21 August 2014, Akgun wrote directly to the Prime Minister seeking a resolution of the on-going issues.<sup>119</sup> In this letter, Akgun noted that the Prime Minister previously intervened in Akgun's favor in March-April 2014 and requests that he do so again.<sup>120</sup> Akgun recounted its success in attracting investors and its commitment to protecting the environment. Akgun then stated that it employed a new consultant to prepare a supplement to the EIA.<sup>121</sup> Finally, Akgun sought the Prime Minister's assistance in getting approval for the 23 investors listed in the letter and noted that if the EIA issue could not be resolved, it may lose those investors.<sup>122</sup>
- 2.102. On 15 October 2014, Akgun submitted the supplemental report prepared by the Istanbul Technical University ("ITU EIA Supplement") to the Mol in an attempt to resolve the "deficiencies" cited by the Mol.<sup>123</sup>
- 2.103. On 17 October 2014, Akgun wrote to the Mol with the same offer – i.e., to have its consultant make a technical presentation.<sup>124</sup> Akgun also explained that its consultant has identified two alternative locations within the ETIZ site for the treatment plant and alternative discharge routes and asked for the Mol's decision on this alternative.<sup>125</sup> No Ethiopian official ever took Akgun up on its offers, asked to meet with Akgun or its consultants or commented on the alternatives proposed by Akgun.

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<sup>119</sup> **C-028**, Letter from Akgun Construction to Prime Minister dated 21 August 2014.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> **C-078**, Ethio-Turkish Industry City Environmental Study dated 10 October 2014 prepared by Istanbul Technical University; **C-027**, Letter from Ministry of Industry to Akgun dated 20 November 2014 and numbered 02.1.30/126 (noting that the ITU study was submitted to the Mol on 15 October 2014) ("Letter dated 20 November 2014"). See also **C-079**, Letter from Akgun Construction to President Dr. Mulatu Teshome dated 14 October 2014.

<sup>124</sup> **C-080**, Letter from Akgun Construction to Ministry of Industry dated 17 October 2014.

<sup>125</sup> *Id.*

- 2.104. In the meantime and unbeknownst to Akgun, on 20 October 2014, the Mol wrote to the MoEF seeking the MoEF's assistance on the EIA issue.<sup>126</sup> In its letter, the Mol first acknowledges the importance of ETIZ and then recounts that though "activities" began, AAWASA raised the issue of the pressure ETIZ would put on the groundwater supply and the "increasing demand for water" in Addis Ababa City.<sup>127</sup> The letter then states that the parties held numerous meetings to find "a lasting solution," but no such solution to the water supply issue could be found.
- 2.105. The Mol references a letter dated 22 July 2014 from the Office of the Prime Minister to the Mol regarding "risks" to the dam and groundwater supply identified by the Addis Municipality. The Mol concludes that resolution of the issue is one outside of the capacity of the Mol and asks the MoEF to review it.<sup>128</sup> The Mol also notes the Municipality's suggestion to move ETIZ to less sensitive land.
- 2.106. On 13 November 2014, the MoEF responded to the Mol and provided its comments on the ITU EIA Supplement.<sup>129</sup>
- 2.107. The MoEF begins its critique by stating that it previously sent review comments to the Mol on 3 April 2014 (i.e., 25 Megabit 2006 E.C.) in response to an EIA forwarded to the MoEF by the Mol on 14 March 2014.<sup>130</sup> In this letter, the MoEF also recounts that on 4 April 2014 the Mol asked it to make "a final decision" on Akgun's EIA and that it, the MoEF, did so in a letter dated

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<sup>126</sup> **C-081**, Letter from Ministry of Industry to Ministry of Environment and Forestry dated 20 October 2014.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> **C-029**, Letter dated 13 November 2014; **C-082**, Review comments made on additional explanation about the main environmental effects report and specific guidance/directions for enhancing and improving Environmental Impact Assessment and Management Plan of Ethio-Turkish Industrial Zone Report ("Review Comments").

<sup>130</sup> **C-029**, Letter dated 13 November 2014.

14 April 2014.<sup>131</sup> The MoEF reminds the Mol that on 14 April 2014, due to several factors and

especially [the zone's impact] on the Legegadi groundwater and dams....we [MoEF] have concluded that these factors made the establishment of the industry zone in Sendafa area very difficult and we recommended that the company should get a replacement site considering the importance and significance of the industry zone.<sup>132</sup>

- 2.108. The Mol did not share these comments with Akgun at that time. Rather on 11 April 2014, as discussed above and at the apparent instruction of the Prime Minister, the Mol began to assist Akgun's efforts to implement ETIZ at the allocated site after months of refusing to do so.<sup>133</sup>
- 2.109. The Mol forwarded the MoEF's 13 November 2014 critique to Akgun on 20 November 2014. In its cover letter the Mol urged Akgun to revise the EIA yet again.<sup>134</sup>
- 2.110. The substance of the MoEF's critique of Akgun's EIAs suggests that the Government's decision to suspend ETIZ had little to do with Akgun's abilities as a developer or the quality of its EIA.<sup>135</sup>

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<sup>131</sup> *Id.* Claimant does not have copies of the internal governmental letters referred to by the MoEF in its 13 November 2014 letter to the Mol.

<sup>132</sup> *Id.*

<sup>133</sup> See **C-072**, Letter from Akgun Construction to Ministry of Industry dated 15 March 2014; **C-073**, Report on March Meeting with Dr. Arkebe Oqubay; **C-074**, Report on April Meeting with Dr. Arkebe Oqubay; **C-029**, Letter dated 13 November 2014; **C-075**, Letter from Akgun Construction to Ministry of Industry dated 10 April 2014; **C-076**, Letter dated 11 April 2014; **C-077**, Letter dated 23 April 2014.

<sup>134</sup> **C-027**, Letter dated 20 November 2014.

<sup>135</sup> **C-082**, Review Comments. See also **C-083**, D.G. Janka, *Environmental Impact Assessment in Ethiopia: Law and Practices*, A Dissertation (Tuscaloosa, Alabama, 2012), at p. 75. ("the EIA Proclamation can be described as a skeleton with little flesh. As a result, its effective implementation necessarily requires the issuance of other mother specific subsidiary instruments."); *Id.* at p. 79 ("[I]ssues like the stage, duration, and modalities of public participation in the EIA process, the possible measures FEPA or REAs may take in case EIA is not done for actions subject to it, the place that should be given to the opinions of the public in the EIA process, and questions relating to certifying and licensing EIA consultants could be answered by these latter directives. Unfortunately, however, such directives do not exist even as a draft."); *Id.* at pp. 53, 76-77 (confirming via interview with the legal

- 2.111. For instance, in Part 1(a) of the letter the MoEF reminds the Mol that the EIA should have been done “**at the earliest stage of the conceptualization of the proposed zone.**”<sup>136</sup> (bold in the original)
- 2.112. At paragraph 2.2.(a) of its critique, the MoEF refers to the prior meetings with stakeholders and highlights the water depletion concern:

...the concerned water sector agencies have strongly pointed out their fear in regard to the depletion of water resources and scarcity/shortage of water supply for various purposes that would be resulted from the implementation of this proposed development intervention.<sup>137</sup> (bold in original) (underline emphasis added).

#### K. Respondent Decides to Move ETIZ

- 2.113. In the wake of the MoEF’s critique, Yusuf Akgun and his sons travelled to Ethiopia and met with President Mulatu on 9 December 2014.<sup>138</sup> As memorialized in Akgun’s notes of that meeting, the President opened the meeting by stating his sorrow at the status of ETIZ and confirming that the choice of land was “our” (the Government of Ethiopia’s) choice.<sup>139</sup>
- 2.114. The President then confirmed to Mr. Akgun that Akgun’s troubles had been caused by a residential development and that he, the President, was not the animating force behind the farcical EIA process.<sup>140</sup> He concluded by stating that he would take up the issue of an alternate site with Dr. Arkebe Oqubay from the Prime Minister’s Office.<sup>141</sup>

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department of the FEPA and the head of the EIA department that the enabling directives remain in draft stage).

<sup>136</sup> C-082, Review Comments, Part 1 (a).

<sup>137</sup> *Id.* 2.2 (a).

<sup>138</sup> C-084, Details of the Meeting with President Dr. Mulatu Teshome dated 9 December 2014 (“Details of the First December 2014 Meeting with President Dr. Mulatu”). See also Yunus Akgun Statement, ¶¶ 7.6-7.11; Yusuf Akgun Statement, ¶ 5.20.

<sup>139</sup> C-084, Details of the First December 2014 Meeting with President Dr. Mulatu.

<sup>140</sup> *Id.* p. 2.

<sup>141</sup> *Id.*

- 2.115. Two days later, on 11 December 2014, Yusuf and Ufuk Akgun met with Dr. Arkebe, a Minister and Special Adviser to the Prime Minister.<sup>142</sup> According to Akgun's contemporaneous notes of this meeting, Dr. Arkebe accepted, as had the President, that the Mol caused the "failure" of ETIZ by "allocating a wrong place."<sup>143</sup>
- 2.116. He further reported that the Mol had to accept the MoEF's recommendation to stop ETIZ "due to the sensitivity of existing land with respect to water resources."<sup>144</sup> Dr. Arkebe then assured Mr. Akgun that his company would be repaid for its expenses and new suitable land would be allocated.<sup>145</sup> Dr. Arkebe never insinuated, much less stated, that the problems with ETIZ were due to a failing of Akgun.
- 2.117. After that meeting, Mr. Akgun met with President Mulatu for the second time to provide him with a summary of the meeting with Dr. Arkebe.<sup>146</sup>
- 2.118. Following these meetings, Akgun wrote to the Mol on 19 December 2014.<sup>147</sup> In this letter Akgun refers to Dr. Arkebe's admission that the selection of the land was a "mistake" and then expresses a willingness to move the zone and to submit the requested proposal regarding such a move.<sup>148</sup> The Ministry has never contradicted the contents of this letter and has never responded directly to it.
- 2.119. Akgun did as the Mol had requested and responded to the MoEF's "Review Comments" via a letter to the Mol dated 5 February 2015.<sup>149</sup> Neither the Mol

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<sup>142</sup> **C-085**, Details of the Meeting with the Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014 ("Details of the December 2014 Meeting with Dr. Arkebe Oqubay"). *See also* Yunus Akgun Statement, ¶¶ 7.12-7.14; Yusuf Akgun Statement, ¶ 5.21.

<sup>143</sup> **C-085**, Details of the December 2014 Meeting with Dr. Arkebe Oqubay, p. 1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* p. 4.

<sup>146</sup> **C-086**, Details of the Meeting with President Dr. Mulatu Teshome dated 11 December 2014 ("Details of the Second December 2014 Meeting with President Dr. Mulatu").

<sup>147</sup> **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014.

<sup>148</sup> *Id.*

<sup>149</sup> **C-087**, Letter from Akgun Construction to the Minister of Industry dated 5 February 2015.

nor the MoEF responded to these comments. In the ensuing months, Akgun wrote to various officials seeking a resolution and following up on the Government's offer to allocate alternate land. All of Akgun's letters went unanswered.<sup>150</sup>

- 2.120. Indeed, by this point it became clear that the Respondent had determined that ETIZ could never move forward regardless of the quality and content of the EIA that Akgun provided. The problem was not caused by Akgun's EIA; it was caused by Ethiopia's regret over the site it allocated for ETIZ.

#### **L. Akgun Sends Its Notice Letter and the Respondent Makes Half-Hearted Efforts to Revive ETIZ**

- 2.121. By March 2015, construction had been suspended at ETIZ for many months, the Government had stopped responding to Akgun's communications and had taken no real steps to allocate alternative land for ETIZ as they had repeatedly promised.<sup>151</sup>
- 2.122. On 17 June 2015, the Government responded to Akgun's notice letter.<sup>152</sup> In this letter, the MoI notifies Akgun that ETIZ cannot move forward on the allocated site and thus that the 2012 ETIZ Agreement cannot be performed. In its letter, the MoI did not assert any alleged breach by Akgun, attribute the failure of ETIZ to Akgun or invoke the Agreement's termination provisions. Rather the MoI stated that ETIZ must be moved.<sup>153</sup> In doing so, the MoI acknowledged that, due to the ongoing political debate over the best use of limited natural resources, ETIZ could not be built on the land allocated for it.

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<sup>150</sup> **C-088**, Letter from Akgun Construction to President Dr. Mulatu Teshome et al. dated 2 November 2015 ("Letter dated 2 November 2015"), p. 3; Yusuf Akgun Statement, ¶ 5.23; Yunus Akgun Statement, ¶ 7.16.

<sup>151</sup> Yunus Akgun Statement, ¶¶ 7.16, 8.1-8.2; Yusuf Akgun Statement, ¶ 5.23. See also **C-088**, Letter dated 2 November 2015, p. 2 (listing letters which remained without any response.)

<sup>152</sup> **C-031**, Letter from Ministry of Industry to Akgun Construction dated 17 June 2015. See also **C-036**, Notice from Akgun Construction to Ministry of Industry dated 27 March 2015.

<sup>153</sup> **C-031**, Letter from Ministry of Industry to Akgun Construction dated 17 June 2015.

- 2.123. The Mol then asked Akgun to confer with the Oromia Regional Government and submit a new project proposal.<sup>154</sup> Yusuf Akgun then travelled to Ethiopia upon the invitation of the Minister of Industry and attended a meeting with representatives of the Mol and the Oromia State to discuss the proposed relocation on 20 August 2015.<sup>155</sup> On 27 November 2015, Yusuf Akgun met State Minister Tadesse Haile of the Ministry of Industry in Addis Ababa to discuss relocation terms and alternate sites, but no alternate site was ever allocated to Akgun.<sup>156</sup>
- 2.124. Over the next several months Akgun followed up with the Ministry seeking to move forward with the proposed relocation of ETIZ. The Ministry never responded.

## **M. Conclusion**

- 2.125. From this review of the evidence, it is clear that Ethiopia did not suspend ETIZ because Akgun submitted “substandard” EIAs, as it now claims in its Response to Claimant’s Notice of Arbitration.<sup>157</sup> It is equally clear that ETIZ was not suspended due to any failure by Akgun to complete infrastructure work under Art. 9(2), as Respondent also incongruously contends in its Answer.<sup>158</sup>
- 2.126. Numerous Regional and Municipal officials, including those from the Bureau of Rural Land Management and Environmental Protection, assisted in the handover of the first 100ha of the ETIZ site from April 2012 through May 2013.
- 2.127. The evidence shows that in late 2013-early 2014, after Akgun had submitted a draft EIA at the Mol’s request, the Municipality and in particular AAWASA began a crusade to halt ETIZ and move it to a different site. This is

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<sup>154</sup> *Id.*

<sup>155</sup> **C-088**, Letter dated 2 November 2015; **C-089**, Handwritten notes of meeting with Ethiopian State Minister Tadesse Haile dated 20 August 2015. *See also* Yusuf Akgun Statement, ¶ 5.25.

<sup>156</sup> Yusuf Akgun Statement, ¶ 5.26.

<sup>157</sup> Respondent’s Response to Claimant’s Notice of Arbitration dated 19 July 2019 (“Response to NoA”), ¶ 26.

<sup>158</sup> *Id.* ¶ 9.

inconsistent with their prior conduct when they aided in the development of ETIZ and encouraged that development. They did succeed in stalling ETIZ briefly in the early months of 2014, but this lull was interrupted in March and April 2014 with the intervention of the Office of the Prime Minister and a brief resumption of construction activity.

- 2.128. It was at this point that the Municipality appears to have raised the issue of the competing residential development with the Prime Minister's Office directly, forcing him to choose between ETIZ, which the MoI supported, and the residential development, which the Municipality preferred.
- 2.129. The evidence demonstrates that Ethiopia realized it made a "mistake" in allocating land for ETIZ that drew on the same limited water resources as the residential development. It therefore decided to prevent ETIZ from continuing. It did so without any regard to its obligations towards Akgun and in violation of the BIT.

### **3. JURISDICTION**

#### **A. This Tribunal Has Jurisdiction *Ratione Personae***

- 3.1. Article VII(1) of the Treaty provides for the arbitration of "[d]isputes between one of the Parties and an investor of the other Party." The Treaty's definition of "investor" includes "corporations, firms or business associations incorporated or constituted under the law of either of the Parties and having their headquarters in the territory of that Party."<sup>159</sup>
- 3.2. Claimant is Akgun Construction, a company incorporated in the Republic of Turkey and is therefore an investor as defined in Article I(1)(b) of the Treaty. Respondent is the Ethiopian State and thus a Contracting Party to the Treaty. Therefore, jurisdiction *ratione personae* is satisfied.

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<sup>159</sup> CLA-001, Turkey-Ethiopia BIT, Art. I(2).

**B. This Tribunal Has Jurisdiction *Ratione Materiae***

3.3. Article VII of the Treaty contains Ethiopia's consent to arbitrate disputes that arise between Ethiopia and an investor "in connection with his investments."

3.4. Article I of the Treaty defines the term "investment" as:

[...] every kind of asset in particular, but not exclusively:

(a) shares, stocks or any other form of participation in companies,

(b) returns reinvested, claims to money or any other rights having financial value related to an investment,

(c) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated

(d) industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights,

(e) business concessions conferred by law or by contract, including concessions related to natural resources [...].<sup>160</sup>

3.5. The BIT adopts a broad, asset-based definition of "investment" by stating that "[t]he term 'investment,' in conformity with the hosting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively."<sup>161</sup> The Contracting State parties have thus clearly demonstrated a mutual intention to define the term "investment" as broadly as possible so that it covers any asset owned by the foreign investor.

3.6. In the *Nordzucker v. Poland* case, the tribunal interpreted a similar broad clause as follows:

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<sup>160</sup> *Id.* Art. II.

<sup>161</sup> *Id.* Art. I(2).

The Tribunal notes that the specification added to this definition is one of an “open” type which is contained in many BITs. Indeed, the list of various specific investments is preceded by the term “in particular”. It is therefore not exclusive and leaves room for other “kinds of assets” to be included in the notion of “investment” under the BIT. The key terms for purposes of definition are the words “all kinds of assets” (“*alle Arlen von Vermögenswerten*” in the German authentic version and “*wszelkie mienie*” in the Polish authentic version which means the same), each of them being capable of constituting an investment.<sup>162</sup>

- 3.7. Claimant’s investments in Ethiopia are in the form of its interest in the ETIZ Project as embodied in the 2012 ETIZ Agreement. Contrary to what Respondent states,<sup>163</sup> the rights contained in the 2012 ETIZ Agreement are clearly an asset and may also be characterized as rights having financial value (point (b) of Art. I(2)), and therefore they clearly fall within the BIT’s expansive definition of “investments.” Moreover, the know-how needed to develop the ETIZ and the materials and equipment needed to perform the 2012 ETIZ Agreement also fall within the Treaty’s definition of “investment” as indicated in (c) and (d) of Art. I(2) of the Treaty.
- 3.8. In short, this case involves a substantial municipal construction and development project of the sort that investment tribunals routinely accept as an investment in the host State.<sup>164</sup>

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<sup>162</sup> [CLA-008](#), *Nordzucker AG v Poland*, UNCITRAL Partial Award on Jurisdiction dated 10 December 2008, ¶ 166.

<sup>163</sup> Response to NoA, ¶ 15.

<sup>164</sup> See, e.g., [CLA-009](#), *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶¶ 135-136; [CLA-010](#), *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 Decision on Jurisdiction, 16 June 2006, ¶ 92; [CLA-011](#), *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, ¶ 45; [CLA-012](#), *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016 (hereinafter “*Garanti Koza v. Turkmenistan*”), ¶ 234 (each finding that varied construction projects amounted to investments under the “objective” ICSID definition of that term).

### **C. This Tribunal Has Jurisdiction *Ratione Temporis***

- 3.9. The Treaty became effective on 10 March 2005.<sup>165</sup> As provided in Article I(2) of the Turkey-Ethiopia BIT, “[t]he term ‘investment’ covers all investments made in the territory of the other Party before or after the entry into force of the [Treaty]. However, it is not applicable to claims arising out of disputes which occurred prior to its entry into force.”<sup>166</sup>
- 3.10. Claimant’s claims relate to a dispute that arose no earlier than 2014 when Ethiopia forced Claimant to stop work on ETIZ. This event as well as subsequent events that Claimant complains of post-date the effective date of the Treaty.<sup>167</sup> The Tribunal therefore has *ratione temporis* jurisdiction.

### **D. Jurisdiction Under the Treaty Extends to “Umbrella Clause” Claims**

#### **(i) The Treaty’s MFN Clause Permits Claimant’s Umbrella Clause Claims**

- 3.11. The Most Favored Nation (“MFN”) clause in the Treaty allows Claimant to rely on more favorable standards of protection contained in other investment treaties. Here, the umbrella clause contained in the Denmark-Ethiopia BIT provides a more favorable standard of protection than that found in the Turkey-Ethiopia BIT. Thus, the MFN clause in the Turkey-Ethiopia BIT entitles Claimant to the protections of the Denmark-Ethiopia BIT’s umbrella clause, which provides, “[e]ach Contracting Party shall observe any commitment it may have entered in to with regard to investors of the other Contracting Party.”<sup>168</sup>
- 3.12. MFN treatment is provided under Articles III(2) the Treaty:

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<sup>165</sup> **CLA-001**, Turkey-Ethiopia BIT, cover page.

<sup>166</sup> *Id.* Art. I(2).

<sup>167</sup> *Supra* ¶¶ 2.93-2.124.

<sup>168</sup> **CLA-003**, Agreement Between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, signed 24 April 2001 (“Denmark-Ethiopia BIT”), Art. 2(3).

Once the investment is accepted, each Party shall accord to this investment, treatment no less favorable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favorable.<sup>169</sup>

- 3.13. The purpose of the above-cited MFN clause is to ensure provision of the most favorable possible treatment to the investors of the concerning Contracting Party, in this case, Turkish investors. Claimant is thus entitled to more favorable treatment (constituting better substantive protection) included in treaties with third parties, as compared to the treatment contained in the Treaty.
- 3.14. The scope of these provisions encompasses standards of investment protection. Indeed, according to the *ejusdem generis* principle, an MFN clause applies to matters belonging to the same subject matter as to which the MFN clause itself relates. Hence, the subject matter to which an MFN clause relates must be determined in order to delineate the scope of such a clause. Commerce and navigation, privileges and immunities, or protection of investment are examples of such subject matters.<sup>170</sup>

**(ii) The Subject Matter of the Treaty Encompasses Claimant's Umbrella Clause Claims**

- 3.15. In the present case, the subject matter of the Treaty is the promotion and protection of investment. In other words, the *genus* to which the MFN clause in the Treaty applies is the promotion and protection of investment. Accordingly, the MFN clause creates an obligation upon the host State *vis-à-vis* the treatment it provides under other investment treaties, including substantive standards of protection such as umbrella clauses.

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<sup>169</sup> CLA-001, BIT, Art. III(2).

<sup>170</sup> CLA-013, UNCTAD Series on Issues in International Investment Agreements II, Most Favored Nation, United Nations Publication, 2010, pp. 24-25.

- 3.16. This is the case regardless of whether the treaty contains a similar standard of protection.<sup>171</sup> In other words, a standard of protection may be imported from another investment treaty even if such standard did not exist in the treaty containing the MFN clause. Any construction otherwise would defy the very object and purpose of the treaty, viz. ensuring the equality of treatment between different parties. These clauses have been relied on consistently to import more favorable protection standards from other treaties in cases where such protection does not exist in the original treaty. Indeed, the tribunal in *RosInvestCo v. Russian Federation* held, in this regard, that “the very character and intention of [MFN clauses] is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.”<sup>172</sup>
- 3.17. In *Rumeli v. Kazakhstan*, the tribunal imported FPS and FET standards into the Kazakhstan-Turkey BIT, which did not have those standards originally.<sup>173</sup> The MFN clause in the Kazakhstan-Turkey BIT is no broader than the one in the Turkey-Ethiopia BIT. On the contrary, it makes explicit reference to a treatment accorded in similar situations:

1. Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations.

2. Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors

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<sup>171</sup> [CLA-014](#), *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 163.

<sup>172</sup> [CLA-015](#), *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 5 October 2007, ¶ 131.

<sup>173</sup> [CLA-016](#), *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (“*Rumeli v. Kazakhstan*, Award”), ¶ 575.

or to investments of investors of any third country, whichever is the most favourable.<sup>174</sup>

- 3.18. Similarly, in *Al Waraq v. Indonesia*, the tribunal imported the FET clause from the Indonesia-UK BIT into the OIC Treaty. The tribunal stated that although there is no FET clause in the OIC Treaty, FET clauses in other treaties provide more favorable protection and therefore Al Waraq should benefit from it by virtue of the MFN clause in the OIC Agreement.<sup>175</sup>
- 3.19. This practice of importing more favorable provisions from one treaty to another extends to the importation of umbrella clauses. The tribunal in *Arif v. Moldova* examined whether an umbrella clause should fall within the scope of the MFN clause. The clause at issue was not any broader than the MFN clause in the Turkey-Ethiopia BIT. The tribunal in *Arif* found that it does fall into that scope:

The MFN clause in Article 4 is broadly drafted and does not restrict its application to any particular kind of substantive obligation under the BIT. Therefore, the Tribunal finds that the MFN clause of the BIT can import an “umbrella” clause (which is substantive in nature), from either the Moldova-UK or Moldova-USA BIT, thereby extending the more favourable standard of protection granted by the “umbrella” clause in either one of these BIT’s into the BIT at hand. Respondent’s arguments to the contrary are rejected. The Tribunal therefore has jurisdiction over Claimant’s “specific commitments” claim via the MFN clause of Article 4.<sup>176</sup>

- 3.20. In a similar vein, the tribunal in *EDF v. Argentina* imported an umbrella clause through an MFN clause in the Argentina-France BIT. The MFN clause is in

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<sup>174</sup> [CLA-017](#), Agreement Between the Republic of Turkey and The Republic of Kazakhstan Concerning the Reciprocal Promotion and Protection of Investments, signed 1 May 1992 (in force on 10 August 1995), (“Turkey-Kazakhstan BIT”), Arts. 2(1), 2(2).

<sup>175</sup> [CLA-018](#), Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-555.

<sup>176</sup> [CLA-019](#), Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013 (“*Arif v. Moldova*”), ¶ 396 (internal citation omitted).

the Argentina-France BIT is no broader than the MFN clause in Turkey-Ethiopia BIT. The *EDF* tribunal found:

To ignore the MFN clause in this case would permit more favorable treatment to investors protected under third countries, which is exactly what the MFN Clause is intended to prevent.

The Tribunal finds unconvincing a narrow interpretation of Article 8(1) of the Argentina-France BIT which seeks to restrict the application of the MFN clause. The dispute in question clearly arises under the Argentine-France BIT even though that treaty, by its terms, incorporates some provisions from other conventions. To interpret the BIT otherwise would effectively read the MFN language out of the treaty. Such a result cannot be what the two countries intended by the treaty language.

Nothing in Article 9(1) of the ILC Draft Articles on the MFN Clause changes this result. In giving effect to the MFN provisions, the Tribunal does not in any way accord investors anything other than “those rights which fall within the limits of the subject matter of the clause.”<sup>177</sup>

- 3.21. The reasoning of the *Arif* and *EDF* tribunals reflects the correct application of an MFN clause which does not contain any restrictions as to the importation of an umbrella clause from another Treaty. Claimant submits that a similar application is required for the importation of the umbrella clause from the Denmark-Ethiopia BIT to the Turkey-Ethiopia BIT.
- 3.22. In conclusion, it is clear that this Tribunal has jurisdiction to entertain Claimant’s umbrella clause claims.

#### **E. Claimant’s Claims Arise Under the Treaty**

- 3.23. In its Response, Respondent seems to argue that Claimant has brought forward claims “which can only be based on the contract” as part of this

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<sup>177</sup> [CLA-020](#), *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶¶ 932-934.

arbitration and that this Tribunal does not have jurisdiction over Claimant's contractual claims because the 2012 ETIZ Agreement has an exclusive jurisdiction clause.<sup>178</sup> This is not true.

- 3.24. Claimant has the "prerogative to formulate its claims as it sees fit" and Respondent cannot arbitrarily re-cast the nature Claimant's claims to its favor.<sup>179</sup> As the *Saluka* tribunal held, "[f]or purposes of determining its jurisdiction, the Tribunal must look at the claims which are brought before it as they are pleaded and formulated by the relevant party."<sup>180</sup> Furthermore, as the annulment committee in *Vivendi v. Argentina* put it, "it is one thing to exercise contractual jurisdiction ... and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."<sup>181</sup>
- 3.25. Claimant's claims, as Claimant pleads them, arise exclusively under the Treaty. While it may be true that Claimant has contract claims arising under the 2012 ETIZ Agreement, it has not brought those claims before this Tribunal and the mere existence of that Agreement does not foreclose Claimant's right to bring claims under the Treaty.<sup>182</sup>
- 3.26. Claimant notes Respondent's stated intention to raise objections to this Tribunal's jurisdiction and for the avoidance of doubt, reserves its right to respond more fully to Respondent's jurisdictional objections if and when those objections are made out.

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<sup>178</sup> Response to NoA, ¶¶ 14,16.

<sup>179</sup> See [CLA-021](#), *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶¶ 185-186.

<sup>180</sup> [CLA-022](#), *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim, 7 May 2004, ¶ 35.

<sup>181</sup> [CLA-005](#), *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, partly annulled, [CLA-023](#), Decision on Annulment, 3 July 2002, ¶ 105. See also [CLA-024](#), *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017 ("*Tethyan v. Pakistan*, Decision"), ¶ 665-666.

<sup>182</sup> [CLA-025](#), *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 ("*Deutsche Bank v. Sri Lanka*"), ¶ 557.

## F. This Tribunal's Jurisdiction Does Not Extend to Counterclaims

- 3.27. Claimant notes that Respondent has indicated an intention to bring counterclaims against Claimant. Claimant will respond to those counterclaims if and when they are brought. For present purpose, Claimant reiterates that the only source of this Tribunal's jurisdiction is the Treaty. Article VII of the Treaty affords Claimant, and only Claimant, a right to bring claims under it: "Disputes... shall be notified in writing, including a detailed information, **by the investor**, to the recipient Party of the investment."<sup>183</sup> (bold emphasis added)

## 4. APPLICABLE LAW

- 4.1. It is well settled that "the applicable law in any claim for a breach of [a] treaty can be [] said to be the treaty itself specifically and international law generally."<sup>184</sup>
- 4.2. Thus, when considering the law applicable to treaty disputes such as those presently before this Tribunal, the *Addiko* tribunal recently summarized the role of international law and explained that general norms of international law apply even when there is no express language to that effect in the treaty:

In other words, the starting proposition for any treaty is that, by virtue of entering into that arrangement, its Contracting States have agreed that it shall be interpreted by reference not only to its terms (on which those States have expressly agreed), but also by reference to general principles of international law (on which those States have implicitly agreed). If the Contracting Parties wish to add other elements to the applicable law, they generally would do so through incorporation of an express provision to that effect, as the Netherlands and Slovakia for example did in Article 8(6) of their BIT. If the Contracting Parties do not wish to add other elements to the implicit applicable law arising from the VCLT, they do not need to include an express

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<sup>183</sup> **CLA-001**, Turkey-Ethiopia BIT, Art. VII.

<sup>184</sup> **CLA-026**, *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009, ¶ 146.

applicable law provision, although of course they may choose to do so for avoidance of doubt. The fact that they do not include any express clause does not, however, connote that the Contracting States had *no shared understanding at all* regarding the issue. It certainly does not connote that they had a *shared intention to depart* from the basic VCLT proposition that treaties are governed by their express terms and by reference to general principles of international law.<sup>185</sup>

- 4.3. Moreover, while municipal or domestic law may be relevant to the determination of a treaty dispute as a matter of fact, that law does not thereby become law applicable to the underlying treaty dispute.<sup>186</sup> As the *Bankswitch* tribunal held when considering the relationship between municipal and international law, “when a State party enters into a commercial contract with a foreign party, even in the case of a contract that names a domestic legal regime as the governing law, international law will apply to some aspects of the contract.”<sup>187</sup>
- 4.4. Therefore the Turkey-Ethiopia BIT and the rules of other treaties, including but not limited to the Denmark-Ethiopia BIT by virtue of the MFN clause of the Treaty and the general principles of international law form the law applicable to this dispute.

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<sup>185</sup> [CLA-027](#), *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, ¶ 257 (emphasis in original) (referring to the Vienna Convention on the Law of Treaties (“VCLT”).

<sup>186</sup> *Id.* ¶¶ 263-265 (citations omitted).

<sup>187</sup> [CLA-028](#), *Bankswitch Ghana Ltd. v. Republic of Ghana acting as the Government of Ghana*, PCA Case No. 2011-10, Award Save as to Costs, 11 April 2014, ¶ 11.64.

## **5. SUBSTANTIVE CLAIMS**

### **A. Respondent's Right to Regulate Does Not Preclude Its Liability Under the BIT**

- 5.1. Respondent, as a sovereign state, has a right to regulate activities within its borders and, in the specific instance of this case, to determine the appropriate use of State-owned land and water resources. However, where, as here, a State's exercise of those sovereign rights violates the international law obligations it owes to an investor, the State is liable *vis-à-vis* that investor. As the ADC tribunal recognized:

The Tribunal cannot accept the Respondent's position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.

The related point made by the Respondent that by investing in a host State, the investor assumes the "risk" associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable

expectation that they would receive fair treatment and just compensation and not otherwise.<sup>188</sup>

- 5.2. This remains true even where a State acts with the commendable goal of protecting its environment:

a State has a responsibility to preserve the environment and protect local populations [...]. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions.<sup>189</sup>

- 5.3. In this case, however noble Respondent's motive may have been, Respondent's conduct, as discussed below, violated the obligations it owed to Claimant as a matter of international law. Specifically, Ethiopia breached i) its duty not to expropriate Claimant's investment; ii) its duty to treat Akgun fairly and equitably; iii) its duty not to impair Claimant's use of its investment and iv) the specific obligations it owed to Claimant.

## **B. Respondent Violated Its Obligation Not to Expropriate Claimant's Investments**

### **(i) Respondent Has an Obligation Not to Expropriate Claimant's Investments**

- 5.4. Article IV of the Treaty provides:

1. Investments shall not be expropriated, nationalized or subject, **directly or indirectly**, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law

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<sup>188</sup> [CLA-029](#), *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ("ADC v. Hungary"), ¶¶ 423-424.

<sup>189</sup> [CLA-030](#), *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 ("Gold Reserve v. Venezuela"), ¶ 595.

and the general principles of treatment provided for in Article III of this Agreement.

2. Compensation shall be equivalent to the market value of the expropriated investment before the expropriatory action was taken or became known. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 Article V.<sup>190</sup> (emphasis added)

5.5. As follows from the clear wording of this provision, it encompasses both direct and indirect expropriation.

5.6. “Indirect expropriation” is widely understood as a State’s interference with an investment that deprives the investor of the use or enjoyment of its investment without a physical taking.<sup>191</sup>

5.7. It is also universally recognized that:

[E]xpropriation ... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use

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<sup>190</sup> **CLA-001**, Turkey-Ethiopia BIT, Art. IV.

<sup>191</sup> See **CLA-031**, UNCTAD Series on Issues in International Investment Agreements, II, Expropriation, United Nations Publication, 2012 (“UNCTAD on Expropriation”), p. 11; **CLA-032**, *Gemplus S.A et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (“*Gemplus v. Mexico*”), ¶ 8-23; **CLA-033**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (“*Metalclad v. Mexico*”), ¶ 103; **CLA-034**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (“*CME v. Czech Republic*”), ¶¶ 591, 604; **CLA-006**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (“*Tecmed v. Mexico*”), ¶¶ 114, 116; **CLA-035**, *AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 10.3.1 (“Expropriations (“or measures tantamount to expropriation”) include not only open deliberate and acknowledged takings of property (such as outright seizure or formal or obligatory transfer of title in favour of the Host State) but also covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected benefit of property even if not necessarily to the obvious benefit of the Host State.” (citation omitted)); **CLA-036**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (“*Crystallex v. Venezuela*”), ¶ 667 (“It is generally understood that a “direct” expropriation occurs where the investor’s investment is taken through formal transfer of title or outright seizure, whereas an “indirect” expropriation occurs where a state’s action or series of actions result in the investor being deprived of the enjoyment or benefit of its investment, although title to the property or the rights remains with the original owner.”); **CLA-024**, *Tethyan v. Pakistan*, Decision, ¶¶ 1326-1327.

of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.<sup>192</sup>

- 5.8. International investment tribunals consistently hold that a finding of indirect expropriation depends on the effect the contested measure has on the investor. The tribunal in *Archer Daniels v. Mexico* confirmed:

Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. There is a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure.<sup>193</sup>

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<sup>192</sup> [CLA-033](#), *Metalclad v. Mexico*, ¶ 103. See also [CLA-037](#), *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (“*PSEG v. Turkey*”), ¶ 278 (“... there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.”)

<sup>193</sup> [CLA-038](#), *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (“*ADM v. Mexico*”), ¶ 240. See also [CLA-006](#), *Tecmed v. Mexico*, ¶ 116 (stating that the intention behind the measure “is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.”); [CLA-025](#), *Deutsche Bank v. Sri Lanka*, ¶ 503 (“Many tribunals in other cases have tested governmental conduct in the context of indirect expropriation claims by reference to the effect of relevant acts, rather than the intention behind them. In general terms, a substantial deprivation of rights, for at least a meaningful period of time, is required.”); [CLA-005](#), *Vivendi v. Argentina*, Award, ¶ 7.5.20 (“While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state’s intent, is the critical factor.”); [CLA-039](#), *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (“*Azurix v. Argentina*, Award”), ¶¶ 309-310.

- 5.9. Moreover, “the decisive element in an indirect expropriation is the “loss of control” of a foreign investment, in the absence of any physical taking.”<sup>194</sup> The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized.<sup>195</sup> Ownership and enjoyment of the investment are “neutralized” where “a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment.”<sup>196</sup>
- 5.10. This deprivation can be caused by either actions or inactions.<sup>197</sup> A state is liable for expropriation regardless of whether the deprivation results from a single act or failure to act or by the cumulative effect of a series of actions inactions – i.e., a so-called creeping expropriation:

Creeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment.<sup>198</sup>

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<sup>194</sup> [CLA-040](#), *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (“*El Paso v. Argentina*”), ¶¶ 245; 245-248, 256 (“for an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of his investment.”). See also [CLA-033](#), *Metalclad v. Mexico*, ¶ 103; [CLA-024](#), *Tethyan v. Pakistan*, Decision, ¶¶ 1326-1328.

<sup>195</sup> [CLA-040](#), *El Paso v. Argentina*, ¶ 252; [CLA-024](#), *Tethyan v. Pakistan*, Decision, ¶ 1328.

<sup>196</sup> See, e.g., [CLA-007](#), *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (“*LG&E v. Argentina*”), ¶ 188; [CLA-041](#), *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 (“*UP v. Hungary*, Award”), ¶¶ 321-322.

<sup>197</sup> [CLA-034](#), *CME v. Czech Republic*, ¶ 605; [CLA-004](#), *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 186. See also [CLA-042](#), Draft Articles on Responsibility of States for Internationally Wrongful Acts, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, 2001 (“Draft Articles on States Responsibility”), Art. 2.

<sup>198</sup> [CLA-031](#), UNCTAD on Expropriation, at p. 11.

5.11. The Draft Articles on State Responsibility recognize creeping expropriation as a “breach consisting of a composite act.”<sup>199</sup>

5.12. As the *UP v. Hungary* tribunal explained the relevant determination is to analyze whether the measures at issue had the actual effect of depriving the investor of its investment:

Thus, any “measures” have to be considered, irrespective of whether they are legislative, administrative, or other measures undertaken by the State. What is relevant is whether such measures had the effect of dispossessing Claimants, directly or indirectly, of their investment. Therefore, the test is not which measure caused which effect, but whether the “measures” taken together as a package resulted in the dispossession.<sup>200</sup>

5.13. Respondent expropriated Claimant’s investment through a series of measures culminating in the final suspension of ETIZ in mid-2014. Taken together, these acts constitute an indirect and/or creeping expropriation of the Claimants’ investment or “measures of similar effects” within the meaning of Art. IV of the BIT. As a result of these measures, Claimant was deprived of the control, economic use and enjoyment of its investment. Furthermore, the measures taken by Respondent did not fulfil the requirements of Article IV of the Turkey-Ethiopia BIT, and accordingly violated these provisions as will be explained below.

## (ii) Respondent Expropriated Claimant’s Investment

### a. Claimant Was Deprived of Its Investments

5.14. Even where an agreement has not been formally terminated, an investor has been deprived of its rights in that investment for purpose of expropriation analysis where it has been deprived of the right of use of the subject of that

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<sup>199</sup> [CLA-042](#), Draft Articles on States Responsibility, Art. 15. See also [CLA-007](#), *LG&E v. Argentina*, ¶ 188; [CLA-006](#), *Tecmed v. Mexico*, ¶ 114; [CLA-036](#), *Crystallex v. Venezuela*, ¶ 667.

<sup>200</sup> [CLA-041](#), *UP v. Hungary*, Award, ¶ 331.

Agreement.<sup>201</sup> This is all the more true where the instrument of deprivation is the State's imposition of regulatory or other administrative hurdles that it knows the investor cannot overcome.<sup>202</sup>

- 5.15. Claimant has undeniably been deprived of its investments in ETIZ as a result of Respondent's refusal to allow Claimant to develop ETIZ on the allocated land and as required by the 2012 ETIZ Agreement. Under the express terms of the 2012 ETIZ Agreement, Akgun cannot use the allocated land for any purpose other than the development of ETIZ and cannot develop ETIZ on any other land. It is undisputed that Claimant has had no ability to use the allocated land for the agreed purpose since July 2014. As a result, its investment in ETIZ has been completely destroyed.
- 5.16. It is thus undisputable that Akgun's investment was taken by Respondent. The question thus becomes whether this taking was legally justified under applicable international law norms. Claimant submits that the answer to this question is "no" and that this case presents a clear case of unlawful expropriation.

#### **b. Respondent's Expropriation of Claimant's Investment Was Unlawful**

- 5.17. Article IV(1) of the BIT establishes the following criteria for a lawful expropriation: (i) "a public purpose;" (ii) "in a non-discriminatory manner;" (iii) "upon payment of prompt, adequate and effective compensation;" and (iv) "in accordance with due process of law and the general principles of treatment provided for in Article III of this Agreement." Indeed, violation of any one of these elements must result in finding of unlawful expropriation.<sup>203</sup>

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<sup>201</sup> [CLA-043](#), *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Award, 2 March 2015, ¶ 311.

<sup>202</sup> [CLA-041](#), *UP v. Hungary*, Award, ¶ 341 (finding expropriation where respondent state imposed requirements on the investor that were impossible to meet).

<sup>203</sup> [CLA-044](#), *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ("*Siag v. Egypt*"), ¶ 433. [CLA-036](#), *Crystallex v. Venezuela*, ¶¶ 716-717; [CLA-045](#), *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 ("*Pezold v. Zimbabwe*"), ¶ 496.

- 5.18. Even if one were to assume, for the sake of argument, that the expropriation of Claimant's investments was justified and non-discriminatory (which is denied), the taking of these investments would still constitute a violation of international law, given that it was not accompanied by any compensation, let alone the prompt, adequate, and effective compensation, to which Claimant is entitled under international law.<sup>204</sup> Therefore, in this counterfactual scenario, Respondent would nevertheless be in breach of its obligation, set out at Article IV of the BIT, to provide "prompt, adequate and effective compensation."
- 5.19. It is undisputed that Respondent has never paid any compensation to Akgun for the deprivation of Akgun's investment. Importantly, Respondent accepted Claimant's payment for the first 100ha of land and has never even reimbursed Akgun for it despite forbidding Akgun from using the and for which it accepted payment.
- 5.20. Moreover, as explained in further detail in the section setting out Respondent's breaches of its fair and equitable treatment obligations below, Ethiopia's treatment of Akgun and its investment was discriminatory, unreasonable and arbitrary.<sup>205</sup> Thus, not only did Ethiopia unlawfully expropriate Claimant's investment, it also failed to accord Akgun fair and equitable treatment for the reasons explained in the section immediately below.

### **C. Respondent Violated Its Obligation to Provide Fair and Equitable Treatment**

#### **(i) Respondent Has an Obligation to Provide Fair and Equitable Treatment**

- 5.21. Respondent has an obligation to provide fair and equitable treatment under the Treaty. Article II(2) of the Treaty states:

Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full

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<sup>204</sup> [CLA-036](#), *Crystallex v. Venezuela*, ¶¶ 716-717; [CLA-045](#), *Pezold v. Zimbabwe*, ¶¶ 496-497; [CLA-044](#), *Siag v. Egypt*, ¶¶ 433-435.

<sup>205</sup> *Infra* Section 5.C.

protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.<sup>206</sup>

- 5.22. The BIT is silent on what constitutes “fair and equitable treatment.” The *MTD* tribunal suggested that “[i]n their ordinary meaning, the terms ‘fair’ and ‘equitable’ [...] mean ‘just’, ‘evenhanded’, ‘unbiased’, ‘legitimate.’”<sup>207</sup>
- 5.23. Thus Article II(2) must be interpreted within the broader context of the Treaty which includes the other provisions of the Turkey-Ethiopia BIT and in particular its Preamble.<sup>208</sup> The ultimate purpose of the Treaty as agreed by the Contracting States in the Preamble is “to promote greater economic cooperation between [the Contracting States], particularly with respect to investment by investors of one Party in the territory of the other Party.”<sup>209</sup> In the Preamble, the Contracting States further agreed that their “agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Parties” and that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.”<sup>210</sup>
- 5.24. “Fair and equitable” must be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. With words such as “promote” and “stimulate” the text of the Turkey-Ethiopia BIT reflects the Contracting State’s positive attitude towards investment. Furthermore, the Contracting States expressly recognized the role that FET plays in maintaining “a stable framework for investment and maximum

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<sup>206</sup> **CLA-001**, Turkey-Ethiopia BIT, Art. II(2).

<sup>207</sup> **CLA-046**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (“*MTD v. Chile*”), ¶ 113.

<sup>208</sup> **CLA-047**, Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force on 27 January 1980), United Nations Treaty Series, vol. 1155, p. 331 at Art. 31(2).

<sup>209</sup> **CLA-001**, Turkey-Ethiopia BIT, Preamble.

<sup>210</sup> *Id.*

effective use of economic resources.” In the words of the *Saluka* tribunal, the FET standard can be interpreted to provide for treatment which,

if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor’s decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable.<sup>211</sup>

5.25. In a seminal decision,<sup>212</sup> the tribunal in *Tecmed v. Mexico* explained that the FET standard encompasses the following obligations:

... to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its

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<sup>211</sup> [CLA-048](#), *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (“*Saluka v. Czech Republic*, Partial Award”), ¶ 301.

<sup>212</sup> See, e.g., [CLA-046](#), *MTD v. Chile*, ¶¶ 114-115; [CLA-048](#), *Saluka v. Czech Republic*, Partial Award, ¶¶ 302, 307; [CLA-049](#), *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (“*Lemire v. Ukraine*, Decision”), ¶ 418; [CLA-007](#), *LG&E v. Argentina*, ¶ 127.

commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>213</sup>

5.26. Following the reasoning of *Tecmed*, the *Rumeli v. Kazakhstan* tribunal distilled the FET standard:

The parties rightly agree that the fair and equitable treatment standard encompasses *inter alia* the following concrete principles:

- the State must act in a transparent manner;
- the State is obliged to act in good faith;
- the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
- the State must respect procedural propriety and due process.

The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations.<sup>214</sup>

5.27. The tribunal in *Deutsche Bank v. Sri Lanka* echoed this reasoning when it summarized the contents of the FET obligation to include:

- protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment;

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<sup>213</sup> **CLA-006**, *Tecmed v. Mexico*, ¶ 154.

<sup>214</sup> **CLA-016**, *Rumeli v. Kazakhstan*, Award, ¶ 609.

-good faith conduct although bad faith on the part of the State is not required for its violation;

-conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary;

-conduct that does not offend judicial propriety, that complies with due process and the right to be heard.<sup>215</sup>

5.28. It is equally well-settled that a State may not rely on its right to regulate to excuse it from its FET obligations:

In answer to Canada's concerns about potential limits on the State's ability to regulate, this Tribunal does not **consider that the FET obligation, as interpreted in accordance with the terms of the BIT, improperly or unreasonably restricts the State from legislating and adapting its legal system to changing circumstances. In doing so, however, the State may not ignore the interests of an investor that relied on the State's earlier course of action.**<sup>216</sup> (emphasis added)

5.29. Further, a State may violate its FET obligations even if the conduct at issue was well-intentioned. Thus, a claimant need not prove that the State acted with "bad faith and malicious intent" to prevail on its FET claim.<sup>217</sup>

5.30. Rather, regardless of the nature or aim of State conduct, however noble it may or may not have been, a state violates its FET obligations if it fails to

i. respect the investor's legitimate expectations;<sup>218</sup>

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<sup>215</sup> [CLA-025](#), *Deutsche Bank v. Sri Lanka*, ¶ 420.

<sup>216</sup> [CLA-050](#), *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020 (footnotes omitted).

<sup>217</sup> [CLA-039](#), *Azurix v. Argentina*, Award, ¶ 372.

<sup>218</sup> See, e.g., [CLA-048](#), *Saluka v. Czech Republic*, Partial Award, ¶ 302; [CLA-036](#), *Crystallex v. Venezuela*, ¶ 546; [CLA-049](#), *Lemire v. Ukraine*, Decision, ¶ 264; [CLA-030](#), *Gold Reserve v. Venezuela*, ¶¶ 570-571; [CLA-040](#), *El Paso v. Argentina*, ¶ 348.

- ii. act consistently;<sup>219</sup>
- iii. provide a stable and predictable legal and business environment for the investment;<sup>220</sup>
- iv. act transparently,<sup>221</sup>
- v. refrain from arbitrary and discriminatory behaviour<sup>222</sup> and in particular to comply with the principles of due process in its administrative decision-making;<sup>223</sup>
- vi. act in good faith;<sup>224</sup> or
- vii. ensure that there is a reasonable relationship of proportionality between the impact of the measure on the investment and the aim sought by the measure.<sup>225</sup>

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<sup>219</sup> **CLA-006**, *Tecmed v. Mexico*, ¶ 154; **CLA-036**, *Crystallex v. Venezuela*, ¶ 579; **CLA-012**, *Garanti Koza v. Turkmenistan*, ¶¶ 381-383 (noting that when evaluating an FET violation focus should be put on the question of “whether “there has been “inconsistency of action between two arms of the same government vis-à-vis the same investor,” that is, has the government acted coherently and applied its policies consistently”). See also **CLA-051**, *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon v. Canada*, Award on Jurisdiction and Liability”), ¶ 602 (finding breach of FET where Respondent state failed to treat investor in a manner consistent with its own laws).

<sup>220</sup> **CLA-037**, *PSEG v. Turkey*, ¶¶ 253-254 (emphasizing that the States “need to ensure a stable and predictable business environment for investors to operate in”); **CLA-007**, *LG&E v. Argentina*, ¶¶ 125, 127, 131 (noting that “that the stability of the legal and business framework in the State party is an essential element in the [FET] standard” as well as an investor’s legitimate expectations). See also **CLA-052**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (“*Masdar Solar v. Spain*”), ¶ 484.

<sup>221</sup> **CLA-006**, *Tecmed v. Mexico*, ¶ 143; **CLA-007**, *LG&E v. Argentina*, ¶¶ 128, 131; **CLA-053**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017 (“*Deutsche Telekom v. India*”), ¶¶ 333-336; **CLA-036**, *Crystallex v. Venezuela*, ¶ 579; **CLA-030**, *Gold Reserve v. Venezuela*, ¶ 570 (“Fair and equitable treatment also requires that any regulation of an investment be done in a transparent manner”), ¶¶ 587, 591. See also **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶¶ 307, 309; **CLA-033**, *Metalclad v. Mexico*, ¶ 76.

<sup>222</sup> **CLA-006**, *Tecmed v. Mexico*, ¶ 154; **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶¶ 307, 309; **CLA-049**, *Lemire v. Ukraine*, Decision, ¶ 284; **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶ 420.

<sup>223</sup> **CLA-053**, *Deutsche Telekom v. India*, ¶¶ 333-336; **CLA-037**, *PSEG v. Turkey*, ¶¶ 246-249; **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 308; **CLA-049**, *Lemire v. Ukraine*, Decision, ¶ 284.

<sup>224</sup> **CLA-053**, *Deutsche Telekom v. India*, ¶¶ 333-336; **CLA-049**, *Lemire v. Ukraine*, Decision, ¶ 284; **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶ 420.

<sup>225</sup> **CLA-054**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 (“*SolEs Badajoz v. Spain*”), ¶¶ 326-328; **CLA-053**, *Deutsche Telekom v. India*, ¶¶ 333-336; **CLA-055**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v.*

5.31. A claimant need not show a breach of each of these elements to prevail on its FET claim.<sup>226</sup> However, where, as here, the evidence proves that Respondent did in fact breach each of the sub-standards of its FET obligation, Claimant respectfully submits that the Tribunal has no choice but to find that Respondent breached its obligation to afford Claimant fair and equitable treatment. Respondent's breach of each of these elements is discussed in turn below.

**(ii) Respondent Violated Its Obligation to Provide Fair and Equitable Treatment**

5.32. When assessing the State's breach of its FET obligations, "all of the facts and circumstances of the particular case must be considered."<sup>227</sup> Furthermore, "if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures."<sup>228</sup> Claimant submits that every measure discussed below, taken individually or collectively, rises to the level of an FET violation.

**a. Respondent Breached Claimant's Legitimate Expectations**

5.33. The duty of the host state to respect the investor's "legitimate expectations" lies at the core of the FET standard.<sup>229</sup> Tribunals consistently find that investors' expectations will be deemed frustrated if the host state unjustly

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*Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶¶ 403-404; [CLA-046](#), *MTD v. Chile*, ¶ 109. See also [CLA-006](#), *Tecmed v. Mexico*, ¶¶ 122, 149.

<sup>226</sup> [CLA-040](#), *El Paso v. Argentina*, ¶¶ 459, 515-518; [CLA-030](#), *Gold Reserve v. Venezuela*, ¶ 566.

<sup>227</sup> [CLA-030](#), *Gold Reserve v. Venezuela*, ¶ 566. See also [CLA-012](#), *Garanti Koza v. Turkmenistan*, ¶ 379.

<sup>228</sup> [CLA-030](#), *Gold Reserve v. Venezuela*, ¶ 566. See also [CLA-040](#), *El Paso v. Argentina*, ¶¶ 459, 516-518.

<sup>229</sup> See, e.g., [CLA-024](#), *Tethyan v. Pakistan*, Decision, ¶ 811 ("a dominant principle of the FET standard is the protection of the investor's legitimate, investment-backed expectations"). See also [CLA-040](#), *El Paso v. Argentina*, ¶ 348; [CLA-056](#), *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014 ("*Perenco v. Ecuador*, Decision"), ¶ 560.

altered the legal and business framework, including through inconsistent and incoherent actions of the State officials, and/or unjustly failed to meet its contractual undertakings upon which the investors relied in making their investments.<sup>230</sup>

- 5.34. As explained by the tribunal in *SolEs Badajoz GmbH v. Kingdom of Spain*, an investor's legitimate expectations can arise from the behavior and statements made by the State officials for the purpose of inducing investment by an investor.<sup>231</sup> Moreover, the State's intent to create an expectation is not relevant to the determination of whether it has breached an investor's legitimate expectation. As the *Novenergia* tribunal held: "[i]ntent is not needed. The relevant question is rather whether the statement or conduct *objectively* suffices to create legitimate expectations in the recipient."<sup>232</sup>
- 5.35. In keeping with this, the *MTD* tribunal held that the "[a]pproval of a Project in a location would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view."<sup>233</sup> In an analogy to the present case, the *MTD* tribunal further determined that it was unreasonable, and thus contrary to FET, for the respondent to have approved an investment via one authority, the FIC, when a separate authority later declared the investment to be contrary to its urban development policy and thus likely to be frustrated.<sup>234</sup>
- 5.36. In this case there can be no doubt that Ethiopia, through specific representations made by the Mol and the Oromia Regional State, created a legitimate expectation that Akgun would be able to use the land allocated to Akgun for the express purpose of developing ETIZ and that Ethiopia would

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<sup>230</sup> See, e.g., [CLA-025](#), *Deutsche Bank v. Sri Lanka*, ¶¶ 428, 523; [CLA-040](#), *El Paso v. Argentina*, ¶¶ 375-376; [CLA-057](#), *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010 ("*Frontier v. Czech Republic*"), ¶ 285; [CLA-004](#), *Eureko v. Poland*, ¶ 232; [CLA-024](#), *Tethyan v. Pakistan*, Decision ¶ 958; [CLA-056](#), *Perenco v. Ecuador*, Decision, ¶¶ 561-562.

<sup>231</sup> [CLA-054](#), *SolEs Badajoz v. Spain*, ¶ 313.

<sup>232</sup> [CLA-058](#), *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. 063/2015, Final Arbitral Award, 15 February 2018, ¶ 652 (emphasis in original).

<sup>233</sup> [CLA-046](#), *MTD v. Chile*, ¶ 163.

<sup>234</sup> *Id.* ¶¶ 163-166, 189.

provide governmental support to Akgun. Indeed, there is no doubt that explicit representations by a State, such as Ethiopia's commitments to support ETIZ as provided in the 2012 ETIZ Agreement, create specific expectations.

- 5.37. Similarly, there is no doubt that, in the context of this case, where Respondent recruited Claimant, negotiated with Claimant, entered into a series of agreements with Claimant and repeatedly encouraged Claimant through acts and statements at the highest levels of government, that Claimant's expectations were legitimate.<sup>235</sup> This is all the more true where the State not only approved a specific piece of land for the project, but itself identified the land, proposed the land to Claimant, accepted payment for the land and allocated the land to Claimant.<sup>236</sup>
- 5.38. Finally, there is equally no doubt that Respondent violated the expectations it had created when it withdrew both its support for ETIZ and prohibited Claimant from using the land for its agreed purpose — i.e., the development of ETIZ.

**b. Respondent Violated Its Obligation to Act Consistently and to Provide a Stable and Predictable Legal and Business Environment for the Investment**

- 5.39. The FET obligation includes an obligation to act consistently.<sup>237</sup>
- 5.40. In a case similar to the one at hand, *Metalclad*, the Mexican Government issued a number of federal construction and operating permits for the claimant's landfill project.<sup>238</sup> Metalclad was then assured that it had received all necessary permits to undertake the project.<sup>239</sup> It started construction of the landfill and "did this openly and continuously, and with the full knowledge of the federal, state, and municipal governments."<sup>240</sup> Yet, the municipal

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<sup>235</sup> *Supra* ¶¶ 2.31-2.46, 2.55-2.59, 2.85-2.88, 2.91-2.92 and sources cited therein.

<sup>236</sup> [CLA-046](#), *MTD v Chile*, ¶ 163 (holding that a state's approval of a project to be developed on a specific plot of land created a legitimate expectation that the project could be developed on that land).

<sup>237</sup> *See, e.g.*, [CLA-036](#), *Crystallex v. Venezuela*, ¶ 579.

<sup>238</sup> [CLA-033](#), *Metalclad v. Mexico*, ¶ 78.

<sup>239</sup> *Id.* ¶¶ 80, 85.

<sup>240</sup> *Id.* ¶ 87.

government issued a “Stop Work Order” on the grounds that Metalclad failed to obtain a necessary municipal construction permit.<sup>241</sup> Metalclad was then assured that it simply needed to make the application and the municipal construction permit would be “issued as a matter of course.”<sup>242</sup> Yet, Metalclad’s application was denied and the government forced the project to stop.<sup>243</sup> The tribunal held:

The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency [...].

Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit would be granted.<sup>244</sup>

5.41. The *Metalclad* tribunal further held:

Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly [...].<sup>245</sup>

5.42. The tribunal in *Gold Reserve v. Venezuela* found a violation of FET where for a number of years following the grant of the concession, the respondent raised

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.* ¶ 88.

<sup>243</sup> *Id.* ¶ 90.

<sup>244</sup> *Id.* ¶¶ 88-89.

<sup>245</sup> *Id.* ¶ 99.

no objections to the claimant's mining activities; yet, it relied on those activities as a reason to terminate the concessions.<sup>246</sup> The tribunal stated:

Claimant had therefore good reasons to rely on the continuing validity of its mining titles and rights and an expectation that it would obtain the required authorization to start the exploitation of the concessions. Claimant's reliance and expectations were reinforced by the absence of any warnings or formal notice from Respondent regarding alleged failures to fulfill its mining obligations, even if of an essential nature.<sup>247</sup>

- 5.43. International law thus requires that a state's decision-making in relation to an investor to be orderly, timely and free of serious administrative negligence. In keeping with this, separate government agencies must also act coherently in their positions regarding an investor *vis-à-vis* one another.<sup>248</sup>
- 5.44. In the present case Respondent's conduct lacked any coherence and belied a complete lack of inconsistency not only across different arms of the government, but also within the same branch. The level of inconsistency and governmental disorganization in this case amounts to an independent violation of the FET obligation.
- 5.45. Ethiopian authorities at all levels of government represented to Akgun that ETIZ was to be the centerpiece of the country's development plan and they used such assurances to induce Akgun to invest in Ethiopia.<sup>249</sup> The 2012 ETIZ Agreement itself highlights ETIZ's importance.<sup>250</sup> The project was well-publicized in Ethiopia and abroad.<sup>251</sup> High-level officials repeatedly reminded

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<sup>246</sup> [CLA-030](#), *Gold Reserve v. Venezuela*, ¶ 578.

<sup>247</sup> *Id.* ¶ 579.

<sup>248</sup> [CLA-012](#), *Garanti Koza v. Turkmenistan*, ¶¶ 381-383.

<sup>249</sup> *Supra* ¶¶ 2.32-2.34, 2.38-2.41 and sources cited therein. See also Yusuf Akgun Statement, ¶¶ 4.3-4.5, 4.10, 4.15; Yunus Akgun Statement, ¶¶ 3.3, 5.2.

<sup>250</sup> **C-008**, The 2010 ETIZ Agreement, Preamble; **C-009**, The 2012 ETIZ Agreement, Preamble.

<sup>251</sup> **C-003**, Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*; **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*; **C-004**, *Ethio-Turkish International Industrial City Catalogue for Potential Investors (resubmitted)* ("ETIZ Catalogue").

Akgun of its importance to the country.<sup>252</sup> Both parties recognized that ETIZ was planned to become the “Shining Star of Africa.”<sup>253</sup>

5.46. However, when ETIZ lost political favor, those same authorities in a classic instance of a government “blow[ing] hot and cold” withdrew any support for ETIZ in blatant conflict with their prior representations to the contrary.

5.47. For instance, the Mol at various times:

- Assured Akgun it would be allowed to develop ETIZ on the land that had been allocated;<sup>254</sup>
- Suspended ETIZ allegedly because the EIA process had not been completed;<sup>255</sup>
- Allowed ETIZ to resume even though the alleged reason for the suspension (EIA) was not resolved;<sup>256</sup>
- Again suspended ETIZ and informed Akgun that it would be moved due to the local municipality’s resource concerns;<sup>257</sup>
- Assured Akgun that ETIZ could and would be moved;<sup>258</sup> and
- Never amended the 2012 ETIZ Agreement or allocated suitable alternate land for ETIZ.<sup>259</sup>

5.48. Respondent’s executive branch treated Akgun with a similar lack of consistency, with the President and Office of the Prime Minister at times

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<sup>252</sup> See, e.g., **C-073**, Report on March Meeting with Dr. Arkebe Oqubay; **C-074**, Report on April Meeting with Dr. Arkebe Oqubay; **C-084**, Details of the First December 2014 Meeting with President Dr. Mulatu; **C-085**, Details of the December 2014 Meeting with Dr. Arkebe Oqubay; **C-086**, Details of the Second December 2014 Meeting with President Dr. Mulatu. See also Yunus Akgun Statement, ¶ 8.3.

<sup>253</sup> **C-003**, Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*; **C-004**, ETIZ Catalogue (resubmitted).

<sup>254</sup> *Supra* ¶¶ 2.35-2.36, 2.46-2.48, 2.86-2.87 and sources cited therein.

<sup>255</sup> *Supra* ¶ 2.78, and sources cited therein.

<sup>256</sup> *Supra* ¶¶ 2.88, 2.92 and sources cited therein.

<sup>257</sup> *Supra* ¶¶ 2.93-2.94 and sources cited therein.

<sup>258</sup> *Supra* ¶¶ 2.122-2.123 and sources cited therein.

<sup>259</sup> *Supra* ¶¶ 2.123-2.124 and sources cited therein.

intervening to support Akgun's efforts to resume construction and at times intervening to halt construction and insist that it must be moved.<sup>260</sup>

- 5.49. Not only were the various arms of Ethiopia's government internally inconsistent in their approach to Akgun and ETIZ, the various arms of the government also failed to act with any semblance of consistency. As discussed at length above<sup>261</sup> and need not be repeated again here, the local Addis Ababa municipal authorities, the President, the Office of the Prime Minister, the Mol and the MoEF each gave Akgun inconsistent and conflicting directives as to the hurdles Akgun needed to clear before its construction on ETIZ could resume, whether ETIZ needed to be relocated and whether ETIZ could move forward at all.

**c. Respondent Violated Its Obligation to Act Transparently, to Refrain from Arbitrary and Discriminatory Behavior in Its Administrative Decision-Making**

- 5.50. Respondent's conduct not only frustrated Claimant's legitimate expectations and wholly lacked any consistency, it also breached Respondent's obligation to act transparently, to refrain from arbitrary and discriminatory behavior and to comply with the principles of due process in its administrative decision-making.
- 5.51. A lack of transparency in decision-making often, as it does in the present case, goes hand in hand with arbitrary decision making. As the tribunal in *Crystallex v. Venezuela* concluded:

In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.<sup>262</sup>

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<sup>260</sup> *Supra* ¶¶ 2.85-2.87, 2.92-2.95, 2.113-2.118 and sources cited therein.

<sup>261</sup> *Supra* ¶¶ 2.67-2.94, 2.113-2.118 and sources cited therein.

<sup>262</sup> [CLA-036](#), *Crystallex v. Venezuela*, ¶ 578.

- 5.52. A lack transparency coupled with arbitrary behavior was also at issue in the *Deutsche Telekom v. India* case. In that case, as in the present case, the state failed to inform the investor of competing government interests that posed a threat to the investor's investment. The tribunal held that where India failed to engage in constructive talks with the investor aimed at an acceptable resolution and or amendment to their agreement it violated its FET obligation.<sup>263</sup> The tribunal went on to hold that where the State made a decision to the detriment of the investor that was not based on fact and was the result of a flawed process, the state violated its FET obligation.<sup>264</sup>
- 5.53. The *Deutsche Telekom* tribunal reasoned that it is "difficult to understand" why the investor was not informed of the allegedly competing military needs, which became the main reason for the annulment of the project: "If irreconcilable military needs had indeed arisen, as India argues, this incompatibility with the Agreement should have been communicated to Devas and DT."<sup>265</sup> The tribunal concluded that the lack of transparency in that case was "manifest" when the State led the investor to believe the contract was viable even though the State had reason to believe otherwise and that therefore India violated the FET standard.<sup>266</sup>
- 5.54. Indeed where the lack of transparency is such that the State leaves the investor without any clear indication of when, how or why its administrative decisions are made or, as in this case, fails to make any clear or consistent decisions whatsoever, it has breached its FET obligations. For example, in *Nordzucker v. Poland*, the tribunal found that Poland's failure to conclude the sales procedure with respect to the claimant's investment and the fact that it "left it hanging" amounted to a violation of the FET standard.<sup>267</sup>

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<sup>263</sup> [CLA-053](#), *Deutsche Telekom v. India*, ¶¶ 362-363, 376.

<sup>264</sup> *Id.* ¶ 363.

<sup>265</sup> [CLA-053](#), *Deutsche Telekom v. India*, ¶ 376.

<sup>266</sup> *Id.* ¶¶ 380, 387, 390.

<sup>267</sup> [CLA-059](#), *Nordzucker AG v. Republic of Poland*, UNCITRAL, Second Partial Award on Merits, 28 January 2009, ¶ 77.

- 5.55. The *PSEG Global v. Turkey* tribunal drew particular attention to the state's "evident negligence on the part of the administration in the handling of the negotiations with the Claimants" as well as inconsistencies in the administration's practice.<sup>268</sup> The *PSEG Global* tribunal also noted that the fact that the attitudes and policies of the administration kept changing contributed to the state's violation of its FET obligation and ultimately held that the State committed an "evident breach" of the FET standard.<sup>269</sup>
- 5.56. Ethiopia's treatment of Akgun lacked transparency. The MoI and executive members of government, in the form of the President and Prime Minister's office, gave Akgun conflicting instructions as to the importance and relevance of the EIA and whether and in what form ETIZ could proceed.<sup>270</sup>
- 5.57. Additionally, the events of this case occurred in the context Ethiopia's sweeping policy change regarding investment zones. Respondent undoubtedly recognized that the terms of the 2012 ETIZ Agreement did not conform to this new policy and would have put Akgun in a more advantageous position than other developers, but it did not disclose the existence of this policy change to Akgun until after it had decided to permanently suspend the development of ETIZ.
- 5.58. In sum, Respondent made a self-ascribed "mistake" in the land that it allocated for ETIZ due to a competing political interest and it regretted its error. However, that mistake and regret are not imputable to Akgun.

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<sup>268</sup> [CLA-037](#), *PSEG v. Turkey*, ¶ 246.

<sup>269</sup> *Id.* ¶¶ 254-256.

<sup>270</sup> *Supra* ¶¶ 2.67-2.118 and sources cited therein.

**d. Respondent Violated Its Obligation to Act in Good Faith**

- 5.59. International tribunals recognize that a finding of bad faith is not a necessary element of the FET standard violation,<sup>271</sup> but that a finding of bad faith will certainly amount to a FET violation.<sup>272</sup>
- 5.60. As stated in *Frontier Petroleum Services Ltd. v. The Czech Republic*, “[b]ad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created.”<sup>273</sup>
- 5.61. Respondent’s numerous failures to treat Akgun with even a minimum level of honesty, transparency or consistency also amount to a breach of Respondent’s obligation to act in good faith *vis-à-vis* Akgun.<sup>274</sup>

**e. Respondent Violated Its Obligation of Proportionality**

- 5.62. There must be an appropriate correlation between the State’s public policy objective and the measure adopted to achieve it. This has to do both with the nature of the measure and the way it is implemented.<sup>275</sup>
- 5.63. As the tribunal in *Gold Reserve v. Venezuela* observed: “the better course of action for addressing any growing concerns would have been to examine with Claimant how best to proceed to alleviate the same.”<sup>276</sup> The tribunal further acknowledged:

a State has a responsibility to preserve the environment and protect local populations [...]. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching

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<sup>271</sup> [CLA-025](#), *Deutsche Bank v. Sri Lanka*, ¶ 420; [CLA-007](#), *LG&E v. Argentina*, ¶ 129; [CLA-057](#), *Frontier v. Czech Republic*, ¶ 297.

<sup>272</sup> [CLA-007](#), *LG&E v. Argentina*, ¶ 129; [CLA-057](#), *Frontier v. Czech Republic*, ¶ 301; [CLA-039](#), *Azurix v. Argentina*, Award, ¶ 372; [CLA-044](#), *Siag v. Egypt*, ¶ 450.

<sup>273</sup> [CLA-057](#), *Frontier v. Czech Republic*, ¶ 300.

<sup>274</sup> *Supra* ¶¶ 2.74-2.124.

<sup>275</sup> [CLA-054](#), *SolEs Badajoz v. Spain*, ¶¶ 308, 316-317, 328; [CLA-039](#), *Azurix v. Argentina*, Award, ¶ 311; [CLA-006](#), *Tecmed v. Mexico*, ¶ 149.

<sup>276</sup> [CLA-030](#), *Gold Reserve v. Venezuela*, ¶ 598.

ways and means to satisfy in a balanced way both conditions.<sup>277</sup>

- 5.64. The tribunal in *SolEs Badajoz GmbH v. Kingdom of Spain* found measures taken by Spain to be disproportionate where “those measures suddenly and unexpectedly removed the essential features of the regime in place when Claimant invested.”<sup>278</sup>
- 5.65. It is undeniable that the allocation of suitable land for ETIZ was indeed an “essential feature” of the legal and business framework of Akgun’s investment. Consequently, Respondent’s actions permanently prevented the use by Akgun of its investment. This is not a balanced and proportional treatment taken by a State in response to a genuine regulatory need, but rather a violation of the Ethiopia’s FET obligation.
- 5.66. This is underscored by Respondent’s refusal to engage in any constructive discussions with Akgun, failure to propose any adequate alternative land and resultant failure to relocate ETIZ. Instead, Respondent retained the payments made by Akgun to Ethiopia, abandoned ETIZ and attempted to disclaim any responsibility for it. This left Akgun without the use of the land and consequently without any ability to pursue its investment and/or any compensation whatsoever. Such a result is in no way proportional to the investor’s legitimate interests and amounts to a breach of Ethiopia’s FET obligations.

#### **D. Respondent Breached Its Non-Impairment Obligation**

- 5.67. Art. II(2) of the BIT expressly provides that Ethiopia shall not in any way “impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.”<sup>279</sup>
- 5.68. Indeed, as stated by the *Saluka* tribunal, State actions which are discriminatory and lacking in good faith necessarily amount to the breach of

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<sup>277</sup> [CLA-030](#), *Gold Reserve v. Venezuela*, ¶ 595.

<sup>278</sup> [CLA-054](#), *SolEs Badajoz v. Spain*, ¶ 462.

<sup>279</sup> [CLA-001](#), BIT, Art. II(2).

the “non-impairment” standard in the BITs.<sup>280</sup> Furthermore, as noted by the tribunal in *LG&E v. Argentina*, “a State that fails to base its actions on reasoned judgment, and uses abusive arguments instead, would not ‘stimulate the flow of private capital;’” consequently such actions would be in breach of the state’s non-impairment obligation.<sup>281</sup> The State measures which are “unreasonable” also violate that obligation.<sup>282</sup>

- 5.69. Claimant submits that by expropriating Claimant’s investment as discussed in Section 5.B(ii) and its gross violation of its FET obligations as discussed in Section 5.C(ii) above, Respondent has also violated its specific obligation not to impair Akgun’s enjoyment of its investment.

## **E. Respondent Breached Its Umbrella Clause Obligations**

### **(i) The Umbrella Clause Obligation**

- 5.70. The BIT between Ethiopia and Denmark includes an umbrella clause at Article 2(3). Ethiopia’s obligations under the clause extend to Claimant by virtue of the MFN provisions in the Turkey-Ethiopia BIT.<sup>283</sup> The umbrella clause reads:

Each Contracting Party shall observe any commitment it may have entered in to with regard to investments of investors of the other Contracting Party.<sup>284</sup>

- 5.71. As the *Garanti Koza* tribunal explains:

Such treaty provisions are commonly referred to as “umbrella clauses,” because they bring contractual and other commitments under the protective umbrella of a bi-lateral investment treaty.<sup>285</sup>

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<sup>280</sup> [CLA-048](#), *Saluka v. Czech Republic*, Partial Award, ¶¶ 465-467.

<sup>281</sup> [CLA-007](#), *LG&E v. Argentina*, ¶ 158.

<sup>282</sup> [CLA-044](#), *Siag v. Egypt*, ¶¶ 459-460.

<sup>283</sup> *Supra* Section 3.D.

<sup>284</sup> [CLA-003](#), Denmark-Ethiopia BIT, Art. 2(3).

<sup>285</sup> [CLA-012](#), *Garanti Koza v. Turkmenistan*, ¶ 328 (internal citation omitted).

5.72. The purpose of such clauses is well-accepted:

Stated in general terms the purpose of such clauses is to ensure that the parties to the treaty in question will respect specific undertakings made towards nationals of each other.<sup>286</sup>

5.73. Article 2(3) uses mandatory language and is broadly written. By using the phrase “shall observe” it imposes a mandatory duty on Ethiopia that cannot be escaped.<sup>287</sup> Further, “Any” obligations is capacious; it means not only obligations of a certain type, but “any” - that is to say, all...”<sup>288</sup>

5.74. The BIVAC tribunal similarly found when interpreting the phrase “any obligation:”

The words ‘any obligation’ are all encompassing. They are not limited to international obligations, or non-contractual obligations, so that they appear without apparent limitation with respect to commitments that impose legal obligations. On a plain meaning they are undoubtedly capable of being read to include a contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, whereby

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<sup>286</sup> [CLA-060](#), Kaj Hober, STATE RESPONSIBILITY AND ATTRIBUTION IN THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, edited by Peter Muchlinski, Federico Ortino and Christoph Schreuer, Oxford University Press, p. 575.

<sup>287</sup> [CLA-004](#), *Eureko v. Poland*, ¶¶ 244-259 (providing historical summary of the jurisprudence surrounding the interpretation of umbrella clauses); *id.* ¶ 246 (“The plain meaning - the “ordinary meaning” -- of a provision prescribing that a State “shall observe any obligations it may have entered into” with regard to certain foreign investments is not obscure. The phrase, “shall observe” is imperative and categorical. “Any” obligations is capacious; it means not only obligations of a certain type, but “any” - that is to say, all - obligations entered into with regard to investments of investors of the other Contracting Party.”); [CLA-061](#), *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 60 (observing that an umbrella clause with similar language to that in the Denmark-Ethiopia BIT “clearly falls into the category of the most general and direct formulations tending to an assimilation of contractual obligations to treaty ones; not only does it use the term ‘shall observe’ but it refers in the most general terms to ‘any’ obligations that either Party may have entered into ‘with regard to investments.’”)

<sup>288</sup> [CLA-004](#), *Eureko v. Poland*, ¶ 246. See also [CLA-012](#), *Garanti Koza v. Turkmenistan*, ¶ 329.

the alleged breaches of the Ministry are attributable to the State.’<sup>289</sup>

- 5.75. The *BIVAC* tribunal goes on to hold that the umbrella clause “imports” or elevates all of the obligations of a contract between an investor and a state into the ambit of the BIT such that a breach of a protected obligation becomes a breach of the substantive obligations of the treaty:

For these reasons, we conclude that Article 3(4) of the BIT does have the effect for which *BIVAC* argues, namely that it gives the Tribunal jurisdiction over a claim that arises from or is produced directly in relation to the Contract. This is not, however, the end of the matter. Assuming that Article 3(4) does import the obligations under the Contract into the BIT, giving this Tribunal jurisdiction to interpret and apply the Contract as such, then it must have imported into the BIT all of the obligations owed by Paraguay to *BIVAC* under the Contract.<sup>290</sup>

- 5.76. Indeed, the umbrella clause in the Ethiopia-Denmark BIT, obligates Ethiopia to observe *all commitments* it has entered into *vis-à-vis* specific investments it has entered into with investors such as Akgun. Therefore, Ethiopia’s breaches of commitments owed to Akgun in the 2012 ETIZ Agreement are breaches of the Treaty.

## **(ii) Respondent Breached Its Umbrella Clause Obligations**

- 5.77. Akgun must first show that Ethiopia owes an obligation to it with regard to a “specific investment.” Given the facts of this case, this is easily done.
- 5.78. Ethiopia entered into specific contractual commitments with Akgun that are at issue in this arbitration. Ethiopia agreed via the 2012 ETIZ Agreement to, among other things, grant Akgun the right of use of the specific plot of land

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<sup>289</sup> [CLA-062](#), *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 141.

<sup>290</sup> *Id.* ¶ 142.

identified therein for the express purpose of developing ETIZ.<sup>291</sup> It also agreed to provide support to Akgun for ETIZ.<sup>292</sup>

5.79. It is undeniable that while Ethiopia entered into the 2012 ETIZ Agreement, encouraged Akgun's investment in its performance and accepted Akgun's payment for the first 100ha of land, it did not uphold its end of the bargain. Rather, Ethiopia breached its fundamental obligation under the 2012 Agreement – to allow Akgun to use the site allocated for the development of ETIZ.

5.80. Ethiopia's breach of the 2012 ETIZ Agreement is not limited to its failure to allow Akgun the 80 year right of use for the ETIZ site for the express purposes of developing ETIZ.<sup>293</sup> Indeed it breached multiple obligations it owed under the terms of that agreement. For example, Respondent breached the following provisions of the 2012 ETIZ Agreement:

- The Ministry undertakes to facilitate possible supports of all governmental organs of various levels, during the construction, development and operation of the IZ.<sup>294</sup>
- The GOE undertakes that there shall not be any expropriation except in conformity with the relevant laws; in connection with the Land use right, Parcels, plants, enterprises and/or factories to be established over the Land.<sup>295</sup>
- For the purpose of ensuring the realization of the Project in full, the GoE hereby undertakes to provide adequate energy power including energy lines up to red line of the Project at its own expenses and that the IZ will not suffer undue power interruption.<sup>296</sup>

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<sup>291</sup> **C-009**, The 2012 ETIZ Agreement, Arts. 3-5.

<sup>292</sup> *Id.* Arts. 3, 11.

<sup>293</sup> *Id.* Arts. 3, 5, 7.

<sup>294</sup> *Id.* Art. 11(1).

<sup>295</sup> *Id.* Art. 11(2).

<sup>296</sup> *Id.* Art. 11(8).

- The GOE undertakes to bring telecommunication up to the red line of the project at its own expenses.<sup>297</sup>
- In the case where the Project is suspended or stopped or the Land is returned to the Ministry due to third persons, legal entities or civil society organizations and similar external factors without any default which is attributable to the Developer, any and all direct and indirect losses of the Developer shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the BIT.<sup>298</sup>
- If the investment made within the scope of the Project is stopped or suspended by a court order or administrative decision without any default which is attributable to the Developer, any and all direct and indirect losses of the Developer shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the BIT.<sup>299</sup>

5.81. It is equally undeniable, that Ethiopia's breaches of those commitments were conducted by state actors, namely, the MoI and the Office of the Prime Minister. Similarly, the MoI and the Office of the Prime Minister breached the commitments owed to Akgun via state, not commercial acts, namely via a political decision to suspend ETIZ.

5.82. It is thus clear that Ethiopia flagrantly breached the obligations it owed to Akgun under the Turkey-Ethiopia BIT and that it must now be held accountable by this Tribunal. Moreover, as explained in Section 6 below, there is similarly no doubt that Respondent's actions caused significant harm to Claimant for which it must now be required to compensate Claimant.

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<sup>297</sup> *Id.* Art. 11(9).

<sup>298</sup> *Id.* Art. 11(10).

<sup>299</sup> *Id.* Art. 11(11).

## 6. QUANTUM

### A. Standard of Compensation

- 6.1. The BIT does not provide guidance with respect to the calculation of compensation due to Claimant; it only determines compensation in case of lawful expropriation. Arbitral tribunals in investment treaty arbitrations have held that the standard of compensation for the violations of the FET obligation, umbrella clause and unlawful expropriation is different from that of lawful expropriation.<sup>300</sup> It is well-established that compensation in those cases must be determined in accordance with the general principles of customary international law.
- 6.2. The customary international law standard of compensation for illegal international acts was first set out in PCIJ's decision in the *Factory at Chorzów* case:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and the situation which would, in all probability, have existed if that act had not been committed.<sup>301</sup>

- 6.3. The application of the customary international law standard of compensation, or the full reparation standard, requires that the investor be put in the position he would have been but for the wrongful act committed by the host state.
- 6.4. The principle of full reparation is also reflected in Art. 31 of the ILC Articles on State Responsibility.<sup>302</sup> According to the ILC Articles, compensable injury includes “any damage, whether material or moral, caused by the

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<sup>300</sup> [CLA-029](#), *ADC v. Hungary*, ¶ 483; [CLA-005](#), *Vivendi v. Argentina*, Award, ¶¶ 8.2.3-8.2.5.

<sup>301</sup> [CLA-063](#), *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, 13 September 1928, PCIJ Rep. Series A. – No. 17 (“*Chorzów*”), p. 47.

<sup>302</sup> [CLA-042](#), Draft Articles on States Responsibility, Art. 31(1) (“The Responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”).

internationally wrongful act.”<sup>303</sup> A State responsible for the internationally wrongful act must make full reparation for the injury in the form of restitution, compensation and/or satisfaction, either separately or jointly.<sup>304</sup> In the case of compensation, such compensation shall cover any financially assessable damage, including any possible lost profits.<sup>305</sup>

- 6.5. The overwhelming majority of international tribunals have also recognized that the damages resulting from a host states’ illegal conduct should be compensated based on the customary international law standard of full reparation as articulated in the *Factory at Chorzów* case and the ILC Articles on State Responsibility.<sup>306</sup>

## **B. Valuation Date**

- 6.6. BITs do not generally provide for a date at which the investment must be valued in the event of unlawful expropriation or other BIT breaches. Arbitral tribunals have considered that, in cases of creeping expropriation, like the case at hand, the date of expropriation is not necessarily the date of the first or of the last expropriatory event. It can be any point in time within that range when the owner has been irreversibly deprived of its property.<sup>307</sup> The exact date on which this moment is deemed to have occurred is left to the discretion of the arbitral tribunal, which is entrusted to make a case-by-case assessment in this regard.

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<sup>303</sup> *Id.* Art. 31(2).

<sup>304</sup> *Id.* Art. 34.

<sup>305</sup> *Id.* Art. 36.

<sup>306</sup> See, e.g., [CLA-029](#), *ADC v. Hungary*, ¶ 483; [CLA-038](#), *ADM v. Mexico*, ¶ 116; [CLA-064](#), *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (“*Burlington v. Ecuador*”), ¶¶ 160, 177; [CLA-052](#), *Masdar Solar v. Spain*, ¶¶ 548-550. See also [CLA-065](#), THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (3<sup>rd</sup> ed., Law Business Research, 2018) (“GAR GUIDE ON DAMAGES”), at 88 (noting that the *Chorzów* standard has become “the primary rule for compensation under international law”).

<sup>307</sup> [CLA-066](#), *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (“*Santa Elena v. Costa Rica*”), ¶ 78 (“The expropriated property is to be evaluated as of the date on which the governmental “interference” has deprived the owner of his rights or has made those rights practically useless.”); [CLA-039](#), *Azurix v. Argentina*, Award, ¶ 417.

- 6.7. In the present case, Claimant submits that the date of expropriation shall be 24 June 2014, the date on which the Respondent permanently suspended ETIZ.<sup>308</sup> Although Respondent's violations began prior to that date and continued after that date, it was as of 24 June 2014 (the "Suspension Date") that Claimant had lost its control over the investment and thus had been effectively deprived of it.
- 6.8. Based on the foregoing, in particular the State's obligation to make full reparation for all injuries caused, Claimant has instructed, on the basis of these principles, its valuation expert, A&M, to assess the value of ETIZ as at 24 June 2014, namely the Suspension Date.<sup>309</sup>

### **C. Lost Profits**

#### **(i) Lost Profits Are Recoverable as Part of the Reparation Standard**

- 6.9. As discussed above, the full reparation standard is intended to put the injured party in the position in which it would have been, but for the wrongful act. To achieve that aim, international tribunals enjoy a wide margin of discretion as to which valuation method they adopt to quantify the compensation due to the injured party.<sup>310</sup>
- 6.10. Article 36(2) of the ILC Articles on State Responsibility provides that "compensation shall cover any, financially assessable damage including loss of profits insofar as it is established."<sup>311</sup> This provision indicates that the injured

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<sup>308</sup> **C-016**, Suspension Letter.

<sup>309</sup> A&M Report, ¶ 59.

<sup>310</sup> See, e.g., **CLA-067**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee, 25 March 2010 ("*Rumeli v. Kazakhstan*, Decision of the *Ad Hoc* Committee"), ¶ 146; **CLA-068**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 ("*Tethyan v. Pakistan*, Award"), ¶ 310; **CLA-036**, *Crystallex v. Venezuela*, ¶ 886.

<sup>311</sup> **CLA-042**, Draft Articles on States Responsibility, Art. 36(2).

party must be entitled to recover both losses incurred as well as profits of which it was deprived because of the breach.<sup>312</sup>

- 6.11. It is well-settled that lost profits should be established with reasonable probability. Notwithstanding this, it should be remembered that calculation of lost profits naturally involves approximation:

[I]t is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.<sup>313</sup>

- 6.12. As Prof. Schreuer notes, “[t]he calculation of lost profits always has a speculative element.”<sup>314</sup>

- 6.13. At the same time, arbitral tribunals recognize that “[d]amages can very well be calculated on the basis of estimates as long as the underlying assumptions can be rationally justified.”<sup>315</sup> Accordingly, lost profits shall be awarded as long as they are “probable or reasonably anticipated and not merely possible.”<sup>316</sup>

- 6.14. The tribunal in *Lemire v. Ukraine* explained it in the following terms:

Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.<sup>317</sup>

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<sup>312</sup> *Id.* See also [CLA-031](#), UNCTAD on Expropriation, p. 114.

<sup>313</sup> [CLA-005](#), *Vivendi v. Argentina*, Award, 8.3.16.

<sup>314</sup> [CLA-067](#), *Rumeli Telekom and Telsim v. Kazakhstan*, Decision of the Ad Hoc Committee, ¶ 139 citing Schreuer et al *The ICSID Convention: A Commentary* (2 ed, 2009) 1012-3 (citations omitted).

<sup>315</sup> [CLA-052](#), *Masdar Solar v. Spain*, ¶ 585. See also [CLA-036](#), *Crystallex v. Venezuela*, ¶¶ 874-875.

<sup>316</sup> [CLA-038](#), *ADM v. Mexico*, ¶ 285. See also [CLA-068](#), *Tethyan v. Pakistan*, Award, ¶ 298.

<sup>317</sup> [CLA-069](#), *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (“*Lemire v. Ukraine*, Award”), ¶ 246.

6.15. In valuing the compensation due to Claimant, Claimant's quantum expert, A&M, used the discounted cash flow ("DCF") method, which is widely considered to be the preferred method of determining compensation in expropriation cases.<sup>318</sup> As the *Masdar Solar* tribunal has put it, "the DCF valuation method is presumptively appropriate, absent persuasive reasons making it inappropriate in particular cases."<sup>319</sup>

6.16. Under the DCF method:

Receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value.<sup>320</sup>

6.17. In other words, as Claimant's expert, A&M, summarizes it:

The DCF Method is a commonly adopted valuation methodology based on the fundamental financial principle that the value of an investment is equal to the future cash flows expected to be produced by the investment discounted to present value at an appropriate discount rate reflecting the risks of the investor achieving those future expected cash flows.<sup>321</sup>

6.18. Having compared the DCF method to other available valuation methods in light of the "specificity of the expected Project cash flows and the lack of comparable data to allow for an assessment under the market approach,"

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<sup>318</sup> A&M Report, ¶ 63.

<sup>319</sup> [CLA-052](#), *Masdar Solar v. Spain*, ¶ 575.

<sup>320</sup> [CLA-031](#), UNCTAD on Expropriation, p. 118, Box 13 (internal citation omitted). See also A&M Report, ¶¶ 66-67.

<sup>321</sup> A&M Report, ¶ 66.

A&M opines that the DCF method is the most appropriate method to evaluate the loss of Claimant's Investment in Ethiopia under the standard of full reparation.<sup>322</sup>

**(ii) Lost Profits Can be Awarded for Investments That Were Interrupted at an Early Stage**

- 6.19. In order to assess the reliability and the certainty of the data used for future projections, arbitral tribunals often rely on companies' historical performance and their qualification as "going concerns."<sup>323</sup> This practice may lead to the misconception that the DCF method only applies to projects that have a record of proven profitability. Yet, this is not true.
- 6.20. Arbitral tribunals have indeed accepted the application of the DCF method even when a project has not started operations, when the data used for projections of future income can be established with sufficient certainty. In fact, "[d]enying lost profits simply because the injured business is new would leave the injured claimant less than whole and would fail to achieve the goal of full compensation."<sup>324</sup> Disallowing the recovery of lost profits, including through the DCF method, by the claimants whose business was at an early stage at the time of the wrongful act would also "result in a windfall to the wrongdoer and could even provide an incentive for a party to breach its contractual obligations."<sup>325</sup>
- 6.21. As set forth by the tribunal in *Micula v. Romania*:
- [B]efore they are entitled to request a more lenient application of the standard of proof, the Claimants must first prove that they would have actually suffered lost profits, i.e., that they have been deprived of profits that would have actually been earned. In the Tribunal's view, this requires proving **(i) that the Claimants were engaged in a profit-**

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<sup>322</sup> *Id.* ¶¶ 63-75.

<sup>323</sup> See, e.g., [CLA-052](#), *Masdar Solar v. Spain*, ¶ 582.

<sup>324</sup> [CLA-070](#), JOHN Y. GOTANDA, RECOVERING LOST PROFITS IN INTERNATIONAL DISPUTES / 36 Geo. J. Int'l L. 61, 2004-2005, at p. 101.

<sup>325</sup> *Id.* p. 102.

making activity (or, at the very least, that there is sufficient certainty that they had engaged or would have engaged in a profit-making activity but for the revocation of the incentives), and (ii) that that activity would have indeed been profitable (at the very least, that such probability was probable).

In the Tribunal's view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability. But it places the emphasis on the word 'usually.' **Depending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but for the international wrong.** This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits or where, as here, there is a track record of similar sales. This must be assessed on a case by case basis, in light of all the factual circumstances of the case.<sup>326</sup>

- 6.22. A number of tribunals have followed this approach and awarded loss of profits, including on the basis of the DCF method, even for the projects which were at their infancy.
- 6.23. For example, this was the case in *Crystallex v. Venezuela*. The dispute in that case arose out of certain measures taken by Venezuela which affected the claimant's investment in the undeveloped gold deposits area called "Las Cristinas."
- 6.24. Crystallex executed a mine operating agreement for the development of Las Cristinas with a state-run company, CVG, under a concession given to CVG by the Ministry of Mines.<sup>327</sup> After the execution of the agreement, the claimant prepared a feasibility study to show that the project would be financially sound

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<sup>326</sup> [CLA-071](#), *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 1009-1010 (underline in original, bold added).

<sup>327</sup> [CLA-036](#), *Crystallex v. Venezuela*, ¶¶ 15-18.

and the study was approved by the respondent.<sup>328</sup> Crystallex also prepared and submitted the EIA study to be approved by the Ministry of Environment.<sup>329</sup> Yet, the Ministry of Environment denied the request for a permit for various reasons, which included environmental concerns.<sup>330</sup> Subsequently, CVG terminated the agreement and the Las Cristinas gold deposit was nationalized by the state.<sup>331</sup>

- 6.25. By the time of the agreement's termination, Crystallex had not yet started operating the mine and therefore was not "a going concern" which had a proven record of profitability. However, this was not a problem for the tribunal when awarding lost profits. The *Crystallex* tribunal stated:

[O]nce the *fact of* future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty. In other words, the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or *would have engaged* in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.<sup>332</sup>

- 6.26. In that case, the tribunal established that, notwithstanding the absence of the proven record of profitability, had the claimant been allowed to operate, it would have engaged in a profitmaking activity and that such activity would have been profitable.<sup>333</sup>
- 6.27. The tribunal also noted that "once the fact of damage has been established, a claimant should not be required to prove its exact *quantification* with the same

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<sup>328</sup> *Id.* ¶¶ 23-32.

<sup>329</sup> *Id.* ¶¶ 33-35.

<sup>330</sup> *Id.* ¶ 44.

<sup>331</sup> *Id.* ¶¶ 59-63.

<sup>332</sup> *Id.* [CLA-036](#), *Crystallex v. Venezuela*, ¶ 875 (emphasis in original).

<sup>333</sup> [CLA-036](#), *Crystallex v. Venezuela*, ¶¶ 877-880.

degree of certainty”<sup>334</sup> and that “[a]rbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself.”<sup>335</sup> Indeed, the tribunal pointed out that such approach must be taken particularly in those cases where, like in the case at hand, a possible uncertainty in determining the damage is the result of the other party’s wrongdoing.<sup>336</sup>

- 6.28. In another case, *ADC v. Hungary*, the investor was awarded rights to construct, renovate and participate in the operation of two airport terminals in Hungary. The State terminated the 12-year contract after only two years, thereby expropriating the contract rights. The tribunal found that the expropriation was unlawful and, notwithstanding early termination of the agreement, ruled that the value of the investment should be calculated through the use of the DCF method as of the date of the award to restore the claimant to the position it would have been in by accounting for increases in value of the investment from the date of the expropriation.<sup>337</sup>
- 6.29. The tribunal in *Vivendi v. Argentina*, although it did not award lost profits on the facts of that case, was also supportive of the idea that a claimant which cannot rely on a record of demonstrated profitability may still be awarded lost profits. The tribunal observed:

In the Tribunal’s view, the likelihood of lost profits must be sufficiently established by Claimants in order to be the basis of compensable damages. The Tribunal also recognises that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with *sufficient* certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been

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<sup>334</sup> *Id.* ¶ 868 (emphasis in original).

<sup>335</sup> *Id.* ¶ 871.

<sup>336</sup> *Id.* See also [CLA-072](#), *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (“*SPP v. Egypt*”), ¶ 215; [CLA-006](#), *Tecmed v. Mexico*, ¶ 190.

<sup>337</sup> [CLA-029](#), *ADC v. Hungary*, ¶ 502.

profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.<sup>338</sup>

- 6.30. In *Vivendi*, the tribunal found that the claimants faced significant challenges and eventually concluded that they had failed to establish with a sufficient degree of certainty that the concession would have been profitable.<sup>339</sup>
- 6.31. Most recently, in *Tethyan v. Pakistan*, the tribunal conceded that the absence of a proven record of profitability shall not be a hurdle to awarding lost profits, particularly through the application of the DCF.
- 6.32. Tethyan acquired its investment in Pakistan in 2006, when it took over the rights to an exploration license at the Reko Diq site of the Pakistani province of Balochistan.<sup>340</sup> It began exploring the area and discovered what it described as one of the world's largest undeveloped copper and gold deposits.<sup>341</sup> However, in 2011, Balochistani authorities refused to permit Tethyan to convert its exploration license into a mining license to be able to commence mining operations at the site and the project stalled.<sup>342</sup> The claimant never started operating the mine. In fact, at the time of the breach it had not even signed the mineral agreement and/or received the mineral license.<sup>343</sup>
- 6.33. The tribunal observed that in deciding whether the calculation of lost profits through a DCF method is appropriate for a project which has not yet become operational, it must first establish whether, based on the available evidence, the project would have become operational and profitable in the absence of the respondent's breaches.<sup>344</sup> Secondly, the tribunal must establish whether

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<sup>338</sup> **CLA-005**, *Vivendi v. Argentina*, Award, ¶ 8.3.4 (emphasis in original).

<sup>339</sup> *Id.* ¶¶ 8.3.5-8.3.10.

<sup>340</sup> **CLA-024**, *Tethyan v. Pakistan*, Decision, ¶¶ 217-222, 350-357.

<sup>341</sup> *Id.* ¶¶ 357, 390.

<sup>342</sup> *Id.* ¶ 513.

<sup>343</sup> **CLA-024**, *Tethyan v. Pakistan*, Decision, ¶ 513.

<sup>344</sup> *Id.* ¶ 330.

it can determine, “with reasonable confidence,” the amount of the lost profits based on the inputs submitted by the parties and their experts.<sup>345</sup>

- 6.34. On the facts of the case, the tribunal found that the claimant’s project would indeed have become operational and profitable but for the respondent’s illegal conduct, and that the inputs provided by the parties did not entail any “fundamental uncertainties” in relation to the project and that ultimately the tribunal was provided “with a reasonable basis to determine the future cash flows of Claimant’s investment with a reasonable amount of confidence.”<sup>346</sup>
- 6.35. In sum, the foregoing review of the available case law suggests that the award of lost profits, including those calculated on the basis of the DCF method, is appropriate for the newly established projects which have not yet become operational as long as claimants can demonstrate that they were engaged or would have engaged in a profit-making activity but for the breach and that that activity would have been profitable.

**(iii) Claimant is Entitled to Lost Profits Computed through the DCF Method**

- 6.36. The compensation of loss of profits is particularly warranted in this case, since the 2012 ETIZ Agreement expressly provides that in case the project is suspended or stopped for no fault of the developer, the latter must be entitled to compensation of “any and all direct and indirect losses.”<sup>347</sup> The term “indirect losses” conventionally encompasses lost profits.
- 6.37. To properly value Akgun’s loss of profits, the Tribunal must assume a counterfactual scenario in which Ethiopia did not suspend the project and had complied with its own obligations in the 2012 ETIZ Agreement.<sup>348</sup> In this scenario, it is highly probable, or “reasonably certain,”<sup>349</sup> that ETIZ would have

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.* ¶¶ 334; 331-335.

<sup>347</sup> **C-009**, The 2012 ETIZ Agreement, Art. 11(10).

<sup>348</sup> A&M Report, ¶¶ 76-78.

<sup>349</sup> A&M Report, ¶¶ 79-83.

become a major industrial zone in Africa attracting investors from all over the world, and that it would have been a profitable investment for Akgun. As A&M explains in its report, this is the case for at least three reasons:

- i. Claimant is a highly successful developer with an established track record of developing and operating a similar industrial development in Turkey since 1984,<sup>350</sup>
- ii. There was a high demand from both Turkish and international industrialists for a development such as ETIZ,<sup>351</sup> and
- iii. ETIZ had a high probability of financial feasibility given the essentially self-funded nature of Claimant's business model, which was for the industrialists to provide the capital for Claimant to develop and build both the infrastructure and superstructure (factories) for each industrialist after a contract was signed and funds were received, which was to cover both Akgun's underlying costs and provide a constructor's profit.<sup>352</sup>

6.38. First and foremost, Akgun had extensive experience in developing industrial zones and the Ikitelli industrial zone in Istanbul is an example of that success.<sup>353</sup> Akgun possessed the requisite know-how, financial and human resources as well as managerial skills to successfully develop the project as envisaged in the 2012 ETIZ Agreement and expand it further beyond that agreement. If Akgun did not possess such experience and skill, Ethiopia would not have recruited Akgun to develop ETIZ in Ethiopia in the first place or, following its review of the EITZ feasibility study and designs, entered into the 2012 ETIZ Agreement.<sup>354</sup>

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<sup>350</sup> A&M Report, Section 5.1(A).

<sup>351</sup> *Id.* Section 5.1(B).

<sup>352</sup> *Id.* Section 5.1(C).

<sup>353</sup> Yusuf Akgun Statement, ¶¶ 2.4-2.7; **C-003**, Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*, at 7; **C-004**, ETIZ Catalogue (resubmitted), p. 19. See *supra* ¶¶ 2.32-2.34, 2.39-2.41.

<sup>354</sup> **C-004**, ETIZ Catalogue (resubmitted), p. 5; **C-007**, MoU; **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*; **C-008**, The 2010 ETIZ Agreement, Preamble; **C-009**, The 2012 ETIZ Agreement, Preamble ("whereas; the Developer has know-how and experience at the highest level regarding the establishment of an organized industrial zone, construction of infrastructure and

6.39. Second, ETIZ was to be of a scale and magnitude that would have been the first of its kind in Ethiopia.<sup>355</sup> Moreover, ETIZ commenced at a time when Ethiopia's critical focus was in the development of industrial zones. As A&M explains:

[A]bsent Respondent's Measures in this matter, the ETIZ would have been one of the first large-scale OIZ in operation in Ethiopia, during a time when industrial park development was a critical cornerstone to the country's industrial plan, as laid out Ethiopia's Growth and Transformation Plans and discussed in Section 3.1(B) of this Report. This early market entry position, especially on the outskirts of Addis Ababa, the country's largest city, with good access to transportation channels and low-cost and educated labor would have served as a strategic advantage in attracting industrialist investors.<sup>356</sup>

6.40. The fact that ETIZ would have become profitable and would have been expanded into additional land is further supported by the fact that in the years following the suspension of ETIZ, industrial zones have thrived in Ethiopia and continue to be the cornerstone of the country's economic development plan. The country is reported to have 33 industrial zones as of summer 2019 (both operating and currently under construction).<sup>357</sup> For comparison, at the time

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superstructure, operation of organized industrial zones and finding Investors to invest in organized industrial zones"). See *supra* ¶¶ 2.32-2.34, 2.38-2.46; Yusuf Akgun Statement, ¶¶ 4.2-4.5, 4.9-4.11, 4.16, 4.21; Yunus Akgun Statement, ¶¶ 3.2-3.4, 4.4.

<sup>355</sup> **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*; **C-044**, Akgun Guest Book, p. 2; Yusuf Akgun Statement, ¶ 4.14.

<sup>356</sup> A&M Report, ¶ 90 (internal citation omitted).

<sup>357</sup> **C-090**, Cepheus Research & Analytics, *Ethiopia's Industrial Parks: A Data Pack on recent performance*, 18 September 2020, <https://cepheuscapital.com/wp-content/uploads/2020/09/Industrial-Parks-Overview-2019-20.pdf> (last accessed 6 November 2020), at 3; **C-091**, UNIDO, *Industrial Park Development in Ethiopia – Case Study Report*, 2018, <https://www.unido.org/api/opentext/documents/download/10694802/unido-file-10694802> (last accessed 2 November 2020) ("*Industrial Park Development in Ethiopia – Case Study Report*"), Tables 3-5.

Akgun entered the Ethiopian industrial zone market there were only three zones which had been marked for industrial zone development.<sup>358</sup>

- 6.41. Indeed, at the time Akgun made its investment the Ethiopian market for industrial zones was still largely untapped. Today, the government promotes development of industrial parks in various ways; in fact, this has been one of the main focuses of Ethiopia's economic development since the country adopted its Growth and Transformation Plan.<sup>359</sup> Akgun was prevented from taking advantage of this favorable market environment available to an early entrant. If ETIZ continued, Akgun would have been able to launch the zone by 2016<sup>360</sup> and it is very likely that investors who eventually invested in other zones would have invested in ETIZ, thereby ensuring its rapid and successful development and further expansion on the wave of Ethiopia's economic boom.
- 6.42. As A&M's research shows, there was a "strong and continuing demand" from industrialists for organized industrial zones in Ethiopia. This is best seen in the actual construction and expansion of industrial zones within Ethiopia at the time of Claimant's investment and subsequent to the suspension of ETIZ.<sup>361</sup>
- 6.43. In addition, a number of industrialists were considering investing in the zone and had it not been for Ethiopia's breach they would line up to sublease plots within ETIZ to establish their factories. Akgun had long lists of investors waiting to lease the land and start construction of their factories.<sup>362</sup> As Yusuf

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<sup>358</sup> See **C-009**, The 2012 ETIZ Agreement, Art. 11(14).

<sup>359</sup> **C-091**, *Industrial Park Development in Ethiopia – Case Study Report*, pp. 8-14, 17-18; **C-047**, GTP I; **C-092**, National Planning Commission, *Growth and Transformation Plan II (2015/16-2019/20)*, Volume I: Main Text, May 2016. See also A&M Report, ¶¶ 32-40, 91-95.

<sup>360</sup> **C-093**, Letter from Akgun Construction to Ministry of Industry dated 7 July 2014 and the attached Business Plan for 15 years ("Letter dated 7 July 2014").

<sup>361</sup> A&M Report, ¶¶ 96-97.

<sup>362</sup> **C-094**, Letter from Akgun Construction to Ministry of Industry dated 2 January 2012; **C-28**, Letter from Akgun Construction to Prime Minister dated 21 August 2014; **C-095**, List of 123 Investors for ETIZ submitted to President and other Ethiopian officials; **C-096**, Emails from Yusuf Akgun to 73 potential Investors dated 2-4 February 2015.

Akgun and Yunus Akgun testify, these lists were compiled as a result of aggressive marketing of the zone in Turkey, Ethiopia and abroad.<sup>363</sup>

- 6.44. The record is clear that Akgun prepared various ETIZ marketing materials and engaged local representatives in Germany, Japan, Dubai and the USA to advertise the project and look for international investors.<sup>364</sup> Numerous meetings were held with Turkish industrialists in Istanbul.<sup>365</sup> Akgun Construction entered into the sublease agreement with the first industrialist, Afro Oil, and the latter commenced construction of its factory.<sup>366</sup> These promotional activities resulted in interest from a large number of investors, most of whom were very serious about investing in ETIZ.<sup>367</sup> Akgun's ability to achieve high occupancy rates on ETIZ is also supported by the fact that Akgun was able to achieve those rates on its prior industrial zone projects, such as the Ikitelli industrial zone in Istanbul and Eskoop industrial site in particular.<sup>368</sup>
- 6.45. Thus, Akgun was clearly able to achieve the required occupancy rates on all project stages.
- 6.46. The high probability of Claimant's success on ETIZ is further supported by the ETIZ development model.<sup>369</sup> Yunus Akgun explains:

ETIZ was to be a phased project, which would largely finance itself. My father had experience in successfully implementing this self-finance model in the Ikitelli Industrial Zone in Istanbul. Akgun made some initial investments in connection with ETIZ, but its strategic plan was to finance

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<sup>363</sup> Yusuf Akgun Statement, ¶¶ 4.26-4.28; Yunus Akgun Statement, ¶¶ 5.7-5.11.

<sup>364</sup> Yusuf Akgun Statement, ¶¶ 4.26-4.28; Yunus Akgun Statement, ¶¶ 5.7-5.11; **C-097**, Letter from Intertrailer GmbH (local representative in Germany) to Akgun Construction dated 16 October 2014; **C-098**, Letter from Mermedya (local representative in Japan) to Akgun Construction dated 5 November 2014; **C-099**, Letter from Akgun Construction announcing the local representative in the USA dated 21 August 2013.

<sup>365</sup> Yusuf Akgun Statement, ¶¶ 4.26, 4.28; Yunus Akgun Statement, ¶ 5.7.

<sup>366</sup> **C-015**, Sub-lease of parcel of land/building contractual agreement made between Akgun Construction and Afro Oil Manufacturing P.L.C. dated 25 October 2013.

<sup>367</sup> Yusuf Akgun Statement, ¶ 4.28; Yunus Akgun Statement, ¶ 5.9. See *a/so* **C-093**, Letter dated 7 July 2014.

<sup>368</sup> Yusuf Akgun Statement, ¶¶ 2.3-2.5.

<sup>369</sup> A&M Report, Section 5.1(C).

the remaining development of the project with the profits it received from industrialists as they joined ETIZ. As part of this plan, early industrialist investors would receive discounts on infrastructure and construction costs, since Akgun knew that once a few factories were under construction and operating, additional industrialist investors would follow.<sup>370</sup>

- 6.47. A&M states that this represents a “cost-plus model”, a common and widely used model in the construction industry.<sup>371</sup> A&M explains:

With the exception of certain critical up-front infrastructure or superstructure components, including, a management office and a police station, Claimant's business model was to develop the ETIZ in a *unitized fashion* in which Claimant would not begin construction until a contract was signed with an industrialist and funds were received. I understand from Claimant that half of the revenue associated with an infrastructure/superstructure contracted development was to be received from the industrialist up front, with the other half payable upon completion. In this manner, the development of the ETIZ was to be demand driven and essentially self-funding.<sup>372</sup>

- 6.48. The foregoing provides this Tribunal with much more than the threshold of reasonable certainty and probability for an award of lost profits applying the DCF method. It constitutes proof beyond the *Micula v. Romania* requirement, (i) that the Claimant would have engaged in a profit-making activity but for the Suspension of the Project, and (ii) that that activity would have indeed been profitable. Therefore, Claimant's claim for compensation for its lost profits is warranted.

- 6.49. Furthermore, any compensation other than full compensation by way of an award of lost profits would contradict Claimant's legitimate expectations,

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<sup>370</sup> Yunus Akgun Statement, ¶ 9.1. See also Yusuf Akgun Statement, ¶¶ 2.6, 4.19.

<sup>371</sup> A&M Report, ¶ 103.

<sup>372</sup> *Id.* ¶ 104.

including when it signed the 2012 ETIZ Agreement and was allocated the land to develop ETIZ, and undertook all necessary studies and works in relation thereto.<sup>373</sup>

**(iv) Calculation of Claimant's Lost Profits**

- 6.50. To calculate the quantum of Claimant's damages based on the DCF method, A&M uses certain assumptions which are summarily presented in the table immediately below:<sup>374</sup>

**Table 3 - A&M DCF Model Key Assumptions**

| Key Revenue & Expense / Cost Unitized Assumptions |                    |                    |                |                         |                |            |
|---------------------------------------------------|--------------------|--------------------|----------------|-------------------------|----------------|------------|
| Revenue/Expense Item                              | Report Sub-Section | Revenue Assumption | Per            | Expense/Cost Assumption | Per            | Source     |
| Infrastructure                                    | 5.2A-B             | \$ 47.66           | m <sup>2</sup> | \$ 39.71                | m <sup>2</sup> | AM-330     |
| Superstructure                                    | 5.2A-B             | \$ 400.00          | m <sup>2</sup> | \$ 307.69               | m <sup>2</sup> | AM-310     |
| Factory Rent                                      | 5.2A               | \$ 1.00            | m <sup>2</sup> | N/A                     |                | C-015      |
| Service Fees                                      | 5.2A               | \$ 0.50            | m <sup>2</sup> | \$ 0.39                 | m <sup>2</sup> | AM-325     |
| Water Fees                                        | 5.2A               | \$ 0.30            | m <sup>2</sup> | \$ 0.23                 | m <sup>2</sup> | AM-325     |
| Key Other Assumptions                             |                    |                    |                |                         |                |            |
| Item                                              | Report Sub-Section | Amount             | Unit           | Per                     |                | Source     |
| Marketing Expenses                                | 5.2D               | \$ 10,000,000      | \$             | ETIZ                    |                | AM-350     |
| ETIZ Land Area                                    | 5.2A               | 1,460              | ha             | ETIZ                    |                | C-009      |
| Hectares Developed per Year                       | 5.2A               | 100                | ha             | Year                    |                | AM-308     |
| Hectares Developed per Quarter                    | 5.2A               | 25                 | ha             | Quarter                 |                | Formula    |
| Land Lease CAPEX                                  | 5.2E               | \$ 825,000         | \$             | 100 Ha                  |                | AM-004     |
| Water Treatment Plant CAPEX                       | 5.2E               | \$ 57,000,000      | \$             | ETIZ                    |                | AM-330,343 |
| Religious Center CAPEX                            | 5.2E               | \$ 3,200,000       | \$             | ETIZ                    |                | AM-349     |
| ETIZ Annual Factory Water Consumption             | 5.2E               | 15,330,000         | m <sup>3</sup> | Year                    |                | AM-350     |

- 6.51. Claimant respectfully refers the Tribunal to Section 5.2 of the A&M Report for more detailed analysis of each one of those assumptions.
- 6.52. As a result of its analysis and based on the above assumptions and other elements identified and detailed in the A&M's Report, A&M calculates the total amount of USD 241,515,079 as Claimant's lost profits for the first two Stages

<sup>373</sup> *Supra* Section 5.C(ii)(a).

<sup>374</sup> A&M Report, ¶ 108.

(1460ha) of ETIZ, before interest. The summary of A&M's calculation, based on each successive state of the project development, is reproduced below:<sup>375</sup>

**Table 5 - FMV of Claimant's Investment by Completed Stage of Development**

|                                            | <i>Hectares</i> | <i>USD</i>                                                 | <i>USD</i>                              | <i>USD</i>       | <i>USD</i>            | <i>%</i>      |
|--------------------------------------------|-----------------|------------------------------------------------------------|-----------------------------------------|------------------|-----------------------|---------------|
| Progression                                | Area            | Present Value "PV" Profits Through Construction Completion | PV Profits Post-Construction Completion | Total PV Profits | Cumulative PV Profits | Stage % of PV |
| Phase 1                                    | 100             | 18,494,964                                                 | 8,769,255                               | 27,264,219       | 27,264,219            | 11%           |
| Stage I                                    | 660             | 156,865,764                                                | 25,995,048                              | 182,860,811      | 182,860,811           | 76%           |
| Stage II                                   | 800             | 59,082,416                                                 | 25,566,899                              | 84,649,315       | 241,515,079           | 100%          |
| Estimated Pre-Award Interest               |                 |                                                            |                                         |                  | 139,962,101           |               |
| Total Damages Including Pre-Award Interest |                 |                                                            |                                         |                  | 381,477,179           |               |

#### **D. Claimant Must be Compensated for Loss of Opportunity**

- 6.53. In addition to lost profits for inability, due to Ethiopia's breaches, to develop ETIZ on the original land plot of 1460ha as envisaged in the 2012 ETIZ Agreement, Claimant must be awarded damages for the loss of its opportunity to expand ETIZ into the additional area of 2000ha.
- 6.54. Moreover, if for some reason the Tribunal considers (and Claimant submits that it should not) that Claimant cannot be awarded lost profits as set out in Section 6.C above, Claimant at the very least must be awarded damages for its loss of opportunity to develop ETIZ on the original area of 1460ha.

##### **(i) Loss of Opportunity is Compensable under International Law**

- 6.55. There is no doubt that compensation for loss of opportunity may be granted within the application of the principle of full reparation. As put by the tribunal in *SOABI v. Senegal*, despite the existence of numerous risks for the realization of profits, "[i]n contrast to hypothetical damage, whose realization is completely speculative, damages may be analyzed as the certain loss of chance to obtain a probable result. It then calls for reparation."<sup>376</sup>

<sup>375</sup> A&M Report, ¶ 152.

<sup>376</sup> [CLA-073](#), *Société Ouest Africaine des Bétons Industriels ("SOABI") v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, ¶ 6.18.

6.56. Similarly, a sole arbitrator in the *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company* found:

... in such cases the existence of damage is uncertain, case law has looked at the position at the time when the opportunity was lost and has accepted that this opportunity itself has a value whose loss gives rise to compensation.<sup>377</sup>

6.57. The arbitrator then went on to state:

It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.<sup>378</sup>

6.58. In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, the tribunal held that an “opportunity of making a commercial success of the project” was integral part of the value of the claimant’s investment, therefore mandating compensation for the loss of such opportunity.<sup>379</sup> The tribunal in that case acknowledged that the quantification of the loss of opportunity “necessarily involves an element of subjectivism and, consequently, some uncertainty” but, it continued, “it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.”<sup>380</sup> This finding of the *SPP* tribunal has been since endorsed by numerous tribunals.<sup>381</sup>

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<sup>377</sup> [CLA-032](#), *Gemplus v. Mexico*, ¶ 13-84 citing *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963).

<sup>378</sup> *Id.*

<sup>379</sup> [CLA-072](#), *SPP v. Egypt*, ¶ 215.

<sup>380</sup> *Id.*

<sup>381</sup> [CLA-032](#), *Gemplus v. Mexico*, ¶¶ 13-86, 13-91; Tab 11; [CLA-036](#), *Crystallex v. Venezuela*, ¶¶ 870- 871; Tab 12; [CLA-074](#), *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award, 18 April 2017 (“*Gavazzi v. Romania*”), ¶¶ 121-124.

- 6.59. Following the *SOABI*, *Sapphire* and *SPP* awards, the tribunal in *Gemplus v. Mexico* also found that where the quantification of loss is uncertain or difficult, the claimants should not be treated “as having failed to prove an essential element of their claims in respect of lost future profits, with the result that their claims for compensation should be dismissed.”<sup>382</sup> Indeed, the tribunal noted that such approach was not required by international law and would “produce a harsh and unfair result.”<sup>383</sup>
- 6.60. The *Gemplus* tribunal also held that in cases where the claimant’s difficulty in proving its lost profits claim is caused by the respondent’s breach, the burden of proving the future profits should be reversed:

[T]he Tribunal is mindful of the fact that the Claimant’s evidential difficulties in proving their claim for loss of future profits are directly caused by the breaches of the BITs by the Respondent responsible for such loss. If there had been no such breaches, the Concessionaire would have had an opportunity to restore the project, as originally envisaged; and it could then have been seen, as actual facts, whether and, if so, to what extent the restored project would have been profitable for the Concessionaire and, indirectly, the Claimants. The Tribunal considers that, as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent’s wrongs and unfairly defeat the claimant’s claim for compensation [...]

At this point, confronted by evidential difficulties created by the respondent’s own wrongs, the tribunal considers that the claimant’s burden of proof may be satisfied to the

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<sup>382</sup> [CLA-032](#), *Gemplus v. Mexico*, ¶ 13-91.

<sup>383</sup> *Id.*

tribunal's satisfaction, subject to the respondent itself proving otherwise.<sup>384</sup>

- 6.61. The approach developed in the *Gemplus* award according to which the burden of proof in cases where the respondent's wrongdoing prevented the claimant from proving its compensation shall be shifted from the claimant to the respondent, has been supported by subsequent investor-state tribunals. Indeed, as the *Gavazzi* tribunal pointed out, the respondent should not be allowed to "escape liability for compensation as a direct result of the difficulty or resulting uncertainty for which respondent is responsible," otherwise "the guilty party would profit unfairly from its own wrong."<sup>385</sup>
- 6.62. In a more recent case, *Burlington Resources Inc. v. Republic of Ecuador*, the tribunal also did not have a problem in recognizing that "the loss of a business opportunity (or "loss of a chance") may give rise to compensation."<sup>386</sup> In that case, the claimant claimed that in addition to lost profits for expropriation of its investment, i.e. the contractual rights under the production sharing agreement for the exploration of oil, it was also deprived of the opportunity to extend the agreement beyond its agreed duration with respect to one of the blocks, albeit on different terms.<sup>387</sup> The tribunal found that claimant did not have an entitlement to a contract extension and thus could not be awarded profits resulting from such potential extension as loss of opportunity.<sup>388</sup> The tribunal stated, however, that the claimant had "a right to negotiate a contractual extension," or "an *opportunity* to extend the contract," and that that right or opportunity has a value.<sup>389</sup>
- 6.63. In another case against Ecuador, *Perenco v. Ecuador*, in which the claimant submitted the same claim, the tribunal came to a similar conclusion. As in

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<sup>384</sup> *Id.* ¶¶ 13-92.

<sup>385</sup> [CLA-074](#), *Gavazzi v. Romania*, ¶ 224.

<sup>386</sup> [CLA-064](#), *Burlington v. Ecuador*, ¶ 279.

<sup>387</sup> *Id.* ¶¶ 129, 250.

<sup>388</sup> *Id.* ¶¶ 271-280.

<sup>389</sup> *Id.* ¶¶ 278-279 (emphasis in original).

*Burlington*, the Perenco tribunal found Perenco's claim that its contract would have been extended on certain terms was "too remote, uncertain and ultimately too speculative" to be accepted.<sup>390</sup> The tribunal refused to award lost profits for that claim, but nonetheless recognized that Perenco should be compensated for the loss of opportunity to negotiate such an extension.<sup>391</sup>

- 6.64. Similarly in *Bilcon v. Canada*, the tribunal held that compensation for loss of opportunity was due even where the investment never passed the planning stages. In contrast to *Akgun*, in *Bilcon*, the state was transparent about the need for an EIA prior to granting *Bilcon* rights, in this case mining rights, to the land at issue.<sup>392</sup> While the tribunal found that lost profits were not appropriate where, unlike *Akgun*, *Bilcon* never acquired any formal rights and never commenced operation, it nevertheless held that *Bilcon* must be compensated for the loss of opportunity to have its application fairly considered.<sup>393</sup> In that case, as in *Akgun*, the State encouraged *Bilcon*'s investments with the knowledge that there were factors outside the control of *Bilcon* that would "effectively preclude any real possibility that an application could succeed."<sup>394</sup>
- 6.65. Accordingly, it is indeed well settled in international law that it is possible to grant compensation on the basis of a loss of opportunity, especially when the wronged party is not capable of establishing loss of profits with reasonable certainty. It is even more so in cases where claimant's failure to establish profits was a result of the acts and omissions of the respondent. It should therefore be enough for the tribunal to be able to admit with sufficient probability the existence and extent of the damage on the grounds that the wronged party lost the opportunity to generate future income or to negotiate extensions of the investment agreement as a result of the wrongdoer's acts or

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<sup>390</sup> [CLA-075](#), *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award, 27 September 2019, ¶ 220.

<sup>391</sup> *Id.* ¶ 221.

<sup>392</sup> [CLA-051](#), *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 152-157.

<sup>393</sup> [CLA-076](#), *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, ¶¶ 175-176.

<sup>394</sup> [CLA-051](#), *Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶ 590.

omissions. In this respect, as discussed above, the burden of proof will lie on Respondent, as the author of the damage, to show that there was no chance that the Claimant could have developed the project as anticipated.

**(ii) Standard of Compensation for Loss of Opportunity**

6.66. As discussed above, international tribunals have recognized that the quantification of the loss of opportunity necessarily involves an element of some uncertainty but that that uncertainty should not bar the tribunal from awarding damages for loss of opportunity when such loss has been incurred.<sup>395</sup> The question remains, however, as to what should be the proper standard of compensation for loss of opportunity.

6.67. The UNIDROIT Principles state that compensation for the loss of a chance should be calculated in proportion to the probability of its occurrence.<sup>396</sup> The UNIDROIT Principles provide the following example to that effect:

A entrusts a file to B, an express delivery company, in response to an invitation to submit tenders for the construction of an airport. B undertakes to deliver the file before the closing date for tenders but delivers it after that date and A's application is refused. The amount of compensation will depend upon the degree of probability of A's tender having been accepted and calls for a comparison of it with the applications which were admitted for consideration. The compensation will therefore be calculated as a proportion of the profit which A might have made.<sup>397</sup>

6.68. Following the rule outlined in the UNIDROIT Principles, the tribunal in *Lemire v. Ukraine* stated that loss of opportunity should be calculated "as the

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<sup>395</sup> [CLA-072](#), *SPP v. Egypt*, ¶ 215; [CLA-032](#), *Gemplus v. Mexico*, ¶ 13-91; [CLA-074](#), *Gavazzi v. Romania*, ¶ 121.

<sup>396</sup> [CLA-077](#), UNIDROIT Principles, Art. 7.4.3.

<sup>397</sup> *Id.* at Comment 2.

hypothetical maximum loss, multiplied by the probability of the chance coming to fruition.”<sup>398</sup>

- 6.69. The same approach was followed in one of the recent cases, *Flemingo DutyFree Shop Private Limited v. Republic of Poland*. Following the rational of the *Lemire* tribunal, the tribunal in that case stated:

Compensation for a loss of chance should be in proportion to the probability of its occurrence, as is also confirmed by Article 7.4.3 of the UNIDROIT Principles on International Commercial Contracts. A sufficient causal link between the loss and the breach is required. The harm must be a direct consequence of the breach.<sup>399</sup>

- 6.70. The GAR Guide on Damages in International Arbitration echoes the principle set out in the UNIDROIT Principles and endorsed by *Lemire* and *Flemingo DutyFree* tribunals:

[T]here is nothing in principle under international law that would preclude a tribunal from awarding compensation for the loss of a chance in proportion to the probability of its occurrence – especially when a more conservative approach might unduly benefit the breaching party that created the situation of uncertainty.<sup>400</sup>

- 6.71. The GAR Guide illustrates the application of the proportionality principle in the following example:

For instance, if a claimant is improperly barred from participating in the bidding process for a potentially lucrative oil and gas concession, it may be hard to prove that the claimant would have won the bidding process had it been allowed to participate. The claimant might be able to provide compelling evidence that it would have offered more than the winning bid, but can it prove that the party

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<sup>398</sup> [CLA-069](#), *Lemire v. Ukraine*, Award, ¶ 251.

<sup>399</sup> [CLA-078](#), *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 (“*Flemingo DutyFree v. Poland*”), ¶¶ 924;922-924 (internal citation omitted).

<sup>400</sup> [CLA-065](#), GAR GUIDE ON DAMAGES, at 89.

who actually won the concession was not willing to bid even more had it been necessary? In such a circumstance, awarding compensation based on the assumption that the claimant would have won the bid might be deemed too speculative. An alternative approach would be to assess the odds that the claimant would have won the bid and award the claimant compensation in accordance with those odds. Thus, for instance, if the tribunal deemed that there was a 65 per cent chance that the claimant would have won the bid, the tribunal might determine the amount of damages that would be due assuming that the claimant had won the bid and then award the claimant only 65 per cent of that amount.<sup>401</sup>

- 6.72. S. Ripinsky and K. Williams suggest that a claim for loss of opportunity is a type of a lost profits claim which can be entertained by the tribunal when claimant cannot prove its lost profits claim with a sufficient degree of certainty:

Where a tribunal cannot accept a claim for lost profits as not sufficiently certain, it may choose to award, instead, a compensation for the loss of business (commercial) opportunity, or for the loss of a chance. This head of damage appears to be a subspecies of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits. The concept of the loss of opportunity, or the loss of a chance, is recognized in a number of national legal systems, as well as in the UNIDROIT Principles of International Commercial Contracts. The latter provide in Article 7.4.3(2) that '[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence'. It is suggested that a chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss

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<sup>401</sup> *Id.*

in fact occurred. Loss of a chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of a chance to make a profit.<sup>402</sup>

- 6.73. The authors also acknowledge that the quantification of the claim for loss of opportunity should be made “by reference to the degree of probability of the chance turning out in the plaintiff’s favour,” however, they note that in practice the quantification of the loss of opportunity by arbitral tribunals is decided based on the tribunals’ discretion.<sup>403</sup>
- 6.74. One of the cases in which the tribunal recognized the standard underlined in the UNIDROIT Principles but still quantified the loss of opportunity in a discretionary manner is *Gemplus*. In that case, the tribunal assessed the investor’s lost opportunity to make future profits for the remainder of the contract’s duration period.<sup>404</sup> The tribunal noted that “[i]t remains extremely difficult for the Tribunal to assess the value of this lost opportunity in money terms,” especially in light of the fact that claimant’s investment was severely damaged from events for which the respondent born no liability, and was subject to numerous risks.<sup>405</sup> Yet, the tribunal found that even under these circumstance there was “a reasonable opportunity” to make future profits for the remainder of the project’s period and that respondent’s breaches made it impossible to show how the investors could or would have made use of that lost opportunity.<sup>406</sup> For the purpose of its calculation, the tribunal estimated a price the hypothetical willing buyer would have paid to the hypothetical willing seller materially informed as to their intended transaction for the claimants’ shares. Indeed, it noted that “business people can agree a price

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<sup>402</sup> [CLA-032](#), *Gemplus v. Mexico*, ¶ 13-87 quoting Ripinsky & Williams on Damages, at 291 (footnotes omitted).

<sup>403</sup> *Id.*

<sup>404</sup> [CLA-032](#), *Gemplus v. Mexico*, ¶¶ 13-95 to 13-96.

<sup>405</sup> *Id.* ¶¶ 13-96 to 13-99.

<sup>406</sup> *Id.* ¶¶ 13-95-13-99.

notwithstanding expert accountants respectively advising them that only a higher or lower price is appropriate.”<sup>407</sup>

- 6.75. The foregoing analysis of available case law suggests that the compensation for loss of opportunity is generally assessed in proportion to the probability of its occurrence.<sup>408</sup> Where that probability is impossible to determine, the quantification is mostly done at the discretion of the tribunal.

**(iii) Claimant is Entitled to Compensation for Loss of Opportunity**

- 6.76. As the case law cited above demonstrates, to be able to claim compensation for loss of opportunity a claimant must demonstrate that a certain opportunity existed and that on a balance of probabilities test it would have created profits for the claimant but for the illegal conduct by the state. Based on the facts of this case, it is undisputed that such opportunity existed *vis-à-vis* Akgun and that Akgun should be compensated for losing it.
- 6.77. As set forth at Section 6.C.(iii) above, Claimant has shown that it is reasonably certain that it would have proceeded with the development and operation of ETIZ or at the very least, that there is a sufficient probability for Claimant to have been able to do so.
- 6.78. As also explained above,<sup>409</sup> the Tribunal has discretion in determining compensation for loss of opportunity; however, Claimant submits that damages sustained by Akgun as a result of the loss of an opportunity should be quantified based on Akgun’s lost profits which represent “the hypothetical maximum loss.”<sup>410</sup>
- 6.79. Claimant submits that the additional 2000ha would have been at least as profitable as the first 1460ha, if Akgun had been afforded the right to develop

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<sup>407</sup> *Id.* ¶ 13-99.

<sup>408</sup> [CLA-065](#), GAR GUIDE ON DAMAGES, at 88; [CLA-032](#), *Gemplus v. Mexico*, ¶ 13-87 citing Ripinsky & Williams on Damages, at 291 (footnotes omitted).

<sup>409</sup> *Supra* Section 6.D(ii).

<sup>410</sup> See, e.g., [CLA-069](#), *Lemire v. Ukraine*, Award, ¶ 251.

Stage II. There was at least a 50% probability that the additional land would have been allocated and Akgun would have been able to expand ETIZ. Claimant's damages for loss of opportunity to negotiate the allocation of additional 2000ha of land and to expand ETIZ shall therefore be no less than half of Claimant's lost profits that the Tribunal would find quantifiable for Stage I and Stage II of ETIZ collectively.

- 6.80. In addition, and only if the Tribunal dismisses Claimant's claim for lost profits with respect to the development of ETIZ on the original 1460ha of land, Claimant must be compensated for the loss of opportunity to develop ETIZ on the original area of 1460ha. Claimant submits that these profits are more than probable and that there was a near certainty that ETIZ would have been developed through Stage I. Claimant further submits that it was also highly probable that ETIZ would have been developed through Stage II. The Tribunal is therefore requested, if it deems that Claimant is not entitled to compensation on the basis of lost profits, to apply a risk factor that the Tribunal deems appropriate to the quantified lost profits, corresponding to the probability the Tribunal deems Claimant had of developing and profiting from ETIZ pursuant to the DCF method.

#### **E. Out of Pocket Damages**

- 6.81. Should the tribunal determine, and Claimant submits that it should not, that Claimant is not due compensation for its lost profits, the Tribunal must award Claimant compensation for the amounts it expended in its effort to pursue its investment.<sup>411</sup> Should the tribunal determine, and Claimant submits that it should not, that Claimant is not due compensation for its lost profits or its loss of opportunity, the Tribunal must award Claimant compensation for the amounts it expended in its effort to pursue its investment at a minimum.
- 6.82. Claimant spent millions of dollars and years of effort pursuing this investment by among other things, preparing plans and feasibility studies, acquiring equipment and machinery necessary for construction, hiring employees and

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<sup>411</sup> [CLA-063](#), *Chorzów*, p. 47.

consultants, preparing marketing materials and paying Respondent amounts due under the 2012 ETIZ Agreement.

- 6.83. As explained in the expert opinion on quantum, these expenditures as documented amount to no less than USD 4,955,131 before interest.<sup>412</sup>
- 6.84. This said, a number of documents that would prove additional Akgun expenses in connection with the implementation of ETIZ, including local accounting and ledger books, computer accounting records, as well as records tracing the cash payments to employees and consultants, etc. were left in Ethiopia and are no longer available to Claimant.<sup>413</sup> Claimant estimates that its total expenses, both documented and undocumented, incurred in connection with ETIZ amount to a figure in the range of USD 7,000,000 before interest and respectfully requests this Tribunal to award this amount.

#### **F. Interest Due on Compensation Amount**

- 6.85. Claimant is also due interest on its investment.
- 6.86. The right to claim damages for the loss of the use of money and therefore the right to claim for interest is enshrined in Art. 38 of the ICL Articles on State Responsibility and recognized in the consistent jurisprudence of arbitral tribunals in investment arbitration.<sup>414</sup>
- 6.87. The applicable interest rate must reflect the full reparation standard and wipe out all the consequences of Respondent's illegal acts. It is well-settled that the only way this is possible is through the award of the interest compounded at an appropriate interval so to take into account the element of risk associated with Claimant's investment and the unlawful character of the respondent's measures.<sup>415</sup>

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<sup>412</sup> *Id.*

<sup>413</sup> Yunus Akgun Statement, ¶¶ 8.4-8.7.

<sup>414</sup> [CLA-042](#), Draft Articles on States Responsibility, Art. 38. See, e.g., [CLA-044](#), *Siag v. Egypt*, ¶ 598; [CLA-039](#), *Azurix v. Argentina*, Award, ¶ 440.

<sup>415</sup> [CLA-033](#), *Metalclad v. Mexico*, ¶ 128; [CLA-066](#), *Santa Elena v. Costa Rica*, ¶ 104; [CLA-078](#), *Flemingo DutyFree v. Poland*, ¶¶ 940-941.

- 6.88. Claimant's expert, A&M, is of the opinion that the Respondent's one-year short-term borrowing rate (based on ten-year Ethiopian sovereign bond yields) of 6.625 percent is a reasonable pre-award interest rate in this case.<sup>416</sup> Assuming December 2022 as the date of the Award in this case, the amount of pre-award interest, compounded annually, on Claimant's lost profits is calculated at USD 139,962,101 and on Claimant's supportable sunk costs - at USD 3,514,215.<sup>417</sup>
- 6.89. In addition to pre-award interest, Claimant respectfully requests the Tribunal to award post-award interest at a rate to be determined by the Tribunal.

## **7. CLAIMS FOR RELIEF**

- 7.1. Respondent's breaches have caused significant damages to Claimant. Respondent is obliged to provide Claimant with full compensation for these damages.
- 7.2. Claimant, accordingly, requests that the Arbitral Tribunal grant the following relief in favor of Claimant:
- i. Find and declare that Respondent has violated its obligations under the BIT and international law as a result of its acts and omissions with respect to Claimant's investment in ETIZ;
  - ii. Award compensation to Claimant for its damages;
  - iii. Award Claimant all costs and fees incurred in connection with this Arbitration;
  - iv. Award Claimant pre-award and post-award interest at a rate to be compounded; and
  - v. Award Claimant any other relief to which it may be entitled in law or equity.

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<sup>416</sup> A&M Report, ¶ 150.

<sup>417</sup> *Id.* Table 5 at ¶ 152 and Table 6 at ¶ 154.

## 8. RESERVATION OF RIGHTS AND FUTURE SUBMISSIONS

- 8.1. Claimant expressly reserves all of its rights under international law and all other rights that it has or may have under law, equity and otherwise.
- 8.2. Claimant also hereby expressly reserves the right to further amend, supplement, and augment its claims and to submit such further pleadings, arguments, exhibits, and evidentiary materials as may be appropriate, including but not limited to witness statements, expert witness reports and studies, and oral testimony, as Claimant may in its judgment deem appropriate or as may be required to respond to any claim, allegation, or defense that may be advanced by Respondent.



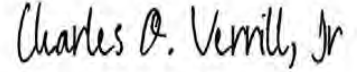
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