

UNCITRAL ARBITRATION
PERMANENT COURT OF ARBITRATION

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

v.

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
Respondent

Statement of Reply and Defense to Respondent's
Jurisdictional Objections and Counterclaims

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Terms and Abbreviations

2008 Directive	Ethiopia's Directive No. 1/2008 (RLA-2)
2003 Guideline	Ethiopia's Environmental Impact Assessment Procedural Guideline Series No. 1 of 2003 (RLA-3)
2010 ETIZ Agreement, or 2010 Agreement	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 (C-008)
2012 ETIZ Agreement, or 2012 Agreement	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 (C-009)
AAWASA	Addis Ababa Water and Sewerage Authority
Afro Oil	Afro Oil Manufacturing P.L.C.
Akgun Construction, Akgun, Claimant	Akgun Insaat Makina Sanayii Dis Ticaret Ltd. Sti.
Art.	Article
Arts.	Articles
Condominium Project	Projects for the construction of over 35,000 condominium houses in Bole Arabsa and Yeka Abado areas
DCF	Discounted Cash Flow
Draft Articles on State Responsibility	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 (CLA-042)
EIA	Environmental Impact Assessment
EIA Proclamation	Environmental Impact Assessment Proclamation, Proclamation No.299/2002 (RLA-1)
EPA	Environmental Protection Authority
Ethiopia, Respondent	Federal Democratic Republic of Ethiopia
ETIZ, Project	Ethio-Turkish Industrial Zone
GOTA	GOTA Management and Development Consultancy
GOTA EIA	EIA for ETIZ prepared by GOTA in October 2013 and revised in March 2014 (C-069 and C-070)
Ikitelli	Ikitelli organized industrial zone in Istanbul
ITU Supplement	A supplemental study to GOTA EIA prepared by Istanbul Technical University dated 10 October 2014 (C-078)
IZ	Industrial Zone
Legatafo	A region in Oromia State in Ethiopia

Legedadi	A dam and reservoir in Ethiopia
Mol	Ethiopian Ministry of Trade and Industry
MoU	Memorandum of Understanding between the Oromia State and Akgun dated 13 October 2008 (C-007)
MoEF	Ethiopian Ministry of Environment and Forestry
MoWIE	Ethiopian Ministry of Water, Irrigation and Energy
OIZ	Organized Industrial Zone
Prof.	Professor
SEA	Strategic Environmental Assessment
Sendafa	A region in Oromia State in Ethiopia
Turkey-Ethiopia BIT, Treaty	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 (CLA-1)

Dramatis Personae

Abadula Gemed	President of the Oromia Regional State in Ethiopia during 2008-2010
Ahmed Abteu	Ethiopian Minister of Industry during 2013-2015, Respondent's witness
Arkebe Oqubay, Dr. Arkebe	Senior Minister and Special Advisor to the Prime Minister of Ethiopia between 2010 - present
Atila Yurtcu	Honorary Consul of Ethiopia in Istanbul during 2008-2009
Ayale H. Anabo, Dr. Anabo	Dr. Ayale H. Anabo, Respondent's expert
Dale Whittington, Prof. Whittington	Professor Dale Whittington, Claimant's expert
Girma Birru	Ethiopian Minister of Trade and Industry during 2009-2010
Hailemariam Dessalegn	Prime Minister of Ethiopia from August 2012 to August 2019, Deputy Prime Minister of Ethiopia from August 2010 to August 2012
Hagos Sequar, Mr. Hagos	Former Mol official, local employee of Akgun
Mekete Bekele Tekle, Prof. Tekle	Professor Mekete Bekele Tekle, Claimant's expert
Meles Zenawi	Prime Minister of Ethiopia from August 1995 to August 2012, Chairperson of the Environmental Council of Ethiopia
Mesfin Seyoum	Ethiopian Minister of Foreign Affairs during 2009-2010
Mulatu Teshome Wirtu, Dr. Mulatu	President of Ethiopia from October 2013 to October 2018, former Ambassador of Ethiopia to Turkey
Susan Murcott, Prof. Murcott	Professor Susan Murcott, Respondent's expert
Sufian Ahmed	Ethiopian Minister of Finance and Economic Development during 2009-2015
Tadesse Haile	Ethiopian State Minister of Industry during 2012-2015
Ufuk Akgun	Shareholder of Akgun, son of Yusuf Akgun
Yunus Akgun	Shareholder of Akgun, son of Yusuf Akgun
Yusuf Akgun	Founder of Akgun, father of Ufuk and Yunus Akguns

1. OVERVIEW

- 1.1. Pursuant to Procedural Order No. 1 dated 4 December 2020, as amended by the Tribunal's Communication No. 32 dated 30 September 2021, Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. respectfully submits this Statement of Reply and Defense to Respondent's Jurisdictional Objections and Counterclaims ("Reply") in response to the Federal Democratic Republic of Ethiopia's Statement of Defense dated 12 March 2021 ("Statement of Defense") and in further support of Claimant's Statement of Claim dated 20 November 2020 ("Statement of Claim").
- 1.2. Akgun's Reply comprises nine main sections:
 - 1.2.1. **Section 1** is this Overview, which summarizes the relevant facts and legal arguments.
 - 1.2.2. **Section 2** is the Statement of Facts, which reiterates certain key facts that Akgun established in its Statement of Claim and builds upon those facts to show the inadequacy of Respondent's allegations and defenses.
 - 1.2.3. **Section 3** rebuts Respondent's challenge to this Tribunal's jurisdiction, establishing that Akgun solely advances claims under the Treaty and explaining why Akgun possessed an investment that conforms with the Treaty's requirements. Akgun further establishes that this Tribunal also possesses jurisdiction over Akgun's asserted umbrella clause claims.
 - 1.2.4. **Section 4** sets forth the applicable law and demonstrates that Respondent's citations to Turkish law are irrelevant and, in any event, do not aid its arguments.
 - 1.2.5. **Section 5** addresses Respondent's arguments concerning Akgun's legal claims. Akgun shows that Respondent's defenses are thinly reasoned and barely supported. Akgun further explains why applying the facts to the relevant legal principles establishes its claims here.
 - 1.2.6. **Section 6** rebuts Respondent's arguments against Akgun's bases for establishing the quantum of Respondent's liability, addressing the very few authorities that Respondent cites and explaining why the relevant authorities and literature support Akgun's position.

- 1.2.7. **Section 7** addresses Respondent's ill-fated counterclaims, showing that the plain text of the Treaty defeats jurisdiction over those counterclaims, and further advances Claimant's defenses against Respondent's meritless substantive claims and claim for damages.
- 1.2.8. **Section 8** contains Akgun's prayer for relief.
- 1.2.9. **Section 9** contains Akgun's reservation of rights.
- 1.3. Akgun supports this Reply with three witness statements:
 - 1.3.1. The Second Witness Statement of Mr. Yusuf Akgun, who addresses in his statement Respondent's misleading arguments concerning the environmental practices in the Ikitelli organized industrial zone in Istanbul, the site selection process for ETIZ, the sub-lease with Afro Oil Manufacturing P.L.C. and its factory within ETIZ, and the Respondent's failure to provide Akgun with suitable alternatives for the ETIZ project.
 - 1.3.2. The Second Witness Statement of Mr. Yunus Akgun, who describes in his statement Akgun's experience with EIA-related issues in Ethiopia, the site selection process for ETIZ, and the facts surrounding Akgun's choice of vendor to perform the EIA that Ethiopia belatedly requested for ETIZ.
 - 1.3.3. The Witness Statement of Mr. Ufuk Akgun, who, like Mr. Yunus Akgun, is a shareholder of Claimant and Mr. Yusuf Akgun's son, describes the facts surrounding the commencement of ETIZ, including the site selection process, Akgun's initial efforts to promote ETIZ, and Akgun's efforts to attract investors for ETIZ. He also describes the origin of Akgun's relationship with Afro Oil and how it differed from the other investors that Akgun attracted to ETIZ. Further, he describes the events leading up to, and following, Ethiopia's suspension of ETIZ in 2014, including the evident bureaucratic confusion within Ethiopia surrounding the EIA process.
- 1.4. Akgun further supports this Reply with two expert opinions:
 - 1.4.1. The Expert Report of Prof. Mekete Bekele Tekle, who is an Associate Professor of Law at the Addis Ababa University School of Law. Prof. Tekle's Report focuses in particular on issues of Ethiopian environmental law, which is his area of specialty. His Report shows that during the period relevant to this dispute, Ethiopia's EIA-related

laws were largely ineffective, opaque, and inconsistently applied. He further opines that Ethiopia's efforts to apply those laws to Akgun were in derogation of its own legal duties. In the course of his opinion, Prof. Tekle addresses a number of points that Respondent's proffered expert witnesses, Prof. Susan Murcott and Dr. Ayele H. Anabo, raise in their opinions.

- 1.4.2. The Expert Report of Prof. Dale Whittington, who is a Professor of Environmental Sciences & Engineering and City & Regional Planning at the University of North Carolina at Chapel Hill, where he currently serves as Director of the PhD Program in the Department of City and Regional Planning. Prof. Whittington's areas of expertise include the fields of environmental policy, benefit-cost analysis, and water and sanitation policy in developing countries. Pursuant to that expertise, Prof. Whittington evaluates Ethiopia's watershed policy choices in relation to the Legedadi watershed that is at issue in this case and also analyzes the status of that watershed, showing that Ethiopia has failed to protect it. Prof. Whittington also explains that Ethiopia inappropriately sought to shift its natural resource policy decisions to Akgun. He further evaluates the EIAs the Akgun submitted to Ethiopia against the EIAs that Ethiopia has accepted for other industrial parks, concluding that the EIAs Akgun submitted were similar to or better than those analyses, despite the fact that Ethiopia deemed unacceptable the EIAs Akgun submitted. In the course of his opinion, Prof. Whittington addresses a number of points that Respondent's proffered expert witness, Prof. Susan Murcott, raises in her opinion.

These expert opinions, along with the witness statements, cited facts and legal authorities demonstrate that Respondent's defenses and counterclaims fail. In particular, Respondent's failure to address the relevant facts is fatal, as summarized directly below.

A. Respondent's Casual Disregard of the Facts Dooms its Defenses

- 1.5. Respondent ignores numerous facts inconvenient to its Defense. The most glaring omissions follow:
 - 1.5.1. The Ikitelli organized industrial zone in Istanbul is a legitimate, major success and Akgun was and continues to be a chief player in the founding, operation, and growth of Ikitelli. Respondent recruited

Akgun to establish an industrial zone in Ethiopia after coming away favorably impressed with Ikitelli. Thus, the plan to establish an industrial zone in the mold of Ikitelli in Ethiopia was Respondent's idea from inception.

- 1.5.2. In 2009, Akgun prepared preliminary and detailed feasibility studies for the Ethio-Turkish Industrial Zone, which described the nature of the Project. Akgun provided these studies to Respondent in well-publicized meetings that included numerous ministers of state. These enthusiastically well-received meetings and the plans for ETIZ were recounted in contemporaneous news articles. During this period, Akgun repeatedly emphasized its commitment to develop ETIZ with utmost sensitivity to environmental concerns.
- 1.5.3. Akgun described to Respondent the properties of the land that it thought would be commercially suitable for ETIZ, including the topographic characteristics, geographic proximity to transportation hubs, and availability of labor force.
- 1.5.4. Respondent selected the region of the Oromia Regional State for the project's location, which was to lie between the towns of Legatafo and Sendafa, a few dozen kilometers northeast of Addis Ababa. Respondent showed Akgun three sites within this region, all of which were very near to one another and adjacent to the same road. The below map illustrates the approximate locations of the three sites that Respondent showed to Akgun:¹

¹ See Witness Statement of Yusuf Akgun dated 17 October 2021 ("Yusuf Akgun 2nd Statement"), ¶ 3.6, Figure 1.



- 1.5.5. Of the sites offered in the location Respondent selected, two were unsuitable, leaving the site in question in this matter as Akgun's only option, which Respondent favored in any case.
- 1.5.6. By deciding to site ETIZ within the Legedadi watershed and later issuing investment licenses and providing the land for ETIZ to Akgun, Respondent created the clear and obvious expectation that it had determined that this site was suitable for development as an industrial zone. The site was identified in the initial 2010 ETIZ Agreement, under which Respondent was a 30% financial partner, and carried over to the later 2012 ETIZ Agreement. Neither agreement called for any sort of preliminary environmental assessment. Moreover, in the 2012 Agreement,² Respondent mandated that the property it conveyed for ETIZ could only be used to develop an industrial zone. Thus, Akgun reasonably believed that Respondent was warranting to Akgun that the land Respondent allocated was not only suitable but also cleared to be used as an industrial zone. Indeed, such a warranty is inherent in the lease provisions of the Ethiopian civil code.
- 1.5.7. After the parties signed the 2012 Agreement, Respondent was aware of Akgun's efforts to commence work at the site and in fact urged Akgun to start and continue that work, as the 2012 Agreement

² Terms defined in the Claimant's Notice of Arbitration and Statement of Claim carry the same meaning in this Statement of Reply unless otherwise indicated.

itself required. Specifically, Respondent was aware of the construction of the Afro Oil factory, which it characterizes in hindsight in its Statement of Defense as an illegal factory constructed under the cover of night. To the contrary, Respondent advocated for and supported its construction and operation, as it was a pet project of the Ethiopian President, Dr. Mulatu Teshome Wirtu.

- 1.5.8. The references in the 2012 ETIZ Agreement to “carrying out the necessary studies” and application of the background law of Ethiopia did not mean, as Respondent argues, that Akgun undertook the risk that the property was not environmentally suitable for an industrial zone.
- 1.5.9. Akgun had only obligated itself to conduct some limited “studies” to ensure effective protection of the Legedadi watershed from pollution but not a full-blown EIA. The contract provisions upon which Respondent relies relate to pollution control measures to be implemented after ETIZ became operational, not to a study of whether ETIZ would be a suitable project for the site selected. To be sure, those provisions do not presuppose that Akgun must perform an EIA. Much later, when the MoI requested an EIA, Akgun volunteered to conduct the EIA only to keep the project moving but never believed that it was inviting the risk of a negative outcome by volunteering.
- 1.6. Akgun hired GOTA, a viable EIA provider that had performed other EIAs in Ethiopia. Respondent’s prior practice therefore belies its contention that GOTA was not an acceptable vendor. Indeed, the EIA documents GOTA provided and which Akgun later supplemented were similar to, and in some respects better than, the EIAs that Ethiopia approved for other industrial zone projects, which further shows that Respondent’s own practices rebut its current complaints about the EIAs Akgun supplied.
- 1.7. The foundations of Respondent’s defense are demonstrably wrong:
 - 1.7.1. Respondent contends that Akgun was subject to Ethiopian law under the 2012 ETIZ Agreement and was therefore obligated to perform an EIA that assessed both the environmental effects of ETIZ and whether it was a development that was suitable for siting in the Legedadi watershed. It is apparent, however, that it was Respondent’s responsibility to assess whether its environmental

aims for the Legedadi watershed allowed for industrial development because it had initiated the project, which implicated broad questions of Respondent's natural resource and economic development policies. Ethiopia's EIA laws were incomplete, opaque and ineffective during the relevant period.

- 1.7.2. Moreover, Respondent did not consistently apply its EIA laws. Thus, even if Respondent were correct to argue that the 2012 Agreement called upon Akgun to observe the EIA laws, which is denied, the laws themselves and Respondent's administration of those laws rendered any such "compliance" impracticable. In any event, it was Respondent's duty to determine whether the land it provided to Akgun for ETIZ was compatible with its environmental and development goals, but it demonstrably failed to do so and now belatedly and improperly attempts to foist this responsibility onto Akgun. These facts nullify Respondent's argument that Akgun somehow acted illegally or imprudently under Ethiopia's EIA laws.
- 1.7.3. Respondent also contends that it required an approved EIA before Akgun could start work on ETIZ. Yet Respondent concedes that the first time it asked Akgun to develop an EIA for ETIZ was nearly five years after the project was conceived in October 2008, Ethiopia provided the site in 2009, and the parties signed the 2010 and 2012 ETIZ Agreements, during which time Akgun had paid compensation to the inhabitants of the land, confected a lease for the land, received investment permits, obtained machinery and equipment, began to mobilize to the site, solicited investors, and commenced work on ETIZ, all of which was known to Respondent. Moreover, in its internal deliberations concerning the GOTA EIA, Respondent repeatedly conceded that it should have assessed the environmental suitability of the ETIZ site before offering it to Claimant. This concession reflects the fact that Respondent itself violated the clear dictates of the law it argues controls here, in that a governmental agency, such as the Mol, may not issue licenses and permits or hand over land without having received EIA clearance from federal or regional environmental authorities.³

³ See Expert Report of Prof. Mekete Bekele Tekle dated 18 October 2021 ("Tekle Report"), ¶ 2.55.

- 1.7.4. Respondent further contends that ETIZ failed solely because Akgun submitted an inadequate EIA. The evidence flatly contradicts this assertion. ETIZ failed because Respondent's ministries did not observe their obligations under the Ethiopian environmental laws that Respondent contends are controlling in this case,⁴ concealed from Akgun the conclusion that they had made a mistake in situating ETIZ within the Legedadi watershed,⁵ deceived Akgun into thinking that ETIZ could go forward on the designated site if only Akgun would supply a little more detail on its water treatment plans⁶ and revise the GOTA EIA,⁷ and strung Akgun along with empty promises to provide Akgun with an adequate alternative site for ETIZ.⁸
- 1.7.5. Ironically, the GOTA EIA caused Respondent's authorities to confront the fact that constructing and operating ETIZ at the designated location conflicted with other policy concerns—policy concerns that were within Respondent's bailiwick, over which Akgun had no control, and which underscore why Respondent should have performed or commissioned an environmental assessment of the site before selecting the Legedadi watershed for ETIZ and allocating a site within that watershed to Claimant. Those specific policy concerns had to do with 1) the availability of sufficient water resources to service the needs of both ETIZ and the demands of the Condominium Project that Respondent was constructing nearby (a gigantic development for which Respondent admits that it did not even perform an EIA);⁹ and 2) the potential for the construction and operation of ETIZ to impair the water quality and availability in the Legedadi dam and underground basin. Respondent belatedly concluded that it was unwilling to bear the risk of sharing the Legedadi water supply between ETIZ and its Condominium Project and other residential water demands, regardless of whatever level of detail Claimant might supply in an EIA for ETIZ and regardless of

⁴ *Infra* ¶¶ 2.44-2.58, 2.5, 2.160, 2.181, 5.902, 6.8.

⁵ *Infra* ¶¶ 2.156-2.158, 2.170, 2.183, 2.186, 5.209, 6.8.

⁶ *Infra* ¶¶ 2.132-2.138, 2.172, 2.173-2.180, 2.184, 5.209, 6.8.

⁷ *Infra* ¶¶ 2.132-2.138, 2.159, 2.163, 2.174, 2.175, 5.209, 6.8.

⁸ *Infra* ¶¶ 2.188, 2.190, 2.196-197, 5.209, 6.8.

⁹ **C-100**, Respondent's Responses to Claimant's Stern Schedule dated 3 September 2021 (as re-submitted on 4 October 2021) ("Respondent's Responses to Claimant's Stern Schedule"), Response to Request 9.

whatever sort of water treatment measures Claimant proposed for ETIZ. This puts to bed the bogus notion that Akgun's EIA is what doomed ETIZ.

- 1.7.6. Respondent also suggests that it suspended ETIZ because it came to view Akgun as incapable and untrustworthy. It was Respondent, however, which continued to suggest Akgun construct the project at an alternative site after suspending work on the site it had originally allocated, although it never offered Akgun an alternative site suitable to ETIZ. If those suggestions were genuine, then it is nonsensical for Respondent now to suggest that it canceled ETIZ because of any concerns over Akgun's ability to perform. On the other hand, if those suggestions were not genuine, then this shows that Respondent hatched yet another deceptive ploy in abuse of its obligations to Akgun.
- 1.7.7. Finally, Respondent weakly offers that it never terminated the 2012 ETIZ Agreement and behaved in a reasonable way, offering to have Akgun establish ETIZ in a less environmentally vulnerable zone. What Respondent omits from its telling is that it never offered to Akgun an alternative site that could fulfill the needs of ETIZ and it explicitly sought to change the scope of ETIZ that was set forth in the 2012 ETIZ Agreement, amounting to an effective repudiation of that agreement.
- 1.7.8. In sum, the EIA process that Respondent makes the narrative centerpiece of its defense bears little resemblance to the contemporaneous reality on the ground in Ethiopia and the actual course of dealing between the parties. It is only now that Respondent attempts to weaponize that process to unjustifiably escape its obligations to Akgun. The fact that Ethiopia failed to require an EIA for the Condominium Project that it chose instead of ETIZ unmasks the disingenuous nature of this defense. In truth, Respondent's environmental assessment process was fundamentally flawed and there was no EIA that Akgun could have submitted, however detailed it might be, that would have been sufficient to change Respondent's mind about the self-admitted "mistake" it made in deciding to situate ETIZ within the Legedadi watershed. Behind the scenes and without informing Akgun, Respondent had concluded that ETIZ was not going to be permitted to go forward in the location Respondent had

designated. At the same time, while Respondent recognized that it would be obligated to provide an adequate alternative site to Akgun and compensate Akgun for its troubles, it did neither. Having failed to make good on its obligations to Akgun when it recognized the need to do so, Respondent must now face the consequences of that failure.

B. Respondent's Jurisdictional Objections Lack Merit

- 1.8. The Tribunal has jurisdiction over Akgun's claims because those claims arise in connection with investments protected by the Treaty. The Treaty defines "investment" broadly to include "every kind of asset." ETIZ, along with the many assets that Akgun devoted to development of the Project, fall within that expansive definition, particularly in light of the Treaty's objective and purpose. More specifically, Akgun's investments include (1) contractual rights having financial value under the 2012 ETIZ Agreement; (2) equipment, machinery and other movable property needed for completion of the Project and for operation of ETIZ; (3) the experience, expertise and other know-how required to develop an industrial city like ETIZ; and (4) the Project as a whole. Each of these investments is specifically enumerated for protection by the BIT.
- 1.9. Respondent's objections to this Tribunal's jurisdiction have no merit. First, Respondent's objections are premised on a mischaracterization of the facts underlying this dispute. Respondent is wrong that Akgun's assets "never materialized" and that the Project faltered because of Akgun's purported failure to obtain a satisfactory EIA. Second, Akgun's investments satisfy the *Salini* test, though the test is not binding here. Third, Akgun's claims are not contract claims. They are treaty claims, because the fundamental basis for each claim is an obligation imposed on Respondent by the BIT. Finally, the 2012 ETIZ Agreement's forum selection provision does not divest this Tribunal of jurisdiction over this dispute, as (1) it applies only to contractual claims, which Akgun's claims are not; and (2) it is neither mandatory nor exclusive, such that even if the provision were to apply, it would not displace the jurisdiction of this Tribunal.

C. Applicable Law

- 1.10. The Treaty principally governs Claimant's claims. Ethiopian law has no role to play in determining the lawfulness of Ethiopia's acts under international legal principles; its role is limited to determining this Treaty dispute as a matter

of fact. Furthermore, Turkish law does not form the body of applicable law in this dispute. However, even if Respondent were correct in relying on Turkish law—which it is not—the provisions Respondent relies on only further support Claimant’s case.

D. Claimant’s Legal Claims Entitle it to Recovery

- 1.11. **FET & Non-Impairment Obligations.** Applying the relevant legal principles to the facts of this case shows that Respondent violated its FET and non-impairment obligations that are spelled out in Treaty Art. II. Respondent created the legitimate expectation that Akgun would have the opportunity to develop ETIZ on a suitable site in Ethiopia but it unreasonably squelched that expectation in violation of its FET and non-impairment obligations to Akgun. Moreover, Respondent treated Akgun inconsistently by starting and stopping ETIZ at its whim and without reasonable explanation to Akgun. It further subjected Akgun to a legal regime that lacked consistency in its interpretation and enforcement. This inconsistency further violated the FET and non-impairment obligations. Finally, Respondent treated Akgun in unfair and arbitrary manner by designating the site for ETIZ and encouraging Akgun to develop ETIZ on that site before reversing course and deciding instead to develop residential condominiums. In its Defense, Respondent attempts to evade liability by arguing for an exceedingly narrow scope of the FET obligation and an expansive reading of its permissible exercise of police powers. Respondent’s manipulation of the FET standard to suit its defense is unfounded, but Akgun shows that its claims would succeed even under Respondent’s inapt reading of the FET standard.
- 1.12. **Expropriation.** Respondent unlawfully expropriated Claimant’s investments through a series of measures culminating in Respondent’s suspension of the ETIZ project due to a purported lack of an acceptable EIA. Respondent admits that its measures left Claimant’s investments with “no or even negative value,” but argues that fact undermines Claimant’s expropriation claim. Respondent is wrong. That Respondent’s measures deprived Claimant of the value of its investments proves Claimant’s claim under the applicable sole effects test, which even Respondent embraces. Respondent invokes the police powers doctrine in an attempt to evade liability for its expropriatory measures. Yet, as Claimant makes abundantly clear, Respondent acted discriminatorily when it insisted upon an EIA from Claimant for ETIZ while allowing the competing Condominium Project to proceed without one. Rather than a legitimate use of

its police powers, Respondent's continued insistence upon futile EIA revisions was merely the means by which it enacted its policy decision to favor the Condominium Project over ETIZ and camouflaged its own culpability in allocating unsuitable land for ETIZ. Respondent fails to put forth any meritorious argument to rebut Claimant's expropriation case.

- 1.13. **Umbrella Clause.** Respondent violated its umbrella clause obligation which is incorporated from the Denmark-Ethiopia BIT into the Treaty through its MFN clause. By executing the 2012 ETIZ Agreement, Respondent undertook a number of commitments, including an obligation to allocate the land suitable for ETIZ, to provide Akgun with the 80-year right of use of the ETIZ site for the purpose of ETIZ development, to facilitate implementation of the project, not to expropriate, and to pay direct and indirect losses in case the project were suspended through no fault of Akgun. As the facts show, Respondent breached these contractual commitments, by, *inter alia*, committing a mistake in the land allocation for the project, delaying the project implementation, including through forcing Akgun into an obscure and belated EIA process, and finally suspending the project for no fault of Akgun but failing to cover its damages. Respondent also provided a separate commitment to relocate ETIZ to an alternative site but failed to propose any suitable options for relocation.

E. Respondent's Damages Analysis is Thinly Reasoned and Irrational

- 1.14. As to damages, the standard to be applied is full reparation, and the measure is lost profits. Respondent's characterization of the EIA as a "precondition" fails and, thus, undermines the whole of any argument on the part of Respondent to the contrary. In fact, Respondent cites nothing to the contrary, effectively conceding full reparation is the standard and lost profits is the measure in this case.
- 1.15. Furthermore, in the event this Tribunal does not afford Akgun lost profits as the measure for full reparation, loss of opportunity fills in—particularly given that any difficulty in showing Akgun's lost profits is due to Respondent's own breach.
- 1.16. Finally, there can be no question Akgun has sustained out of pocket damages, that those damages are definite and documented, and that Akgun is entitled to recovery of same.

F. Respondent's Counterclaims Fail

- 1.17. As a threshold matter, this Tribunal does not have jurisdiction to hear Respondent's counterclaims for multiple reasons. First, the plain language of Art. VII of the Treaty does not allow host states to bring claims against investors. Since Ethiopia does not have the right to bring claims against Akgun under the Treaty, it does not have the right to raise counterclaims against Akgun. Second, the 2012 ETIZ Agreement does not grant any right to Respondent that it can pursue against Akgun and the rights Respondent intends to rely on in its counterclaims solely belong to the Mol and Oromia Regional State as the parties to the Agreement.
- 1.18. Further, Respondent's pleading of its substantive claims is not in compliance with UNCITRAL Rules because it is unclear and unsubstantiated. Nevertheless, Respondent's arguments fall short of proving that Akgun indeed breached its obligations in the 2012 ETIZ Agreement.
- 1.19. Finally, Respondent's claim for damages suffers logical errors, goes against basic principles of damages valuation methods and is totally unsupported.

2. STATEMENT OF FACTS

- 2.1. As indicated above, Respondent's Statement of Defense fails to convincingly rebut the facts established in Claimant's Statement of Claim.¹⁰ Respondent instead resorts to muddling the record with immaterial or inaccurate facts and unseemly *ad hominem* attacks against Claimant and its principals. Below, Claimant reiterates the key facts that bear on this dispute and sets the record straight on Respondent's misrepresentations. Akgun will show that:
 - 2.1.1. Respondent proposed ETIZ to Akgun, enticed it with the promise of partnership in the largest industrial zone in Africa, selected the area in and around the Legedadi watershed as the region where the project would be located, identified qualified industries and offered Akgun the site for ETIZ with full knowledge of the scope of the Project and the types of industries it would house;
 - 2.1.2. Respondent set forth terms in the 2012 Agreement that dispel the idea that Akgun was expected to perform an EIA as a condition precedent to any other work. Pursuant to the 2012 Agreement,

¹⁰ Claimant's Statement of Claim dated 20 November 2021 ("SoC"), ¶ 2.

Akgun commenced and continued construction on ETIZ with Respondent's full knowledge and encouragement before, during, and after the much later point at which Respondent requested an EIA;

- 2.1.3. Respondent's environmental laws were incomplete, opaque, and inconsistently applied, leaving an investor such as Akgun unable to reasonably conclude whether it was obligated to perform an EIA. Indeed, a reasonable interpretation of those laws indicates that it was Respondent's duty to assess whether it had selected a suitable location for executing its industrial development strategy;
- 2.1.4. Despite having no obligation to perform an EIA, Akgun nevertheless voluntarily and at the Mol's request submitted an EIA by a credible vendor. Unfortunately for Akgun, by volunteering to helm an EIA process that was Respondent's duty from the outset, it became inextricably tangled in Respondent's bureaucratic morass and left vulnerable to Respondent's whim;
- 2.1.5. Respondent concluded that ETIZ could not be constructed in the Legedadi watershed because its water usage would adversely impact the availability of water for residents of Addis Ababa who drew on the same water source and because Respondent hatched a residential development policy that involved constructing tens of thousands of condominium units—without conducting an EIA¹¹—that would also draw on the same water source. Accordingly, Respondent concluded that it had made a mistake in selecting the site for ETIZ and determined that ETIZ would need to be relocated to a different area of the country, but Respondent concealed this conclusion from Akgun for many months, leading Akgun to believe that it could still construct ETIZ at the selected location if it provided additional water usage and treatment data to Respondent and amended its EIA;
- 2.1.6. Respondent's conclusion to relocate ETIZ reflected the fact that the GOTA EIA unveiled environmental concerns that the Mol had ignored in pressing Akgun to implement the 2012 ETIZ Agreement. Respondent's complaints about the quality of the GOTA EIA are

¹¹ **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9.

therefore disingenuous since no changes or additions to the EIA would have altered Respondent's decision to relocate ETIZ; and

- 2.1.7. After many months of deception, Respondent finally admitted its mistake to Akgun and committed to make things right by relocating ETIZ to an adequately suitable replacement site, but Respondent never followed through on that promise.

A. Respondent Proposed the Project to Akgun and Selected the Location

(i) Respondent Visited Ikitelli and Proposed to Replicate it in Ethiopia

- 2.2. The Ikitelli Industrial Zone is a successful industrial zone in Istanbul. Its conception and construction centralized industrial businesses in an area near the former airport, creating efficiencies and synergies. Many firms located there, hundreds of thousands of jobs were created, and these businesses have generated significant economic activity. Mr. Yusuf Akgun was one of the original organizers of Ikitelli and has been a part of its leadership for decades.¹²
- 2.3. In 2008, Ethiopia sent a delegation of officials to Istanbul and during that visit they toured Ikitelli.¹³ Ethiopia had recently instituted an industrial zone development policy that had set the goal "to promote public-private partnerships in infrastructure development for industrial development and speeding up implementation of industrial zones."¹⁴ The delegation included Mr. Abadula Gameda, the president of the Oromia Regional State, along with Dr. Mulatu Teshome Wirtu, the then-Turkish Ambassador of Ethiopia, who later became the Ethiopian President; and Mr. Atilla Yurtcu, the then-Honorary

¹² Witness Statement of Yusuf Akgun dated 19 November 2020 ("Yusuf Akgun 1st Statement"), ¶¶ 2.1-2.7.

¹³ Yusuf Akgun 1st Statement, ¶¶ 4.1-4.3; Witness Statement of Serkan Ufuk Akgun dated 17 October 2021 ("Ufuk Akgun Statement"), ¶ 2.1.

¹⁴ **C-101**, Ministry of Finance and Economic Development, *Ethiopia: Building on Progress A Plan for Accelerated and Sustained Development to End Poverty (2005/06-2009/10)*, Volume I: Main Text, September 2006 ("PASDEP"), p. 157. PASDEP was the 6-year growth and transformation plan effective between 2006 and 2011.

Consul of Ethiopia in Istanbul.¹⁵ Each of these officials are identified in the contemporaneous photographs from those meetings below:¹⁶



Figure 2 – The photo captures the Turkish and Ethiopian delegation following the execution of the Memorandum dated 13 October 2008: **YUSUF AKGUN** (fourth person from left) together with **ATILLA YURTCU**, the then-Honorary Consul of Ethiopia in Istanbul (left of Yusuf Akgun), **ASADULLA GEMADA** – the then-President of the State of Oromia (right of Yusuf Akgun), and **DR. MULATU TESHOME** – the then-Ambassador of Ethiopia to Turkey (right of Asadulla Gemada).

- 2.4. These Ethiopian officials were so impressed with the industrial zone that they immediately solicited Mr. Yusuf Akgun to sign a Memorandum of Understanding (herein, “MoU”) to develop a similar zone near Addis Ababa, and under that MoU it was clearly articulated that Respondent would designate the location for the industrial zone to be established in Ethiopia.¹⁷
- 2.5. The evidence is clear that Ethiopia initiated this project by seeking out Mr. Yusuf Akgun and his company to help fulfil the economic goals Ethiopia set to develop industrial businesses in Ethiopia. Since Ethiopia was initiating the project and inviting Akgun to Ethiopia to do a project that was part of the published plans of the government, Akgun could reasonably expect that Ethiopian governmental ministries had approved it and would support it.

¹⁵ Yusuf Akgun 1st Statement, ¶ 4.2; Ufuk Akgun Statement, ¶ 2.1.

¹⁶ **YUS-08**, Photographs of the Ethiopian delegation visit to Ikitelli Industrial Zone dated 13 October 2008.

¹⁷ Yusuf Akgun 1st Statement, ¶ 4.3; Ufuk Akgun Statement, ¶ 2.1; **C-007**, Memorandum of Understanding between the Oromia State and Akgun Construction dated 13 October 2008 (“MoU”), ¶ 3 (“The location of the [industrial zone] will be shown by the Oromia State”).

Indeed, as contemporaneously reported and as Mr. Yusuf Akgun testifies,¹⁸ Ethiopian officials made specific representations to this effect.

(ii) Respondent Designated the Project's Location

- 2.6. Not only did Ethiopia initiate the Project, but it also designated land in the Oromia Regional State—specifically, land adjacent to the Legedadi dam complex—as the project site, which obtained the name “ETIZ” in collaboration between Akgun and Ethiopian officials.¹⁹ As Mr. Yusuf Akgun explains, he visited the Oromia Regional State President, Mr. Abadula Gemeda, in January 2009 and on that occasion, the Oromian President inquired as to the progress of ETIZ following the MoU.²⁰ Mr. Yusuf Akgun reminded Mr. Abadula Gemeda that, per the MoU, the land for ETIZ was to be designated so that Akgun could develop more detailed plans.²¹ Mr. Yusuf Akgun explained at that time that he needed to understand the location and boundaries of the land in order to begin preparing the feasibility report.²² This included understanding the topography of the land and its geographic features, in order to calculate rough costs.²³ Mr. Yusuf Akgun also communicated that the land needed to be near Addis Ababa and suitable for industrial development and that he did not consider agricultural land to be favorable for such development.²⁴ Directly after that meeting, Mr. Abadula Gemeda evidently assembled a team of officials to show Akgun sites that were both suitable for ETIZ and contained the necessary characteristics that Mr. Yusuf Akgun had specified: proximity to a major population center; linkages to major transportation means; and adequate water and energy resources.²⁵
- 2.7. Shortly thereafter, Akgun inspected the three sites that had been identified as possible locations for ETIZ, all of which were located near the road connecting the towns of Legatafo and Sendafa, and in the same general vicinity of the

¹⁸ Yusuf Akgun 1st Statement, ¶¶ 4.1-4.14; Yusuf Akgun 2nd Statement, ¶ 3.7. See also Ufuk Akgun Statement, ¶ 2.7.

¹⁹ Ufuk Akgun Statement, ¶ 2.7.

²⁰ Yusuf Akgun 1st Statement, ¶ 4.5; Yusuf Akgun 2nd Statement, ¶ 3.1; Ufuk Akgun Statement, ¶ 2.3.

²¹ Yusuf Akgun 1st Statement, ¶ 4.5; Yusuf Akgun 2nd Statement, ¶¶ 3.1-3.2.

²² Yusuf Akgun 2nd Statement, ¶¶ 3.1-3.2.

²³ *Id.*, ¶ 3.2.

²⁴ Yusuf Akgun 1st Statement, ¶ 4.6; Yusuf Akgun 2nd Statement, ¶¶ 3.3, 3.5.

²⁵ C-007, MoU, ¶ 3 (“The location of the [industrial zone] will be shown by the Oromia State”); Yusuf Akgun 1st Statement, ¶¶ 4.5-4.6.

Legedadi dam complex.²⁶ Notably, beyond specifying the characteristics of a desirable site, Akgun played no role in the selection of the three sites that Respondent proposed.²⁷ Among the team of officials that had been assembled to visit the sites were officials from the Mol and Oromia Regional State.²⁸ Some other officials, including Dr. Mulatu, and Mr. Yurtcu accompanied Akgun when it visited the proposed sites.²⁹

- 2.8. Below is a contemporaneous photograph from that site visit in 2009, which shows Dr. Mulatu standing between Mr. Yusuf Akgun and Mr. Yurtcu:³⁰



- 2.9. The below map shows the locations of the respective sites that Respondent proposed for ETIZ:³¹

²⁶ Yusuf Akgun 1st Statement, ¶ 4.7; Yusuf Akgun 2nd Statement, ¶ 3.6.

²⁷ Yusuf Akgun 2nd Statement, ¶ 3.6; Ufuk Akgun Statement, ¶ 2.4; Witness Statement of Yunus Akgun dated 17 October 2021 (“Yunus Akgun 2nd Statement”), ¶¶ 3.2-3.3.

²⁸ Yusuf Akgun 2nd Statement, ¶ 3.3.

²⁹ *Id.*

³⁰ **C-102**, Photo dated 9 January 2009 from the site visit.

³¹ Witness Statement of Yusuf Akgun dated 17 October 2021 (“Yusuf Akgun 2nd Statement”), ¶ 3.6, Figure 1.



- 2.10. The first site contained fertile land in heavy agricultural use, which Akgun was loath to disturb.³² The second site was land that had previously been used as a stone quarry, which had left behind deep pits that appeared to be up to 50 meters deep in some cases.³³ Akgun considered this a more suitable site for industrial activity than the first agricultural site, but informed Respondent's officials that in order for the site to be acceptable, the pits would need to be filled, according to proper construction techniques that would involve layering and compressing the fill material in order to deliver flat, stable land for constructing an industrial site.³⁴ Mr. Girma Birru, the Minister of Industry at that time, informed Akgun that Ethiopia did not have the financial means to undertake such a project to remediate the land for ETIZ.³⁵ Thus, the second site was out of the running.
- 2.11. Finally, Respondent showed Akgun the third site, which is the site at issue in this case. As with the first site, Akgun observed that it was fairly fertile and in agricultural use.³⁶ Akgun communicated this concern to Mr. Girma Birru, who suggested that it would be impossible to find a suitable site that was not already in agricultural use and that in any event this site was the last one available that met the necessary characteristics for ETIZ, chief among them

³² Yusuf Akgun 2nd Statement, ¶¶ 3.3, 3.5.

³³ *Id.*, ¶ 3.4.

³⁴ *Id.*, ¶ 3.4.

³⁵ *Id.*, ¶ 3.4.

³⁶ *Id.*, ¶ 3.5.

the proximity to Addis Ababa.³⁷ In addition, Respondent's officials indicated to Akgun that they preferred the third site for ETIZ among the three options they presented to Akgun.³⁸

- 2.12. Because Respondent selected the region where the three possible ETIZ sites were located, encouraged Akgun to select the site that ultimately was chosen for ETIZ, allocated the site, and never hinted to Akgun during that process that the land's use for an industrial zone was contingent upon additional governmental approvals of its suitability, such as an EIA, Akgun reasonably believed that no such contingencies stood in the way of the project. As further discussed below, this is also clear from the 2012 ETIZ Agreement and other contextual evidence. This was also consistent with Akgun's experience with Ikitelli. The land for Ikitelli zone was allocated to the cooperatives that built their small industrial sites; however, those cooperatives were not required to submit an EIA under Turkish law.³⁹

(iii) Akgun Presented the Project in Ethiopia

- 2.13. Throughout 2009, officials throughout the Ethiopian government became familiar with Akgun and ETIZ. As described above, this began in early 2009 when the site visits occurred and continued throughout 2009 with various meetings, speeches, and ceremonies related to ETIZ.
- 2.14. For instance, in February 2009, the Minister of Foreign Affairs, Mesfin Seyoum, visited Ikitelli, coming away favorably impressed and writing in Akgun's guestbook:

I would like to express my utmost pleasure and satisfaction for your kind invitation that gave me golden opportunity to have first-hand experience about your Industrial zone in Istanbul. It was indeed an eye opener for me.

I'm also encouraged by your enthusiasm and commitment to construct a much bigger Industrial zone in Addis Ababa (Legetaffo). I'm looking forward to seeing the commencement of your project in Ethiopia.

³⁷ *Id.*, ¶ 3.5.

³⁸ *Id.*, ¶ 3.4; Ufuk Akgun Statement, ¶ 2.4; Yunus Akgun 2nd Statement, ¶ 3.4.

³⁹ Yusuf Akgun 2nd Statement, ¶ 3.8. *See also infra* Section 4.C.

In conclusion, I wish to assure you my Government's fullest cooperation and support to you and your group to have firmly establish such visionary project in our country.⁴⁰

- 2.15. Following this visit and after Respondent had identified the ETIZ site, Akgun began to develop more detailed plans for the Project. Akgun retained professionals, such as consultancy and architecture firms, to assist in developing the plans for ETIZ.⁴¹ These efforts led to a pre-feasibility study.⁴²
- 2.16. Mr. Girma Birru, the Minister of Industry, visited Ikitelli in June 2009, during the time Akgun was preparing the pre-feasibility study. That visit is depicted in the below photograph, which shows Mr. Girma Birru reviewing the initial architectural plans with Mr. Yusuf Akgun, Mr. Yunus Akgun, and Mr. Sadettin Ozdonmez, the project architect.⁴³



- 2.17. Akgun, along with its architect and consultant, made a widely acclaimed presentation of the pre-feasibility study to the Council of Ministers in August of 2009 at the Hilton Addis Ababa.⁴⁴ Several of those officials, including

⁴⁰ **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 ("Akgun Guest Book"), p. 2 (handwritten note of Mesfin Seyoum dated 7 February 2009).

⁴¹ Yusuf Akgun 1st Statement, ¶ 4.10.

⁴² **C-043**, Ethio-Turkish Industrial Zone Pre-feasibility Study by Casta dated August 2009 ("Pre-Feasibility Study").

⁴³ **C-103**, Photo dated 3 June 2009 from Mr. Girma Birru's visit.

⁴⁴ Witness Statement of Yunus Akgun dated 19 November 2020 ("Yunus Akgun 1st Statement"), ¶¶ 3.2.-3.3; Ufuk Akgun Statement, ¶¶ 2.5-2.6.

Foreign Minister Seyoum are identified in the contemporaneous photos below:⁴⁵



Photo No. 1 – From left to right: Girma Birru, the then Minister of Trade and Industry, Alemeyahu Tegenu, the then Minister of Mines and Energy, Tadesse Haile, the then State Minister of Trade and Industry



Photo No. 3 – From left to right: Seyoum Mesfin, the then Minister of Foreign Affairs, Abadulla Gemada, the then President of the State of Oromia and Dr. Kassu Illala, the then Minister of Works and Urban Development

- 2.18. Ethiopian officials' efforts to solicit Mr. Yusuf Akgun and develop a partnership with him were well-publicized in Ethiopia. A news article published in August 2009 immediately after the Hilton Addis Ababa presentation described it in detail and related laudatory and supportive statements from Ethiopian officials,

⁴⁵ YUS-09, Photographs of the meeting at the Hilton Addis Ababa dated August 2009.

who “assured the investors of continued public and government support for the realization of the project soon.”⁴⁶

- 2.19. The Minister of Finance and Economic Development, Mr. Sufian Ahmed, visited Ikitelli shortly after the pre-feasibility presentation, in October 2009. He expressed his sentiments in the guestbook, where he wrote, “I am very much impressed by this industrial zone. It is a perfect model for attracting investors. I hope we can have one of its kind in Ethiopia.”⁴⁷ The below photograph shows Mr. Sufian Ahmed’s visit as he wrote in Akgun’s guestbook:⁴⁸



- 2.20. The pre-feasibility study summarized the world-wide development of industrial zones and identified the key demographics and data germane to Respondent’s industrial zone development plans.⁴⁹ It also provided schematics for ETIZ and specified that ETIZ would “comprise various factories and industrial facilities in the areas of textile, leather and leather products, machinery, light metal, food processing, paper & packing and pharmaceuticals industries.”⁵⁰ It specified the planned land area that each type of industry would occupy.⁵¹ It further highlighted that it intended to “[p]revent[]

⁴⁶ **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*, The Ethiopian Herald, 18 August 2009; **C-003**, K. Bekele, *Turkish Investors Envisage an Industrial Zone Worth USD 10bn in Ethiopia*, The Reporter, 22 August 2009.

⁴⁷ **C-044**, Akgun Guest Book, p. 3 (handwritten note of Sufian Ahmed dated 7 October 2009).

⁴⁸ **C-104**, Photo dated 7 October 2009 from Mr. Sufian Ahmed’s visit.

⁴⁹ **C-043**, Pre-Feasibility Study, pp. 6-32.

⁵⁰ *Id.*, pp. 33-37.

⁵¹ *Id.*, pp. 40, 42.

environmental pollution by means of joint treatment plants.”⁵² The study also devoted considerable detail to the anticipated costs and upside that ETIZ might provide.⁵³

- 2.21. After receiving such a warm and enthusiastic response to the pre-feasibility study, Akgun worked with its consultants and architects to develop a more detailed feasibility study, which Respondent had requested.
- 2.22. Akgun provided a final version of the feasibility study to Respondent in December of 2009.⁵⁴ It expanded considerably on the details Akgun provided in the pre-feasibility study, broadening the scope of its economic analysis of Ethiopia and the opportunities that ETIZ might afford to the Ethiopian economy.⁵⁵ In particular, the feasibility study cited to the Ethiopian Investment Commission as a factor that would cut through the red tape to entice foreign investors such as Akgun and the factories that would be located within ETIZ:

To facilitate both foreign and domestic investment, a separate institution, the Ethiopian Investment Commission (EIC), has been formed at the federal government level. In addition, individual Investment bureaus at the regional administration level have been created. **The foreign investor need only apply for an investment certificate at the EIC. The EIC operates as a one-stop agency.** Upon acquisition of a certificate and registration of the business, the foreign investor may approach the investment bureau in collaboration with EIC [to] facilitate access to land and utilities. In this way, by circumventing the normal procedures for licensing, leasing of land, and obtaining utility services, the foreign investor is able to shorten the start-up period and thus the costs of their business.

To take some recent example, a French brewer group obtained permits and secured land for a brewery at Kombolcha (Amhara Regional State) in one month. The plant has been operational for several years.⁵⁶

⁵² *Id.*, p. 45.

⁵³ *Id.*, pp. 74-81.

⁵⁴ **C-045**, Ethio-Turkish Industrial Zone Feasibility Study by Casta dated December 2009 (“Final Feasibility Study”); Yusuf Akgun 1st Statement, ¶ 4.11.

⁵⁵ **C-045**, Final Feasibility Study, pp. 33-125.

⁵⁶ *Id.*, p.102.

- 2.23. The feasibility study also provided a detailed, industry-by-industry analysis of various production sectors within Ethiopia to demonstrate how ETIZ could fulfil growth needs for those sectors.⁵⁷ Those sectors included textiles, leather production, paper products, chemical products, plastics, metals, and machinery and equipment.⁵⁸ Many of these same industries were specified as part of ETIZ and the feasibility study showed schematics of where these industry types would be located within ETIZ.⁵⁹ The feasibility study also showed that ETIZ was to be located northeast of Addis Ababa in the Oromia region.⁶⁰
- 2.24. The feasibility study further devoted a section to water resources and ETIZ's water management plans.⁶¹ The study averred that the "Industrial Zone would operate a water treatment plant in accordance with Federal and State potable water standards and requirement."⁶² It also provided ETIZ's anticipated water usage, which was estimated at 42,000 m³ per day⁶³ and specified that there would be "separate treatment for cyanides, heavy metals."⁶⁴
- 2.25. The study articulated what Akgun perceived to be the strengths of ETIZ, many of which were the same requirements that Mr. Yusuf Akgun had spelled out to Respondent in describing the characteristics of the land that would be suitable for ETIZ.⁶⁵
- 2.26. The study concluded with a project timeline, which clearly stated that "[u]pon the assignation of the land to [Akgun] ... a construction site will immediately be built on the site" and set forth the various start-up costs.⁶⁶ The timeline and anticipated costs did not foresee a preliminary assessment of the assigned site's environmental suitability for an industrial zone.

⁵⁷ *Id.*, pp.126-254.

⁵⁸ *Id.*

⁵⁹ *Id.*, pp. 256, 268, 287-301.

⁶⁰ *Id.*, p. 271.

⁶¹ *Id.*, pp. 326-331.

⁶² *Id.*, p. 328.

⁶³ *Id.*, p. 329.

⁶⁴ *Id.*, p. 330.

⁶⁵ *Id.*, p. 358.

⁶⁶ *Id.*, pp. 366-367.

- 2.27. The feasibility studies, surrounding events and public announcements demonstrate the following.
- 2.27.1. Respondent decided that ETIZ would be located on approximately 1460 ha. of farmland between the towns of Legatafo and Sendafa in the Oromia Regional State. Thus, the siting of the project in this region was Respondent's choice.
 - 2.27.2. Various ministries and regional authorities knew the planned location for ETIZ.
 - 2.27.3. The feasibility studies defined the scope of ETIZ and the various types of industries that it would host.
 - 2.27.4. The feasibility studies specifically committed to adopt environmentally sensitive water treatment methods in accord with whatever state and regulations were in place.
 - 2.27.5. The feasibility study that Akgun presented to senior Ethiopian officials did not include any mention of an EIA. Respondent now suggests that Ethiopian law prohibited any work on the project until an EIA was approved, but the EIA process was not built into the project timeline presented to Respondent, nor was it later mentioned or included in the agreement the parties signed for ETIZ. Presumably, if Respondent were correct in its assertion that Akgun needed to commission an EIA and obtain approval as a condition precedent to any further work, at least one of Respondent's many officials would have pointed out that the feasibility study and the timeline were missing these crucial steps. Yet no one did.⁶⁷

⁶⁷ See Yusuf Akgun 2nd Statement, ¶ 3.7; Ufuk Akgun Statement, ¶ 3.1.

B. The Contract Terms Dispel Respondent's Arguments

(i) Akgun and Respondent Signed Two Contracts for ETIZ

a. The 2010 ETIZ Agreement

- 2.28. Initially, from 2008 until 2012, the government of Ethiopia and Akgun pursued ETIZ as partners.
- 2.29. The proposed project was ambitious; ETIZ was slated to be the largest industrial zone in Africa and constructed all at once.⁶⁸
- 2.30. Following Akgun's submittal of its detailed feasibility study, the parties signed a contract in June 2010 to develop ETIZ on the plot of land that Respondent had identified.⁶⁹ Under the 2010 ETIZ Agreement, ETIZ was to be developed by the "Share Company," which was "the company to be formed jointly by the Developer and the PPESA," where PPESA was "the Privatization and Public Enterprises Supervising Agency of the Federal Democratic Republic of Ethiopia" and the Developer was Akgun.⁷⁰ The joint Share Company was responsible for executing sub-leases with industrialists that would locate their factories in ETIZ,⁷¹ was to submit periodic reports to the MoI,⁷² and was to undertake all the decision-making for ETIZ.⁷³ In addition, the 2010 ETIZ Agreement specified that the Government of Ethiopia "agrees and undertakes to cover 30% (thirty percent) of the Infrastructure Costs."⁷⁴ Thus, it was clear under the initial 2010 ETIZ Agreement that Respondent possessed a major stake and responsibilities as a partner in ETIZ.
- 2.31. Respondent has not offered a single shred of evidence that suggests that it told Akgun anytime from the signing of the 2008 MoU to the 2010 ETIZ Agreement that—notwithstanding the government's initiation of the project, identification of the region for ETIZ, and allocation of the site in the Legedadi

⁶⁸ **C-008**, Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia and Akgun Construction for Lease of Land and Development of an Industrial Zone dated June 2010 ("The 2010 ETIZ Agreement"); **C-043**, Pre-Feasibility Study; **C-045**, Final Feasibility Study.

⁶⁹ **C-008**, The 2010 ETIZ Agreement.

⁷⁰ *Id.*, Art. 1.

⁷¹ *Id.*, Art. 10.(9).

⁷² *Id.*, Art. 10(13).

⁷³ *Id.*, Art. 11(18).

⁷⁴ *Id.*, Art. 11(7).

watershed—Akgun would need to submit an EIA for various other ministries to approve before it could proceed with development and construction.

- 2.32. Ultimately, the parties altered their arrangement and agreed in the 2012 ETIZ Agreement that ETIZ would be constructed in a more modest stage-wise fashion. Yet, it is important to note that under the 2010 ETIZ Agreement, with Respondent as a partner, it was to be constructed all at once—*i.e.*, immediately and with a dramatic and expansive impact on the environment, built in a shorter time frame than under the 2012 ETIZ Agreement. There is no indication that during the initial period while ETIZ was envisioned as a much more ambitious undertaking in partnership with Respondent that Respondent ever informed Akgun that it would need to commission an EIA and obtain approval before construction could commence, or that any sort of analysis of the site’s environmental suitability for an industrial zone was necessary. Ultimately, neither party was able to finance the project as originally envisaged due to the global economic climate.

b. The 2012 ETIZ Agreement

- 2.33. Unable to secure the financing for the project as envisaged in the 2010 ETIZ Agreement, the parties reworked the contract.
- 2.34. During that period, the Deputy Prime Minister, H.E. Hailemariam Dessalegn, came to visit Ikitelli in 2011. On that visit, the Deputy Prime Minister expressed his sentiments in Akgun’s guestbook: “I hope the same Industrial zone will be realized in my country and I assure you that my government will give you all the necessary support.”⁷⁵
- 2.35. Shortly before signing the 2012 ETIZ Agreement, in April 2012, Oromia issued a valuation report of the land to be turned over to Akgun.⁷⁶ The report states that the Oromia Land and Environmental Bureau participated in discussions about the use of the land and that “professionals from [the] Land and Development Bureau of Oromiya” helped to “build consensus regard[ing] the overall benefits of the project” and the use of the land.⁷⁷

⁷⁵ **C-044**, Akgun Guest Book, p. 5 (handwritten note of Hailemariam Dessalegn dated 15 December 2011).

⁷⁶ **C-048**, Compensation Payment Proposal Report dated April 2012.

⁷⁷ *Id.*, p. 1.

- 2.36. In June 2012, a new ETIZ agreement was executed, which relieved Respondent of its duty to provide financing and added some additional terms, including that Akgun perform “necessary studies” to protect the Legedadi watershed.⁷⁸ It did not refer to the necessity of performing an EIA or suggest that the studies to investigate how to protect the watershed would preclude ETIZ from going forward at the designated site.
- 2.37. The contract required a certain mix of industries, including heavy industries that Respondent would later criticize for their inclusion within ETIZ,⁷⁹ even though Respondent dictated this mix of industries under Art. 8.14, which mandated that Akgun prioritize “leather products, goods and articles, textile and garment, chemicals and plastics, pharmaceutical, electric and electronics, printing, packing, automotive, metal and agro-processing Industries.”⁸⁰
- 2.38. Further, under Art. 8.1, the property allocated to Akgun could only be used as an industrial zone; no other use was permitted.⁸¹ This provision renders puzzling Respondent’s contention that the GOTA EIA was defective because it did not sufficiently identify alternative uses for the land.⁸²
- 2.39. The 2012 Agreement required Akgun to meet specific, time-sensitive deadlines that the handover of the land triggered. These provisions show that the parties did not believe Akgun was subject to any law that prohibited Akgun from commencing work on the site until an EIA was prepared and approved. To the contrary, there were numerous provisions in the 2012 Agreement that expressly required Akgun to begin its work on ETIZ immediately and that potentially penalized Akgun with the loss of the project if it did not do so.⁸³ Indeed, Respondent later referred to these provisions in correspondence with Akgun, urging it to get to work on the site.⁸⁴

⁷⁸ **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”).

⁷⁹ **C-016**, Letter from Ministry of Industry to Akgun Construction dated 24 July 2014 (“Suspension Letter”).

⁸⁰ **C-009**, The 2012 ETIZ Agreement, Art. 8(14).

⁸¹ *Id.*, Art. 8(1).

⁸² Expert Report of Prof. Susan Murcott dated 7 March 2021 (“Murcott Report”), ¶ 33.

⁸³ **C-009**, The 2012 ETIZ Agreement, Arts. 5(4), 5(6), 7(5), 8(6), 9(2), 9(5), 10(12) and 10(13).

⁸⁴ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012; **C-012**, Land Lease Certificate issued by Oromia Bureau of Rural Land and Environmental Protection dated 2 January 2013 (“Land Lease Certificate”).

- 2.40. There was no indication that Respondent believed that Akgun bore the risk of a future regulatory impediment halting ETIZ. Instead, the 2012 ETIZ Agreement expressly acknowledged that if ETIZ stopped because of some governmental action without fault on the part of Akgun, the government would pay Akgun's direct and indirect losses.⁸⁵

(ii) Akgun Commenced Work Under the 2012 ETIZ Agreement

- 2.41. On Respondent's urging,⁸⁶ Akgun began working on ETIZ once it signed the 2012 ETIZ Agreement. Among other activities, Akgun:
- 2.41.1. Paid for the relocation of the farmers that occupied the land;⁸⁷
 - 2.41.2. Confected a lease for the land;⁸⁸
 - 2.41.3. Obtained and renewed the requisite investment licenses from Respondent;⁸⁹
 - 2.41.4. Provided reports on the progress of its efforts;⁹⁰ and
 - 2.41.5. Provided Respondent with a work plan, purchased equipment and machinery, and began to mobilize to the site.⁹¹
 - 2.41.6. Akgun was also actively soliciting investors to meet the contract's deadlines.⁹² Akgun began to make progress and many investors in Turkey were attracted to ETIZ because of Akgun's reputation and

⁸⁵ **C-009**, The 2012 ETIZ Agreement, Arts. 11(10)-11(11).

⁸⁶ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012; **C-012**, Land Lease Certificate; Yunus Akgun 1st Statement, ¶ 5.2.

⁸⁷ **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012.

⁸⁸ **C-012**, Land Lease Certificate.

⁸⁹ **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009; **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

⁹⁰ **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; **YUN-16**, Akgun's work report dated 4 October 2013; **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

⁹¹ **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013; Yunus Akgun 1st Statement, ¶ 4.9; **YUN-12**, Photos of some purchased machinery and equipment.

⁹² Yunus Akgun 1st Statement, ¶¶ 5.7-5.11; Yusuf Akgun 1st Statement, ¶ 4.26; Ufuk Akgun Statement, ¶ 2.9.

history with Ikitelli.⁹³ Especially noteworthy is that Akgun had over 100 interested investors and a significant number of preliminary commitments.⁹⁴

- 2.42. It was only after Akgun began devoting its full efforts to ETIZ that Respondent orally requested an EIA.⁹⁵

C. Ethiopian Law Did Not Require Akgun to Obtain an EIA

- 2.43. The foregoing demonstrates that, as a matter of common sense and logic given the dealings between the parties, Akgun could not have been reasonably expected to commission an EIA at any point prior to the Mol's request. As discussed below, Akgun also could not have been expected to do so as a matter of Ethiopian law. It is no defense for Respondent that the 2012 ETIZ Agreement requires that Akgun must comply with Ethiopian law because Ethiopian law, if applicable at all, required Respondent to undertake an assessment of the suitability of the site before providing it to Akgun for ETIZ. Indeed, Ethiopia's EIA-related laws are in many respects incomplete, opaque and inconsistently applied.

(i) Respondent Had a Duty to Assess the Suitability of the Site Before Providing it to Akgun

- 2.44. Respondent grounds its defense in the argument that Akgun's woes result from the GOTA EIA, which Respondent alleges was fundamentally deficient.⁹⁶ It is clear, however, that Respondent concluded that it made a mistake in selecting the Legedadi watershed as the site for ETIZ and that the sufficiency of the GOTA EIA could not fix that mistake.⁹⁷ Respondent fails to acknowledge that had it observed and properly administered its own laws from the outset of the relationship with Akgun, it could have avoided the site selection error that ultimately led to the collapse of the ETIZ project.

⁹³ Ufuk Akgun Statement, ¶ 2.9.

⁹⁴ Yunus Akgun 1st Statement, ¶¶ 5.7-5.11; Yusuf Akgun 1st Statement, ¶ 4.28.

⁹⁵ Yusuf Akgun 1st Statement, ¶ 5.5; Ufuk Akgun Statement, ¶ 3.1.

⁹⁶ SoD, ¶¶ 52-60.

⁹⁷ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014, p. 1; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014, p.1.

2.45. Respondent's proffered expert, Prof. Susan Murcott, asserts that Akgun did not supply a satisfactory EIA and failed to supply a Strategic Environmental Assessment.⁹⁸ Even if Prof. Murcott is correct that an SEA was necessary, she is wrong that such an assessment was Akgun's duty.

2.46. Akgun's expert on Ethiopian law, Prof. Tekle, explains, while an EIA is a project-specific endeavor, an SEA often serves much broader policy purposes:

[A]n SEA is a broader version of the EIA. It is "the EIA of policies, plans and program[s] in which the EIA[s] of individual projects are carried out within the framework established by the SEA of a program (a group of similar projects), which in turn takes place within the framework of an SEA of a plan and before that of a policy." SEAs also apply to "laws including international agreements adopted by the government." By contrast, . . . an EIA would consider the environmental issues in planning and decision-making when dealing with *projects*."⁹⁹

2.47. Prof. Tekle further explains that an SEA that evaluates broader policy considerations is within the remit of the government:

SEAs are the responsibility of the government with regard to the policies, strategies, programs, laws, or international agreements it executes.¹⁰⁰

2.48. Akgun's expert on issues of water use planning and international environmental analysis, Prof. Whittington, likewise opines:

SEAs deal with policies, plans, and programmes, and occupy a higher level on the decision-making hierarchy where decisions are obviously the responsibility of the state. A private firm, *much less a foreign firm*, could not be expected to undertake strategic economic, social, and environmental planning on behalf of the government.¹⁰¹

2.49. Here, ETIZ implicated both government policies and an international agreement—Ethiopia's policy regarding management of water resources and the international agreement it struck with Akgun. These facts reinforce the

⁹⁸ Murcott Report, ¶ 53.

⁹⁹ Tekle Report, ¶ 2.17 (emphasis added) (internal citation omitted).

¹⁰⁰ *Id.*, ¶ 2.21.

¹⁰¹ Expert Report of Prof. Dale Whittington dated 18 October 2021 ("Whittington Report"), ¶ 6.66.

conclusion that Respondent should have performed an SEA before siting ETIZ within the Legedadi watershed.

- 2.50. Prof. Tekle explains that the basis for this conclusion arises out of Ethiopia's constitution and water proclamation law:

Article 51(11) of the Constitution regarding the functions of the Federal Government requires it to “determine and administer the utilization of the waters or rivers and lakes linking two or more States or crossing the boundaries of the national territorial jurisdiction.” Moreover, water is a crucial strategic resource commonly owned by all citizens under the Ethiopian Water Resources Management Proclamation, and its allocation must be decided by the Federal Government based on the principles laid down under Article 6 of the Proclamation. Ethiopian law also establishes a river basin council and authorities responsible for engaging in “strategic water resources planning” for the country's river basins. It would therefore be reasonable to conclude that the government had a master plan of any applicable basin area and had performed an SEA before allocating land within the basin to any developer/investor such that no further SEA would be required.¹⁰²

- 2.51. He further explains that this conclusion is reinforced by the EIA law itself:

Article 2(10) of the EIA Proclamation defines a “public instrument” as “a policy, a strategy, a programme, a law or an international agreement.” “International agreement” is not itself defined; as a result, any agreement between the Government of Ethiopia and a foreign entity—be it a State or a private person—may qualify as such. Article 13 of the EIA Proclamation provides the foundation for the environmental assessment requirement applicable to public instruments, and it makes the “organ or government which initiates” such public instrument responsible for ensuring satisfaction of that requirement. The 2003 Guideline provides that an SEA is “[t]he assessment used to identify the potential impacts of the proposed public instruments.”

Here, it is my opinion that the ETIZ agreement can be considered as an “international agreement” between Ethiopia and a foreign private entity constituting a “public instrument.” Thus, under the EIA Proclamation, the “organ or government” initiating the project is responsible for

¹⁰² Tekle Report, ¶ 2.20.

completing an EIA of the “significant environmental impact[s]” involved—i.e., an SEA—of ETIZ. The 2003 Guideline further confirms that an SEA was required for ETIZ. Foreign investors invited to develop a particular investment are not expected to undertake SEAs of this magnitude.¹⁰³

- 2.52. Thus, Ethiopian law dictates that the government should perform an environmental assessment where a development project implicates national water policy. Further, the time for the government to perform that assessment is before it licenses the project and certainly before it hands over the land for the project. As Prof. Tekle explains:

... as a matter of policy and law, no government agency may issue an investment permit or hand over land to project developers without having an EIA clearance from the environmental authority.¹⁰⁴

- 2.53. Here, the Ethiopian Investment Authority issued an investment license to Akgun in February 2009 and renewed that license in March 2013¹⁰⁵ and the Mol and Oromia handed over the land to Akgun in March 2013, over four years after selecting the Legedadi watershed as the ETIZ site. Thus, Respondent violated its own laws by failing to obtain environmental clearances at the outset of the ETIZ project before it issued the licenses and handed over the land.

- 2.54. Indeed, as further discussed in Section 2.E.iii below, Respondent conceded multiple times in its own internal correspondence in spring 2014 when it was debating the fate of ETIZ that evaluation of site suitability should have occurred before anything else.¹⁰⁶

¹⁰³ Tekle Report, ¶¶ 2.38-2.39.

¹⁰⁴ *Id.*, ¶ 2.31.

¹⁰⁵ **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009; **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

¹⁰⁶ See, e.g., **C-105**, Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector dated 3 April 2014 together with attached Assessment and Discussion report conducted with stakeholders regarding the Environmental Impact Assessment (Second Draft Report) on Ethio-Turkish Industry Zone (“Memorandum dated 3 April 2014”), pp. 4, 6; **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, pp. 1, 2. See also **MBT-04**, D. Ruffeis et al., *Evaluation of the environmental policy and impact assessment process in Ethiopia*, Impact Assessment and Project

2.55. Respondent's failures contravened the very purpose of its EIA process:

Because the purpose of an EIA is to predict and manage the environmental effects of a proposed activity, the EIA should be performed and approved at the earliest stage of the project and, in any case, before the commencement of the planned project activity to the extent that EIA is required.¹⁰⁷

2.56. Prof. Tekle concludes that Respondent's failures lie at the root of Akgun's claims:

... if the government prepares the land for an investment purpose, makes it available to interested investors via a lease agreement with the government and grants a license to leasehold rights without EIA authorization, then it is my opinion that it would be presumed that such land has undergone the necessary EIA or SEA study requirements for the type of investment planned by the investors. Under such circumstances, the most that could be asked of such investor would be to conduct an EIA of the proposed project, but it is my opinion that it would be presumed that the land was suitable for the planned project. If a lack of a proper EIA or SEA leads to the project's failure in this scenario, the government is responsible ...¹⁰⁸

2.57. In sum, Respondent was obligated under its own laws to assess the suitability of the Legedadi watershed as the site for ETIZ prior to selecting that site and its failure to do so contravened Ethiopian law and ultimately led to disaster for Akgun as Respondent attempted to cover up for its error.

(ii) Respondent's EIA Laws Are Incomplete, Unclear and Inconsistently Applied

2.58. Even assuming *arguendo* that the proper frame of analysis is Akgun's compliance with Respondent's EIA laws, those laws are not as sharply defined or enforced as Respondent suggests, rendering those laws a bewildering

Appraisal, 28(1), March 2010, p. 36 ("Good quality reports are produced, but the EIA studies are often not undertaken at the correct stage of the project life cycle and are therefore irrelevant for the project planning and design process and for the construction and follow-up activities."), p. 35 ("The missing legal complementarities between the EPA and the Investment Agency and non-existing communication between the licensing agencies and the environmental authorities prolong the deficits and prevent the initiation of the EIA process.").

¹⁰⁷ Tekle Report, ¶ 2.30.

¹⁰⁸ *Id.*, ¶ 2.32.

maze of bureaucratic traps for a foreign investor such as Akgun. Below, Akgun elaborates on the insufficiencies and inconsistencies in the EIA legal regime.

a. Respondent's EIA Laws Are Incomplete

2.59. Respondent relies on Art. 5 of the EIA Proclamation, which states:

Without authorization from the authority..., no person shall commence implementation of any project that requires an environmental impact assessment as determined by a directive issued pursuant to Article 5.¹⁰⁹

2.60. Respondent, however, fails to offer any detailed analysis of which projects require an EIA “as determined by a directive issued pursuant to Article 5.” Respondent’s omission is telling. Scratching the surface to determine whether such a directive was issued reveals that no such directive ever came into effect.

2.61. Respondent suggests in its Statement of Defense that such a directive was issued in 2008,¹¹⁰ but there is no evidence that Directive No. 1/2008 was anything more than a draft, and therefore without any legal effect. Indeed, when the Tribunal ordered Respondent to reveal the status of Directive No. 1/2008, Respondent was forced to admit that no government official ever signed Directive No. 1/2008 nor was it published in the National Gazette.¹¹¹

2.62. Prof. Tekle explains that specific procedural requirements must be observed for a directive to become law, but that this did not occur with respect to Directive No. 1/2008:

Under Ethiopian law, any administrative agency can adopt directives in accordance with the powers delegated to it by law. The EPA Proclamation re-establishes Ethiopia’s Environmental Protection Authority (“EPA”). It further establishes the Environmental Council (“EC”) as part of the EPA and designates the Ethiopian Prime Minister as the EC’s Chairman. It lists among the EPA’s powers and duties the power to “prepare directives to implement environmental protection laws and, upon approval, ensure

¹⁰⁹ **RLA-1**, Environmental Impact Assessment Proclamation, Proclamation No. 299/2002 (“EIA Proclamation”), Art. 5.

¹¹⁰ Statement of Defense, Objections to Jurisdiction and Counterclaims dated 12 March 2021 (“SoD”), ¶ 43.

¹¹¹ **C-100**, Respondent’s Responses to Claimant’s Stern Schedule, Response to Request 1.

their implementation.” It obligates the EC to “review and approve directives . . . prepared by the [EPA].”

Under Article 20 of the EIA Proclamation, the EPA is authorized to “issue directives necessary for [its] effective implementation.” Article 5 of the EIA Proclamation calls for the issuance of a directive to determine the categories of projects that shall be subject to the EIA requirement.

Thus, Ethiopian law authorized the EPA to adopt a directive describing the projects subject to the EIA requirement. Yet, the EPA never adopted the 2008 Directive.

Although the 2008 Directive purports to implement Article 5 of the EIA Proclamation by listing projects subject to the EIA requirement, the EPA never adopted it, so it is without legal effect. The Chairperson of the Environmental Council of Ethiopia (the then-Prime Minister of Ethiopia Mr. Meles Zenawi)’s name appears typewritten on the 2008 Directive for signature; he should have dated and signed the document as required to adopt it. He did not.¹¹²

- 2.63. Accordingly, combined with Respondent’s admission, Prof. Tekle correctly concludes that “The 2008 Directive therefore remains a mere draft document without legal effect.”¹¹³
- 2.64. Prof. Tekle is not alone in his analysis, as other authors have similarly concluded that the failure to adopt a directive pursuant to Art. 5 renders the EIA proclamation ineffective:

In EIA proclamation 299/2002 (Art. 5) it is stated ‘every project which falls in any category listed in any directive issued pursuant to this Proclamation shall be subject to environmental impact assessment’. In the first place, the definition and listing of projects that require EIA (ruled in Article 5 of the proclamation) is only published in the EPA’s EIA draft guidelines, which are not legally effective. According to a high official of the EPA no list of projects which requires EIA has been formulated to date. Therefore, no enforcement mechanism is in place to specifically determine the liability of a proponent to undertake EIA prior to receiving an investment license from any licensing

¹¹² Tekle Report, ¶¶ 2.7-2.10.

¹¹³ *Id.*, ¶ 2.10.

agency. Without such a detailed list the EPA does not have any legal means to enforce the implementation of EIA.¹¹⁴

- 2.65. Indeed, Respondent itself does not appear to regard Directive No. 1/2008 as effective, as the ESIA that it apparently submitted to the World Bank in 2017 for the Kilinto Industrial Park¹¹⁵ sets forth the relevant environmental laws and does not identify Directive No. 1/2008 among those laws, nor do the EIAs it produced per the Tribunal's order for the Bole Lemi industrial park.¹¹⁶ Ethiopia's expert, Dr. Ayele H. Anabo, also does not list Directive No. 1/2008 among the legal instruments which support the EIA system in Ethiopia.¹¹⁷
- 2.66. Thus, Respondent had failed to fill in the basic gaps of its EIA Proclamation, rendering it ineffective for a foreign investor such as Akgun. Although it is unclear why this fundamental gap was left unfilled, Prof. Tekle's view is that government officials did not want to risk scaring off foreign investment:

The EPA's failure to adopt the 2008 Directive to date is indicative of the lack of commitment on the part of government officials who simply wanted to please investors—particularly foreign investors—in furtherance of economic development. In my opinion, it suggests: (i) a deliberate decision by the EC to “hold” the draft rather than adopt it to avoid scaring prospective investors with EIA requirements, or (ii) a deliberate decision by Mr. Zenawi to promote or attract investment at the expense of polluting the environment.¹¹⁸

¹¹⁴ **MBT-04**, D. Ruffeis et al., *Evaluation of the environmental policy and impact assessment process in Ethiopia*, Impact Assessment and Project Appraisal, 28(1), March 2010, 28:1, p. 33; See also **C-083**, D. G. Janka, *Environmental Impact Assessment in Ethiopia: Law and Practices*, A Dissertation (Tuscaloosa, Alabama, 2012) (“Janka”), pp. 50, 76-77 (concluding that the EIA Proclamation is not applicable to any project until a directive is in force).

¹¹⁵ Claimant notes here for good order that although the Tribunal has indicated that Respondent must produce the approved EIA for the Kilinto Industrial Park, the production of this document is under dispute and Claimant has not as of this writing received the full draft of such EIA. Pursuant to Procedural Order No. 2, the Respondent was directed to produce only a redacted version by 21 October 2021, leaving Claimant insufficient time to analyze the document for the purposes of this Reply dated 22 October 2021. Accordingly, Claimant's description here relies on publicly available documents regarding the Kilinto Industrial Park and reserves its rights to modify its discussion of the Kilinto Industrial Park EIA pending analysis of Respondent's production of the approved EIA.

¹¹⁶ **C-107**, Updated Environmental and Social impact Assessment for Kilinto Industrial Park dated March 2017 (“Kilinto EIA”); **C-108**, Final Environmental Impact Assessment Report for Bole Lemi I Industrial Park, July 2013 (“Bole Lemi EIA I”); **C-109**, Updated Environmental Impact Assessment Report for Bole Lemi II Industrial Park dated March 2017 (“Bole Lemi EIA II”).

¹¹⁷ Expert Legal Opinion of Dr. Ayele H. Anabo dated 12 March 2021, ¶ 6.

¹¹⁸ Tekle Report, ¶ 2.11.

2.67. More broadly, Respondent's EIA laws were not on par with its international peers. Prof. Tekle observes that:

... international best practices feature more detail than that included under Ethiopian law regarding the procedural requirements for conducting an EIA, appealing adverse administrative decisions, and public participation.¹¹⁹

2.68. In its recent analysis of Ethiopia, the World Bank acknowledged this issue:

... although many of the implementing regulations, guidelines and standards for the EIA proclamation have been developed and disseminated, they have never been formally approved.¹²⁰

2.69. In sum, the very terms of the EIA Proclamation that Respondent relies upon to charge Akgun with the responsibility for providing an EIA for ETIZ does not support Respondent's position.

b. Respondent's EIA Laws Are Unclear and Inconsistently Applied

2.70. Respondent's arguments also fail to acknowledge the inconsistent way its EIA-related laws were implemented, as well as the lack of clear lines of authority and communication regarding those laws, which is reflected here in the facts before, during and after the point at which the Mol asked Akgun for an EIA.

2.71. Prof. Tekle describes that practical enforcement of the EIA-related laws in Ethiopia during the period of Akgun's investment was very poor:

Generally, in practice during the 2010-2015 period, the governing bodies did not properly follow and implement the EIA-related laws. Instead, the EPA and regional environmental agencies often unduly delegated their substantive mandate to evaluate EIA reports to sectoral agencies, such as the Ministry of Industry or Investment Agency. These agencies to which the EPA delegated EIA assessment obligations often acted according to their own discretion at the expense of the environment. Government officials tended to prioritize investment promotion over

¹¹⁹ Tekle Report, ¶ 2.32.

¹²⁰ **C-110**, World Bank, *Realizing Ethiopia's Green Transformation: Country Environmental Analysis (CEA)*, 28 June 2017, p. 60.

environmental protection and allowed project commencement without fulfilment of EIA requirements.¹²¹

- 2.72. Indeed, that a project would generate an EIA represented something of an anomaly in the mid-2000s:

... less than 3% of developers appear before the Federal EPA with their EISR out of the total number of projects which have to pass through the EIA process. As it has been observed in EPA documents, out of 11,091 licensed investment projects from 1996 to 1998 E.C. [2004-2006], only 24 prepared EISRs on their respective projects and submitted them to the EPA for review (EPA, 2006). This makes only 0.2%.¹²²

- 2.73. Directly pertinent here, Respondent admits that it failed to perform an EIA for the 35,000-unit Condominium Project to which it ultimately chose to allocate the Legedadi watershed's resources instead of ETIZ.¹²³

- 2.74. Some scholars argue that Ethiopia's investment laws negate the EIA Proclamation's EIA requirement:

The EIA law is now very dated and has not been adapted since the introduction of the proclamation in 2002. However, the Investment Proclamation is very dynamic and the current version does not include a requirement for EIA. According to the Investment Proclamation 375/2003, the Investment Agency can issue the investment license without any requirement for EIA. Based on the principle that newer laws are superior to older ones, the Investment Proclamation prevails over the EIA proclamation. Therefore the EPA does not have any legal means to enforce the law. In addition to this, no mechanism or rule exists which administers the abidance of the law. Legally speaking any investor is in fact not required to conduct EIA.¹²⁴

- 2.75. Indeed,

¹²¹ Tekle Report, ¶ 2.27.

¹²² **MBT-05**, M. Damtie and M. Bayou, *Overview of Environmental Impact Assessment in Ethiopia, Gaps and Challenges* (Melca Mahiber, January 2008), p. 46.

¹²³ **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9.

¹²⁴ **MBT-04**, Dominik Ruffeis, Willibald Loiskandl, Seleshi Bekele Awulachew & Eline Boelee (2010) *Evaluation of the environmental policy and impact assessment process in Ethiopia*, Impact Assessment and Project Appraisal, 28:1, 29-40, DOI, p. 33.

in most cases Ethiopia's Investment Proclamation does not make EIA a requirement to make the decision whether to permit the investment, and practically most projects are granted approval without the say so of the environmental agency. ... As a result, most development initiatives are not passing through the EIA process ¹²⁵

- 2.76. In 2012, Ethiopia enacted Investment Proclamation No. 769/2012, which carried forward the omission of any express EIA requirement in conjunction with the issuance of investment permits. It does, however, obligate the Investment Agency to “execut[e] investors’ requests for approval of [EIA] studies” when they are “conducted.”¹²⁶ As Prof. Tekle explains, the Investment Agency was tasked under Ethiopian law with serving as a “one-stop-shop for investors and, among other things, obligated the agency to assume EIA study clearance processing for investors.”¹²⁷ Indeed, Akgun recorded the “one-stop-shop” concept in its feasibility report as one of the enticements in establishing ETIZ.¹²⁸ Yet, it is apparent that confusion and miscommunication surrounding the EIA process persisted.
- 2.77. Even accepting *arguendo* that Akgun was required to submit an EIA for the ETIZ project, the Ethiopian authorities’ conduct prior to the request for an EIA was not consistent with Ethiopian law because the authorities granted Akgun a permit for the project, handed over the land, and allowed construction to begin without EIA approval.
- 2.78. This inconsistency continued even after the Mol’s request to Akgun for an EIA, according to Prof. Tekle:

[T]hroughout the EIA review process, the Ministry of Industry or Investment Agency was required to provide Akgun with administrative assistance to facilitate the EIA process, acting as a go-between for Akgun and Ethiopia’s bureaucracy, including the EPA. Yet, it is my understanding that the Ministry of Industry failed for some time to report to Akgun in an accurate manner the regional or sectoral agencies’ concerns regarding ETIZ, the inability of any EIA

¹²⁵ **MBT-06**, Environmental Impact Assessment in Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation Adugna Feyissa Gubena, Journal of Environment and Earth Science (Online) Vol.6, No.1, 2016, p. 6.

¹²⁶ **MBT-13**, Investment Proclamation No. 769/2012, Federal Negarit Gazeta of FDRE, 17 September 2012, Art. 30(4)(d).

¹²⁷ Tekle Report, ¶ 2.34.

¹²⁸ **C-045**, Final Feasibility Study, p. 102.

revisions to address those concerns adequately, and the need for an alternative site, all of which further exacerbated the EPA's failure to issue a timely decision on Akgun's EIA.¹²⁹

He continues:

Although Akgun's October 2013 EIA report raised concerns at various Ethiopian sectoral and regional agencies related to ETIZ due to a perceived threat to the water supply and water allocation issues *that could not be countered or avoided through revisions to the EIA*, the EPA or Ministry of Environment did not refuse implementation. Instead, they allowed the Ministry of Industry to demand costly and futile revisions. Moreover, although the Ministry of Industry was intended to serve as a "one-stop shop" for Claimant regarding its investment and therefore lawfully played a part in the process, the participation of so many other governmental agencies in the EIA assessment process was contrary to the EPA's sole jurisdiction over Claimant's EIA under the EPA Proclamation.¹³⁰

2.79. Prof. Tekle observes that such inconsistency is not uncommon:

[P]rocedural anomalies in the EIA process are common in Ethiopia. Officials often violate EIA laws or ignore them entirely in order to favor economic development over environmental protection.¹³¹

2.80. It has further been noted that "licensing agencies do not meet their obligation to ensure that the EPA or the relevant regional environmental agency has authori[z]ed the implementation of a proposed project prior to issuing an investment permit or a trade or an operating licen[s]e."¹³²

2.81. That inconsistency extends to improper delegation of duties and powers and a resulting excess of discretion in administrative decision-making.¹³³

2.82. Respondent's arguments concerning GOTA underscore its inconsistency and lack of clarity in its laws. Respondent asserts that GOTA was an unqualified

¹²⁹ Tekle Report, ¶ 2.61.

¹³⁰ *Id.*, ¶ 2.64; *see also id.*, ¶¶ 2.27, 2.62.

¹³¹ *Id.*, ¶ 2.58.

¹³² **MBT-04**, D. Ruffeis et al., *Evaluation of the environmental policy and impact assessment process in Ethiopia*, Impact Assessment and Project Appraisal, 28(1), March 2010, p. 35.

¹³³ *Supra* ¶ 2.71.

firm and that, in fact, there are no firms in Ethiopia capable of performing an EIA.

- 2.83. But Respondent's own EIA laws require that a local firm must be involved in the EIA process. Prof. Tekle explains that:

... only local, Ethiopian firms involving experts across all applicable disciplines were considered competent to undertake [EIAs]. An individual – whether local or foreign – cannot undertake an EIA study alone in Ethiopia. If an individual or a foreign firm wished to perform an EIA in Ethiopia, he/she/they must be qualified and partner with a competent Ethiopian firm to do so.¹³⁴

- 2.84. Assuming Respondent is correct in its assertion that there are no firms in Ethiopia that are qualified to perform an EIA, then it would be impossible ever to submit an EIA that complies with all EIA-related requirements.¹³⁵ But Respondent's own practices undermined its position, as the principals of GOTA had submitted the report for the Ginchi gypsum factory west of Addis Ababa, which was apparently accepted and has been in operation since that time.¹³⁶

- 2.85. In any event, Respondent's position is untenable and the issue of EIA consultant qualifications is demonstrative of the internal conflicts within Respondent's EIA law and its inconsistent application in practice. Summing up this sentiment, one scholar has observed that "the lack of practical implementation and application of the EIA process leav[es] a huge gap between theory and practice."¹³⁷

¹³⁴ Tekle Report, ¶ 2.35.

¹³⁵ See **MBT-04**, D. Ruffeis et al., *Evaluation of the environmental policy and impact assessment process in Ethiopia*, Impact Assessment and Project Appraisal, 28(1), March 2010, p. 33 ("The consulting firm primarily needs to confirm that they are legally registered and licensed to conduct EIA and need to meet requirements specified under any directive issued by the EPA. According to Damtie and Bayou (2008) such directives or guidelines in a legal sense have never been issued. Therefore, it is not possible to clearly identify qualified consulting firms."); **C-083**, Janka, pp. 40, 42-43, 45 (concluding that EIA consultants must be licensed, and some are, but the appropriate qualifications are left unspecified so the validity of the licenses are doubtful and that foreign EIA experts are not qualified as experts under Ethiopian law and cannot get an Ethiopian license).

¹³⁶ **C-069**, Environmental Impact Assessment Plan of ETIZ by GOTA dated 3 March 2014 (Main Document) ("GOTA EIA"), pp.195-196.

¹³⁷ **MBT-06**, Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation Aduugna Feyissa Gubena, Journal of Environment and Earth Science (Online) Vol.6, No.1, 2016, p. 8.

- 2.86. Respondent's defense attempts to paint the surrealistic picture that Akgun's EIA obligations were clear under the law. According to Respondent's narrative, a private investor was expected to conduct an environmental site suitability analysis for a project that Respondent planned and initiated, and for which Respondent selected the location. It further advances the proposition that this requirement was generally enforced in the middle of the project after the site was allocated, citizens were evicted and their rights expropriated, contracts were executed and money was paid. And finally, Respondent argues that this "requirement" was clear and consistently enforced.¹³⁸ Respondent's narrative obviously makes no logical sense, nor is it consistent with the actual law and practice in Ethiopia.
- 2.87. Respondent also advances the bizarre contention that while EIAs were required, there were no Ethiopian consultants who had the expertise and competence to create an EIA for ETIZ.¹³⁹ This illogical and counter-factual contention casts further doubt on the synthesis of facts and law that forms Respondent's defense.
- 2.88. Common sense suggests that contrary to Respondent's arguments, the real situation is entirely consistent with Prof. Tekle's opinions and the available literature that discusses the confusion and disappointment regarding Ethiopia's environmental regime in this time frame. Put simply, Ethiopian law, if applied consistently with its plain language would have required Respondent to conduct an environmental assessment before allocating the ETIZ site. Moreover, the provisions of the EIA law that Respondent relies on were never fully implemented; as a result, the law was applied inconsistently and in this case, Respondent ignored it. Thus, the Ethiopian EPA did not perform as an effective regulator. Accordingly, Respondent's argument that Ethiopian law clearly obligated Akgun to submit an EIA must be rejected.

¹³⁸ SoD, ¶¶ 45-46.

¹³⁹ *Id.*, ¶ 60; Witness Statement of Mr. Ahmed Abteu dated 12 March 2021 ("Ahmed Abteu Statement"), ¶ 13.

D. Respondent Initiated the EIA Process Far Too Late

(i) Respondent Asked for an EIA Nearly 5 Years After Proposing ETIZ

- 2.89. The Mol requested that Akgun supply an EIA for ETIZ in or around May of 2013.¹⁴⁰ The request, delivered informally, occurred after numerous steps had already been taken to bring the project to fruition, including:
- 2.89.1. October 2008: Respondent's delegation visited Ikitelli and signed the MoU that obligated it to provide the site for the Project;¹⁴¹
 - 2.89.2. January 2009: Respondent decided that ETIZ would be sited in the Legedadi watershed;¹⁴²
 - 2.89.3. February 2009: Respondent issued Akgun its investment permit and trade registration certificate;¹⁴³
 - 2.89.4. May 2009: Respondent issued Akgun its development license;¹⁴⁴
 - 2.89.5. August 2009: Akgun and its consultants presented the pre-feasibility study to a publicized assembly of ministers;¹⁴⁵
 - 2.89.6. December 2009: Akgun provided a nearly 400-page final feasibility study that detailed the project location and its scope;¹⁴⁶
 - 2.89.7. June 2010: Akgun and Respondent signed the 2010 ETIZ Agreement, in which Respondent was partners with Akgun and which indicated the location of the site;¹⁴⁷

¹⁴⁰ SoC, ¶ 2.65.

¹⁴¹ **C-007**, Memorandum of Understanding between the Oromia State and Akgun Construction dated 13 October 2008; *supra* Section 2.A.i.

¹⁴² Yusuf Akgun 1st Statement, ¶¶ 4.5-4.8; Yusuf Akgun 2nd Statement ¶¶ 3.3 - 3.6; *supra* Section 2.A.ii.

¹⁴³ **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009.

¹⁴⁴ **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009.

¹⁴⁵ **C-043**, Pre-Feasibility Study; **C-003**, K. Bekele, *Turkish Investors Envisage an Industrial Zone Worth USD 10bln in Ethiopia*, The Reporter, 22 August 2009; *supra* Section 2.A.iii.

¹⁴⁶ **C-045**, Final Feasibility Study.

¹⁴⁷ **C-008**, The 2010 ETIZ Agreement.

- 2.89.8. April 2012: Respondent authored a site valuation report that details the Oromia Land and Environmental Bureau's participation in discussions about the use of the site;¹⁴⁸
- 2.89.9. June 2012: Akgun and Respondent signed the 2012 ETIZ Agreement, which required Akgun to undertake studies on how to prevent the operation of the zone from polluting the nearby watershed but did not require an EIA;¹⁴⁹
- 2.89.10. July 2012: Akgun paid the compensation to relocate the farmers on the site;¹⁵⁰
- 2.89.11. September 2012: Respondent sent a letter in which it "strongly urge[d] [Akgun] to undertake the work of its industrial zone" and to "commence the work of the projects within a period of six months for otherwise we are mandated to terminate the agreement without any precondition and snatch the land and thereby transfer it to other investors."¹⁵¹
- 2.89.12. January 2013: the land lease certificate was issued to Akgun, stating "we strongly urge you to undertake the work of this project";¹⁵²
- 2.89.13. March 2013: the first 100ha of the site were handed over to Akgun;¹⁵³
- 2.89.14. March 2013: Akgun submitted its initial work plan to Respondent;¹⁵⁴
- 2.89.15. March 2013: the Mol asked the Ethiopian Investment Agency to renew Akgun's investment license and in that letter, it clearly acknowledges that "the investment has been approved by the government and some preparatory works have been carried out";¹⁵⁵

¹⁴⁸ **C-048**, Compensation Payment Proposal Report dated April 2012.

¹⁴⁹ **C-009**, The 2012 ETIZ Agreement.

¹⁵⁰ **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012.

¹⁵¹ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012.

¹⁵² **C-012**, Land Lease Certificate.

¹⁵³ **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 ("Land Handover Protocol").

¹⁵⁴ **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013.

¹⁵⁵ **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013.

- 2.89.16. April 2013: the Ethiopian Investment Agency renewed Akgun's investment permit;¹⁵⁶
- 2.89.17. April 2013: Akgun began to mobilize to the site.¹⁵⁷
- 2.90. Only after all these events did the Mol orally request that Akgun provide an EIA.¹⁵⁸ There was no formal process observed, no official notification concerning the process until much later, nor were Respondent's environmental ministries involved in the communications. This stands in contrast to the communications that Respondent itself cites, which it alleges it sent to Akgun's affiliates concerning other projects.¹⁵⁹
- 2.91. That it was the Mol who delivered the EIA request was not surprising since industrial development is the Mol's remit and the Mol was designated as Respondent's "face" to Akgun; moreover, the 2012 ETIZ Agreement provided that the Mol would assist Akgun in its dealings with other Ethiopian authorities in bringing ETIZ to fruition.¹⁶⁰
- 2.92. Indeed, after signing the 2012 ETIZ Agreement, the Mol assisted Akgun with obtaining licenses, including its request in March 2013 to the Investment Agency to renew Akgun's investment license, which was done. The Mol actively encouraged Akgun to proceed with ETIZ.¹⁶¹
- 2.93. As Prof. Tekle explains in his opinion, it was the Mol that was charged with ensuring that the proper environmental clearances for ETIZ were obtained prior to designating the land, and most certainly prior to signing an investment agreement with Akgun, allocating the land to Akgun, and encouraging Akgun to commence construction.¹⁶²

¹⁵⁶ **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

¹⁵⁷ Yunus Akgun 1st Statement, ¶ 4.9.

¹⁵⁸ Yusuf Akgun 1st Statement, ¶ 5.5.

¹⁵⁹ **See R-1**, Letter from the Environmental Protection Authority to Oyap, dated 11 April 2005; **R-2**, Letter from the Environmental Protection Authority to Oyap, dated 29 November 2006; **R-3**, Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007. However, as Mr. Yunus Akgun states, he does not recall seeing either of these communications prior to Respondent's Statement of Defense. Yunus Akgun 2nd Statement, ¶¶ 2.1-2.2.

¹⁶⁰ **C-009**, The 2012 ETIZ Agreement, Arts. 7(9), 8(8), 11(1).

¹⁶¹ Yunus Akgun 1st Statement, ¶ 5.2.

¹⁶² *Supra* Section 2.C.i.

- 2.94. To the extent approvals were required, the 2012 ETIZ Agreement explicitly obligated the Mol to assist in obtaining any necessary regulatory approvals.¹⁶³ Assisting foreign investors in avoiding regulatory friction was also part of the Mol's legal mandate. Under the Ethiopian law,¹⁶⁴ the Mol is supposed to:
- 2.94.1. "enter into contracts and international agreements in accordance with the law";¹⁶⁵
 - 2.94.2. "promote the expansion of industry and investment";¹⁶⁶
 - 2.94.3. "create conducive conditions for the acceleration of industrial development";¹⁶⁷
 - 2.94.4. "create enabling environment for domestic and foreign investment";¹⁶⁸
 - 2.94.5. "facilitate the provision of efficient one-stop shopping services to investors";¹⁶⁹ and
 - 2.94.6. The Mol's duties later expanded to explicitly include: "provide support to industries so as to ensure compliance with environmental protection requirements."¹⁷⁰
- 2.95. There is no evidence any Mol official mentioned the supposed EIA "requirement" to Akgun until mid-2013, which was after the farmers were evicted, the property was allocated, the licenses were provided, the lease was agreed to, the money was paid, and the project was underway.¹⁷¹
- 2.96. At the time of the Mol's request, the EIA was not suggested to be an impediment to the ongoing work, nor was it presented as a pre-condition to anything further occurring on the site. There were no provisions in either the 2010 or 2012 ETIZ Agreements that indicate the parties anticipated or

¹⁶³ **C-009**, The 2012 ETIZ Agreement, Arts. 7(9), 8(8), 11(1).

¹⁶⁴ **C-111**, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010.

¹⁶⁵ *Id.*, Art. 10(1)(f).

¹⁶⁶ *Id.*, Art. 20(1)(a).

¹⁶⁷ *Id.*, Art. 20(1)(b).

¹⁶⁸ *Id.*, Art. 20(1)(d).

¹⁶⁹ *Id.*, Art. 20(1)(e).

¹⁷⁰ **MBT-02**, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1097/2018 Art. 19(1)(x).

¹⁷¹ SoC, ¶¶ 2.62-2.65; *supra* Section 2.B.ii.

discussed an onerous process to obtain further approvals, such as an EIA, for the project before it could commence. Notably, the Mol neither asked nor required that Akgun stop work at the ETIZ site when it made the initial EIA request to Akgun.

- 2.97. The 2012 ETIZ Agreement called for Akgun to carry out “necessary studies” to determine its pollution control measures, but this provision cannot be interpreted to require an EIA. Prof. Tekle observes that in his opinion, this is a provision that addresses pollution control measures, as those measures are regulated under Ethiopian law:

... both agreements call for Akgun to avoid environmental pollution in the implementation and management of the project rather than to perform an EIA before implementation. Environmental pollution is an after-the-fact occurrence in the process of project implementation, and it is regulated by the Environmental Pollution Control Proclamation No. 300/2002 . . . It is a separate concern governed by separate proclamations from the EIA Proclamation. ...

Article 8(9) of the 2010 ETIZ Agreement requires Akgun to “protect the environment from pollution by using appropriate methods and technologies.” ... The 2012 Agreement, at article 8(10), repeats this obligation and builds on it by continuing with the following: “In this regard the Developer has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard.” When read in context, it is clear that the “necessary studies” relate to environmental pollution control and do not encompass an EIA.¹⁷²

- 2.98. The 2012 ETIZ Agreement’s plain text further supports this reading for at least three reasons. In full it states:

The Developer shall protect the environment from pollution by using appropriate methods and technologies. In this regard the Developer has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard.¹⁷³

¹⁷² Tekle Report, ¶¶ 2.44, 2.47.

¹⁷³ **C-009**, The 2012 ETIZ Agreement, Art. 8(10).

- 2.99. First, the operative words in art. 8(10), are “take maximum care,” “protect,” and “safeguard.” These words indicate an ongoing obligation rather than obligations that end with the signing of the Agreement. Moreover, the phrase “in this regard” clearly links the “necessary studies” requirement to the ongoing obligations to protect from pollution.
- 2.100. Second, the “necessary studies” obligation cannot be interpreted to require an EIA because that requirement is forward looking and associated with the ongoing obligation to “protect” and “safeguard.” By contrast, an EIA is a snapshot of current environmental factors and an assessment of those factors in taking decisions about the project before it is commenced.
- 2.101. Third, “necessary studies” are limited to “appropriate methods and technologies” necessary to “safeguard the [water sources] from pollution.” In contrast, an EIA will consider a broader range of environmental impacts.
- 2.102. In sum, Art. 8(10) defines obligations that begin after the Agreement is signed and continue as long as it is in effect. The “necessary studies” requirement associated with those obligations logically comes into play after the decision is taken to go forward with the project and play a fundamentally different role than an EIA.
- 2.103. Finally, as discussed above, Respondent also argues that the contemplated EIA was so sophisticated and complex that there were no vendors within Ethiopia that had the requisite expertise to prepare it, but Prof. Tekle explains the absurdity of that contention as a matter of Ethiopian law.¹⁷⁴ Apart from Ethiopian law, however, the contention is also absurd as a matter of logic. If Respondent seriously believed that it was necessary for Akgun to obtain a detailed and exhaustive EIA that would require the work of a specialized consultant from another country that would take a year or more to complete before any construction could go forward, it could have and should have clearly communicated that to Akgun very early in its dealings and included specific provisions to that effect in either the 2010 ETIZ Agreement or the 2012 ETIZ Agreement. It did not; instead, it created provisions requiring Akgun to get to work and imposing draconian consequences¹⁷⁵ if deadlines were not

¹⁷⁴ SoD, ¶ 60; Ahmed Abtew Statement, ¶ 13; *supra* Section 2.C.ii.b.; Tekle Report, ¶ 2.35.

¹⁷⁵ *Supra* Section 2.B.i.b.

met—provisions that would be completely nonsensical if Respondent's suggested EIA procedure was what the parties contemplated.

(ii) Akgun Followed Respondent's Guidance in Obtaining the EIA

- 2.104. There is no dispute that the first request that Akgun perform an EIA came with the Mol's verbal request in May of 2013. Respondent does not dispute Mr. Yusuf Akgun's recollection that an Ethiopian official asked Mr. Yusuf Akgun to retain a consultant to prepare one, noting that Akgun could do that without creating as much delay as if Respondent took on the EIA preparation.¹⁷⁶
- 2.105. Faced with a verbal request to submit an EIA and desiring to be cooperative with the Mol, Akgun hired GOTA to prepare an EIA.¹⁷⁷
- 2.106. Notwithstanding Respondent's criticism of GOTA, the Mol referred GOTA to Mr. Hagos Sequar, who was a former Mol official.¹⁷⁸ Akgun hired Mr. Hagos shortly after it executed the 2012 ETIZ Agreement to assist with ETIZ upon the recommendation of Mr. Tadesse Haile, who was the State Minister of Industry at that time.¹⁷⁹ Mr. Hagos was familiar with other past industrial zone projects and had been a part of the Mol team that was handling ETIZ prior to 2013.¹⁸⁰
- 2.107. According to GOTA's *curriculum vitae*, it had apparently created successful EIAs for other projects, including the gypsum factory in Ginchi, which is approximately 80 km west of Addis Ababa.¹⁸¹ In addition, GOTA had relevant experience in working with the various ministries involved and the Oromia Regional State.¹⁸² The main consultant was Getachew Belis and his team of consultants included Michael Habtom and Seged Kelemu.¹⁸³ These

¹⁷⁶ Yusuf Akgun 1st Statement, ¶ 5.5.

¹⁷⁷ *Id.*, ¶¶ 5.5-5.6. See also Yunus Akgun 1st Statement, ¶ 5.15; Yunus Akgun 2nd Statement, Section 4; Ufuk Akgun Statement, ¶ 3.1.

¹⁷⁸ Yunus Akgun 2nd Statement, ¶ 4.2.

¹⁷⁹ *Id.*, ¶ 4.3.

¹⁸⁰ *Id.*

¹⁸¹ **C-069**, GOTA EIA, pp. 195-196.

¹⁸² *Id.*, pp. 192-193, 195.

¹⁸³ *Id.*, pp. 191-196.

individuals had previously worked for the relevant ministries on feasibility studies and EIAs.¹⁸⁴

- 2.108. Because Mr. Hagos's contacts at the Mol referred GOTA to him, it was no secret to the Ethiopian authorities that Akgun had hired GOTA to perform the EIA.¹⁸⁵ Indeed, GOTA was in contact with various Ethiopian authorities to prepare its report, including the local officials in Sendafa, the Mol and the MoEF.¹⁸⁶ Neither the Mol nor any other authority complained about GOTA at that time or suggested that a different consultant would be better, nor at that time did Mol or any other authority suggest to Akgun that it was committing a fatal error by hiring a local Ethiopian firm to perform the EIA.¹⁸⁷

(iii) Akgun Worked on ETIZ Openly and with Respondent's Encouragement while the EIA Was Pending

- 2.109. There cannot be any real dispute that Respondent knew, accepted, and encouraged that work should go forward on the project site during the preparation of the EIA.

- 2.109.1. First, Akgun was required to provide reports on its project on the site and did so. These reports demonstrated to Respondent that site clearing and construction was taking place there, that Akgun was importing machinery to accelerate its progress, and that Akgun was actively recruiting investors for ETIZ.¹⁸⁸ Contemporaneous correspondence from the Mol also acknowledged Akgun's construction work and sought to secure supply of electricity to the site because "an agreement has been reached with at least 15 investors to establish production plants within the industrial zone."¹⁸⁹

¹⁸⁴ **C-069**, GOTA EIA, pp. 191-196.

¹⁸⁵ Yunus Akgun 2nd Statement, ¶¶ 4.2-4.4.

¹⁸⁶ *Id.*, ¶ 4.4.

¹⁸⁷ *Id.*

¹⁸⁸ **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; **YUN-16**, Letter from Akgun Construction to Ministry of Industry dated 4 October 2013; **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

¹⁸⁹ **C-112**, Letter from Ministry of Industry to Ethiopian electric Power Corporation dated 1 November 2013.

- 2.109.2. Second, Akgun sought and Ethiopia granted various permits, licenses, and certificates needed to perform work on the site.¹⁹⁰
- 2.109.3. Finally, it is undisputed that senior officials in the government urged Akgun to work more quickly and assured Akgun that ETIZ was going to move forward no matter what because it was a priority of the government's economic plan.¹⁹¹ Senior officials suggested that the EIA was an essentially ministerial requirement and that because the project had the support of the highest levels of government, issues regarding the EIA were not going to scuttle the project.¹⁹²
- 2.110. The fact that Ethiopia also promoted the Afro Oil factory further undermines its claims. Although Ethiopia now claims that the construction of this entire factory was secretive and illegal,¹⁹³ the evidence is clear that Ethiopia knew about and supported its construction at the time. As both Mr. Yusuf Akgun and Mr. Ufuk Akgun explain in their witness statements, Afro Oil was a pet project of Ethiopia's President, not an investor whom Akgun solicited.¹⁹⁴ Assisting Afro Oil to get up and running on the site was a gesture of good faith towards the officials who had been boosters of ETIZ since its inception, not a decision that Akgun took for profit-driven motives.¹⁹⁵
- 2.111. Further undermining Respondent's false narrative concerning Afro Oil is the fact that Akgun did not stand to make any substantial profit from Afro Oil's factory construction. Afro Oil, due to its early entry, undertook its construction

¹⁹⁰ **C-063**, Commercial Registration Certificate of Akgun Construction's Ethiopia Branch issued by Ethiopian Investment Agency dated 29 November 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013; **C-012**, Land Lease Certificate; **C-113**, Letter from Ministry of Industry to Ethiopian Electric Power Corporation dated 15 November 2013; **C-114**, Letter from Akgun Construction to Oromia Investment Commission dated 16 September 2013; **C-018**, Letter from Akgun Construction to Bureau of Rural and Environmental Protection of Oromia Regional State dated 14 November 2013; **C-115**, Letter from Akgun Construction to Immigration and Nationality Affairs Main Department dated 22 May 2013; **C-116**, Letter from Akgun Construction to Ministry of Labor and Social Affairs dated 28 November 2013; **C-117**, Letter from Akgun Construction to Ethiopia Investment Agency dated 9 January 2014; **C-118**, Letter from Akgun Construction to Ethiopian Investment Agency dated 24 January 2014; **C-119**, Letter from Ethiopian Investment Agency to Ethiopian Revenues and Customs Authority dated 13 March 2014; **C-120**, Letter from Ethiopian Investment Agency to Ethiopian Revenues and Customs Authority dated 28 March 2014.

¹⁹¹ See Yunus Akgun 1st Statement, ¶¶ 6.8, 6.11; **C-050**, Letter from Investment Board of Oromia to Akgun Construction and Finfine Area Oromia Special Zone Administration dated 17 September 2012.

¹⁹² Yusuf Akgun 1st Statement, ¶¶ 5.5-5.6.

¹⁹³ SoD, ¶ 51; Ahmed Abteu Statement, ¶ 8.

¹⁹⁴ Yusuf Akgun 2nd Statement, ¶ 4.1; Ufuk Akgun Statement, ¶ 2.10.

¹⁹⁵ Yusuf Akgun 2nd Statement, ¶¶ 4.1-4.2; Ufuk Akgun Statement, ¶¶ 2.10-2.11.

independently; Akgun did not direct or perform the construction, as it planned to do for the other investors in ETIZ.¹⁹⁶ Although Akgun signed a sub-lease agreement with Afro Oil that entitled Akgun to periodic sub-lease payments,¹⁹⁷ Akgun's business model for ETIZ under the 2012 ETIZ Agreement relied more on the profits it would make from constructing the factories for the ETIZ investors than the periodic sub-lease payments.¹⁹⁸ The Afro Oil factory represented a deviation from that model.

- 2.112. In addition, Respondent issued an investment permit to Afro Oil in January 2013, months before it even handed over the ETIZ site to Akgun.¹⁹⁹ Respondent's officials, such as Dr. Mulatu, visited the ETIZ site during the time Afro Oil was constructing its factory.²⁰⁰ Respondent issued Afro Oil a construction permit in January 2014, in which the location within ETIZ is detailed and it is stated that Afro Oil's "project is approved."²⁰¹ Respondent further received the EIA for the Afro Oil factory in June 2014, which specifically indicated its construction was occurring in ETIZ.²⁰² Notably, like Akgun, Afro Oil employed an Ethiopian EIA consultant that AAWASA and other Ethiopian ministries have also employed.²⁰³ Moreover, Akgun itself disclosed the progress of the Afro Oil project, specifically informing Respondent in December 2013 that it had provided "46793 m³ of land to Afro Oil Manufacturing P.L.C." and further informing Respondent:

Afro Oil Manufacturing P.L.C. has signed a sub-lease agreement with our company and has achieved title deed certificate and Sub Lease Certificate from the Oromia Regional Government. **This company has started**

¹⁹⁶ Yusuf Akgun 2nd Statement, ¶ 4.2; Ufuk Akgun Statement, ¶ 2.11.

¹⁹⁷ **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.

¹⁹⁸ Yusuf Akgun 2nd Statement, ¶ 4.2; Ufuk Akgun Statement, ¶ 2.11.

¹⁹⁹ **C-121**, Investment Permit for Joint Investment issued to Afro Oil Manufacturing PLC by Ethiopian Investment Agency on 18 January 2013.

²⁰⁰ Ufuk Akgun Statement, ¶ 2.12.

²⁰¹ **C-122**, Construction Permit issued to Afro Oil Manufacturing PLC on 24 January 2014.

²⁰² **C-123**, Environmental and Social Impact Assessment Report for Afro Oil dated June 2014.

²⁰³ See **C-124**, Final Environment Audit Report of the Boreholes in and around Addis Ababa dated November 2009; **C-125**, Addendum to Lalibela Resettlement Action Plan, Land Acquisition Social Impact Screening and Livelihood Restoration Plan for Development Works in Tiya and Melkaqunture dated December 2014.

constructing its factory building in our industrial city site.²⁰⁴

- 2.113. All of this shows that Respondent was not only aware of the Afro Oil project but actively encouraged it. Finally, Respondent argues that Akgun was at fault for failing to halt Afro Oil's construction but as noted above, Akgun itself was not performing the construction. Indeed, Akgun lacked the authority to halt Afro Oil's construction and when Akgun brought the Mol's July 2014 suspension letter to Afro Oil's attention, it had no effect.²⁰⁵ Thus, Respondent's allegations concerning the authorization and construction of the Afro Oil factory are flatly incorrect.
- 2.114. All these facts render illogical Respondent's suggestion that Akgun was somehow in violation of any duty or promise by i) not supplying an EIA at an earlier stage; ii) continuing to work on ETIZ while the EIA was being prepared; or iii) allowing the Afro Oil factory construction to proceed as Respondent had specifically requested, formally permitted, and of which Respondent was at all times aware.

E. Respondent Secretly Decided to Relocate ETIZ but Gave Akgun Numerous Conflicting Messages about ETIZ's Future

(i) Respondent Concealed Early Environmental Concerns of Other Authorities from Akgun

- 2.115. As early as May 2012, authorities such as the AAWASA were communicating to Mol their concerns about the location of ETIZ and its effect on the Legedadi watershed. Respondent exhibits to its Statement of Defense a letter from AAWASA to Mol dated 24 May 2012—just a little over two weeks before the 2012 ETIZ Agreement was executed—in which AAWASA warned Mol that it needed to gather further information about ETIZ, stating:

However, the chosen land fully falls inside the Legedadi dam catchment area. We are concerned that the liquid and dry waste as well as the influence brought by the migration

²⁰⁴ **C-126**, Letter from Akgun Construction to Ethiopian Investment Agency dated 25 December 2013 (emphasis added); **C-022**, Letter from Akgun Construction to Ethiopian Electric Utility dated 27 August 2014 ("... the construction and installation of the 1st factory called Afro Oil manufacturing plc which is located in our industry zone has reached above 80% and it need[s] electrical power because it is near to be operational.").

²⁰⁵ Ufuk Akgun Statement, ¶ 2.13.

of people to the industry zone may affect the quality of Legedadi water that supplies 60% of pure drinking water for the city of Addis Ababa.

Thus, in order for us to assess the effect of the intended investment on the water quality, we request a copy of the environmental impact assessment report. If the report is not attainable, we request types of industries to be constructed, the amount of water needed after the construction is finalized, duration of construction and number of permanent employees, the size of the land intended for the investment and its geographical coordinates. In addition, we ask that we get a prior notice on any future investment, so we can work in unison with regards to providing pure drinking water to the residents of Addis Ababa.²⁰⁶

- 2.116. Neither this letter nor AAWASA's concerns were shared with Akgun at that time. Instead, Mol pushed forward with concluding the 2012 ETIZ Agreement, knowing full well that the local authorities were worried about "the effect of the intended investment on the water quality."
- 2.117. As outlined below, Akgun was subject to similar treatment later, when concerns and conclusions were expressed in internal correspondence among various of Respondent's authorities in spring 2014, to which Akgun was not copied or made aware.

(ii) Respondent Delivered Various Conflicting Messages Regarding the Fate of ETIZ

- 2.118. After Akgun submitted its first draft EIA from GOTA in October 2013, the Mol evidently shared the report with other authorities. AAWASA replied to the Mol in a letter dated 28 November 2013, expressing its concern about the chemical constituents of ETIZ's wastewater, the availability of water "to satisfy the ever-increasing demand for water in the city," and asking the Mol to assemble a workshop involving numerous federal, regional, and municipal authorities to discuss the ETIZ project.²⁰⁷

²⁰⁶ **R-24**, Letter from Addis Ababa Water and Sewerage Authority to the Ministry of Industry, dated 24 May 2012.

²⁰⁷ **C-062**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 28 November 2013.

- 2.119. A series of workshops followed, the first of which occurred on 2 January 2014 and included participants from multiple authorities, including the Mol, AAWASA, the MoEF, the Ministry of Water, Irrigation and Energy, the Oromia Bureau of Environmental Protection, the Oromia Investment Commission, the Ethiopian Investment Agency, and others.²⁰⁸ The result of the workshops was confusion. Although the Mol had advised Akgun to make revisions to the GOTA EIA in order to clear the concerns of other authorities, officials from both AAWASA and the MoEF demonstrated outright hostility to the ETIZ project, insisting that it could not go forward and that no EIA, regardless of the revisions it contained, would satisfy them.²⁰⁹ This hostility surprised Akgun, as it had consistently committed to apply all necessary environmental measures to establish ETIZ as an exemplary industrial zone.²¹⁰ It was further surprising in light of the blatant pollution of water sources in the ETIZ region, which Akgun documented at that time and attempted to bring to the attention of Ethiopian officials in order to contrast how ETIZ could be operated.²¹¹ Alarmed at the conflicting messages, Akgun communicated its concerns both to the Mol and the President, both of which had been boosters of ETIZ.²¹² Both the Mol and the President insisted that Akgun should proceed with revising the EIA and submit it.²¹³
- 2.120. Akgun submitted the revised GOTA EIA in March 2014 and the notes from the follow-up workshop demonstrate the continued conflicting messages that Akgun received.²¹⁴
- 2.121. For instance, the AAWASA recommended that ETIZ “should be removed from the Legedadi watershed” and the Oromia Land and Environmental Protection Bureau also concluded that “[t]he Legedadi Dam and [ETIZ] are not projects to be conducted together” and further elaborated that “even if another assessment is conducted by other consultants, the results will undeniably be

²⁰⁸ **C-066**, List of attendees to Ethio Turkish Industry Zone Environmental Assessment Meeting dated 2 January 2014.

²⁰⁹ Yunus Akgun 1st Statement, ¶¶ 6.3-6.4; Ufuk Akgun Statement, ¶ 3.2

²¹⁰ Yusuf Akgun 2nd Statement, ¶ 2.3; Ufuk Akgun Statement, ¶ 3.3.

²¹¹ Ufuk Akgun Statement, ¶¶ 3.3-3.7.

²¹² Yunus Akgun 1st Statement, ¶¶ 6.6-6.8

²¹³ *Id.*, ¶ 6.8.

²¹⁴ See **C-105**, Memorandum dated 3 April 2014.

conclusive of the necessity to relocate the project.”²¹⁵ But the very first page of those notes demonstrates the confusion, as it contains a handwritten message stating that only if it is determined to be “impossible to undertake a measure that can withstand the [environmental] impacts” of ETIZ, then a “change of site” should be considered and that the MoEF should make a determination to this end.²¹⁶

- 2.122. Thus, Akgun emerged from the workshops with no clear direction from Respondent. As Yunus and Yusuf Akgun explained in their witness statements, Akgun sought guidance from the Prime Minister’s office and from the Mol on how to proceed, and the advice was that the project would receive the full support of the government to proceed as anticipated and that the project would continue on the site that Respondent had allocated, with the suggestion that additional study on the site could help persuade the authorities who were still opposed to ETIZ.²¹⁷ Indeed, Akgun had no reason to question that assurance because shortly thereafter it received a permit to erect billboards advertising ETIZ and the Mol began to provide electricity to the allocated site.²¹⁸
- 2.123. As far as Akgun was aware, by April 2014, the decision had been made at the highest levels of the Ethiopian government that ETIZ could proceed on the allocated site as planned.²¹⁹
- 2.124. By June and July 2014, Akgun was proceeding, submitting its plans to Respondent for the next 15 years, requesting assistance in importing machinery and equipment, and facilitating construction of the Afro Oil facility.²²⁰

²¹⁵ *Id.*, p. 6.

²¹⁶ *Id.*, p. 1.

²¹⁷ Yunus Akgun 1st Statement, ¶ 6.11; Yusuf Akgun 1st Statement, ¶ 5.12; Ufuk Akgun Statement, ¶ 3.8; **C-073**, Report of Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 27 March 2014; **C-074**, Report of Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 3 April 2014.

²¹⁸ Yunus Akgun 1st Statement, ¶ 6.12.

²¹⁹ *See, e.g.*, **C-074**, Report of Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 3 April 2014; Ufuk Akgun Statement, ¶ 3.8.

²²⁰ *See* **C-093**, Letter from Akgun Construction to Ministry of Industry dated 7 July 2014 and the attached Business Plan for 15 years; **C-021**, Letter from Akgun Construction to Ministry of Industry and Ethiopian Investment Agency dated 17 July 2014.

2.125. By late July 2014, however, the Mol instructed Akgun to suspend its work at the ETIZ site due to concerns over the ability of the water source to sustain both the ETIZ project and the nearby Condominium Project, and the concern that ETIZ would pollute the watershed.²²¹ That letter references other communications involving the AAWASA and the Prime Minister's office, neither of which Akgun had ever seen, until Respondent was recently compelled to produce those communications.²²²

(iii) Akgun Was Unaware that the Ethiopian Authorities Had Already Decided that ETIZ Could Not Go Forward at the Allocated Site

2.126. After filing its Statement of Defense and only in response to Claimant's document requests, Ethiopia for the first time produced intragovernmental correspondence and internal notes from early-mid 2014. This correspondence reveals the internal deliberations among various Ethiopian authorities, including the AAWASA, the Mol, the MoEF, and the MoWIE. Each of these authorities concluded that it was an error to select the site for ETIZ because it was too environmentally sensitive an area due to its proximity to the Legedadi dam and underground basin and determined that the only solution was to relocate ETIZ to another site.

2.127. More specifically, the letters reveal the following:

2.127.1. In a letter from the AAWASA to the Mol dated 6 February 2014,²²³ AAWASA outlines data about the Legedadi dam, such as its capacity of 47 million m³ that originates mostly from rain runoff, its daily supply to Addis Ababa of 165,000 m³, and that it is the "main source of potable water to East Addis Ababa, Central Addis Ababa and Northern Addis Ababa."²²⁴ It recounts data about the Legedadi underground basin, such as its 42,000 m³ daily capacity and that it supplies "the residences in Bole Arabsa and Yeka Abado Condominiums being constructed under the City Housing

²²¹ C-016, Suspension Letter.

²²² *Id.*

²²³ C-127, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 6 February 2014 (copying the mayor of Addis Ababa; the MoWIE; the Office of the Addis Ababa Manager; the GM of the AAWASA; the Deputy Manager of the AAWASA; the project office; the Water Production Distribution System Supervision Sub Process; and the AAWASA Water Customer Services Sub Process).

²²⁴ *Id.*, p. 1.

Development Program along with the other houses intended to be constructed under the master plan of the city.”²²⁵ It further reflects construction and operational data about ETIZ, such as its daily consumption of 42,000 m³ and its waste constituents and concludes that the scenario whereby “a filtration mechanism [that] could possibly clean 100% [of ETIZ emissions]” is “very unlikely.”²²⁶ AAWASA further underscored its skepticism about treatment methods, concluding that “[e]ven if it is attempted to treat the industrial effluents emitted from the industry zone, any technical difficulties or errors that might occur in the filtration process risk rendering the entire collection [of rainwater runoff] during the winter season useless.”²²⁷ AAWASA also concluded that the underground capacity of 42,000 m³, which supplied both Addis Ababa and the “ancillary constructions” meant that “the industry zone will not have the capacity to produce water from underground.”²²⁸ AAWASA’s ultimate conclusion was “[to construct] the industry zone at a different place from the currently intended location.”²²⁹

- 2.127.2. In a letter from the MoEF to the Mol dated 14 April 2014,²³⁰ the MoEF applauds the Mol’s industrialization efforts and acknowledges the promise and potential of ETIZ, but states that a “strategic environmental assessment should have been conducted.”²³¹ It further echoes AAWASA’s concerns about the “quantity of water to be consumed by [ETIZ],” noting that there is already a “lack of water to [Addis Ababa]” and that “development engagements are underway to provide residents of Bole Arabsa, Yeka Abado and the localities with deep well water.”²³² Accordingly, MoEF concluded that “the water resource at Legedadi cannot meet the demand of [ETIZ]

²²⁵ *Id.*, p. 3.

²²⁶ *Id.*, pp. 3, 5.

²²⁷ *Id.*, p. 5.

²²⁸ *Id.*, p. 6.

²²⁹ *Id.*, p. 7.

²³⁰ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, (copying the Office of the Prime Minister; the Office of the President of the Oromia Regional Government; the Office of Mayor of the Addis Ababa City Government; and the AAWASA).

²³¹ *Id.*, p. 1.

²³² *Id.*, pp. 1-2.

combined with the population of Addis Ababa.”²³³ Ultimately, MoEF reasoned that “implementation of the proposed industry zone will result in a potential shortage and pollution” and advised that “an alternative replacement industry zone should be prepared.”²³⁴

- 2.127.3. In a letter from AAWASA to the MoI, the MoEF, and the MoWIE dated 16 May 2014,²³⁵ AAWASA states that it has been “notifying the Ministry of Industry and other entities directly concerned” about the “negative impacts [of ETIZ] on the Legedadi Dam water and Legedadi Underground Water.”²³⁶ It reiterates data concerning the Legedadi Dam’s supply of 50% of the water of Addis Ababa, the capacity of the Legedadi underground basin and emphasizes that water from the Legedadi underground complex is “intended to be supplied to the condominium houses under construction in Bole Arabsa and Yeka Abado area along with other residences to be constructed in the future under the Urban Residences Development Program.”²³⁷ With regard to ETIZ, AAWASA concludes that construction efforts will pollute the dam, effluents from ETIZ will encourage algal growth that will ruin the water, and that even if ETIZ treats all effluents, the risk of mechanical or technical failures of the treatment equipment would be too great to tolerate.²³⁸ It states that the EIA has revealed that ETIZ “will have a large impact on the Legedadi Deep underground water,” that the underground water has been dedicated to provide capacity to Addis Ababa and to the new condominium construction “following signing of contracts to this effect,” and that therefore “there will be no water to be supplied to [ETIZ].”²³⁹ Accordingly, AAWASA’s final determination was “to construct [ETIZ] at a location that will not cause impacts on water

²³³ *Id.*, p. 2.

²³⁴ *Id.*

²³⁵ **C-128**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Water, Irrigation and Energy et al. dated 16 May 2014 (copying the office of the Mayor of Addis Ababa; the office of the Deputy Mayor of Addis Ababa; the Bureau of the City Manager of Addis Ababa; the Addis Ababa Environmental Protection Authority; and the general manager and CEO of the AAWASA).

²³⁶ *Id.*, p. 1.

²³⁷ *Id.*, pp. 2-3.

²³⁸ *Id.*, pp. 4-5.

²³⁹ *Id.*, p. 6.

aquifers, a location different from the [location] currently intended.”²⁴⁰

2.127.4. In a follow-up letter from the MoWIE to the Mol,²⁴¹ the MoWIE lauds the Mol’s goals of industrial development but warns that “such industrial zones and other projects should be subject to environmental and social impact assessments *prior to* assignment of construction sites” and that “projects should not be licensed without granting of a license for consumption of water on our behalf.”²⁴²

2.127.5. In a letter from the Office of the Mayor of Addis Ababa to the Prime Minister dated 3 July 2014,²⁴³ the Mayor states that “the Legedadi Deep well underground water source area” was developed “to supply potable water to more than 35,000 condominium houses being constructed in Yeka Abado and Bole Arabsa” and that “the Legedadi Dam” is “the main source of potable surface water for the Addis Ababa City.”²⁴⁴ The Mayor’s letter acknowledges that ETIZ was part of the “national significance of the industry developments” but states that several agencies, including the AAWASA, the MoWIE and the MoEF “have notified the [Mol] about the critical nature of the [ETIZ] issue.”²⁴⁵ Thus, the Mayor’s letter requests that the Prime Minister provide “an alternative site for the industry zone, which is cleared of any dispute and vulnerabilities so as to prevent pollution of the watershed,” in light of the fact that the Legedadi underground water was “dedicated to supply the condominium houses inhabited as of April 2015” and “the Legedadi and Dire surface water source

²⁴⁰ *Id.*

²⁴¹ **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible] (copying the MoEF; the Office of the Mayor of Addis Ababa; the Addis Ababa City Environmental Protection Agency; the AAWASA; the Potable Water and Sanitation Directorate; the Water Usage and Licensing Directorate; the Water Sewerage and Sanitation Program Management Unit; and various State Ministers).

²⁴² *Id.*, pp. 1-2 (emphasis added).

²⁴³ **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014 (copying the Mol; the MoWIE; the MoEF; the Ministry of Urban Development, Construction and Housing, Addis Ababa; the Office of the Mayor; the Office of the Deputy Mayor; the Office of the Addis Ababa City Manager; and the AAWASA).

²⁴⁴ *Id.*, p. 1.

²⁴⁵ *Id.*

(which is the prominent origin of about 195,000 m³ of potable water daily [for Addis Ababa]).”²⁴⁶

2.127.6. All of these pleas evidently persuaded the Prime Minister to reverse course on what he had told Akgun a few months prior in April 2014, as he wrote a letter to the Mol dated 22 July 2014,²⁴⁷ in which he reiterated the litany of concerns about the Mol’s decision to site ETIZ within the Legedadi watershed in light of the competing demands on the available water in that region.²⁴⁸ The Prime Minister’s letter acknowledged the demands of the “upcoming Yeka Abado and Bole Arabsa Condominium houses of more than 35,000 residents” and that “the Legedadi deep well underground aquifer shall be cleared of any threats as it is intended to become the source of 40,000 cubic meters of potable water for the upcoming condominium houses as of April 2015.”²⁴⁹ Thus, the Prime Minister instructed the Mol that “the government shall devise a resolution for the dispute as to the industrial village with an alternative site” and that “[a]s such, this is to notify that no further construction shall be conducted prior to authorization by the concerned entities following an adequate environmental impact assessment.”²⁵⁰

2.128. In sum, the intragovernmental correspondence demonstrates that although Respondent was enthusiastic about industrial zones, the GOTA EIA brought Respondent’s concerns regarding ETIZ to the fore. The documents show Respondent was worried about how ETIZ could affect the Legedadi reservoir and the underground water basin: Respondent realized that it had mis-allocated its limited water resources in the Legedadi watershed, as there was a serious question concerning the availability of water to supply both ETIZ and the other competing uses, which included Addis Ababa and the Condominium Project that Respondent was constructing, but for which it never performed any EIAs according to its own admission.²⁵¹ The correspondence also

²⁴⁶ *Id.*, p. 2.

²⁴⁷ **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014 (copying the MoWIE; the Ministry of Urban Development and Housing Construction; the MoEF; the Oromia National Regional Government; and the Mayor of Addis Ababa).

²⁴⁸ *Id.*

²⁴⁹ *Id.*, pp. 1, 2.

²⁵⁰ *Id.*, p. 2.

²⁵¹ **C-100**, Respondent’s Responses to Claimant’s Stern Schedule, Response to Request 9.

demonstrates that after reviewing the GOTA EIA, Respondent developed a heightened awareness of the obvious risk that the industries in ETIZ, both during their construction and while in operation, could discharge pollutants that might possibly affect the Legedadi reservoir and underground basin, if untreated.

- 2.129. Respondent also became concerned about ancillary sources of pollution that were beyond Akgun's control, such as the people who would move into the area of ETIZ for jobs and the waste they would create that could pollute the water sources.²⁵²
- 2.130. Respondent criticized the GOTA EIA's details regarding the amounts of effluents and treatment processes to be used.²⁵³ These criticisms were founded on the assumption that there would be no treatment plant in ETIZ,²⁵⁴ but the project-related materials that Akgun provided to Respondent going back to 2009 contradicted that assumption.²⁵⁵
- 2.131. Regardless of their view of the particulars of GOTA's EIA, Respondent concluded that even if ETIZ implemented maximum mitigation measures, the risk of an error in that mitigation system was too great to accept because even a minor error could contaminate the reservoir and underground basin. As a result, Respondent concluded that the only solution to mitigate these concerns was to relocate ETIZ to a different spot and the ministries and municipal entities asked the Prime Minister to do just that.²⁵⁶
- 2.132. But Respondent kept Akgun in the dark regarding the futility of further assessment of the allocated site. Instead, in its suspension letter to Akgun, the Mol led Akgun to believe that it could still develop ETIZ on the original site if only it presented an acceptable EIA,²⁵⁷ even though Respondent had concluded otherwise and no EIA could possibly suffice.

²⁵² See, e.g., **C-127**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 6 February 2014, pp. 5-6.

²⁵³ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, pp. 1-2.

²⁵⁴ See, e.g., **C-128**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Water, Irrigation and Energy et al. dated 16 May 2014, p. 5.

²⁵⁵ **C-045**, Final Feasibility Study, pp. 328-331.

²⁵⁶ **C-016**, Suspension Letter; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014; **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014.

²⁵⁷ See Ufuk Akgun Statement, ¶ 3.8.

- 2.133. As described above, the Prime Minister's letter to the Mol specifies that "establishment of the industrial zone in the selected site will pose a threat to the potable water supplied for the residents of the city" and that "the Legedadi deep well underground aquifer shall be cleared of any threats as it is intended to become the source of 40,000 cubic meter of potable water for the upcoming condominium house as of April 2015."²⁵⁸
- 2.134. The Prime Minister's letter to the Mol concludes that "**the government shall devise a resolution** for the dispute as to the industrial village with an alternative site, cleared from any risk and dispute so as to protect the watershed from pollution."²⁵⁹
- 2.135. Finally, the Prime Minister advised the Mol that "no further construction shall be conducted prior to authorization by the concerned entities following adequate [EIA]."²⁶⁰
- 2.136. But the Mol did not communicate these important points to Akgun in its suspension letter, failing to mention to Akgun that: (i) the decision had been made to relocate the site; (ii) the government was going to devise a resolution and make sure that any alternative site was "cleared from any risk and dispute"; and (iii) the call to cease construction applied not only to the ETIZ site but also in general for any site until an EIA had been conducted on an alternative site.
- 2.137. Instead, the Mol's letter suggested that Akgun could still proceed with ETIZ on the original, allocated site, if it continued to work on the EIA and present a water treatment plan that would satisfy the municipal and other authorities. Akgun did just that, not knowing it had been sent on a wild goose chase.²⁶¹

F. Respondent's Environmental Due Diligence Failures Doomed ETIZ

- 2.138. Respondent's defense devotes great effort to criticizing Akgun's role in the EIA process, but the foregoing demonstrates that it was the Mol that perverted the EIA process, knowing all along about the water pollution risk and the concerns of other authorities but failing to communicate those issues to Akgun

²⁵⁸ **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014, pp. 1, 2.

²⁵⁹ *Id.*, p. 2 (emphasis added).

²⁶⁰ *Id.*

²⁶¹ See **C-016**, Suspension Letter.

in a timely fashion. Worse, once it was clear that a decision had been taken to relocate ETIZ, the MoI also failed to communicate that to Akgun, instead encouraging Akgun to continue to revise its EIA and provide additional water treatment plans—plans that Respondent never legitimately considered. Below, Akgun discusses how Respondent failed at the site selection stage and why its criticisms of Akgun’s EIA are irrelevant and erroneous.

(i) Because of Respondent’s Environmental Due Diligence Failures, It Allocated Unsuitable Land for ETIZ

- 2.139. It was Respondent’s responsibility to allocate the land for ETIZ.²⁶² In an attempt to comply with its obligation, Respondent provided Akgun an option of three different sites in 2009.²⁶³ That each of these sites suffered from the same fatal flaw—proximity to the watershed supplying Addis Ababa that Respondent ultimately deemed unfit for ETIZ—shows that it is Respondent’s failures, not Akgun’s or the EIA it supplied, that doomed ETIZ.
- 2.140. As Prof. Whittington explains, the best professional practices for protecting urban watersheds, such as the Legedadi watershed, involve minimizing development activities of all kinds in the watershed and providing high-level treatment of raw water supplied.²⁶⁴ Respondent did not have an apparatus in place to put these practices into effect when it chose to site ETIZ within the Legedadi watershed. Prof. Whittington observes that:

It does not seem that the Ethiopian officials considered the available knowledge about best planning practices for protecting drinking water supplies through watershed management. ...

When the first agreement between the GOE and Akgun was signed on June 11, 2010 (“the 2010 ETIZ Agreement”), the GOE and Akgun were still acting as partners. GOE had committed to fund 30% of the infrastructure costs of [ETIZ] and the site of [ETIZ] had already been selected. In my opinion, Akgun had every reason to believe that this site was suitable and acceptable to the GOE because the GOE proposed the site as promised in the 2008 Memorandum of Understanding. From my perspective, it is unreasonable to

²⁶² **C-007**, MoU, ¶ 3; **C-008**, The 2010 ETIZ Agreement, Art. 7(1); **C-009**, The 2012 ETIZ Agreement, Art. 7(1).

²⁶³ See Yusuf Akgun 2nd Statement, ¶¶ 3.3-3.6; Ufuk Akgun Statement, ¶ 2.3.

²⁶⁴ Whittington Report, ¶¶ 5.5-5.7.

expect that a private actor such as Akgun would have known or been concerned about a state's internal deliberations regarding the site selection process, or known the tradeoffs between the environment and the economy that these parties decided to make.²⁶⁵

- 2.141. The facts discussed above in Section 2.C – 2.D surrounding the EIA process underscore Respondent's failure to conduct the proper initial due diligence concerning its natural resources and environmental and economic plans as they related to industrial zone development in the Legedadi watershed.
- 2.142. As Prof. Whittington demonstrates, Ethiopia has failed to protect the Legedadi reservoir when compared to the management of other reservoirs.²⁶⁶ Prof. Whittington's study of the Legedadi watershed shows in vivid depiction that it is subject to heavy agricultural use, along with increasing urbanization threats, as over the last decade the town of Sendafa has significantly expanded to its north and Addis Ababa continues to expand towards Sendafa from its south, including the massive Bole Arabsa and Yeka Abado condominium complexes.²⁶⁷ As Prof. Whittington explains, these development goals conflict with preserving the Legedadi watershed, which is demonstrative of the bureaucratic confusion within Ethiopia of which Akgun was a victim.²⁶⁸
- 2.143. In fact, it was GOTA EIA that ultimately caused Respondent to develop a heightened awareness that it had adopted conflicting goals for land use in the Legedadi watershed,²⁶⁹ which realization ultimately led to Respondent's unfair treatment of Akgun in suspending the project, failure to consider the proposed

²⁶⁵ Whittington Report, ¶¶ 6.4-6.5.

²⁶⁶ Whittington Report, ¶¶ 5.9-5.22.

²⁶⁷ *Id.* ¶ 5.11-5.18; **Exhibit DW-1A**, Satellite Photo of the Lege Dadi Reservoir (November 2016); **Exhibit DW-1B**, Satellite Photo of the Lege Dadi Reservoir (December 2017); **Exhibit DW-1C**, Satellite Photo of the Lege Dadi Reservoir (May 2018); **Exhibit DW-1D**, Satellite Photo of the Lege Dadi Reservoir (Nov 2018); **Exhibit DW-1E**, Satellite Photo of the Lege Dadi Reservoir (January 2019); **Exhibit DW-1F**, Satellite Photo of the Lege Dadi Reservoir (October 2019); **Exhibit DW-1G**, Satellite Photo of the Lege Dadi Reservoir (January 2020); **Exhibit DW-1H**, Satellite Photo of the Lege Dadi Reservoir (August 2021); **Exhibit DW-1I**, Satellite Photo of the Aswan High Dam (March 2018); **Exhibit DW-1J**, Satellite Photo of the Aswan High Dam (August 2020); **Exhibit DW-1K**, Satellite Photo of Lake Victoria (December 2018); **Exhibit DW-1L**, Satellite Photo of Lake Victoria (December 2020).

²⁶⁸ *Id.*, ¶ 5.21-5.22; 6.32.

²⁶⁹ *See, e.g.*, **C-127**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 6 February 2014; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014; **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014; Whittington Report, ¶¶ 6.43-6.45.

mitigation and treatment measures, and failure to provide any reasonable alternative site for Akgun to develop ETIZ.

- 2.144. As noted above, throughout the deliberations that occurred in 2014, various authorities acknowledged that an EIA and/or SEA should have been performed and accepted before the land was selected and handed over for construction.²⁷⁰ Prof. Whittington agrees with that conclusion:

The proper timing for such an analysis was before the GOE proposed the three potential sites for the GOE/Akgun industrial park. If a SEA had been undertaken at that time, the GOE's poor site selection for the GOE/Akgun industrial park would not have occurred. If the GOE or Oromia State had conducted a proper SEA, it would have understood that the site chosen (as well as Alternative Site 1) were within the Lege Dadi Watershed and posed an unacceptable risk to Addis Ababa's water supply.²⁷¹

- 2.145. But as Prof. Tekle explained and as is detailed above in Section 2.C.i, an SEA was Respondent's duty here, not Akgun's.²⁷² Prof. Whittington offers additional insight on the SEA process. Prof. Whittington agrees that an SEA would have been a useful tool in the siting of ETIZ because

... it would have identified that there was not sufficient groundwater for both the GOE/Akgun industrial park and the GOE's nearby housing developments. Also, a SEA should have highlighted the risks to Addis Ababa's water supply if an accident occurred in the GOE/Akgun industrial park and the discharges flowed through the watershed and reached the Lege Dadi Reservoir.²⁷³

- 2.146. But as Prof. Whittington explains, it is unreasonable for Respondent to have expected Akgun to conduct an SEA, contrary to what Respondent's expert Prof. Murcott²⁷⁴ opines:

It is not the role of a private developer to conduct a national strategic planning exercise for the Government of Ethiopia.
... In fact, it would have been highly inappropriate for a

²⁷⁰ See, e.g., **C-105**, Memorandum dated 3 April 2014, pp. 4, 6; **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, pp. 1, 2.

²⁷¹ Whittington Report, ¶ 6.59.

²⁷² See Tekle Report, ¶¶ 2.20-2.22, 2.38-2.41.

²⁷³ Whittington Report, ¶ 6.59.

²⁷⁴ Murcott Report, ¶ 49.

private, foreign firm to attempt to balance [Respondent's] economic development, environmental quality, and social objectives across "multiple projects and programs," or to presume to understand and interpret "Ethiopia's vision for its development" or how it should "achieve a sustainability of lifestyles."²⁷⁵

- 2.147. Indeed, Prof. Whittington considers it "inappropriate" to place the responsibility for an SEA on Akgun:

In a letter to the MOI dated 14/04/2014, the MOEF twice stated with respect to the GOE/Akgun industrial park that a Strategic Environmental Assessment ("SEA") should have been performed. However, it is unclear who the MOEF thought should have performed a SEA. In my opinion, if the MOEF meant to imply that Akgun should have performed a SEA, this was an inappropriate request that further illustrates the GOE's confusion about its own responsibilities. As Prof. Murcott notes in her critique of the GOTA EIA, the Government of Ethiopia was Akgun's "project partner." In its role as a partner, the Government of Ethiopia was itself responsible for strategic economic, social, and environmental planning.²⁷⁶ ...

A private firm, *much less a foreign firm*, could not be expected to undertake strategic economic, social, and environmental planning on behalf of the government. The MOEF's statement illustrates the confusion within the Government of Ethiopia about both 1) its own responsibilities in the national planning process to ensure sustainable development, and 2) its responsibility to fairly treat a private firm that *it brought to Ethiopia to help the GOE implement its national economic development strategy*.²⁷⁷

- 2.148. Thus, Respondent's deliberations concerning the GOTA EIA show that it recognized its error in failing to perform an SEA to evaluate whether the Legedadi watershed was an appropriate site for an industrial zone project before it selected that area for ETIZ and provided the land to Akgun.

- 2.149. The forgoing demonstrates that Respondent should have conducted the site analysis in time to know that the land was unsuitable before Akgun undertook

²⁷⁵ Whittington Report, ¶¶ 6.60-6.61.

²⁷⁶ *Id.*, ¶ 6.65.

²⁷⁷ *Id.*, ¶ 6.66.

any work on that site. If it was Respondent's intent that Akgun provide the EIA, it should have asked Akgun to do so back in 2009 before providing the site to Akgun around which all the subsequent planning occurred. It was illogical to ask Akgun to submit an EIA after the land was identified in 2009, after the investment licenses were obtained in 2009, after the well-publicized presentations on the feasibility study in 2009 that made no secret about the location or the scope of the project, after Oromia's April 2012 valuation report that details how the Oromia Land and Environmental Bureau had participated in discussions about the use of the land, after the 2012 ETIZ Agreement was signed in June 2012, after Akgun paid for the resettlement of the occupants of the land, after Akgun signed the lease for the land in January 2013, after Akgun renewed its investment license in March 2013, and after Akgun mobilized to the site in April 2013. Indeed, it was unfair of Respondent to take all these steps and then ask Akgun to provide an EIA without having first performed a broader natural resource and economic policy background analysis of its own regarding its plans for the Legedadi watershed, such as an SEA.

- 2.150. As discussed above, the Mol asked Akgun to provide an EIA in mid-2013—well after all these steps and without requesting that Akgun halt its work on ETIZ. Thus, the Mol ignored its responsibility to ensure environmental clearances and pushed the project forward to advance its development goals.

(ii) Respondent's Criticisms of the GOTA EIA Are Inapposite

- 2.151. Although the EIA process in Ethiopia was flawed as described in Section 2.C, and in particular with respect to Akgun as described in Section 2.D, the GOTA EIA did serve its ultimate purpose. As Prof. Whittington explains:

An EIA is not a set of engineering or construction plans for a project; it is not a benefit cost analysis or a financial feasibility analysis of a project. Nor does it prescribe a set of emissions standards. The purpose of an EIA is to estimate the consequences and risks to the environment and stakeholders that would result from a project's implementation and to highlight the tradeoffs that the government may have to make. This was in fact the result of the EIA process in this case.²⁷⁸

He continues:

²⁷⁸Whittington Report, ¶ 6.43.

As a result of the EIA process, the AAWASA as well as other GOE agencies recognized the risk the development posed to the Addis Ababa water supply and eventually concluded that this risk (coupled with the quantity of groundwater required) was unacceptable. In other words, if the EIA had been conducted by the world's best environmental consulting firm, the result of the EIA process would have been identical.²⁷⁹

- 2.152. As a result, Respondent's criticisms of the GOTA EIA and the supplement to that EIA, which Istanbul Technical University (ITU) supplied, are largely irrelevant.
- 2.153. When Akgun provided its first draft of the EIA in October 2013, the Mol forwarded that draft to the relevant authorities that deal with environmental matters, including AAWASA.²⁸⁰
- 2.154. Those ministries, upon reading the EIA and its revisions, came to understand that the Mol had committed a huge blunder by designating an area for ETIZ that sat directly in the crosshairs of the Legedadi watershed, which was also meant to serve urban water needs, including the Condominium Project. Those ministries learned that from reading the GOTA EIA, which demonstrates that the EIA did what an EIA is supposed to do in considering critical environmental issues.
- 2.155. The purpose of an EIA is to (i) identify the risks a project poses, and (ii) determine whether proposed measures (e.g., water treatment) mitigate those risks.²⁸¹ While Akgun identified the risks and offered mitigation measures, Respondent never advanced past the stage of evaluating the identified risks. Before considering Akgun's proposed treatment measures it reached the peremptory conclusion that the project needed to be suspended. This decision made way for the Condominium Project and Respondent has offered no evidence that it considered the pollution that project would cause. Indeed, Respondent has admitted that it conducted *no EIA* for its project to construct tens of thousands of condominium units.²⁸²

²⁷⁹ Whittington Report, ¶ 6.45.

²⁸⁰ See SoC, ¶¶ 2.68-2.70.

²⁸¹ See *supra* Section 2.C.i., ¶ 2.51. See also *infra* ¶ 5.52; Whittington Report, ¶¶ 5.39-5.41, 6.43; Tekle Report, ¶ 2.15.

²⁸² C-100, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9.

- 2.156. As a result of their review of the GOTA EIA, the Ethiopian authorities concluded that ETIZ would need to be relocated to a different spot from the one that the Mol had selected.²⁸³
- 2.157. The Mol sat witness to all this and saw unfolding the serious ramifications to Akgun of its above-described environmental due diligence failures. But the Mol did not act to rectify its mistakes. Instead, it concealed from Akgun the consensus of various Ethiopian authorities—including the Prime Minister—that ETIZ would need to be relocated. Worse yet, it led Akgun to believe that if only it would make additional edits and improvements to the EIA, ETIZ could go forward as planned.²⁸⁴
- 2.158. In its Defense, Ethiopia claims that it cancelled the project because it considered the GOTA EIA and ITU Supplement to be lacking, but as the facts show and Prof. Whittington explains, that GOTA EIA is what caused Ethiopia to confront the fact that it had been promoting and planning a project without having considered the environmental consequences of its actions.²⁸⁵ Thus, the GOTA EIA made manifest the fact that Ethiopia should have made the determination of suitability prior to offering the project's site. In failing to make this determination, the Mol ignored Ethiopia's environmental laws.
- 2.159. Respondent puts forward several individual criticisms of the GOTA EIA and ITU Supplement through its expert Prof. Murcott, but those criticisms are either erroneous or simply miss the point. For instance, Respondent fixates on the supposed infirmity that the GOTA EIA and ITU Supplement did not detail the precise type and volume of effluent for each factory that would be located within the industrial zone.²⁸⁶ Such a criticism defies logic, as it would require a level of prescience that is impossible to achieve. As Prof. Whittington observes:

First, it is not possible *ex ante* to know the firms that will decide to locate in the industrial park and the precise production technologies they will choose to use. The

²⁸³ See **C-127**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 6 February 2014; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014; **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014; **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible]; **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014.

²⁸⁴ **C-016**, Suspension Letter.

²⁸⁵ Whittington Report, ¶¶ 6.43-6.45, 6.52.

²⁸⁶ Murcott Report, ¶ 53.

environmental mitigation plan for any industrial park must be sufficiently robust to manage this uncertainty.

Second, there are limits to how much analysis is required (and one can afford) to make a reasoned decision about the issue at hand, i.e., whether [ETIZ] should be located in the Lege Dadi watershed. Requiring that Akgun commission dozens of EIAs (one for each possible occupant of the industrial park) and then an overarching SEA would not have been practical. Nor were such efforts necessary for AAWASA or the MoEF to conclude that [ETIZ] should not be located in the Lege Dadi watershed.²⁸⁷

- 2.160. To the extent Prof. Murcott contends that GOTA EIA and ITU Supplement are lacking in certain other particulars, those issues became irrelevant once Ethiopia realized its site selection error. As Prof. Whittington explains, Respondent

did not need for the EIA to be “improved” to conclude that it was an unacceptable risk to locate the [ETIZ] within the watershed. It was a waste of time and resources to ask Akgun to revise its EIA because Ethiopian authorities had already reached the conclusion that the project should not be located in the watershed.²⁸⁸

- 2.161. Even if Akgun provided an EIA that contained everything Respondent says it should have contained, ETIZ still could not have proceeded in the Legedadi watershed site. Ethiopian officials’ contemporaneous notes confirmed this idea, wherein they stated that they believed it was “impossible” to put ETIZ on the site selected: “The Legedadi dam and treatment plant and Ethio-Turkish industrial zone could not co-exist. The EIA study has limitation[s] as discussed in the meeting but even if it [had] some depth, it should have been shown the impossibility of the co-existence of the two institutions at the same catchment area.”²⁸⁹

- 2.162. Furthermore, Respondent’s criticism of the EIAs for ETIZ rings hollow as a reason for rejecting the project since they are not any less elaborate or detailed than the EIAs that have been submitted and accepted for other

²⁸⁷ Whittington Report, ¶¶ 6.47-6.48.

²⁸⁸ *Id.*, ¶ 6.50.

²⁸⁹ **C-105**, Memorandum dated 3 April 2014, p. 9.

projects in Ethiopia, including for industrial parks that are now operational.²⁹⁰ In this respect, it is telling that Prof. Murcott compares GOTA EIA and ITU Supplement to EIAs performed in other countries and not those performed in Ethiopia.²⁹¹

- 2.163. Concluding his opinion concerning Akgun's participation in the EIA process, Prof. Whittington observes:

The EIA process achieved its primary purpose. It resulted in the issues about the environmental risks of the project being raised and discussed by various agencies and ministries in [Ethiopia], after which [Ethiopia] decided to reverse its decision to locate [ETIZ] within the Lege Dadi Watershed. Prof. Murcott's attention on the quality of the EIA itself is thus misplaced.²⁹²

- 2.164. Ironically, the facts of this case demonstrate the need for robust policy processes that EIAs were originally implemented to address. As Prof. Whittington explains, an important original goal of the EIA process when it was first conceived in the United States was to:

... foster dialogue between balkanized, mission-driven government agencies and to ensure that information about environmental impacts was available to and considered by all the US government agencies with responsibilities related to the proposed project, not just the agency proposing the project.²⁹³

- 2.165. Akgun was the victim of Ethiopia's "balkanized, mission-driven government agencies," particularly the MoI, that failed to fulfil their responsibilities or properly communicate with each other concerning ETIZ until its fate was already sealed.

G. Respondent Admitted Its Mistake but Failed to Fix It

- 2.166. Despite the various misdirected arguments that Respondent raises, there were only two issues regarding ETIZ that were at stake in 2014: (i) whether Respondent was willing to accept any level of pollution risk to the Legedadi

²⁹⁰ Whittington Report, ¶¶ 6.39-6.40; **C-108**, Bole Lemi EIA I; **C-109**, Bole Lemi EIA II; **C-107**, Kilinto EIA.

²⁹¹ Murcott Report, ¶ 63; Whittington Report, ¶ 6.41.

²⁹² Whittington Report, ¶ 6.52.

²⁹³ *Id.*, ¶ 5.30.

watershed; and (ii) whether there was enough water in the Legedadi watershed to supply both ETIZ and other local needs, including Respondent's new Condominium Project. Ultimately, as the above-related facts demonstrate, Respondent concluded these issues in favor of its urban development projects and against ETIZ, both determining that it was unwilling to accept any level of risk to the Legedadi watershed from ETIZ and that it preferred to allocate its limited water resources to its burgeoning residential population within and beyond Addis Ababa.²⁹⁴ These were policy decisions that were beyond Akgun's control and that demonstrate that Respondent erred in its original decision to locate ETIZ within the Legedadi watershed.²⁹⁵ Respondent, however, failed to fix its mistake.

- 2.167. With respect to the water pollution issue, the evidence is that Akgun intended to supply a solution for this issue in the form of an expensive modular water treatment facility that was intended to be a state-of-the-art solution to the potential watershed pollution issues on the site.²⁹⁶ Yusuf Akgun had publicly committed to implement environmentally friendly water treatment measures since the early stages of the Project's conception.²⁹⁷
- 2.168. The Mol, however, concealed Respondent's conclusion that "[e]ven if industrial water treatment is attempted with regard to the industrial effluents from [ETIZ], any errors in the process of treatment, or any technical problems that may occur in the filtration station could release unfiltered effluents to the dam,"²⁹⁸ that "no technology can clean 100% [of the] wastes, and it is sure that the dam will be polluted in the long run,"²⁹⁹ and that "[e]ven if at least the potential chemical pollution on the dam is just 1%, the Addis Ababa people will be at risk, which will

²⁹⁴ *Supra* ¶¶ 2.1.5 and 2.44; Section 2.E.iii.

²⁹⁵ See Whittington Report, ¶¶ 6.19-6.22, 6.31, 6.60-6.63.

²⁹⁶ **C-023**, Report on Organized Industrial Zone Waste Water Purification Plant/Ethiopia Technical Approach File from Akgun Construction to Ministry of Industry dated January 2014; **C-078**, Ethio-Turkish Industry City Environmental Study dated 10 October 2014 prepared by Istanbul Technical University ("ITU Supplement"); Yusuf Akgun 2nd Statement, ¶ 2.3.

²⁹⁷ **C-045**, Final Feasibility Study, pp. 330-331, 371-374; **C-132**, T. Tsige, *We will have a better hospital from the ones abroad*, The Reporter, 19 June 2010 (quoting Mr. Yusuf Akgun: "The project will be environmentally friendly. For example, we have plans to collect the drainage water in one place using filtering system, which will make the water safe for drinking. It can also be used to water plants and trees.").

²⁹⁸ **C-128**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Water, Irrigation and Energy et al. dated 16 May 2014, p. 5.

²⁹⁹ **C-105**, Memorandum dated 3 April 2014, p. 7.

have catastrophic result.”³⁰⁰ The Mol further concealed from Akgun the direction from the Prime Minister’s office to the Mol that as a result of these concerns, “the government shall devise a resolution for the dispute as to the industrial village with an alternative site, cleared from any risk and dispute so as to protect the watershed from pollution.”³⁰¹

- 2.169. Whether Respondent genuinely sought to “protect the watershed from pollution” is highly questionable. Prof. Whittington’s detailed analysis of the land use patterns within the Legedadi watershed shows that it has been subject to increasing urban expansion and heavy agricultural use.³⁰² He concludes:

It is my opinion that these factors show clear evidence of poor watershed protection planning practices and are indicative of the lack of coordinated, effective action by Ethiopian governmental agencies to restrict development in the watershed and to protect the quality of the water flowing into the reservoir.³⁰³

- 2.170. But at the time it received the Mol’s 24 July 2014 suspension letter, Akgun took the Mol at its word and as a result, after receiving the letter, Akgun mistakenly believed it could still develop ETIZ on the allocated site by providing additional water treatment details.³⁰⁴ Thus, it spent additional time and money futilely attempting to address the water treatment concerns.

- 2.171. These efforts were demonstrated in its follow-up communications, in which Akgun:

2.171.1. Provided additional details to the Mol concerning its wastewater treatment plans, with particular emphasis on the constituents that the Mol identified as pollutants of concern in its suspension letter;³⁰⁵

³⁰⁰ *Id.*, p. 10.

³⁰¹ **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014, p. 2.

³⁰² Whittington Report, ¶¶ 5.9-5.21.

³⁰³ *Id.*, ¶ 5.22.

³⁰⁴ Ufuk Akgun Statement, ¶ 3.8.

³⁰⁵ **C-025**, Letter from Akgun Construction to Ministry of Industry dated 19 August 2014.

- 2.171.2. Communicated its ongoing plans to the Prime Minister's office and its intention to host interested investors at the site in anticipation of resolving the water treatment concerns;³⁰⁶
 - 2.171.3. Sought additional information from various authorities concerning rainfall and other issues to supplement the GOTA EIA.³⁰⁷
 - 2.171.4. Commissioned and supplied a supplement to the EIA, which offered more detail concerning the treatment processes it planned to put into place, along with a proposal it had received from a water treatment engineering firm, supplying the supplement to both the Mol and the President's offices.³⁰⁸
- 2.172. At no point during this process, which extended from July 2014 – November 2014, did any of Respondent's officials indicate to Akgun that Respondent had already decided to relocate ETIZ.
- 2.173. Instead, Respondent continued the ruse by supplying written comments to Akgun's EIA and supplement thereto, lending the appearance that it still considered the original ETIZ site in the Legedadi watershed to be a viable location.³⁰⁹ In addition, Respondent's comments set forth a number of impracticable and inappropriate tasks for Akgun to undertake, such as providing granular detail on the effluents of each and every factory to be established within ETIZ and providing an EIA for each of those factories.³¹⁰ Respondent also sought to have Akgun conduct an analysis of the distribution of its water resources and to determine the "acceptable limits of environmental resource[] [usage]."³¹¹ As discussed above, Prof. Whittington explains that

³⁰⁶ **C-028**, Letter from Akgun Construction to Prime Minister dated 21 August 2014.

³⁰⁷ **C-133**, Letter from Akgun Construction to Ethiopian Mapping Agency dated 21 August 2014; **C-134**, Letter from Akgun Construction to Ministry of Agriculture dated 27 August 2014; **C-135**, Letter from Akgun Construction to Ministry of Water, Irrigation and Energy dated 27 August 2014; **C-136**, Letter from City Government of Addis Ababa Authority to Akgun Construction dated 1 September 2014.

³⁰⁸ **C-023**, Report on Organized Industrial Zone Waste Water Purification Plant/Ethiopia Technical Approach File from Akgun Construction to Ministry of Industry dated January 2014; **C-078**, ITU Supplement; **C-079**, Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu dated 14 October 2014; **C-080**, Letter from Akgun Construction to Ministry of Industry dated 17 October 2014.

³⁰⁹ **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 on ITU Supplement").

³¹⁰ *Id.*

³¹¹ *Id.*, pp. 3, 5.

determining in advance the specific effluents of numerous factories yet to be established within a large-scale industrial zone, the composition and usage of which is bound to vary over its decades-long lease term, is not a reasonably practicable task.³¹² Nor was it within Akgun's power, ability, or remit to set natural resource policy for a large watershed area.³¹³

- 2.174. Thus, Respondent's reply to Akgun's water treatment proposal failed to consider that proposal on its merits, instead creating a confusing hash of new issues that were impossible for Akgun to solve.
- 2.175. If there was a better solution that made sense for pollution protection that Respondent wanted, all it had to do was suggest it and Akgun would likely have agreed to it.³¹⁴ Respondent did not do so and Akgun was simply left to guess at what solution would satisfy Respondent's concerns. Respondent's confounding reply to Akgun's attempts to solve the pollution concerns is illuminated by its production of intra-governmental correspondence, discussed in detail above, showing that it had already decided to prevent ETIZ from moving forward at the allocated site.³¹⁵ Respondent obviously had no intention of resolving these issues so that ETIZ could proceed at that site but this was not communicated to Akgun.
- 2.176. Unbeknownst to Akgun, its proposals for water pollution treatment were purely academic in light of Respondent's determination that there was not enough water in the Legedadi watershed to support ETIZ and Respondent's other development goals.³¹⁶
- 2.177. From the beginning, Akgun had transparently communicated to Respondent ETIZ's projected water usage.³¹⁷ To mitigate its usage, Akgun had committed to recycle water within ETIZ, but Respondent's notes and correspondence reveal that this was not a satisfactory solution to its needs, as Akgun's

³¹² *Supra* Section 2.F.ii; Whittington Report, ¶¶ 6.46-6.48.

³¹³ *See* Whittington Report, ¶¶ 6.60-6.66.

³¹⁴ Yusuf Akgun 2nd Statement, ¶ 2.3.

³¹⁵ *Supra* Section 2.E.iii.

³¹⁶ *See* Whittington Report, ¶ 6.31.

³¹⁷ **C-045**, Final Feasibility Study, pp. 329.

retention of water within ETIZ would, in Respondent's view, "highly reduce the raw water intake of the dam."³¹⁸

- 2.178. In its internal correspondence and notes, Respondent repeatedly acknowledged that its residential condominium development would draw on same limited water source as ETIZ.³¹⁹ Respondent concluded that "the water resource at Legedadi cannot meet the demand of the industry zone combined with the population of Addis Ababa³²⁰ and that pursuing its Condominium Project "implies there will be no water to be supplied to [ETIZ]."³²¹ As a result, Respondent recognized that the "Legedadi Dam and the Industry Zone are not projects to be conducted together. [...] [E]ven if another assessment is conducted by other consultants, the results will undeniably be conclusive of the necessity to relocate the project."³²²
- 2.179. Respondent internally recognized that its error regarding ETIZ's location stemmed from its failure to conduct an environmental assessment in the first instance, remarking that "a Strategic Environmental Assessment should be conducted **in advance**" of site allocation³²³ and that "industrial zones and other projects should be subject to environmental and social impact assessments **prior to assignment of construction sites**."³²⁴
- 2.180. Thus, Respondent also concluded that it should provide "a mechanism to make up for the investor in regards to motivation, financially (considering the expenses thus far)" and that Akgun should "be availed with an alternative site that suits the intended development."³²⁵ The Prime Minister's instructions to the Mol to suspend and relocate ETIZ confirmed that "the government shall

³¹⁸ **C-105**, Memorandum dated 3 April 2014, p. 3.

³¹⁹ *Supra* Section 2.E.iii.

³²⁰ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, p. 2.

³²¹ **C-128**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Water, Irrigation and Energy et al. dated 16 May 2014, p. 6.

³²² **C-105**, Memorandum dated 3 April 2014, p. 6.

³²³ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, p. 2 (emphasis added).

³²⁴ **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible] (emphasis added).

³²⁵ **C-105**, Memorandum dated 3 April 2014, p. 10.

devise a resolution for the dispute as to the industrial village with an alternative site.”³²⁶

- 2.181. Despite having realized its mistake and made the determination that ETIZ would have to be relocated and Akgun properly compensated, Respondent continued to obfuscate, delay, and avoid specifying any solutions to the concerns it had articulated or render any formal decisions regarding the fate of ETIZ.
- 2.182. As noted above, Akgun had received Respondent's follow-up set of comments on its water treatment supplement in November 2014, still unaware of Respondent's decision to relocate ETIZ.³²⁷
- 2.183. At that point, nearly a year into receiving various conflicting messages from Respondent and presented with a set of comments that presented it with a virtually impossible task, Akgun sought a meeting with the President and Prime Minister's offices in the hopes of obtaining clear guidance once and for all, which meetings occurred in December 2014.³²⁸
- 2.184. Finally revealing to Akgun what it had recognized internally several months prior, Respondent admitted during those meetings to its mistake in the selection of the Legedadi watershed for ETIZ. This admission is reflected in the contemporaneous meeting notes that Mr. Yusuf Akgun's assistant authored and in the follow-up letters that Akgun sent to Respondent.³²⁹ As Mr. Yunus Akgun recounts:

... the President again noted that the main problem with ETIZ was not a threat of environmental pollution. Rather, it was the value of land surrounding Addis Ababa and the fact that other investors desired to develop a housing project on that land, and the available water resources could not

³²⁶ **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014, p. 2.

³²⁷ **C-030**, Letter from Ministry of Industry to Akgun Construction dated 20 November 2014 and numbered 02.3/435; **C-082**, Review Comments on ITU Supplement.

³²⁸ Yusuf Akgun 1st Statement, ¶¶ 5.20-5.21; Yunus Akgun 1st Statement, ¶¶ 7.7-7.14.

³²⁹ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister, Dr. Arkebe Oqubay dated 11 December 2014; **C-086**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 11 December 2014. See also Yusuf Akgun 1st Statement, ¶¶ 5.20-5.21; Yunus Akgun 1st Statement, ¶¶ 7.7-7.14.

support both the ETIZ project and the proposed housing project.³³⁰

- 2.185. Before this arbitration, Ethiopia never denied its mistake, though it does so now for the expediency of its legal arguments, even though its own contemporaneous, internal correspondence clearly document its error.
- 2.186. During those meetings, Respondent also communicated to Akgun that it still favored the idea for ETIZ, just not in the original location Respondent had allocated.³³¹ That Respondent wished to continue to work with Akgun on the same project on a different site underscores that Akgun was not at fault for the demise of ETIZ. This is apparently why the most senior Ethiopian officials were apologetic to Akgun when they made the decision that the project could not proceed at the original location and why they acknowledged that locating the industrial zone in the Legedadi watershed was their mistake.
- 2.187. Still alert to the potential of ETIZ, Akgun followed up with several letters to Respondent over the subsequent months.³³²
- 2.188. After several months of non-responsiveness, Respondent finally replied to Akgun and arrangements were made for Akgun to visit Ethiopia and inspect alternative sites.³³³
- 2.189. Akgun had made clear the requirements for an alternative site and that it should be similarly suitable as the original site, meaning: proximity to transportation hubs (rail, highway, airport); proximity to population center to provide for labor and keep costs lower; feasible land characteristics that would not make construction onerous (such as having to significantly alter the landscape to accommodate construction).³³⁴

³³⁰ Yunus Akgun 1st Statement, ¶ 7.9.

³³¹ *Id.*, ¶ 7.14.

³³² Yusuf Akgun 1st Statement, ¶¶ 5.22-5.23; **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014; **C-137**, Letter from Akgun Construction to Ministry of Industry dated 14 January 2015; **YUN-13**, Letter from Akgun Construction to Prime Minister dated 24 March 2015; **C-138**, Letter from Akgun Construction to Ministry of Industry dated 16 April 2015; **C-139**, Letter from Akgun Construction to Ministry of Industry dated 30 April 2015.

³³³ **C-031**, Letter from Ministry of Industry to Akgun Construction dated 17 June 2015.

³³⁴ **YUN-13**, Letter from Akgun Construction to Prime Minister dated 24 March 2015, p. 4.

2.190. Yusuf Akgun reiterated these requirements to Ethiopian officials while visiting one of the proposed alternative sites in August 2015.³³⁵

2.191. Respondent cannot credibly claim that it did not know about or understand these requirements. In an analysis the World Bank supplied in April 2014 in response to Ethiopia's application to finance the development of the Bole Lemi and Kilinto industrial zones, the authors highlighted the importance of those very requirements to industrial zone success in Ethiopia:

In the near-to-medium term, Bole Lemi and Kilinto IZs are considered as the more viable IZ sites. This is because the two sites (i) are strategically located close to Addis Ababa, the capital city in Ethiopia, (ii) cover large area with expansion capabilities, (iii) have direct access to key logistics links such as the Addis Ring Road and the national highway system, (iv) have the opportunity to be linked with Bole International Airport and the new Cargo Terminal, (v) can be developed rapidly as both are greenfield sites, (vi) can cater to light and medium industry that show significant near-term demand, (vii) pose fewer environmental, social or resettlement issues, (viii) have access to domestic, regional and international markets, and (ix) have access to a large and varied labor pool.³³⁶

2.192. That analysis specifically linked the failure of other attempted industrial zones in Africa to "establishment of zones, often for political reasons, in remote areas that lack access to transport infrastructure, utilities, markets, and labor."³³⁷ These were precisely the sort of problems Akgun sought to avoid in articulating its requirements for ETIZ.

2.193. That same analysis explained that Ethiopia's development of industrial zones "faced a number of challenges and the results to date have been mixed," due to "lack of clarity in development agreement; absence of a clear legal, regulatory and institutional framework for [industrial zone] development and management; the capacity of the Government to coordinate and deliver support services to the zone; the management of environmental and social impacts, and the establishment of stronger linkages between the zone

³³⁵ **C-140**, Video taken on 21 August 2015 during a site visit in Ethiopia; **C-141**, Transcription of the video taken on 21 August 2015 during a site visit in Ethiopia.

³³⁶ **C-142**, World Bank, *International Development Association Project Appraisal Document on a Proposed Credit to Ethiopia for a Competitiveness and Job Creation Project*, 18 April 2014, p. 6, ¶ 12.

³³⁷ *Id.*, pp. 16-17, ¶ 46.

investments and the Ethiopian economy.”³³⁸ These were some of the very challenges that beset ETIZ and for which Akgun suffered.

- 2.194. In any event, Akgun travelled to Ethiopia in August 2015 to survey some possible alternative sites, but as Mr. Yusuf Akgun states, he informed Respondent’s officials that none of the sites was suitable for ETIZ’s requirements and they were each at a great distance from Addis Ababa.³³⁹
- 2.195. In a follow-up meeting in November 2015, Respondent again promised to find and allocate a suitable replacement site, but never did so.³⁴⁰
- 2.196. In a final coda, Respondent contacted Akgun in 2017 to inquire about setting up an industrial zone, albeit with a mix of industries different to what was originally planned and demanded by Ethiopia for ETIZ.³⁴¹ Thus, even years after it had suspended ETIZ, Respondent evidently still considered Akgun a desirable investor and a worthy industrial zone developer. Respondent’s continued interest in Akgun in 2017 shows that Respondent’s narrative that it canceled ETIZ several years prior because it regarded Akgun as irresponsible and incapable of building an industrial zone is an after-the-fact justification created for the purpose of its defense, without grounding in the facts of this case.
- 2.197. In the same vein, Respondent attempts to attack Akgun’s credibility as a developer by painting the portrait that the Ikitelli zone in Istanbul hosts heavily polluting industries and is on the verge of being closed down.³⁴² This is simply untrue. First, there are no plans underway to close down Ikitelli; indeed, it is in a process of continued growth and expansion.³⁴³ In addition, Respondent fails to detail the fact that Ikitelli requires its factories to provide pre-treatment of any potentially dangerous waste and conversion to domestic waste before discharging to the water treatment plant.³⁴⁴ Finally, Respondent

³³⁸ *Id.*, p. 6, fn. 23.

³³⁹ Yusuf Akgun 1st Statement, ¶ 5.25.

³⁴⁰ *Id.*, ¶ 5.26.

³⁴¹ See Yusuf Akgun 2nd Statement, ¶¶ 5.1-5.3; **YUS-19**, Email thread from 19 December 2016 through 30 March 2017 between Anwar K. Yahia and Yusuf Akgun; **YUS-20**, Email thread from 7 February 2017 between Anwar K. Yahia and Yusuf Akgun; **YUS-21**, Email from Anwar K. Yahia to Yusuf Akgun dated 7 June 2017.

³⁴² SoD, ¶¶ 127-128.

³⁴³ Yusuf Akgun 2nd Statement, ¶ 2.4.

³⁴⁴ *Id.*, ¶¶ 2.1-2.2.

mischaracterizes the few regulatory citations that it references, as those citations do not implicate closure of the cited entities and in any event represent less than 1% of the establishments within Ikitelli, which is hardly evidence that Ikitelli is operated in an environmentally reckless manner as Respondent argues.³⁴⁵ Thus, Respondent's cynical attempt to blacken Akgun's reputation is without merit. In any event, the bases for Respondent's unsuccessful effort to damage Akgun's reputation are not even contemporaneous with the facts at issue, which occurred from 2008-2015.

- 2.198. Returning to the relevant facts, and given the harsh, arbitrary, and opaque way Respondent had previously behaved and Respondent's apparent unwillingness to remedy its mistakes, Akgun was unable to trust Respondent's new solicitation of interest in 2017 and did not wish to put itself in peril of similar treatment. Akgun now seeks relief from this Tribunal to compel Respondent to account for its errors and appropriately compensate Akgun.

3. JURISDICTION

- 3.1. The Tribunal has jurisdiction *ratione materiae* over this dispute because, as demonstrated in the Sections below, (1) the dispute arises from "investments" that Akgun made within the meaning set forth in the BIT; (2) Akgun's claims arise under the BIT and are treaty claims; and (3) the dispute resolution provision of the 2012 ETIZ Agreement does not bar the Tribunal's jurisdiction over Akgun's claims.

A. The BIT Protects Akgun's Investments

- 3.2. The BIT defines "investments" broadly to include "every kind of asset,"³⁴⁶ a definition which, pursuant to Arts. 31(1) and (2) of the Vienna convention on the Law of Treaties (the "VCLT"), "shall be interpreted in good faith in accordance with [its] ordinary meaning" and in light of the BIT's "object and purpose."³⁴⁷ The preamble to the BIT³⁴⁸ clearly sets forth that object and

³⁴⁵ Yusuf Akgun 2nd Statement, ¶¶ 2.5-2.6.

³⁴⁶ **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 ("Turkey-Ethiopia BIT").

³⁴⁷ **CLA-047**, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January 1980 ("VCLT"), Arts. 31(1), 31(2).

³⁴⁸ *Id.*, Art. 31(2) (providing that "[t]he context for the purpose of the interpretation of a treaty shall compromise . . . its preamble and annexes . . .").

purpose, recognizing that the parties entered into the BIT to “stimulate the flow of capital and technology and the economic development of the Parties.”³⁴⁹ Each of Akgun’s investments are assets related to the development of ETIZ, an industrial city designed to do just that, as Ethiopian officials repeatedly and readily admitted, observing that:

- 3.2.1. “[T]he manufacturing sector will have immense social and economic significance realizing the vision of our country. Thus, considering its share towards that growth, the industry zone intended to be established around Sendafa is of potential significance.”³⁵⁰
 - 3.2.2. The establishment of “industrial zones in our country will have potentially positive impacts,” “the preference for establishing such mega projects in our country makes the nation and the government proud” and “such projects will have a significant role in “securing expedited and sustainable growth in our country.”³⁵¹
 - 3.2.3. The government made “paramount efforts [...] to attract industrial developers” like Akgun, noting the “national significance” of the development of industrial cities like ETIZ.³⁵²
- 3.3. Therefore, the BIT protects each of Akgun’s investments within the ordinary meaning of the BIT’s terms in the context of its object and purpose and, under VCLT Arts. 31(1) and (2), this Tribunal’s jurisdictional analysis need go no further. To be sure, the result of any further inquiry is the same.
- 3.4. In addition to defining “investment” broadly to mean “any kind of asset,” the BIT provides a non-exclusive list of assets that fall within that definition.³⁵³ This list includes, but is not limited to:
- 3.4.1. “claims to money or any other rights having financial value related to an investment;”
 - 3.4.2. “moveable and immovable property;” and

³⁴⁹ **CLA-001**, Turkey-Ethiopia BIT, Preamble.

³⁵⁰ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, p. 1.

³⁵¹ **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible].

³⁵² **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014, p. 1.

³⁵³ **CLA-001**, Turkey-Ethiopia BIT, Art. I(2) (“The term ‘investment’ . . . shall include every kind of asset in particular, but *not exclusively* . . .”).

- 3.4.3. “trademarks, goodwill, know-how and other similar rights.”³⁵⁴
- 3.5. Akgun’s assets fall squarely within these categories and include:
- 3.5.1. rights under the 2012 ETIZ Agreement, leases, sub-leases, and other contractual rights having financial value related to the Project;
 - 3.5.2. equipment, machinery, and other movable property necessary for completion of the Project; and
 - 3.5.3. the know-how needed to develop the Project (e.g., demonstrated expertise in the development of a successful industrial zone, such as Akgun’s Ikitelli Industrial Zone); and
 - 3.5.4. the Project as a whole.
- 3.6. Despite the plain language of the BIT, Respondent argues that Akgun’s ETIZ assets fall beyond the meaning of “investment” set forth therein, because:
- 3.6.1. Akgun’s assets, such as its contractual right to build ETIZ, the know-how, materials and equipment needed to perform the project, were “unaccrued potential that never materialized” because of Akgun’s purported failure to “submi[t] an acceptable EIA;”³⁵⁵
 - 3.6.2. To qualify as an “investment”, Akgun’s assets, at least with respect to rights having financial value, must relate to an investment, which Respondent contends they do not;³⁵⁶ and
 - 3.6.3. “Even if Akgun had met the EIA and other regulatory requirements,” “the right to build in and of itself cannot qualify as an ‘investment’” under the *Salini* test.³⁵⁷
- 3.7. The facts of this case do not support Respondent’s jurisdictional objections and those objections are also inconsistent with the decisions of arbitral tribunals applying similar standards as those applicable here. To the contrary, for the reasons set forth in the following sections, (1) each of Akgun’s assets is an “investment” within the plain meaning set forth in the BIT; (2) Respondent is wrong that those investments “never materialized” due to Akgun’s purported

³⁵⁴ *Id.*

³⁵⁵ SoD, ¶¶ 162-163, 167-168.

³⁵⁶ *Id.*, ¶ 165.

³⁵⁷ *Id.*, ¶¶ 162, 165.

failure to provide an EIA; and (3) Akgun's investments further satisfy the *Salini* test, even though *Salini* is not binding on this Tribunal.

(i) Akgun's Assets Are Stand-Alone Investments under the Plain Language of BIT Arts. I(2)(b), I(2)(c), and I(2)(d)

3.8. Akgun's investments include (1) rights under the 2012 ETIZ Agreement; (2) the know-how required to develop an industrial city; (3) the materials and equipment needed to build ETIZ; and (4) the Project as a whole. As set forth in greater detail below, each is a stand-alone investment under the BIT.

a. Akgun's Rights under the 2012 ETIZ Agreement, Know-How, Materials and Equipment Constitute Investments under the BIT

3.9. *First*, Akgun's rights under the 2012 ETIZ Agreement and other contractual rights related to ETIZ constitute stand-alone investments under the BIT, because each is either a "right having financial value" or a "right[]" such as mortgages, liens, pledges and any other similar rights" (or both) and, as such, is a protected investment under BIT Art. I(2)(b) and/or I(2)(c).

3.10. The rights under the 2012 ETIZ Agreement include *inter alia* (i) the right to develop ETIZ; and (ii) the leasehold for the land on which ETIZ was to be developed. Each of these rights has financial value and is a stand-alone investment under the BIT. The right to develop ETIZ and, upon completion of the Project, to operate ETIZ for 80 years, was hugely valuable, as demonstrated by the significant loss of profits set forth in Akgun's Statement of Claim.³⁵⁸ And Respondent itself acknowledges the financial value of the ETIZ leasehold, noting in its Statement of Defense that "Akgun took a valuable piece of land off market for an extended period of time."³⁵⁹ Clearly, then, these rights have "financial value" and are protected investments under the BIT.

3.11. Nevertheless, Respondent argues that none of Akgun's contractual rights are protected investments because "'rights having financial value' must be 'related to an investment' which investment may only be an 'asset'" and "[a] leasehold right obtained for the purpose of future development is not an 'asset' to which 'rights having financial value' may relate."³⁶⁰ Respondent asserts no authority

³⁵⁸ SoC, Section 6.C.

³⁵⁹ SoD, ¶ 173.

³⁶⁰ *Id.*, ¶ 182.

in support of its claim that a leasehold is not an asset. Regardless, Akgun's contractual rights having financial value relate to Akgun's other stand-alone investments—*i.e.*, the know-how in developing ETIZ, and the movable property, materials, equipment and personnel employed for the Project, each of which is a protected investment within the plain meaning of the BIT, as set forth below.

- 3.12. Second, Akgun's experience and expertise in developing industrial cities constitutes "know-how," an investment protected under BIT Art. I(2)(d). Indeed, Respondent specifically identified and solicited Akgun because of its know-how in developing industrial cities, and Ethiopian officials themselves repeatedly confirmed the value of Akgun's know-how. For example:

3.12.1. In early 2009, Minister of Foreign Affairs, Mesfin Seyoum, visited Ikitelli and remarked that it was "a golden opportunity to have first-hand experience about your Industrial Zone in Istanbul," that "[i]t was indeed an eye-opener for [him]" and that he would ensure that the Ethiopian government would fully support Akgun's development of "such visionary project" in Ethiopia.³⁶¹

3.12.2. Months later, the Minister of Finance and Economic Development, Mr. Sufian Ahmed, also visited Ikitelli and remarked that he was "very much impressed by this industrial zone. It is a perfect model for attracting investors. I hope we can have one of its kind in Ethiopia."³⁶²

3.12.3. Indeed, the necessity and value of Akgun's know-how is memorialized in both the 2010 and 2012 ETIZ Agreements, in which the parties acknowledged that Akgun "has know-how and experience at the highest level regarding the establishment of an industrial zone, construction of infrastructure and superstructure, operation of industrial zones and finding Investors to invest in industrial zones" and will "bring its highest level of know-how, experience, financial, technical and technological resources to the Federal Democratic Republic of Ethiopia for the purpose of establishing an industrial zone within the scope of the project."³⁶³

³⁶¹ **C-044**, Akgun Guest Book, p. 2 (handwritten note of Mesfin Seyoum dated 7 February 2009).

³⁶² *Id.*, p. 3 (handwritten note of Sufian Ahmed dated 7 October 2009).

³⁶³ **C-008**, The 2010 ETIZ Agreement, Preamble; **C-009**, The 2012 ETIZ Agreement, Preamble.

- 3.13. Third, Akgun contributed “movable property” to the Project, which is a protected investment under the plain language of BIT Art. I(2)(c). Akgun rented and purchased heavy machinery, equipment, and construction materials, and mobilized those resources to the ETIZ site location.³⁶⁴ Akgun also employed personnel and set up an office to operate its Ethiopian branch, to manage the Project, and to construct ETIZ.³⁶⁵

b. Akgun’s Project as a Whole Constitutes an Investment under the BIT

- 3.14. As Claimant demonstrated above, all that the Treaty requires is that a putative investor has an asset of some value; specifically, a right having financial value related to an investment, movable and immovable property or know-how, without more, amounts to an investment. Additionally, the ETIZ Project as a whole, and Akgun’s interest therein, constitutes an investment within the BIT’s protection.
- 3.15. It cannot seriously be argued that the ETIZ Project does not meet the Treaty’s definition of investment. Indeed, investment tribunals routinely accept that large construction and infrastructure projects are investments in the host State.³⁶⁶ In the seminal ICSID Commentary, Schreuer and others explained that an investment tribunal had no difficulty in finding subject matter jurisdiction in cases where a construction project was at stake:

Another sizeable group of cases concerns civil engineering and construction projects. Tribunals have not entertained doubts that these were investments. Similarly, infrastructure projects are the basis of numerous investment disputes.³⁶⁷

³⁶⁴ **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013; Yunus Akgun 1st Statement, ¶¶ 4.9, 5.3; **YUN-12**, Photos of some purchased machinery and equipment.

³⁶⁵ **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013; Yunus Akgun 1st Statement, ¶ 5.3.

³⁶⁶ 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 (“*Beijing Urban Construction v. Yemen*”), ¶¶ 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 (“*Jan de Nul N.V. v. Egypt*”), ¶ 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 (“*Salini v. Morocco*”), ¶¶ 45-49; **CLA-012**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016 (“*Garanti Koza LLP v. Turkmenistan*”), ¶ 234.

³⁶⁷ **CLA-079**, C. Schreuer et al., *THE ICSID CONVENTION: A COMMENTARY* (2 ed., 2009), p. 127 (internal citations omitted).

- 3.16. Thus, there is a *jurisprudence constante* that large construction projects qualify as investments. Underscoring this body of caselaw, in a number of cases concerning construction projects, the respondent States have not challenged the *ratione materiae* jurisdiction of the tribunals, demonstrating that the respondents rightfully considered such projects to constitute “investments” under the applicable treaties, treaties with definitions of “investment” that are markedly similar to the BIT’s definition applicable here.³⁶⁸
- 3.17. ETIZ is a project like those found to be investments in the foregoing cases. ETIZ is a large project for the construction and development of an industrial zone. Akgun invested in this project through setting up an office in Ethiopia; leasing and purchasing machinery and equipment; importing construction materials; hiring and transferring employees to Ethiopia; providing requisite know-how and expertise to carry out the work on the project; marketing the project to prospective industrialists; leasing land and constructing necessary facilities to carry out this project.³⁶⁹ Indeed, once completed, the Project would bring industrialists to Ethiopia and greatly broaden the manufacturing sector in the state, “stimulat[ing] the flow of capital, technology and the economic development of” Ethiopia.³⁷⁰
- 3.18. As such, there can be no doubt that the Project as a whole constitutes a stand-alone qualified “investment” under the BIT.

³⁶⁸ See, e.g., **CLA-080**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17), Award, 6 February 2008 (“*Desert Line v. Yemen*”), ¶¶ 92-93; **CLA-081**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004 (“*Salini v. Jordan*, Decision on Jurisdiction”), ¶ 29. The Oman-Yemen BIT in *Desert Line* defined investment as “every kind of assets” including “[m]ovable and immovable property”, “[d]ebts as well as service of debt deriving from a contract related to the investment”, “[i]ntellectual and industrial property rights and intangible elements relating to commercial assets such as trademarks, copyrights, designs, goodwill, etc. used in a licensed investment.” See Oman-Yemen BIT, Art. 1(1) as cited in **CLA-080**, *Desert Line v. Yemen*, ¶ 92. Similarly, the Italy-Jordan BIT in *Salini* defined investment as “any kind of property” comprising “movable and immovable property and any ownership right ‘in rem;’” “credits for sums of money or any service right having an economic value connected with an investment.” See **CLA-081**, *Salini v. Jordan*, Decision on Jurisdiction, ¶ 66 (quoting Art. 1(1) of Italy-Jordan BIT).

³⁶⁹ See *supra* Sections 2.A.i, 2.A.iii, 2.B.ii; *infra* Section 3.A.iii.

³⁷⁰ See *supra* Sections 2.B.i.a, 2.B.ii; see also *supra* ¶ 3.2; **CLA-001**, Turkey-Ethiopia BIT, Preamble.

(ii) Respondent's Argument that Akgun's Assets Are Not Protected Investments Because of Akgun's Purported Failure to Perform an EIA Has No Merit

- 3.19. Respondent nevertheless argues that Akgun's assets are not investments within the meaning set forth in the BIT because, according to Respondent, those assets were merely "prospective or potential investment[s]" "that never materialized by the Claimant's own lack of satisfaction of environmental conditions under the Agreement and the relevant laws."³⁷¹
- 3.20. In making this argument, Respondent mischaracterizes both the nature of Akgun's assets and Akgun's satisfaction of its obligations under the 2012 ETIZ Agreement. First, Respondent is wrong that Akgun's assets "never materialized"—work on the Project had been ongoing for nearly a decade when Respondent thwarted its completion, at which point substantial progress on ETIZ had been made. Second, Respondent is wrong that Akgun was required to perform an EIA. Neither the 2012 ETIZ Agreement nor Ethiopian Law imposed such a requirement. Premised as they are on these factual mischaracterizations, Respondent's argument that Akgun's assets are not investments because the Project was undeveloped and Akgun failed to perform an EIA has no merit.

a. Development of ETIZ Had Progressed Substantially

- 3.21. Respondent is wrong that Akgun's assets were "unaccrued potential"—development of ETIZ had commenced and was very well underway until Respondent thwarted the Project.
- 3.21.1. Akgun and the Oromia Regional State entered into a Memorandum of Understanding in 2008.³⁷²
- 3.21.2. Respondent appointed a committee of experts to identify the location at which the ETIZ would be developed and selected a site in Oromia state.³⁷³

³⁷¹ SoD, ¶¶ 163, 167.

³⁷² C-007, MoU.

³⁷³ Yusuf Akgun 1st Statement, ¶ 4.7

- 3.21.3. Akgun established an Ethiopian branch through which it would conduct business related to the project.³⁷⁴
- 3.21.4. Akgun employed professional consultants and architects to assist in developing the plans for ETIZ and multiple feasibility studies for the Project, each of which was well-received by the Ethiopian government.³⁷⁵ Akgun submitted a final version of the feasibility study to Respondent in December of 2009.³⁷⁶
- 3.21.5. In 2009, Akgun applied for, and Respondent issued, the required permits and licenses for construction and development of ETIZ.³⁷⁷
- 3.21.6. In June of 2010, Akgun and Respondent entered into the 2010 Agreement to develop ETIZ at the site Respondent identified.³⁷⁸
- 3.21.7. Two years later, Akgun and Ethiopia entered into the 2012 Agreement, which modified the 2010 Agreement, including to relieve Respondent of its financing obligations for the Project.³⁷⁹
- 3.21.8. The 2012 ETIZ Agreement included a lease for land at the site that Respondent selected. Akgun paid tens of thousands of dollars to Ethiopia for the leasehold and Ethiopia handed over the first 100ha of the land to Akgun, payment that, in part, served to compensate the farmers who were relocated from the land on which ETIZ was to be located.³⁸⁰
- 3.21.9. Throughout this time, Akgun devoted time and resources to marketing ETIZ, and actively solicited investors in accordance with the deadlines the 2012 ETIZ Agreement set. Akgun succeeded in

³⁷⁴ **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009.

³⁷⁵ Yusuf Akgun 1st Statement, ¶ 4.10, **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*, The Ethiopian Herald, 18 August 2009, **C-043**, Pre-Feasibility Study, **C-045**, Final Feasibility Study.

³⁷⁶ **C-045**, Final Feasibility Study; Yusuf Akgun 1st Statement, ¶ 4.11.

³⁷⁷ **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-040**, Taxpayer Registration Certificate issued by FDRE Ministry of Revenue Federal Inland Revenue Authority dated 4 March 2009; **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009.

³⁷⁸ **C-008**, The 2010 ETIZ Agreement.

³⁷⁹ *Id.*

³⁸⁰ **C-009**, 2012 ETIZ Agreement; **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012; **C-012**, Land Lease Certificate; **C-013**, Land Handover Protocol.

soliciting more than 100 interested investors and secured a significant number of preliminary commitments.³⁸¹

3.21.10. Akgun also devoted time, money and other resources to soliciting industrialists to establish factories in ETIZ.³⁸²

3.21.11. Akgun had purchased, leased, and/or imported machinery, equipment and other movable property to the ETIZ site for construction of ETIZ.³⁸³

3.21.12. Akgun hired laborers and other personnel to perform work on the Project in Ethiopia.³⁸⁴

3.21.13. Akgun began construction of ETIZ at Respondent's encouragement, including clearing the site and building infrastructure and other facilities for the industrial city.³⁸⁵ Respondent had full knowledge of Akgun's construction work.³⁸⁶

3.22. Clearly, then, Respondent is wrong that Akgun's investments were undeveloped or prospective only. Akgun had worked diligently on the Project for years and had progressed significantly in completing ETIZ before Respondent caused the Project to fail.

b. The Project Was Not Conditioned on Akgun's Obtaining an EIA

3.23. Respondent further argues that Akgun's claims are beyond the scope of this Tribunal's jurisdiction because "the lack of presentment of an acceptable EIA

³⁸¹ Yunus Akgun 1st Statement, ¶¶ 5.7-5.11; Ufuk Akgun Statement, ¶ 2.9.

³⁸² Yusuf Akgun 1st Statement, ¶¶ 4.26-4.28; Yunus Akgun 1st Statement, ¶¶ 5.7-5.11; **C-093**, Letter from Akgun Construction to Ministry of Industry dated 7 July 2014 and the attached Business Plan for 15 years; **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.

³⁸³ **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013; Yunus Akgun 1st Statement, ¶¶ 4.9, 5.3; **YUN-12**, Photos of some purchased machinery and equipment.

³⁸⁴ Yunus Akgun 1st Statement, ¶ 5.3.

³⁸⁵ **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; **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

³⁸⁶ 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; **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

means the repudiation of the builder's contractual obligations.”³⁸⁷ As a threshold matter, this argument goes to the merits of Akgun’s claims and, as such, is irrelevant to the jurisdictional analysis.³⁸⁸ Regardless, this argument is premised on a mischaracterization of the facts in this case and fails for that reason. Respondent is wrong that Akgun was required to perform an EIA as a condition precedent to developing ETIZ by contract or by law.³⁸⁹

1) Akgun Had No Contractual Obligation to Perform an EIA

3.24. Neither the 2010 Agreement nor the 2012 Agreement required an EIA; instead, Arts. 8(9) and 8(10) of the 2010 and 2012 Agreements, respectively, required only that Akgun “protect the environment from pollution by using appropriate methods and technologies.”³⁹⁰ Prof. Tekle explains, and common sense provides, “[t]his provision is only about prevention of pollution by using appropriate technologies *during the operation* of the project.”³⁹¹

3.25. And, while true that Art. 8(10) of the 2012 Agreement requires Akgun to carry out the “necessary environmental studies” “to safeguard the Legedadi and Dire Dams underground water basins from pollution,”³⁹² Prof. Tekle explains that those studies

relate to environmental pollution control and do not encompass an EIA. . . . Because [an EIA] would necessarily implicate the land use master plan and water basin master plan studies of the area that ensure the underground water resources are sufficient to meet the population’s needs, it could never be left to foreign investors alone.³⁹³

³⁸⁷ SoD, ¶ 163.

³⁸⁸ See, e.g., **CLA-024**, *Tethyan Copper Company Pty Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017 (“*Tethyan v. Pakistan*”), ¶ 681 (“As to Respondent’s *ratione materiae* objection, the Tribunal agrees with Claimant that the arguments raised by Respondent in this regard relate to the merits of the claim. Even if the Tribunal were to find that the right that is claimed to have been violated does not exist, this would not, in itself, lead to the inadmissibility of the claim.”).

³⁸⁹ SoD, ¶¶ 37, 40.

³⁹⁰ **C-008**, The 2010 ETIZ Agreement, Art. 8(9); **C-009**, The 2012 ETIZ Agreement, Art. 8(10).

³⁹¹ Tekle Report, ¶ 2.47 (emphasis added).

³⁹² **C-009**, The 2012 ETIZ Agreement, Art. 8(10).

³⁹³ Tekle Report, ¶¶ 2.47-2.48.

- 3.26. Indeed, this is the only reasonable interpretation of the 2012 Agreement in the context of the other provisions therein. Arts. 7(1), 7(5), 7(6), 8(6), 9(2), and 9(5) of the 2012 Agreement confirm that Akgun was not required to perform an EIA before work on ETIZ could begin.
- 3.27. Art. 7(1) obligated the Ministry and the Oromia Regional State to deliver the leased land to Akgun “with the rights of management, operation and usage.”³⁹⁴ Art. 7(6) requires that delivery of the leased land occur “immediately after settlement of the compensation fee to Oromia Regional State.”³⁹⁵ Akgun paid Oromia Regional State the compensation fee for the first 100ha of the leased land on 31 July 2012, and Akgun received the land lease certificate for the first 100ha on 2 January 2013.³⁹⁶ Upon handover of the land a few months later, in accordance with Art. 7(1) of the 2012 Agreement, Akgun’s rights to manage, operate, and use the land ripened, and Akgun could commence construction of ETIZ immediately (*i.e.*, without first conducting an EIA).
- 3.28. But not only did Akgun have the *right* to begin development of the Project immediately upon handover of the leased land, it had the *obligation* to begin construction of ETIZ promptly thereafter. Arts. 7(5), 8(6), and 9(5) of the 2012 Agreement required Akgun to commence “construction of infrastructure,” “project activities,” and “construction of the necessary facilities for the development of [ETIZ]” on the leased land within six months of the handover.³⁹⁷ Indeed, in September 2012, Respondent demanded that Akgun begin construction of ETIZ within six months lest Respondent “terminate the agreement without any precondition and snatch the land.”³⁹⁸ If Respondent had required an EIA before construction of ETIZ could begin, it certainly would have sought to enforce this requirement—or, at the very least, made the requirement clear—when imposing these time constraints on Akgun. It did not. The inclusion of these provisions, along with Respondent’s threats to terminate the 2012 Agreement if Akgun did not begin construction of ETIZ

³⁹⁴ **C-009**, The 2012 ETIZ Agreement, Art. 7(1).

³⁹⁵ *Id.*, Art. 7(6).

³⁹⁶ **C-010**, Receipt issued by Cooperative Bank of Oromia, dated 31 July 2012; Yunus Akgun 1st Statement, ¶ 4.8; **C-012**, Land Lease Certificate.

³⁹⁷ **C-009**, The 2012 ETIZ Agreement, Arts. 7(5), 8(6), and 9(5).

³⁹⁸ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012.

immediately, demonstrate that Akgun was under no contractual obligation to perform an EIA before commencing work on ETIZ.³⁹⁹

- 3.29. Other aspects of Respondent's conduct further confirm that nothing in the 2010 or 2012 Agreements required Akgun to perform an EIA before work on ETIZ could begin. At no point during the initial planning stages of the Project, the feasibility studies of ETIZ, the negotiations of the MOU, the 2010 Agreement, and the 2012 Agreement, or the early stages of construction did Respondent once mention, much less require, an EIA. It was not until mid-2013—five years after Respondent solicited Akgun's expertise in developing ETIZ and after Akgun had made substantial investments and progress in constructing and developing ETIZ⁴⁰⁰—that Respondent requested an EIA for the first time.⁴⁰¹ This demonstrates that Akgun was under no contractual obligation to perform an EIA before development of ETIZ could commence.

2) Akgun Had no Legal Obligation to Perform an EIA

- 3.30. Respondent alternatively argues that Akgun was required to perform an EIA in accordance with Ethiopian law, relying on the "EIA Proclamation, the 2008 Directive and the 2003 Guideline."⁴⁰²
- 3.31. Respondent is again wrong. To the extent an EIA was required, it was Respondent's obligation to obtain one. As Prof. Tekle explains, none of the authorities Respondent cites are binding law: "Although the 2008 Directive purports to implement Article 5 of the EIA Proclamation by listing projects subject to the EIA requirement, the EPA never adopted it, so it is without legal effect."⁴⁰³ Likewise, "Guidelines, including the 2003 Guideline [...], are not 'law.'"⁴⁰⁴
- 3.32. Instead, Prof. Tekle explains, it was Respondent's duty to assess the suitability of the site location before handing the land over to Akgun for development of ETIZ. As further detailed herein, Respondent should have conducted an SEA, because the Project "involve[ed] the use of a crucial water

³⁹⁹ See *supra* Sections 2.B.i.b, 2.D, 2.E.

⁴⁰⁰ See *supra* Section 2.D.i.

⁴⁰¹ Yusuf Akgun 1st Statement, ¶ 5.5.

⁴⁰² SoD, Section III(D).

⁴⁰³ Tekle Report, ¶ 2.10.

⁴⁰⁴ *Id.*, ¶ 2.12.

resource (surface or underground) that may affect more than just the immediate area,” as both the Ethiopian Water Resources Management Proclamation and Art. 51(11) of the Constitution require.⁴⁰⁵

- 3.33. Moreover, Akgun *did* produce an EIA, even though Akgun was under no obligation—contractual, legal, or otherwise—to do so. Respondent claims that the EIA Akgun submitted was unsatisfactory, such that Akgun acted, still, in “repudiation of the builder’s contractual obligations.”⁴⁰⁶ But as explained, the EIA is what caused the Ethiopian authorities to confront their original siting error and the potential environmental risks of developing ETIZ at that site, as internal correspondence among Ethiopian agencies evidenced—correspondence on which Akgun was never copied.⁴⁰⁷ The EIA further illuminated Respondent’s conflicting development initiatives and failure to comprehensively plan for its natural resource allocation, as the EIA process caused Respondent to realize that its residential condominium development was slated to draw on the same limited water source as ETIZ, which would imperil drinking water availability.
- 3.34. In light of these risks, Ethiopia determined that the ETIZ could not be developed at the site it had selected. But Ethiopia promised that, in such event, Ethiopia would select another suitable site.⁴⁰⁸ It did not do that.
- 3.35. In sum, Akgun was not required to perform an EIA before construction of ETIZ could begin, the development of which had progressed substantially by the time Respondent forced the Project to shut down. Thus, Akgun’s rights to develop ETIZ, as well as the know-how, materials and equipment needed to develop it, were neither “unaccrued” nor unrealized because of Akgun’s purported failure to satisfy “environmental conditions under the agreement and the relevant laws.”⁴⁰⁹ It was Respondent’s actions—not Akgun’s—that forced the Project to stall and ultimately fail. Respondent’s objections to jurisdiction on the bases that Akgun’s assets were “unaccrued potential” that never materialized because Akgun did not obtain a satisfactory EIA therefore fail.

⁴⁰⁵ *Id.*, ¶ 2.20.

⁴⁰⁶ SoD, ¶ 163.

⁴⁰⁷ **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; **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

⁴⁰⁸ See *supra* Sections 2.E.-2.G.

⁴⁰⁹ SoD, ¶¶ 167, 168.

(iii) Though the *Salini* Factors Do Not Apply in This Case, Akgun's Investments Satisfy Each One

- 3.36. In its Statement of Claim, Akgun established that a substantial municipal construction like ETIZ is of the sort that investment tribunals routinely accept as an investment in the host state, citing *Beijing Urban Construction v. Yemen*,⁴¹⁰ *Jan de Nul N.V. av. Egypt*,⁴¹¹ *Salini v. Morocco [I]*,⁴¹² and *Garanti Koza v. Turkmenistan*⁴¹³ in support.⁴¹⁴
- 3.37. Without acknowledging *Garanti Koza*, Respondent argues that none of the cases cited above support Akgun's claim that the Project is an investment. Respondent invokes the so-called *Salini* factors (*i.e.*, duration, risk, and contribution) in arguing that the cases cited above fail to support the proposition that the Project is a qualifying investment under the BIT.⁴¹⁵
- 3.38. Respondent is wrong that *Salini* requires the Tribunal to find that this dispute is beyond its jurisdiction. *First*, the *Salini* test is not binding here. *Second*, though not required, Akgun's investments satisfy the *Salini* test.

a. *Salini* Does Not Bind the Tribunal's Analysis

- 3.39. As a threshold matter, Respondent is wrong to suggest that the *Salini* factors are binding on this Tribunal. First, the BIT itself offers a clear definition and scope of "investments" the Treaty protects. As noted above, where the plain language of a treaty is unambiguous, Art. 31 of the VCLT requires that the "ordinary meaning to be given to the terms of the treaty," the Tribunal need not look any further to determine the basis for its jurisdiction. Because Akgun's investments fall within the ordinary meaning of the BIT, the *Salini* analysis is unnecessary and redundant.
- 3.40. A majority of tribunals follows this approach. For example, in *Beijing Urban Construction*, the tribunal found that it was unnecessary to look to the *Salini* factors, even in an ICSID proceeding, because "[t]he BIT contains a detailed

⁴¹⁰ CLA-009, *Beijing Urban Construction v. Yemen*.

⁴¹¹ CLA-010, *Jan de Nul N.V. v. Egypt*.

⁴¹² CLA-011, *Salini v. Morocco*.

⁴¹³ CLA-012, *Garanti Koza LLP v. Turkmenistan*.

⁴¹⁴ SoC, ¶ 3.8.

⁴¹⁵ SoD, ¶ 171 (citing *Beijing Urban Construction v. Yemen*, ¶ 137).

definition of what constitutes an investment.”⁴¹⁶ Similarly, in *Gavrilovic*, the tribunal found that it was unnecessary to examine the *Salini* factors in an ICSID arbitration where “the State parties[] articulat[ed] [...] the meaning of ‘investment’ in their instrument of consent to arbitration, namely, the BIT.”⁴¹⁷ Thus, these tribunals recognized—even in the context of an ICSID tribunal—a detailed definition of investment in the operative BIT may render moot any resort to the *Salini* factors.

- 3.41. The same rationale applies here. The definition of “investment” in the BIT and the non-exclusive list of such “investments” is similarly worded and as detailed as the definitions in the China-Yemen and Austria-Croatia BITs at issue in *Beijing Urban Construction* and *Gavrilovic*, respectively. Because Akgun’s assets fall within that definition, they constitute “investments” under the BIT.
- 3.42. In short, as the tribunal in *Guaracachi America* aptly stated, “the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only from the (very broad) definition contained in the BIT concluded by” the parties to the treaty.⁴¹⁸ Because the BIT defines “investments” to plainly include the assets at issue here, the Tribunal need not refer to the *Salini* factors.
- 3.43. Second, while the *Salini* test is conventionally used in ICSID cases (though not all ICSID tribunals adhere to it),⁴¹⁹ this is not an ICSID case. Non-ICSID tribunals have routinely rejected strict adherence to the ICSID definition of investment. The tribunal in *Energolians v. Moldova*, for example, rejected the application of the *Salini* factors in a UNCITRAL case, reasoning that the *Salini* criteria have been developed within the system of the ICSID Convention, such that the criteria cannot be universally applied, and that a non-ICSID tribunal should not go beyond the text of the treaty to which the parties have agreed.⁴²⁰ The *Energolians* tribunal emphasized the broad aim of cross-border economic

⁴¹⁶ **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶¶ 135-136.

⁴¹⁷ **CLA-082**, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, ¶ 192.

⁴¹⁸ **CLA-083**, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 364.

⁴¹⁹ See, e.g., **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶¶ 135-136.

⁴²⁰ **CLA-084**, *Energolians TOB v. Republic of Moldova*, UNCITRAL, Arbitral Award, 23 October 2013, ¶¶ 241, 235-237.

stimulation cited in the preamble of the treaty at issue, similar to the broad economic objectives the BIT sets forth.⁴²¹

- 3.44. Similarly, in *Flemingo Duty-Free Shop v. Poland*, the tribunal found no need to refer to the *Salini* criteria because the tribunal was convened under the UNCITRAL Arbitration Rules, not ICSID.⁴²² In *White Industries Australia Ltd. v. India*, the tribunal determined that “the so-called *Salini Test* [is] simply not applicable” because the case was “not subject to the ICSID Convention.”⁴²³ And, in *A11Y LTD. v. Czech Republic*, the tribunal concluded that “[i]t is not the task of this Tribunal to add words to the broad definition agreed by the Contracting Parties,” recalling “that this case is proceeding pursuant to the UNCITRAL Arbitration Rules, [which] have no equivalent to Article 25 of the ICSID Convention.”⁴²⁴ In accordance with these decisions, and because this Tribunal is convened under the UNCITRAL Arbitration Rules, it need not apply the ICSID-specific *Salini* test.

b. Regardless, Each of Akgun’s Investments Satisfies the *Salini* Test

- 3.45. Though *Salini* is not dispositive as to the meaning of “investments” under the BIT, Akgun’s assets satisfy the *Salini* test.
- 3.46. As the *Salini* tribunal originally applied it, the test comprises four factors: duration, risk, the investor’s contribution of assets, and contribution to the economic development of the host State.⁴²⁵ Increasingly, however, “there seems to be a move away from *Salini* to a simpler test involving contribution, duration and risk.”⁴²⁶ Indeed, in asserting that *Salini* bars the Tribunal’s

⁴²¹ *Id.*

⁴²² **CLA-078**, *Flemingo DutyFree Shop Private Ltd. v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 (“*Flemingo DutyFree*”), ¶¶ 296-298.

⁴²³ **CLA-085**, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶ 7.4.9.

⁴²⁴ **CLA-086**, *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award, 29 June 2018, ¶¶ 138-140; **CLA-087**, *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case No. 2014/181, Final Award, 10 March 2017, ¶ 150 (“As a preliminary matter, the Tribunal does not deem it necessary to inquire into the question whether the requirements of a contribution, certain duration and an element of risk are met in this instance, given that this arbitration was brought under the SCC Arbitration Rules, not the ICSID Arbitration Rules under which the so-called *Salini* test has been developed in arbitral case law in relation to Article 25 of the 1965 ICSID Convention.”).

⁴²⁵ **CLA-011**, *Salini v. Morocco*, ¶ 52.

⁴²⁶ **CLA-045**, *Bernhard von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (“*Pezold v. Zimbabwe*”), ¶ 285.

jurisdiction here, Respondent argued only that the Project fails to satisfy the “substantial contribution” prong of the *Salini* test, apparently collapsing the contribution and economic development factors or omitting the latter entirely. Akgun addresses those factors together in its response below. Importantly, these factors are “interdependent” and, “[a]s a result, these various criteria should be assessed globally even if, for the sake reasoning, the Tribunal considers them individually here.”⁴²⁷

1) *Duration*

- 3.47. Citing *Beijing Urban Construction*, Respondent argues that Akgun’s development of the Project “had no meaningful performance of any duration” such that it does not qualify as an investment under the BIT, because it fails the “substantial duration” prong of the *Salini* test.⁴²⁸
- 3.48. Specifically, Respondent argues that, whereas the project in *Beijing Urban Construction* “was a major ongoing construction project,” “Akgun’s land lease contract never took off the ground for failure to meet basic environmental requirements.”⁴²⁹ But, for reasons previously stated, that is untrue and, as such, provides no support to Respondent’s argument that the BIT does not protect Akgun’s investments.
- 3.49. Instead, the Project meets the duration requirement of the *Salini* test. The Project spanned from at least 2008, when Akgun entered into the MoU and began conducting pre-feasibility studies and devoting other resources to the Project, until 2015, when Respondent failed to locate a new site for ETIZ. Moreover, pursuant to the 2012 Agreement, Akgun committed (and had the right) to lease the property on which ETIZ was to be located and to operate ETIZ for 80 years once ETIZ had been completed.⁴³⁰ This exceeds the duration of other projects found to be “qualified investments” under the *Salini* test.⁴³¹ For example, in *Beijing Urban Construction*, the project lasted from

⁴²⁷ *Id.*

⁴²⁸ SoD, ¶ 173.

⁴²⁹ SoD, ¶¶ 172-173.

⁴³⁰ **C-009**, The 2012 ETIZ Agreement, Art. 6(1).

⁴³¹ **CLA-011**, *Salini v. Morocco*, ¶ 54 (project duration of 36 months satisfied test); see also **CLA-088**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (“*Bayindir v. Pakistan*”), ¶ 133 (contract of three years plus four-year maintenance period satisfied the duration test for an investment).

2002 until 2009 (*i.e.*, seven years).⁴³² In *Jan de Nul, N.V.*, the project lasted from 1992 until 1994 (*i.e.*, two years).⁴³³ In *Salini*, the project lasted 36 months (*i.e.*, three years).⁴³⁴

- 3.50. The Project's planned duration of 80 (and no less than seven) years "complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years."⁴³⁵ Akgun has satisfied the duration prong of the *Salini* test.

2) Risk

- 3.51. Respondent next argues that the Project does not satisfy the risk requirement of the *Salini* test, claiming that while the *Beijing Urban Construction* and *Salini* investors were "clearly exposed . . . to risks posed by the sovereign power," Akgun was not.⁴³⁶
- 3.52. Respondent is wrong that Akgun was not subject to any risks in developing the Project. Akgun bore significant risk in developing the project, including that: Akgun would be unsuccessful in recruiting investors for the Project; Akgun would be unable to identify and enter into subleases with manufacturers; the costs of labor and materials in developing the Project might increase; or accidents may cause damage to the property or personnel. These are precisely the types of risk that tribunals have found to be hallmarks of an investment.⁴³⁷
- 3.52.1. In *Beijing Urban Construction*, the tribunal concluded that "a construction contract in which the execution of the works extends

⁴³² **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶¶ 22-25.

⁴³³ **CLA-010**, *Jan de Nul N.V. v. Egypt*, ¶¶ 94-95.

⁴³⁴ **CLA-011**, *Salini v. Morocco*, ¶ 54.

⁴³⁵ *Id.*

⁴³⁶ SoD, ¶¶ 170-173.

⁴³⁷ See, e.g., **CLA-011**, *Salini v. Morocco*, ¶ 55 ("Notably, among others, the risk associated with the prerogatives of the Owner permitting [Claimants] to limits without changing the manner of fixing prices; the risks the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.").

over a substantial period of time involves by definition an element of risk.”⁴³⁸

3.52.2. In *Jan de Nul, N.V.*, the tribunal similarly determined that operation of a municipal project that required “the mobilization of two heavy ships for a period of approximately 19 months” was of such “magnitude and complexity” that there can be “no question” that risk is involved.⁴³⁹

3.52.3. In *Salini*, the tribunal found that “[a] construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk” for the investor.⁴⁴⁰

3.53. The ETIZ Project easily satisfies these parameters. It was a construction and development project that would last over the span of many years. Indeed, by the time Respondent thwarted it, the Project had been ongoing for at least seven years and was not yet near completion (in part, because of the repeated delays Respondent caused), such that it “involves by definition an element of risk.”⁴⁴¹ The ETIZ Project was highly complex and involved, essentially, developing dozens of manufacturing facilities, across a variety of industries and coordinated over phases, such that there can be “no question” that risk is involved.⁴⁴² And, there was no guarantee that the total cost of the Project would not overrun estimates, such that it “create[d] an obvious risk” for Akgun.⁴⁴³ The Project satisfies the second *Salini* factor.

⁴³⁸ **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶ 137 (citing **CLA-089**, *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶ 78).

⁴³⁹ **CLA-010**, *Jan de Nul N.V. v. Egypt*, ¶ 92.

⁴⁴⁰ **CLA-011**, *Salini v. Morocco*, ¶¶ 55-56 (citing, *inter alia*, the risks that (1) the construction contract would be prematurely and unilaterally terminated or modified by the other party; (2) potential increase in the cost of labor or other adverse effects resulting from changes in the host country’s law; (3) accidents or damage would be caused to property during the performance of the project” (4) problems of co-ordination possibly arising from the simultaneous performance of other projects would arise; (5) unforeseeable incidents that could not be considered as *force majeure*, would not give rise to a right to compensation”). See also **CLA-088**, *Bayindir v. Pakistan*, ¶ 136 (“Besides the inherent risk in long-term contracts, . . . the very existence of a defect liability period of one year and of a maintenance period of four years against payment, creates an obvious risk for [the investor].”).

⁴⁴¹ **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶ 137.

⁴⁴² See **CLA-010**, *Jan de Nul N.V. v. Egypt*, ¶ 92.

⁴⁴³ See **CLA-011**, *Salini v. Morocco*, ¶¶ 55-56.

3) Contribution

3.54. Respondent finally argues that the Project fails to satisfy the contribution prong of the *Salini* test, which Respondent claims requires that the investor's contribution be "substantial."⁴⁴⁴ As noted above, Respondent does not separately argue that Akgun failed to satisfy the economic development factor sometimes included in the *Salini* analysis. In any event, Akgun satisfies both aspects of the contribution prong. Akgun itself made substantial contributions of assets to the Project, which investment would, in turn, contribute substantially to the economic development of Ethiopia, the host State.

(a) Investor's Contribution of Assets

3.55. First, Akgun devoted significant assets to the Project in satisfaction of the asset contribution prong of the *Salini* test. Under the *Salini* test, contributions of assets are not limited to financial commitments, and "could, then, consist of loans, materials, works, or services, provided they have an economic value."⁴⁴⁵ "In other words, the Contractor must have committed outlays, in some way, in order to pursue an economic objective."⁴⁴⁶ That is, there is 'no need for actual expenses to have been incurred,' for an investment to satisfy this standard; "the relevant criterion [is] the *commitment* to bring in resources toward the project."⁴⁴⁷

3.56. Akgun made a number of substantial contributions in cash, in kind, and in future commitments:

- i. It established an Ethiopian branch.
- ii. It paid for the ETIZ leasehold.
- iii. It brought investors to Ethiopia.
- iv. It conducted numerous feasibility studies and EIAs.
- v. It provided the know-how to develop a successful ETIZ.

⁴⁴⁴ SoD, ¶ 177.

⁴⁴⁵ **CLA-090**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005 ("*Consorzio v. Algeria*"), pt. II ¶ 14(i). See also **CLA-011**, *Salini v. Morocco*, ¶¶ 54-55 (listing a broad variety of examples of the forms that risks may take).

⁴⁴⁶ **CLA-090**, *Consorzio v. Algeria*, pt. II ¶ 14(i).

⁴⁴⁷ **CLA-091**, *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶ 243 (emphasis in original).

- vi. It provided and further committed to provide equipment, materials and labor to construct the ETIZ.
- vii. It committed to managing and operating ETIZ for 80 years thereafter.

3.57. These are the very kinds of resources that tribunals have found to satisfy the “contribution” requirement of the investment test. For example, the *Salini* tribunal determined that an investor’s “use[] of know-how,” provision of “the necessary equipment and qualified personnel for the accomplishment of the works,” establishment of the “production tools on the building sites” and financing of the “purchases necessary to carry out the works and to pay the salaries of the workforce” were “contributions in money, in kind, and in industry” are the sorts of contribution that an “investment” requires. Akgun made the same contributions in furtherance of the Project. Akgun has satisfied the contribution of assets prong of the *Salini* test.

(b) Economic Development of the Host State

3.58. The Project would also contribute substantially to Ethiopia’s economic development. Indeed, the 2012 ETIZ Agreement memorialized Akgun’s substantial contributions, with “the Ministry recognizing the importance of the development of the Industrial Zones to attract foreign direct investments and support the industrialization of the Federal Democratic Republic of Ethiopia.”⁴⁴⁸ And, Ethiopian officials repeatedly lauded the substantial economic development that the Project would generate, including that:

3.58.1. “[T]he manufacturing sector will have immense social and economic significance in realizing the vision of our country. Thus, considering its share towards that growth, the industry zone intended to be established around Sendafa is of potential significance .”⁴⁴⁹

3.58.2. The establishment of “industrial zones in our country will have potentially positive impacts for our country’s renaissance” and “such projects will have a significant role in securing expedited and sustainable growth in our country.”⁴⁵⁰

⁴⁴⁸ **C-009**, The 2012 ETIZ Agreement.

⁴⁴⁹ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, p. 1.

⁴⁵⁰ **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible], p. 1.

- 3.58.3. The government made “paramount efforts [...] to attract industrial developers” like Akgun, noting the “national significance” of the development of industrial cities like ETIZ.⁴⁵¹
- 3.59. Even Respondent’s witness, Mr. Gemenchu, recognized that ETIZ’s success “would have most definitely been Ethiopia’s success as well.”⁴⁵² Respondent cannot now claim that ETIZ would not significantly contribute to its economic development. For example, in *Beijing Urban Construction*, the tribunal determined that “it is obvious that construction of an international air terminal worth in excess of a hundred million dollars contributes to the host State’s economic development.”⁴⁵³ Like the air terminal at issue in *Beijing Urban Construction*, the ETIZ Project was estimated to be worth many hundreds of millions of dollars and, as such, “obvious[ly]” contributed to Respondent’s economic development. The Project satisfies the final prong of the *Salini* test.
- 3.60. Respondent does not dispute that each of Akgun’s other investments (*i.e.*, its other contractual rights having financial value related to the Project; the equipment, machinery, and other movable property necessary for completion of the Project; and the know-how needed to develop the Project) satisfy the *Salini* test. To be sure, each satisfies the *Salini* factors for the reasons set forth above. Akgun committed those assets for a duration of no less than seven years, while subject to the risks outlined above and as part of an investment that constitutes contribution and that would generate significant economic development in Ethiopia.

B. Akgun’s Claims Are Treaty Claims and the Tribunal’s Jurisdiction Extends to All of Them

- 3.61. Respondent next argues that no matter whether Akgun’s assets are “investments” within the meaning of the BIT or under the *Salini* test, Akgun’s claims are nonetheless beyond the scope of this Tribunal’s jurisdiction because those claims are “patently[] contract claim[s].”⁴⁵⁴
- 3.62. In making this argument, Respondent asserts that the issues before this Tribunal are limited to (i) whether Akgun was required to submit an EIA under

⁴⁵¹ **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014, p. 1.

⁴⁵² Witness Statement of Mr. Sisay Gemenchu EDO dated 12 March 2021, ¶ 7.

⁴⁵³ **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶ 137.

⁴⁵⁴ SoD, ¶¶ 185, 187.

the contract and applicable laws . . .; (ii) what constitutes an adequate EIA; and (iii) who determines said adequacy” of the EIA.⁴⁵⁵ This mischaracterizes the nature of Akgun’s claims. Akgun has alleged that Respondent (1) expropriated Akgun’s investments in violation of the BIT; (2) violated its obligation to provide Akgun with fair and equitable treatment under the BIT; (3) impaired Akgun’s investment in violation of the BIT; and (4) violated the BIT’s umbrella clause. Those are treaty claims.

- 3.63. While Akgun’s claims may involve rights arising under the 2012 ETIZ Agreement and related contracts, that alone does not transform Akgun’s treaty claims into contract claims and does not deprive this Tribunal of jurisdiction over this dispute. As the *Vivendi* ad-hoc committee and many other international tribunals have recognized, treaty claims and contract claims can coexist and “a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT’s standards and questions of contracts.”⁴⁵⁶ The “conceptual separation” of treaty claims and contract claims is “well established.”⁴⁵⁷ As the *Crystallex* tribunal explained:

The fact that a contract may exist between the Parties and that issues relating to its performance or termination may play a role in the Parties’ pleadings, does not *per se* entail that the Tribunal is faced with contract claims rather than treaty claims.⁴⁵⁸

- 3.64. Nor does “the fact that a State may be exercising a contractual right or remedy [...] itself exclude the possibility of a treaty breach.”⁴⁵⁹ The distinction lies in whether the “‘fundamental basis of the claim’ is a treaty laying down an

⁴⁵⁵ SoD, ¶¶ 185, 187.

⁴⁵⁶ **CLA-023**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, 3 July 2002 (“*Vivendi*, Decision on Annulment”), ¶ 60; see also **RLA-30**, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2015, ¶ 258 (“[T]he fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.”); **CLA-092**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (“*SGS v. Paraguay*, Decision on Jurisdiction”), ¶ 132 (“[A]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.”).

⁴⁵⁷ **CLA-088**, *Bayindir v. Pakistan*, ¶ 148.

⁴⁵⁸ **CLA-036**, *Crystallex Intl. Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (“*Crystallex v. Venezuela*”), ¶ 474.

⁴⁵⁹ **CLA-088**, *Bayindir v. Pakistan*, ¶ 157.

independent standard by which the conduct of the parties is to be judged.”⁴⁶⁰ If so, the claim is a treaty claim.

- 3.65. In applying this analysis, the Tribunal’s starting point shall be the Claimant’s formulation and characterization of its claims, “as it is for a claimant to file its claims and thus define the nature of the claim that it submits before a tribunal.”⁴⁶¹ Indeed, many investment tribunals have concluded that, for purposes of determining jurisdiction, tribunals must consider the claims as the claimant characterizes and pleads such claims.⁴⁶² Provided that “the conduct alleged by Claimant[], if established, *could* have breached the BIT,” the Tribunal may exercise jurisdiction over Akgun’s claims.⁴⁶³
- 3.66. Akgun has established, *prima facie*, that the fundamental basis for each of Akgun’s claims is the BIT. As set forth in Akgun’s Statement of Claim, each claim arises from Respondent’s breach of the BIT, namely: (1) the obligation to provide fair and equitable treatment;⁴⁶⁴ (2) the non-impairment obligation;⁴⁶⁵ (3) the obligation not to expropriate Akgun’s investments;⁴⁶⁶ and (4) the umbrella clause obligation.⁴⁶⁷

⁴⁶⁰ **CLA-023**, *Vivendi*, Decision on Annulment, ¶ 101; see also **CLA-024**, *Tethyan v. Pakistan*, ¶ 665 (“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.”) (quoting *Vivendi*, ¶ 105).

⁴⁶¹ **CLA-036**, *Crystallex v. Venezuela*, ¶ 475.

⁴⁶² See **CLA-022**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004 (“*Saluka v. Czech Republic*, Decision on Jurisdiction”), ¶ 35; **CLA-092**, *SGS v. Paraguay*, Decision on Jurisdiction, ¶ 137; see also **CLA-021**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶¶ 185-186.

⁴⁶³ **CLA-023**, *Vivendi*, Decision on Annulment, ¶ 112 (emphasis in original).

⁴⁶⁴ SoC, ¶¶ 5.21-5.66 (citing BIT Art. II(2), which expressly provides that “[i]nvestments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party.”).

⁴⁶⁵ *Id.*, ¶¶ 5.67-5.69 (citing BIT Art. II(2), which expressly provides that “[n]either Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.”).

⁴⁶⁶ *Id.* ¶¶ 5.4-5.20 (citing BIT Art. IV(1), which expressly provides that “[i]nvestments shall not be expropriated, nationalized, or subject, directly or indirectly. . . .”).

⁴⁶⁷ *Id.*, ¶¶ 5.70-5.82 (citing BIT Art. II(3), which expressly provides that “[e]ach Contracting Party shall observe any commitment it may have entered in to with regard to investments of investors of the other Contracting Party.”).

- 3.67. In pleading these claims, Akgun has not “simply label[ed] contract breaches as treaty breaches to avoid the jurisdictional hurdles present in a BIT.”⁴⁶⁸ Each of Akgun’s claims is founded on Respondent’s violations of the standards of protection set forth in the BIT.
- 3.68. Akgun’s fair and equitable treatment claim and non-impairment claims are predicated on Respondent’s (i) frustration of Akgun’s legitimate expectations in developing the Project at a suitable site by, for example, recruiting Akgun to develop ETIZ, repeatedly promising to Akgun its unwavering support for the Project, selecting the Sendafa site, accepting Akgun’s payment for lease of the site; allocating the site to Akgun; withdrawing the site from Akgun; promising Akgun an adequate alternative site after Respondent determined it erred in allocating the Sendafa site to Akgun; and failing to ever provide an adequate alternative site (ii) failure to act consistently and transparently by, for example, crafting opaque regulatory requirements regarding the need for an EIA and arbitrarily and discriminatorily imposing that requirement on Akgun, but not other investment projects in Ethiopia, including the nearby Condominium Project; and (iii) failure to exercise its police power proportionally and in good faith.⁴⁶⁹ This conduct violates Art. II(2) of the BIT, which requires that investments “at all times be accorded fair and equitable treatment” in Ethiopia and that Respondent must refrain from unreasonable or discriminatory measures with respect to “the management, maintenance, use, enjoyment, extension, or disposal of such investments.” These are treaty claims.
- 3.69. Akgun’s expropriation claim is predicated on Respondent’s implying that no EIA would be required as a condition to development of ETIZ, only to then impose an EIA requirement (a requirement grounded neither in the terms of the MoU, the 2010 Agreement, the 2012 Agreement nor Ethiopian law), *five years* into development of the Project and after construction of ETIZ had commenced. Respondent concealed from Akgun its determination that no EIA could be submitted that would permit Akgun to proceed with ETIZ as planned and agreed. Respondent demanded that construction of ETIZ be halted and later promised to recompense Akgun for its troubles and provide an alternative site for the Project, but Respondent never fulfilled that promise.⁴⁷⁰ Respondent

⁴⁶⁸ **CLA-036**, *Crystallex v. Venezuela*, ¶ 475.

⁴⁶⁹ *Supra* Sections 2.E.-2.G; *see also infra* Section 5.C.

⁴⁷⁰ *See supra* Section 2.E.; *see also infra* Section 5.A.

has never compensated Akgun for the expropriation of Akgun's investments. Respondent's conduct violates Art. VI of the BIT, which protects against "direct[] or indirect[]" "expropriate[ion]" of investments.

3.70. Akgun's umbrella clause claim is predicated on Respondent's breaches of specific commitments it undertook by agreeing to the 2012 Agreement, include Respondent's granting the right of use of the Sendafa site, reneging on that grant, and failing to identify and allocate a suitable alternative location.⁴⁷¹ While the primary source of these commitments may be the 2012 Agreement, because Art. (2)(3) of the BIT provides that "Each Contracting Party shall observe *any commitment* it may have entered in to with regard to investments of investors," Respondent's breaches of the commitments set forth in the 2012 Agreement constitute breaches of the Art. 2(3) of the BIT. Where, as here, an investor may have "a right under both the contract and the treaty," the investor "has a self-standing right to pursue the remedy accorded by the treaty."⁴⁷² Akgun has exercised its right to pursue the remedy provided by the umbrella clause, which the BIT's MFN clause imports to the BIT as another substantive protection.

3.71. Consequently, Akgun's claims are treaty claims, and this Tribunal is vested with the jurisdiction to hear them.

C. The Forum Selection Clause in the 2012 ETIZ Agreement Does Not Present an Obstacle to the Tribunal's Jurisdiction

3.72. Finally, Respondent argues that Art. 21 of the 2012 ETIZ Agreement, a forum selection clause, controls resolution of this dispute on the basis that Akgun's claims are contract claims, rather than treaty claims.⁴⁷³ But, for reasons set forth above, Akgun's claims arise under the BIT, not the 2012 ETIZ Agreement and, as tribunals have repeatedly noted, "forum selection clauses apply only to claims based on contractual rights, and may not affect treaty claims."⁴⁷⁴ The *Crystallex* tribunal explained this as follows:

⁴⁷¹ See *infra* Section 5.D.

⁴⁷² **CLA-088**, *Bayindir v. Pakistan*, ¶ 167.

⁴⁷³ SoD, ¶ 185.

⁴⁷⁴ **CLA-093**, *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 498; see also **CLA-092**, *SGS v. Paraguay*, Decision on Jurisdiction, ¶ 138. ("Here, however, we accept that Claimant has stated claims under the Treaty, and so the question before us is simply whether a contractual forum

[A]n exclusive jurisdiction clause in relation to disputes concerning possible *contractual* breaches [...] may not divest an international tribunal of its jurisdiction under an international treaty in relation to possible *treaty* breaches. Differently put, [...] [the] Tribunal has a duty to carry out its remit under the BIT, namely to decide upon treaty claims under international law, irrespective of a domestic law jurisdictional clause relating to the resolution of different types of disputes.⁴⁷⁵

3.73. Importantly, “this rule applies with equal force in the context of an umbrella clause,”⁴⁷⁶ and this Tribunal’s jurisdiction extends to all of Akgun’s claims, including its umbrella clause claim, notwithstanding the 2012 Agreement’s dispute resolution provision.

3.74. At any rate, even if it were applicable, the 2012 ETIZ Agreement’s dispute resolution provision would not preclude the jurisdiction of this Tribunal over Akgun’s claims, because (1) the BIT expressly provides that Akgun’s claims may be heard in this forum; (2) the Agreement’s forum selection clause does not affect the Tribunal’s jurisdiction, as the 2012 ETIZ Agreement incorporates the BIT’s arbitration provision by reference; and (3) the 2012 ETIZ Agreement’s dispute resolution provision is not mandatory or exclusive.

3.75. By entering into the BIT, Respondent consented to arbitration before this Tribunal and is now bound to honor that consent. Art. VII(2) of the Treaty provides:

2. If the disputes [between one of the Parties and an investor of the other Party, in connection with his investment], cannot be settled . . . within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, *as the investor may choose*, to:

- (a) the Competent Court or Arbitral Tribunal of the Party in the territory of which the investment has been made; *or*
- (b) the International Center for Settlement of Investment Disputes (ICSID) set up by the “Convention on Settlement of Investment Disputes Between States and

selection clause can divest this Tribunal of its jurisdiction to hear claims for breach of the Treaty. The answer to that question is undoubtedly negative.”).

⁴⁷⁵ **CLA-036**, *Crystallex v. Venezuela*, ¶ 480 (emphasis in original); see also **CLA-023**, *Vivendi*, Decision on Annulment, ¶ 103 (“A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”).

⁴⁷⁶ **CLA-012**, *Garanti Koza v. Turkmenistan*, ¶ 245 (quoting *SGS v. Paraguay*, Decision on Jurisdiction, ¶ 142).

Nationals of other States”, in case both Parties become signatories of this Convention,
(c) an ad hoc court of arbitration laid own under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).⁴⁷⁷

- 3.76. Where, as here, a treaty “allows the investor to submit the dispute [...] to arbitration” and “therefore gives the investor the power to choose among several methods of dispute settlement,” “once the investor has expressed its consent in choosing [...] arbitration, the only means of dispute settlement available is [that] arbitration.”⁴⁷⁸ As the *SGS v. Paraguay* tribunal explained: “it is now uniformly accepted that the ratification of a bilateral investment treaty containing such provisions constitutes a State’s written consent to arbitration of covered disputes.”⁴⁷⁹ Indeed, “[t]he State’s consent in a BIT is often described as an ‘open invitation’ or a ‘standing offer’ to covered investors to submit such disputes to international arbitration, which the investor ‘accepts’ by giving its own written consent to resort to such arbitration.”⁴⁸⁰
- 3.77. And, as the *Lanco* tribunal further explained, at least as to ICSID arbitration, “once valid consent to ICSID arbitration is established,” there is a “presumption in favor of ICSID arbitration” and “any other forum called on to decide the issue should decline jurisdiction.”⁴⁸¹ The same rule should apply here.
- 3.78. Were there any doubt, the 2012 ETIZ Agreement provides that “[t]he relevant Ethiopian laws, and the BIT shall govern this Agreement” and, as such, incorporates the BIT’s arbitration clause by reference and, as a consequence and allows this Tribunal to resolve Akgun’s claims involving the 2012 ETIZ Agreement.⁴⁸² Other tribunals have found that, where treaty provisions are incorporated by reference into a contract related to or at issue in the dispute, the arbitration provisions of the treaty apply. For example, in *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic* (“COSB”), the tribunal concluded

⁴⁷⁷ **CLA-001**, Turkey-Ethiopia BIT, Art. VII(2).

⁴⁷⁸ **CLA-094**, *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998 (“*Lanco v. Argentina*”), ¶ 31.

⁴⁷⁹ **CLA-092**, *SGS v. Paraguay*, Decision on Jurisdiction, ¶ 70.

⁴⁸⁰ *Id.*

⁴⁸¹ **CLA-094**, *Lanco v. Argentina*, ¶ 40.

⁴⁸² **C-009**, The 2012 ETIZ Agreement, Art. 13.

“that by referring to the BIT, the parties intended to incorporate Article 8 of the BIT by reference into the [contract at dispute], in order to provide for international arbitration as their chosen dispute-settlement method.”⁴⁸³

- 3.79. The specific contractual language on which the *COSB* tribunal based its conclusion reads as follows:

This Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Mutual Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992.⁴⁸⁴

- 3.80. The 2012 ETIZ Agreement employs nearly identical language, and this Tribunal should reach a similar conclusion—by incorporating the BIT’s arbitration provision into the 2012 ETIZ Agreement, the parties agreed that disputes involving the 2012 ETIZ Agreement may be submitted to arbitration under the UNCITRAL rules and before this Tribunal.
- 3.81. Regardless, Art. 21 of the 2012 ETIZ Agreement is neither mandatory nor exclusive, contrary to what Respondent claims. As many international tribunals have found, a provision is mandatory when it employs the word “**shall**.”⁴⁸⁵ In contrast, Art. 21 of the 2012 ETIZ Agreement provides only that a dispute arising thereunder “**may** be submitted” in accordance with the procedures set forth therein. It is permissive, not mandatory. Also absent from Art. 21 is any language providing that its dispute resolution procedure is the *exclusive* means by which disputes involving the 2012 ETIZ Agreement may be resolved. A forum selection clause is exclusive only when made expressly so.⁴⁸⁶ Because it is neither mandatory nor exclusive, even if Art. 21 of the 2012

⁴⁸³ **CLA-095**, *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 55.

⁴⁸⁴ *Id.*, ¶ 49.

⁴⁸⁵ **CLA-022**, *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶¶ 52, 54 (“Article 21 is in mandatory terms: the disputes and differences in question ‘**shall** be finally settled by arbitration’ in accordance with the UNCITRAL Rules.”) (emphasis added); *see also* **CLA-096**, *Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 115 (finding that the use of the word “shall” renders a provision mandatory).

⁴⁸⁶ *See, e.g.*, **CLA-097**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 112 (finding that a contractual forum selection clause was not exclusive and did not displace the arbitral tribunal’s jurisdiction where the clause was not made expressly exclusive).

ETIZ Agreement applied, Akgun's claims may still be heard by this Tribunal, if Akgun so chooses.

- 3.82. In sum, because (1) Akgun's claims are "investments" within the ordinary meaning of the BIT and under the *Salini* test; (2) Akgun's claims are treaty claims; and (3) the 2012 ETIZ Agreement does not require that this dispute be heard in another forum, this Tribunal has jurisdiction *ratione materiae* over this dispute.

D. This Tribunal Has Jurisdiction over Claimant's Umbrella Clause Claims

- 3.83. The MFN clause of the Treaty allows for the importation of provisions from other bilateral investment treaties to which Ethiopia is a party if those provisions afford more favorable investment protection than the Turkey-Ethiopia BIT. There is no umbrella clause in the Treaty. Therefore, Akgun relies on the umbrella clause in the Denmark-Ethiopia BIT by virtue of the MFN clause of the Treaty.⁴⁸⁷
- 3.84. Respondent does not object, in principle, that the Treaty's MFN clause may incorporate umbrella clause protection. Rather, Respondent tries to fend off the application of the umbrella clause based on the following four grounds: (i) differences in definitions of "investment" under the Turkey-Ethiopia BIT and Denmark-Ethiopia BIT, (ii) inconsistency between the intent of the Parties and the object and purpose of the BIT, (iii) lack of privity of contract, and (iv) availability of contractual remedies and lack of exhaustion of such remedies.⁴⁸⁸ All of these objections fail as will be discussed below.

(i) Any Alleged Difference in Definitions of "Investment" under the Relevant Treaties Has No Effect on the Importation of the Umbrella Clause Protection through the Treaty's MFN Clause

- 3.85. its Statement of Defense, Respondent argues that the umbrella clause protection from the Denmark-Ethiopia BIT cannot be incorporated into the Turkey-Ethiopia BIT because the relevant BITs contain different definitions of "investment."⁴⁸⁹ More specifically, Respondent states that the Denmark-Ethiopia BIT contains a broader definition of "investment," extending to "a

⁴⁸⁷ SoC, ¶¶ 3.11-3.22.

⁴⁸⁸ SoD, ¶ 228.

⁴⁸⁹ SoD, ¶ 233.

larger class of contractual rights” which explains why that treaty contains an umbrella clause.⁴⁹⁰ Respondent asserts that the definition of “investment” under the Turkey-Ethiopia BIT is narrower and does not include the kinds of contractual rights that the Denmark-Ethiopia treaty includes.⁴⁹¹ Respondent’s argument is flawed.

- 3.86. Contrary to Respondent’s portrayal, the “investment” definitions in both BITs are similar. Furthermore, Claimant submits that the Turkey-Ethiopia BIT’s definition of “investment” is broader in relevant part than the Denmark-Ethiopia BIT’s definition.
- 3.87. First, in interpreting the relevant provisions from the Denmark-Ethiopia and Turkey-Ethiopia BITs, Respondent omits that both Treaties broadly define the term “investment” as “every kind of asset” which includes “in particular, but not exclusively” a few specific types of examples of assets that qualify as investments listed under Art. 1(2) of the Turkey-Ethiopia BIT and Art. 1(1) of the Denmark-Ethiopia BIT.⁴⁹²
- 3.88. A closer look at the examples of what can constitute an “investment” under both Treaties reveals that these examples are nearly identical.⁴⁹³ Respondent takes issue with the specific example in point (b) of the Turkey-Ethiopia BIT (*i.e.*, “returns reinvested, claims to money or any other rights having financial value related to an investment”) which corresponds to point (c) of the Denmark-Ethiopia BIT (*i.e.*, “returns reinvested, claims to money and claims to performance pursuant to contracts having an economic value”).⁴⁹⁴
- 3.89. On its face, these specific examples of “investment” are nearly identical (in particular, with respect to “returns invested” and “claims to money”). The only difference concerns the clause, where the Turkey-Ethiopia BIT states that term investment includes “any other rights having financial value related to an

⁴⁹⁰ SoD, ¶ 233.

⁴⁹¹ SoD, ¶¶ 233-237.

⁴⁹² **CLA-001**, Turkey-Ethiopia BIT, Art. 1(2); **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. 1(1).

⁴⁹³ Point (a) of the Turkey-Ethiopia BIT corresponds to point (b) of the Denmark-Ethiopia BIT; point (b) of the Turkey-Ethiopia BIT corresponds to point (c) of the Denmark-Ethiopia BIT; point (c) of the Turkey-Ethiopia BIT corresponds to point (b) of the Denmark-Ethiopia BIT; and points (d) and (e) of the Turkey-Ethiopia BIT correspond to points (d) and (e) of the Denmark-Ethiopia BIT, respectively. See **CLA-001**, Turkey-Ethiopia BIT, Art. 1(2); **CLA-003**, Denmark-Ethiopia BIT, Art. 1(1).

⁴⁹⁴ SoD, ¶ 236.

investment” while the Denmark-Ethiopia BIT states it includes “claims to performance pursuant to contracts having an economic value.”⁴⁹⁵ In Claimant’s reading, both examples point to the same type of investment with the exception that the formulation under the Turkey-Ethiopia BIT is broader since it is not strictly limited to rights under contracts but expands to include any kinds of rights having financial value. The conceivable sets of rights having financial value are plainly broader than contractual rights.

- 3.90. Regardless of whichever definition is broader, both “claims to performance pursuant to contracts having an economic value” as per the Denmark-Ethiopia BIT and “rights having a financial value related to an investment” as per the Turkey-Ethiopia BIT encompass contractual rights of the sort Akgun holds.⁴⁹⁶ Naturally, Akgun’s interest under the 2012 ETIZ Agreement is a claim to performance pursuant to a contract having an economic value within the meaning of the Denmark-Ethiopia BIT. It is also a right having a financial value related to an investment within the meaning of the Turkey-Ethiopia BIT.⁴⁹⁷ Thus, Respondent’s reliance on the definition of “investment” fails on its own terms.
- 3.91. In any event, the definition of an investment in the source treaty from which an investor seeks to import an umbrella clause has no bearing on the analysis of whether an MFN clause in the applicable jurisdiction-granting treaty may incorporate standards found in other treaties to which the host state is party. Indeed, for an investor to enjoy any sort of treaty protection, including umbrella clause protection incorporated through an MFN clause, such investor must first have an investment as defined in the applicable BIT the investor has invoked as the basis for its claims. As the tribunal in *Metal-Tech Ltd. v. Uzbekistan* stated:

[A]n MFN clause cannot be used to import a more favorable definition of investment contained in another BIT. The reason is that the defined terms “investments” and “investors” are used in the MFN clause itself, so that the treatment assured to investments and investors by Article 3 necessarily refers to investments and investors as defined in Article 1 of the BIT. In other words, one must fall within the scope of the treaty, which is in particular

⁴⁹⁵ **CLA-001**, Turkey-Ethiopia BIT, Art. I(2)(b); **CLA-003**, Denmark-Ethiopia BIT, Art. 1(1)(c).

⁴⁹⁶ *Supra* Section 3.A.

⁴⁹⁷ *Supra* Section 3.A.

circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protections, of which MFN treatment forms part. Or, in fewer words, one must be under the treaty to claim through the treaty.⁴⁹⁸

3.92. More specifically, “an umbrella clause does not broaden the subject-matter jurisdiction of treaty-based tribunals beyond the limits of what constituted protected investment under the respective investment treaty.”⁴⁹⁹ Respondent agrees with that.⁵⁰⁰

3.93. As Claimant already discussed in the Section 3.A of this Reply, Akgun has a protected investment under the BIT. More specifically, Akgun’s contractual rights qualify as an investment under the BIT as “rights having financial value related to an investment.”⁵⁰¹ Akgun also holds investments in the form of “movable and immovable property” and “know-how.”⁵⁰² In addition, the ETIZ project as a whole constitutes an investment under the BIT.⁵⁰³

(ii) The Importation of the Umbrella Clause Protection through the Treaty’s MFN Clause is Consistent with the Object and Purpose of the Treaty

3.94. Respondent argues that “[i]t cannot in honesty be argued that these unlikely but most creative maneuvers of borrowing bits and pieces of other treaties is what Turkey and Ethiopia intended when they agreed [to include an MFN clause into the Treaty]” and that the fact that the umbrella clause is missing from the Treaty means that the parties “have plainly chosen to exclude” it.⁵⁰⁴

3.95. Respondent’s argument fails as it undermines the very purpose of an MFN clause. The express purpose of the MFN clause is to ensure the most favorable possible treatment to the investments and investors:

MFN treatment in IIAs is meant to ensure an equality of competitive conditions between foreign investors of

⁴⁹⁸ **CLA-098**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 145.

⁴⁹⁹ **CLA-099**, S. Schill, *Enabling Private Ordering - Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, TDM 1 (2010) (“Schill”), p. 69.

⁵⁰⁰ SoD, ¶ 237.

⁵⁰¹ *Supra* Section 3.A.

⁵⁰² *Supra* Section 3.A.

⁵⁰³ *Supra* Section 3.B.

⁵⁰⁴ SoD, ¶ 239.

different nationalities seeking to set up an investment or operating that investment in a host country. Foreign investors seek sufficient assurance that there will not be adverse discrimination which puts them at a competitive disadvantage. Such discrimination includes situations in which competitors from other foreign countries receive more favourable treatment. The MFN standard thus helps to establish equality of competitive opportunities between investors from different foreign countries. It prevents competition between investors from being distorted by discrimination based on nationality considerations.⁵⁰⁵

- 3.96. The case law of international investment tribunals further supports a common understanding that the MFN clauses are designed to ensure the host state's equality of treatment to foreign investors of different nationalities. As the *UP* tribunal stated:

The self-evident purpose of an MFN clause is to ensure that treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT. The purpose of such a clause is to ensure that there will be no discrimination between foreign investors. There is no reason of principle, or of construction, that would restrict the operation of an MFN clause to treatment of a particular kind or form.⁵⁰⁶

- 3.97. Consequently, the very fact that Turkey and Ethiopia decided to include an MFN clause in the Treaty indicates that they intended to place Turkish investors on equal footing with investors from other countries and extend the protection provided to those investors to Turkish investors as well. Had this not been the intention, the contracting parties would not have included the MFN clause in the first place.
- 3.98. As discussed, many tribunals have incorporated umbrella clauses and other standards of protection into an applicable treaty from the source treaties by virtue of the MFN clauses.⁵⁰⁷

⁵⁰⁵ SoC, ¶ 3.16. See also **CLA-013**, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations Publication, 2010, pp. 13-14.

⁵⁰⁶ **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 ("*UP v. Hungary*"), ¶¶ 162-163. See also **CLA-020**, *EDF International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 ("*EDF v. Argentina*"), ¶ 932.

⁵⁰⁷ SoC, ¶¶ 3.16-3.21.

3.99. Finally, Respondent is wrong to draw the inference that the parties “have plainly chosen to exclude” the umbrella clause from the Treaty.⁵⁰⁸ For a specific protection to be excluded from the scope of the MFN clause or from the Treaty, such exclusion must be express. Nothing in the wording of the Treaty or Treaty’s MFN clause suggests that the parties have agreed to expressly exclude the umbrella clause protection. In addition, the Denmark-Ethiopia BIT post-dates the Turkey-Ethiopia BIT.⁵⁰⁹ It is nonsensical for Respondent to suggest that the Turkey-Ethiopia BIT reflects a choice to exclude protections that were not yet in place. Accordingly, the umbrella clause protection is available to Claimant through the Treaty’s MFN clause.

(iii) Ethiopia Itself Undertook the Specific Commitments towards Akgun Underlying Claimant’s Umbrella Clause Claim

3.100. Respondent argues that the 2012 ETIZ Agreement was not concluded with Ethiopia, but rather with the Ethiopian Mol and Oromia Regional State, which are entities distinct from Ethiopia.⁵¹⁰ Respondent relies on *Impregilo v. Pakistan* to state that when a contract is entered into with a separate and distinct entity and not with the State itself, the MFN clause cannot guarantee the observance of the contractual commitments. Furthermore, by relying on *Impregilo* Respondent seems to suggest that the conduct of a state entity possessing a separate personality, including an act of entering into a contract, can only be attributable to the State if such conduct is in exercise of sovereign authority.⁵¹¹

3.101. The question whether umbrella clauses permit examination of breaches that do not involve the exercise of governmental authority is one of merits and not of jurisdiction. However, since Respondent addresses this issue as part of its jurisdictional arguments, Claimant will also discuss this issue here for the sake of completeness.

3.102. As Claimant will explain below, there is no requirement to show the exercise of state action for the purpose of assessing Claimant’s umbrella clause claims (Section a), and in any case, the negotiation of the investment agreement with

⁵⁰⁸ SoD, ¶ 239.

⁵⁰⁹ While the Turkey-Ethiopia BIT was signed on 16 November 2000 the Denmark-Ethiopia BIT was signed on 24 April 2001. See **CLA-001**, Turkey-Ethiopia BIT; **CLA-003**, Denmark-Ethiopia BIT.

⁵¹⁰ SoD, ¶¶ 229-232.

⁵¹¹ *Id.*

Akgun and Ethiopia's subsequent conduct with respect to ETIZ was through an exercise of sovereign means (Section b).

a. International Rules on Attribution Do Not Require Conduct in the Exercise of Sovereign Authority

- 3.103. Respondent relies on *Impregilo v. Pakistan* to state that the contractual obligations of the Ministry of Industry and Oromia Regional State do not bind Ethiopia. Respondent is wrong, and its reliance on *Impregilo* does not help its case.
- 3.104. In *Impregilo*, a contracting party to the contract at stake was the Pakistan Water and Power Development Authority, which the tribunal found to be “an autonomous corporate body, legally and financially distinct from Pakistan.”⁵¹² The tribunal concluded that the obligations in the contract at issue formed no part of the treaty even despite the existence of an umbrella clause because those obligations were not the obligations of the state.⁵¹³
- 3.105. At the same time, the tribunal emphasized that the violation of a contract between an investor and the host state could result in claims under a treaty, but only where the specific behavior of the state can be attributed to the exercise of sovereign authority. If this were the case, even the behavior of a state entity, which has a distinct legal personality under domestic law, could, under international law, be attributed to the state itself.⁵¹⁴
- 3.106. The tribunal's discussion turned on the question of attribution. The tribunal held that the conclusion of an investment contract by a state agency which has a separate legal personality under national law cannot automatically be attributed to the state itself for the purpose of invoking an umbrella clause, while an attribution of acts or omissions of such an entity, if they violate the rights of the investor, can be attributed to the state under international law. However, the violation of the investor's rights must be the result of behavior that goes beyond that of an ordinary party to a commercial contract. It must originate in an exercise of sovereign authority.⁵¹⁵

⁵¹² RLA-30, *Impregilo v. Pakistan*, ¶¶ 198-209.

⁵¹³ *Id.*, ¶ 223.

⁵¹⁴ *Id.*, ¶¶ 210, 218-219, 260-262.

⁵¹⁵ *Id.*, ¶¶ 260-262.

3.107. A majority of tribunals have subsequently discussed and rejected the *Impregilo* tribunal's finding that umbrella clauses only protect against breaches in an exercise of sovereign authority. The weight of authority holds that there is no requirement to show the exercise of sovereign authority for the purpose of analyzing the viability of an investor's umbrella clause claim.

3.108. Specifically, the tribunals in *Eureko v. Poland* and *Enron Corporation v. Argentina* observed that the wording of the umbrella clause concerns "any obligation," not obligations that concern governmental authority.⁵¹⁶ In this regard, the *Enron* tribunal noted:

Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature. Tribunals interpreting this expression have found it to cover both contractual obligations such as payment as well as obligations assumed through law or regulation. 'Obligations' covered by the 'umbrella clause' are nevertheless limited by their object: '*with regard to investments*.'⁵¹⁷

3.109. In a similar manner, in *Burlington Resources Inc. v. Republic of Ecuador*, the tribunal held that there is no support in the text of the umbrella clause for requiring the claimant to show an exercise of sovereign power and concluded that "Claimant may rely upon the treaty's umbrella clause even if no exercise of Respondent's sovereign power is involved."⁵¹⁸

3.110. The tribunal in *SGS v. Paraguay* came to the same conclusion:

Article 11 [containing an umbrella clause] requires the "observance" of commitments. Also as a matter of the ordinary meaning of the term, a failure to meet one's obligations under a contract is clearly a failure to "observe" one's commitments. There is nothing in Article 11 that states or implies that a government will only fail to observe its commitments if it abuses its sovereign authority. Hence, again applying standard principles of treaty interpretation,

⁵¹⁶ **CLA-004**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005 ("*Eureko v. Poland*"), ¶ 246; **CLA-100**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("*Enron v. Argentina*"), ¶¶ 271-274. See also **CLA-004**, *Eureko v. Poland*, ¶¶ 115-134.

⁵¹⁷ **CLA-100**, *Enron v. Argentina*, ¶ 274 (emphasis in original).

⁵¹⁸ **CLA-101**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, ¶ 190. See also **CLA-102**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 320-321, 325.

a breach of contract by Paraguay with respect to an investment of a Swiss investor is a breach of Article 11.

[...]

[T]he parties' discussion of whether Paraguay took actions of a sovereign nature, and, if so, whether such actions were an abuse of government authority, is irrelevant. In short, if Paraguay failed to observe its contractual commitments, then it breached Article 11. No further examination of whether Paraguay's actions are properly characterized as "sovereign" or "commercial" in nature is necessary.⁵¹⁹

- 3.111. In addition, a number of commentators have rejected the idea that an investor must demonstrate sovereign conduct to establish the state's breach of its umbrella clause obligations.⁵²⁰ For example, Judge Crawford, who was also special rapporteur of the ILC's work on State Responsibility, explains why there is no requirement of the exercise of *puissance publique* to find a breach of an umbrella clause in the following words:

The fourth proposition, also drawn from the law of State responsibility, concerns breach. In general a finding of a breach of international law does not depend on the characterization of the conduct in question as "governmental", or as involving the exercise of sovereign authority. **There are only two questions: what is the State obliged to do or refrain from doing, and has it complied with that obligation? Unless the primary rule which is the source of the obligation requires it, there is no third question, how to characterize the breach. Still less is there any requirement to prove any particular motive, whether financial or "governmental".** That point is made in the ILC's commentaries, both on Articles 4 and 12. Thus the ILC said on Article 4:

"It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial'

⁵¹⁹ **CLA-103**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, ¶¶ 91, 95.

⁵²⁰ See **CLA-099**, Schill, pp. 29-30 (including commentaries cited therein); **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 State Responsibility"), Commentary to Art. 4, p. 41, ¶ 6 (noting with respect to all international breaches that "[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*" and that "the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4").

or ‘*acta iure gestionis*’. The breach by a State of a contract clearly does not as such entail a breach of international law. Something further is required before international law becomes relevant, e.g. a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it may amount to an internationally wrongful act.”

The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission.⁵²¹

3.112. As such, by virtue of the umbrella clause, any of Respondent’s contractual breaches become breaches of international law. In light of the overwhelming authority discussed herein, *Impregilo* is an outlier decision that this Tribunal should not follow.

3.113. In sum, under the international rules on attribution, a claimant need not prove an exercise of sovereign authority to make an umbrella clause claim.

b. Ethiopia’s Conduct with Respect to ETIZ is Attributable to Respondent and Was in Exercise of Sovereign Authority

3.114. In any event, the facts at issue in this case demonstrate that the Mol’s and Oromia Regional State’s act of entering into the 2012 ETIZ Agreement shall be attributable under international law to the State of Ethiopia and the conduct of said entities vis-à-vis ETIZ shall trigger Ethiopia’s international responsibility irrespective of whether Akgun must show the exercise of state action. This is because i) under the international rules of attribution, the acts of the Mol and Oromia Regional State are attributable to the Respondent and ii) the entry into the ETIZ-related agreements and Respondent’s overall conduct with respect to the ETIZ project was through sovereign means.

1) The Acts of the Mol and Oromia Regional State Are Attributable to the Respondent

3.115. In the present case, the contracting state entities at issue are the Mol and Oromia Regional State. Under Ethiopian law both entities possess separate

⁵²¹ **CLA-104**, J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351, pp. 356-357 (internal citations omitted) (emphasis added).

legal personality.⁵²² The analysis, however, does not end there. To ascertain whether the acts of these entities can be attributed to the State of Ethiopia for the purpose of Claimant's Treaty claims, including the umbrella clause claim, international rules on attribution shall apply.⁵²³

3.116. While the BIT does not address the rules of attribution, such rules are found in general international law which supplements the BIT in this respect.⁵²⁴ The Draft Articles on Responsibility of States for Intentionally Wrongful Acts provide the most appropriate legal framework under international law to address this issue. Indeed, the Draft Articles on State Responsibility are widely regarded as a codification of customary international law on the rules of attribution.⁵²⁵

3.117. Art. 4 of the Draft Articles on State Responsibility states:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.⁵²⁶

3.118. Notably, with respect to the conduct of a State organ under Art. 4, the relevance of the distinction between commercial and sovereign acts is expressly denied:

⁵²² Tekle Report, ¶ 2.4.

⁵²³ See, e.g., **CLA-105**, *Bosh International, Inc. and B&P, Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶ 246 (stating that "the term 'Party' in the umbrella clause refers to any situation where the Party is acting *qua* State. This means that where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility), such entities are considered to be 'the Party' for the purposes of Article II(3)(c)."). See also **CLA-062**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction, 29 May 2009 ("*BIVAC v. Paraguay*"), ¶ 141; **RLA-30**, *Impregilo v. Pakistan*, ¶ 210.

⁵²⁴ Indeed, as the *Eureko* tribunal has recognized, an international tribunal must decide an international dispute on the basis of the Treaty and the "universally acknowledged rules and principles of international law." See **CLA-004**, *Eureko v. Poland*, ¶ 126.

⁵²⁵ See, e.g., **CLA-061**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 ("*Noble Ventures v. Romania*"), ¶¶ 69-70; **CLA-004**, *Eureko v. Poland*, ¶¶ 127-134.

⁵²⁶ **CLA-042**, Draft Articles on State Responsibility, Art. 4 (emphasis added).

The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.⁵²⁷

- 3.119. The commentary to Art. 4 further stresses that “entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4.”⁵²⁸
- 3.120. Clearly, the Mol is “an organ of the central Government” and Oromia Regional State is “a territorial unit of the State.”⁵²⁹ Indeed, many tribunals have found the conduct of similar entities attributable to the respondent state.⁵³⁰ Consequently, there is no doubt that based on the international rules on attribution, the obligations of both the Mol and Oromia Regional State bind Ethiopia, because these entities are a state organ and a territorial unit of the State, respectively, and their actions are directly attributable to Respondent irrespective of their separate legal personalities under Ethiopian law.
- 3.121. Therefore, for the purpose of Claimant’s Treaty-based umbrella clause claim, the underlying contractual obligations as envisaged in the 2012 ETIZ Agreement are between Akgun and Ethiopia.

2) Respondent’s Overall Conduct with Respect to the ETIZ Project Was Through Sovereign Means

- 3.122. Even if this Tribunal were to find that the application of the rules of attribution require a showing of sovereign authority and/or that there cannot be a Treaty violation without an exercise of sovereign authority, it should nevertheless find that Ethiopia is liable. The requirement of government authority is easily met in Akgun’s case because the process through which the ETIZ-related agreements were negotiated and implemented was replete with state action.
- 3.123. First, Respondent actively recruited Akgun to develop and operate ETIZ. In 2008, a high-level delegation of Ethiopian officials led by the Oromia Regional State’s President invited Akgun to set up an industrial zone in Ethiopia.⁵³¹ This

⁵²⁷ *Id.*, Commentary to Charter II, p. 39, ¶ 7 (emphasis added).

⁵²⁸ *Id.*, Commentary to Art. 4, p. 41, ¶ 6.

⁵²⁹ *Id.*, Art. 4.

⁵³⁰ See, e.g., **CLA-004**, *Eureko v. Poland*, ¶¶ 127-134; **CLA-062**, *BIVAC v. Paraguay*, ¶ 141.

⁵³¹ SoC, ¶¶ 2.31-2.34.

was done in the implementation of Ethiopia's industrial zone development policy that had set the goal "to promote public-private partnerships in infrastructure development for industrial development and speeding up implementation of industrial zones."⁵³² Then, as now, spurring economic growth and development by increasing foreign investment into the Ethiopian manufacturing sector was a key economic policy objective of the Ethiopian government.⁵³³ Indeed, the Memorandum of Understanding executed between Akgun and Oromia Regional State in 2008 outlined that the parties agreed to set up "a New Industrial Zone" in Ethiopia and that this was done in order "to use the competitiveness for the country and to submit the plot completed modern with all infrastructures to the Industrialist Entrepreneurs to grow national industrial production and export."⁵³⁴ It is notable that the Memorandum of Understanding bears Ethiopia's national flag.⁵³⁵

- 3.124. The ETIZ Agreements, too, specifically recognized their public purpose and in particular "the importance of the development of the Industrial Zones to attract foreign direct investments and support the industrialization of the Federal Democratic Republic of Ethiopia."⁵³⁶ Besides, the 2012 ETIZ Agreement obligated Akgun to take into account "the Industrial Development Strategy of the GOE while allocating industries in the Industry Zone."⁵³⁷ It also specifically required 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."⁵³⁸ Ethiopia introduced these provisions with a view towards promoting the Ethiopia Growth and Transformation Plan that had been promulgated in November 2010 to replace an earlier policy plan.⁵³⁹ This Plan identifies both industrial zones and small and medium size enterprises in these exact

⁵³² See also **C-101**, PASDEP, p. 157.

⁵³³ *Id.*, pp. 43, 59, 157.

⁵³⁴ **C-007**, MoU, Preamble. See also *supra* Section 2.

⁵³⁵ *Id.*, Cover page.

⁵³⁶ **C-008**, The 2010 ETIZ Agreement, Preamble; **C-009**, The 2012 ETIZ Agreement, Preamble. See also Ahmed Abteu Statement, ¶ 3 (recognizing that the MoI signed the 2012 ETIZ Agreement "for purposes of federal oversight and facilitation of the country's overall industrial development and investment promotion policies.")

⁵³⁷ **C-009**, The 2012 ETIZ Agreement, Art. 8(13).

⁵³⁸ *Id.*, Art. 8.14.

⁵³⁹ **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"), Introduction.

industries as strategically important to the success of the Growth and Transformation Plan.⁵⁴⁰

- 3.125. Under the 2010 Agreement, the Government was Akgun's express partner in the project and undertook to cover 30% of the project's infrastructure costs.⁵⁴¹ This explicit State involvement was another indication of the project's high economic importance for the country.
- 3.126. Furthermore, the text of the ETIZ Agreements is replete with references to the Government of Ethiopia, which undertook to support the implementation of the project in various ways and provided an express guarantee to Akgun against expropriation.⁵⁴² These provisions clearly demonstrate that the ETIZ Agreements were powerful tools within the context of the Ethiopia's development vision and of a piece with country's industrialization policy, which aimed at further attraction of foreign investment and the overall increase of the country's economic development, not least through the establishment of ETIZ.
- 3.127. Next, various governmental authorities took part in bringing the project to life from the initial conception of the idea. The Ethiopian Investment Agency and other relevant agencies issued licenses and permits in support of Akgun's project, thereby authorizing Akgun's investment at the governmental level.⁵⁴³ The Oromia Regional State together with the MoI officials selected the site for the ETIZ.⁵⁴⁴ Allocation of the site for ETIZ near Addis Ababa in Sendafa town represented a governmental act, which was to implement the State's policy to attract foreign investors and ensure that the project location was easily accessible, suitable and met Akgun's and investors' expectations.⁵⁴⁵
- 3.128. Furthermore, the Oromia Bureau of Rural Land and Environmental Protection issued a valuation report with respect to the government's selected site for ETIZ, accepted Akgun's payment for the land and delivered it to Akgun.⁵⁴⁶ It

⁵⁴⁰ **C-047**, GTP I, Section 5.2.1.

⁵⁴¹ **C-008**, The 2010 ETIZ Agreement, Art. 11(7).

⁵⁴² *Id.*, Arts. 11(2), 11(7-9), 11(11-12), 11(17-18); **C-009**, The 2012 ETIZ Agreement, Arts. 11(2), 11(8), 11(9), 11(13).

⁵⁴³ SoC, ¶ 2.37.

⁵⁴⁴ *Supra* Section 2.A.

⁵⁴⁵ Yusuf Akgun 1st Statement, ¶¶ 4.5-4.7.

⁵⁴⁶ SoC, ¶¶ 2.52-2.55; **C-048**, Compensation Payment Proposal Report dated April 2012; **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012. *Supra* Sections 2.A.-2.B.

also issued the land lease certificate to Akgun.⁵⁴⁷ Notably, the certificate was copied to a number of further state authorities, including Oromia Investment Commission, Finfine Area Oromia Special Zone Land Use and Environmental Protection Office, Bereh Woreda Land Usage and Environmental Protection Office, Environmental Protection Work Process, Land Usage Work Process, and Rural Land Administration Work Process. In the text of the certificate, Oromia Bureau of Rural Land and Environmental Protection urged “all the concerned bodies with a copy of this letter to extend the due assistance and cooperation” to the project.⁵⁴⁸ This reference alone demonstrates the extent of the government’s involvement with the ETIZ project.

- 3.129. In addition, governmental officials at various levels, including the Minister of Industry, Prime Minister and the future President of the country, Dr. Mulatu, pressured Akgun not to wait and start implementing the project immediately.⁵⁴⁹ The Investment Board of Oromia threatened Akgun to take the state’s selected land back and allocate it to other investors if it did not commence works promptly.⁵⁵⁰ This, too, reflected the government’s decision to push for a rapid start of such an important and “visionary” project to Ethiopia, “a perfect model for attracting investors.”⁵⁵¹
- 3.130. Ethiopian officials at the government’s highest levels closely followed Akgun’s progress on ETIZ.⁵⁵² Both the Prime Minister and President of the country were involved and took decisions as to the format and future of the project.⁵⁵³ Indeed, it was the Prime Minister and the President who arranged for the entire

⁵⁴⁷ **C-012**, Land Lease Certificate.

⁵⁴⁸ *Id.*

⁵⁴⁹ Yunus Akgun 1st Statement, ¶ 5.2. Akgun felt that pressure. See Yusuf Akgun 1st Statement, ¶¶ 4.10, 4.24; Yunus Akgun 1st Statement, ¶¶ 3.3.

⁵⁵⁰ SoC, ¶¶ 2.57-2.58; **C-050**, Letter from Investment Board of Oromia to Akgun Construction and Finfine Area Oromia Special Zone Administration dated 17 September 2012; **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012. See *also supra* Section 2.D.i.

⁵⁵¹ **C-044**, Akgun Guest Book, p. 2 (handwritten note of Mesfin Seyoum dated 7 February 2009) and p. 3 (handwritten note of Sufian Ahmed dated 7 October 2009).

⁵⁵² SoC, ¶¶ 2.38-2.42; Yusuf Akgun 1st Statement, ¶¶ 4.17-4.21, 5.12-5.13; Yunus Akgun 1st Statement, ¶¶ 6.11, 7.7-7.15.

⁵⁵³ SoC, ¶¶ 2.45, 2.55, 2.60-2.64, 2.85-2.87, 2.113-2.118; Yusuf Akgun 1st Statement, ¶¶ 4.17-4.21, 5.12-5.13, 5.20-5.22; Yunus Akgun First Statement, ¶¶ 4.1-4.4, 5.2, 6.11, 7.7-7.14; **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014.

legal framework for the management of the subleasing of plots of land to be established in Ethiopia to enable such subleasing within ETIZ.⁵⁵⁴

- 3.131. Finally, and most importantly, it was the government of Ethiopia who suspended the project by its administrative decision.⁵⁵⁵ Respondent concluded that ETIZ could not be constructed in the Legedadi watershed due its residential water needs. Accordingly, Respondent concluded that it had made a mistake in selecting the site for ETIZ and determined that ETIZ would need to be relocated to a different area of the country.⁵⁵⁶ It was again the government's choice to change course and relocate the project to an alternative site.⁵⁵⁷
- 3.132. Yet, the Ethiopian authorities never relocated the project and left Akgun swinging in the wind. Ethiopia's failure to relocate ETIZ to an alternative site yet again represents a sovereign choice. This is in and of itself a state action leading to expropriation of the entirety of Akgun's investment.
- 3.133. In light of these facts, it is evident that Ethiopia's sovereign authority was involved at every stage of the ETIZ project, starting from Respondent's invitation to Akgun to develop an industrial zone in Ethiopia to the government's suspension and failure to provide an adequate alternative site for ETIZ.

(iv) Claimant's Umbrella Claim is a Treaty Claim and the Availability of Contract Remedies Does Not Bar This Tribunal's Jurisdiction over That Claim

- 3.134. Respondent seems to suggest that Akgun's umbrella clause claim is in fact a "contract claim."⁵⁵⁸ This is fundamentally incorrect. As discussed above in Section 3.B, all of Claimant's claims are treaty claims arising out of Respondent's violations of multiple BIT provisions.⁵⁵⁹

⁵⁵⁴ SoC, ¶¶ 2.60-2.61; **C-052**, Letter from Office of the Prime Minister to Ministry of Finance and Economic Development et al. dated 14 February 2013; **C-143**, Letter from Office of the President to Oromia Industry and Urban Development Bureau dated 27 February 2013.

⁵⁵⁵ **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014; **C-016**, Suspension Letter (referencing the Prime Minister letter).

⁵⁵⁶ *Supra* Sections 2.E.-2.G.

⁵⁵⁷ **C-031**, Letter from Ministry of Industry to Akgun Construction dated 17 June 2015.

⁵⁵⁸ SoD, ¶¶ 232, 238, 399.

⁵⁵⁹ *Supra* Section 3.B.

3.135. More specifically, Akgun’s umbrella clause claim is a treaty claim. Indeed, umbrella clause protection is protection that the BIT provides; it is not located in any contract. By virtue of an umbrella clause, breaches of contractual obligations and other specific commitments of States are elevated into an investor’s treaty claim.⁵⁶⁰ This “elevation,” however, does not change the fact that the BIT forms the sole legal basis of the claim. As Jarrod Wong, former Legal Adviser at the Iran-United States Claims Tribunal, noted in his Treatise on umbrella clauses:

[W]hile claims premised on the umbrella clause are defined by reference to the terms of contract, this act of incorporating the contract does not alter the fact that the claims ultimately *are* BIT claims whose “nature” is wholly that of treaty claims.⁵⁶¹

3.136. Respondent further argues that the availability of contract remedies precludes Claimant’s umbrella clause claim and that Claimant must first exhaust such contract remedies before resorting to the BIT’s dispute resolution mechanism.⁵⁶² Respondent’s contention is entirely frivolous.

3.137. First, Respondent devotes only one paragraph to this argument in its submission, makes it in passing and does not rely on a single authority to support it. Based on this alone, Respondent’s argument must be rejected as unsubstantiated.

3.138. In any event, as already explained above in Section 3.C, the contract’s forum selection clause does not preclude this Tribunal’s jurisdiction over Claimant’s claims. As demonstrated above, the majority of tribunals have held that the host State’s consent to arbitration under the BIT as a forum can be seized alternatively to any contractually selected forum.⁵⁶³

⁵⁶⁰ See, e.g., **CLA-004**, *Eureko v. Poland*, ¶¶ 244, 251 (stating that the history of the umbrella clause makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an international forum); **CLA-061**, *Noble Ventures v. Romania*, ¶¶ 51-54, 60-61; **CLA-106**, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14(1) *George Mason Law Rev.* 137 (“Wong”), pp. 144-145, 151, 166 (stating in particular that “[t]he umbrella clause applies to obligations arising under investor-State contracts so as to allow for their breach to be resolved as BIT violations”).

⁵⁶¹ **CLA-106**, Wong, p. 172 (emphasis in original). See also *supra* Section 3.B.

⁵⁶² SoD, ¶ 238.

⁵⁶³ *Supra* Section 3.C.

- 3.139. In specific cases where the violation of an umbrella clause was alleged, the case law of international tribunals demonstrates that treaty-based arbitration shall take primacy over a forum selection clause. Indeed, to allow forum selection clauses in investment agreements to trump recourse to a BIT based arbitration “is to take away with one hand what was given with the other.”⁵⁶⁴
- 3.140. For example, in *Eureko v. Poland*, the tribunal upheld jurisdiction over claimant’s umbrella clause claims notwithstanding the contractual forum selection clause. The tribunal explained that since the cause of action for the violation of an umbrella clause obligation is based on a treaty, the forum selection clause in the underlying contract could not exclude treaty-based arbitration.⁵⁶⁵
- 3.141. The tribunal in *Impregilo v. Pakistan*, the very case Respondent relies on, similarly found that a forum selection clause in the contract does not trump the tribunal’s jurisdiction under the BIT.⁵⁶⁶ The tribunal stated that allowing the contractual remedies to supersede the BIT’s dispute resolution mechanism with respect to treaty claims “would confuse the essential distinction between the Treaty Claims and the Contract Claims.”⁵⁶⁷ The tribunal explained:
- Since the two enquiries are fundamentally different (albeit with some overlap), it is not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty Claims.⁵⁶⁸
- 3.142. Other international tribunals have followed the same approach in cases where a violation of an umbrella clause was invoked, dismissing the state’s objection to the tribunals’ jurisdiction based on the state’s argument that a forum selection clause in a contract between a foreign investor and the host State primed the BIT.⁵⁶⁹

⁵⁶⁴ **CLA-106**, Wong, p.167.

⁵⁶⁵ **CLA-004**, *Eureko v. Poland*, ¶¶ 92-114, 250.

⁵⁶⁶ **RLA-30**, *Impregilo v. Pakistan*, ¶¶ 286-290.

⁵⁶⁷ *Id.*, ¶ 289.

⁵⁶⁸ *Id.*

⁵⁶⁹ See, e.g., **CLA-107**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶¶ 75-85; **CLA-108**, *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶¶ 90-99; **CLA-020**, *EDF v. Argentina*, ¶¶ 930-931.

3.143. Scholarly works support this approach.⁵⁷⁰ For example, Stephan W. Schill, a former International Arbitration Law Clerk to The Honorable Charles N. Brower, similarly states that a contractual forum selection clause cannot override the consent to arbitration under a BIT when the investor invokes a violation of the umbrella clause obligation. He first reiterates the proposition that any umbrella clause claim constitutes a treaty-based course of action which a contractual forum selection clause cannot, by nature, override. He then points out another crucial distinction; while a contract claim concerns the liability of the host State vis-à-vis a foreign investor, an umbrella clause claim involves the international responsibility of the host State for the violation of an obligation vis-à-vis the investor's home State.⁵⁷¹ Mr. Schill explains:

In this view, the investor does not only bring a claim in its own name for enforcing its right under an investor-State contract, but also enforces the umbrella clause obligation under the investment treaty in place between the host State and the investor's home State.

That a contractual forum selection clause cannot bind a treaty-based tribunal sitting on the question of a violation of the umbrella clause as an obligation under international law also becomes clear, if one envisages the case that the investor's home State decides to initiate inter-State arbitration under a BIT and invokes the violation of the treaty's umbrella clause. In this case, the State would clearly not be bound by the contractual forum selection in the investor-State relation, because the investor does not dispose of the power to restrict its home State concerning the arbitration mechanism under an international treaty.⁵⁷²

3.144. Another scholar, Mr. Jarrod Wong, agrees that a contractual forum selection clause should not be permitted to prevail over the umbrella clause and the BIT's dispute settlement provisions:

There are two reasons the forum selection clause should not prevail. First, a BIT violation arising under the umbrella clause is no less redressable under the BIT for being defined by reference to the contract (whose terms are

⁵⁷⁰ **CLA-099**, Schill, pp. 48-54; **CLA-106**, Wong, p. 139 ("an umbrella clause enables a BIT tribunal to exercise jurisdiction over claims concerning such breaches of contract, which are also BIT violations under the clause, and further permits the tribunal to do so notwithstanding an exclusive forum selection clause in the contract. Indeed"), pp. 167-175.

⁵⁷¹ **CLA-099**, Schill, pp. 50-51.

⁵⁷² *Id.*, p. 51.

simply incorporated into the umbrella clause). Second, the conflict between BIT provisions and the forum selection clause in the contract arises from an ambiguity that should be resolved against the State, who alone is party to both the BIT and the contract.⁵⁷³

- 3.145. Indeed, any States, such as Ethiopia and Turkey, are free to introduce specific language in their BITs that would limit the effect the BIT settlement provisions have on contracts containing a forum selection clause. Notably, such language is not included in the Turkey-Ethiopia BIT.
- 3.146. Similarly, Ethiopia could have inserted language in the underlying contract with Akgun thereby excluding the application of any relevant BIT to such contract. Yet, in Akgun's case, a reference to the BIT is expressly included in the text of the contract⁵⁷⁴ thereby confirming that the BIT provisions, including those on dispute resolution, are available to the parties.
- 3.147. Consequently, the availability of the contractually agreed remedies does not preclude the jurisdiction of the Tribunal over Claimant's umbrella clause claim.

4. APPLICABLE LAW

A. The Treaty Principally Governs Claimant's Claims

- 4.1. As discussed in Claimant's Statement of Claim⁵⁷⁵ and Respondent confirmed,⁵⁷⁶ the Treaty principally governs Akgun's claims.⁵⁷⁷ In the words of the *EDF* tribunal, "the BIT supplies the primary foundation and framework for the Tribunal's consideration of investor protection."⁵⁷⁸
- 4.2. In addition, the parties also seem to agree that in determining Respondent's international responsibility, the Treaty must be supplemented by relevant rules

⁵⁷³ **CLA-106**, Wong, pp.173-175.

⁵⁷⁴ **C-009**, The 2012 ETIZ Agreement, Arts. 11(10), 11(11), 13, 21(5).

⁵⁷⁵ SoC, ¶¶ 4.1-4.4.

⁵⁷⁶ SoD, ¶ 190.

⁵⁷⁷ In addition, as stated in Claimant's Statement of Claim, the rules of other treaties govern Akgun's claim, including but not limited to the Denmark-Ethiopia BIT by virtue of the MFN clause of the Treaty. SoC, ¶ 4.4.

⁵⁷⁸ **CLA-020**, *EDF v. Argentina*, ¶ 904.

of customary international law.⁵⁷⁹ Indeed, as the tribunal in *Addiko Bank AG and Addiko Bank d.d. v. Croatia* stated:

A treaty is not an empty vessel with no governing law whatsoever, until some is assigned to it through resort to the default rules of a particular dispute resolution mechanism. Under the very definition of a treaty provided by Article 2(1)(a) of the VCLT, a treaty is “an international agreement concluded between States in written form and governed by international law” 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.⁵⁸⁰

- 4.3. Respondent argues that Ethiopian law plays a role in determining Ethiopia’s international responsibility and insists that it shall form part of the applicable law in this case.⁵⁸¹ This is incorrect, and in any event, Respondent does not cite a single authority to support its contention.
- 4.4. The customary international law as well as case law of international tribunals is settled on the fact that municipal law has limited relevance in determining international responsibility of states. More specifically, the legality of Respondent’s acts under national law does not determine their lawfulness under international legal principles.
- 4.5. Indeed, Art. 27 of the 1969 Vienna Convention precludes a state from “invok[ing] the provisions of its internal law as justification for its failure to perform.”⁵⁸² The Draft Articles on State Responsibility further confirm:

⁵⁷⁹ SoD, ¶ 190; SoC, ¶¶ 4.1-4.2.

⁵⁸⁰ **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. See also **CLA-026**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶ 146.

⁵⁸¹ SoD, ¶¶ 190-194.

⁵⁸² **CLA-047**, VCLT, Art. 27.

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.⁵⁸³

- 4.6. In addition, “[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.”⁵⁸⁴
- 4.7. Consequently, the legality of Ethiopia’s acts under Ethiopian law does not determine their lawfulness under international law.
- 4.8. Claimant agrees, however, that Ethiopian law has a role to play in the present dispute—just not with respect to determining the lawfulness of Ethiopia’s acts under international legal principles. Since the claims that Akgun pleads are Treaty-based causes of action, the role of Ethiopian law is limited to determining this Treaty dispute as a matter of fact. As the tribunal in *Azurix v. Argentina* stated:

[T]he law of Argentina should be helpful in the carrying out the Tribunal’s inquiry into the alleged breaches of the Concession Agreement to which Argentina’s law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration.⁵⁸⁵

- 4.9. Respondent criticizes Claimant’s reliance on *Bankswitch v. Ghana*. Respondent states that the paragraph Claimant cites does not suggest that domestic law does not constitute the body of law that applies for the settlement of the dispute but rather only states that international law may govern some aspects of the domestic contract.⁵⁸⁶ This is not entirely accurate.
- 4.10. *Bankswitch* was a purely contractual case based on a commercial contract between an investor and the State; no BIT applied to the dispute. Even then, the tribunal applied international rules to the contract governed by Ghanaian law because it found it to have an international nature:

[T]he legal relationship arising out of the Agreement and the law governing the Parties’ contractual relationship are

⁵⁸³ **CLA-042**, Draft Articles on State Responsibility, Art. 3.

⁵⁸⁴ *Id.*, Art. 32. See also **CLA-007**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 94.

⁵⁸⁵ **CLA-039**, *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (“*Azurix v. Argentina*”), ¶ 67.

⁵⁸⁶ SoD, ¶ 191.

matters within the international legal order and, when applicable, should be measured against international standards.⁵⁸⁷

- 4.11. Indeed, where claimant pleads a Treaty claim, as here, the case law is settled that the applicable law shall be the Treaty and relevant rules of international law, and that the role of the domestic law is limited as explained above.
- 4.12. Respondent also suggests that the fact that Claimant pleads an umbrella clause claim somehow automatically incorporates Ethiopian law into the body of applicable law.⁵⁸⁸ Respondent is wrong. Umbrella clause claims do not affect the applicable law in a Treaty dispute. Rather, umbrella clauses engage the host State's international responsibility once a breach of the law governing the contractual relations between an investor and the State has occurred:

While the obligations in the BIT are obligations entered into under international law, the relations between investor and host State remain governed by whatever law the parties to the investor-State contract have chosen as the applicable law. Therefore, umbrella clauses, as an inter-State obligation, do nothing more than engage the host State's international responsibility for breaches of its investment-related promises. In contrast, the content of the obligation and the question whether a breach has occurred is to be determined according to the law applicable to this promise. Umbrella clauses do nothing more than back up the contractual bargain struck between the parties and enable the investor to enforce the commitments accepted by the host State in the treaty-based forum. They do not, however, affect the content of the substantive obligations between investor and host State.⁵⁸⁹

- 4.13. In other words, the law applicable to the underlying contract does not change when a claimant pleads an umbrella clause claim. The law that the parties have selected as applicable in their contract will govern the existence and scope of the contractual obligations. However, international law will determine the performance of the contractual obligations, and in particular the issue of whether the State is internationally responsible for its contractual breaches.

⁵⁸⁷ **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, ¶ 11.63.

⁵⁸⁸ SoD, ¶ 192.

⁵⁸⁹ **CLA-099**, Schill, p. 47.

- 4.14. In the case at hand, the law applicable to the 2012 ETIZ Agreement is “[t]he relevant Ethiopian laws, and the BIT.”⁵⁹⁰ Thus, Ethiopian law shall apply to ascertaining contractual obligations and breaches as between the parties to the contract. The Treaty and relevant rules of international law, however, will govern whether the contractual breaches can trigger an international responsibility of Ethiopia.

B. Turkish Law Is Not Applicable to This Case

- 4.15. Respondent suggests that Turkish law may “be useful to discern mutuality of understanding for the purpose of interpreting and applying the Treaty’s provisions and to evaluate the Claimant’s knowledge of certain standards and expectations.”⁵⁹¹
- 4.16. Respondent does not supply any support for its contention. Claimant submits that Turkish law has no role in these proceedings. It is not applicable law under any of the legal instruments at issue. Therefore, Respondent’s reliance on Turkish law should be dismissed in its entirety.

C. In Any Event, Respondent’s Reliance on Turkish Law Does Not Help Its Case

- 4.17. In its Statement of Defense, Ethiopia resorts to Turkish law in an attempt to supply support to its ill-founded EIA-related arguments with respect to ETIZ. This attempt is futile. Ethiopia’s analysis of Turkish law, besides being completely inapposite to the dispute, is flawed, confusing, and at times irrelevant and simply inaccurate.
- 4.18. First, Ethiopia devotes several pages to discussing the definition and status of an “industrial zone” under Turkish law in addition to the status of an “organized industrial zone”.⁵⁹² Yet, as Ethiopia itself recognizes, IZ (*i.e.*, “industrial zone”) and OIZ (*i.e.*, “organized industrial zone”) are subject to different laws and regulations in Turkey and have two different statuses, that cannot coexist.⁵⁹³ Most importantly, as Ethiopia again recognizes, ETIZ qualifies as OIZ, not IZ

⁵⁹⁰ **C-009**, The 2012 ETIZ Agreement, Art. 13.

⁵⁹¹ SoD, ¶ 194.

⁵⁹² SoD, ¶¶ 84-106; **R-14**, Turkish Law on Industrial Zones No. 4737, dated 9 January 2002; **R-15**, Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854); **R-11**, Turkish Law on Organized Industrial Zones No: 4562, dated 12 April 2000, Art. 3(h).

⁵⁹³ SoD, ¶¶ 85, 87.

under Turkish law.⁵⁹⁴ Consequently, even if one assumes that ETIZ should, for some reason, be assessed based on Turkish law, IZ-related regulations would be inapplicable to ETIZ; thus, Ethiopia's discussion concerning IZ is completely irrelevant.

- 4.19. Ethiopia then suggests that had ETIZ been developed in Turkey, it would have been considered a specialized OIZ which required an EIA, and that EIA must have been prepared after the land allocation for the project.⁵⁹⁵ Even in this irrelevant hypothetical scenario, Ethiopia is wrong.
- 4.20. First, if ETIZ were to be developed in Turkey, it would not qualify as a "specialized OIZ" under Turkish law. This is because under Turkish law, "specialized OIZ" is an organized industrial zone, which includes factories relating to the same type of industry.⁵⁹⁶
- 4.21. Conversely, ETIZ was supposed to contain factories from various industries. Art. 8(14) of the 2012 ETIZ Agreement expressly states that ETIZ was to include various industries such as "leather products, goods and articles, textile and garment, chemicals and plastic, pharmaceutical, electric and electronics, printing, packing, automotive, metal and agro-processing Industries."⁵⁹⁷ Indeed, Akgun's studies and plans developed for the project accounted for that feature of ETIZ as they included various industry sectors from the project's inception.⁵⁹⁸ Respondent recognizes this, too.⁵⁹⁹ Thus, there is no legal basis for analyzing ETIZ as a "specialized OIZ" under Turkish law. Rather, it would

⁵⁹⁴ See, e.g., **C-043**, Pre-Feasibility Study, p. 72; SoD, ¶ 96 (recognizing that Ikitelli, an original model for ETIZ, is OIZ, not IZ); **R-19**, List of OIZs in Turkey Approved by Ministry of Industry and Technology, updated 31 January 2021.

⁵⁹⁵ SoD, ¶¶ 98-100, 106.

⁵⁹⁶ See **R-11**, Turkish Law on Organized Industrial Zones No: 4562, dated 12 April 2000 Art. 3(d); **R-10**, Turkish Organized Industrial Location Selection Regulation (Official Gazette No. 17 January 2008/26759) Art. 4(1)(c). R-11 and R-10 were the laws in effect at the time of the signing of the 2012 ETIZ Agreement. In its analysis, Respondent makes references to different versions of the Turkish Laws and Regulations but it fails to identify the effective versions at the time of the 2012 ETIZ Agreement. Claimant corrects this in this section. See also **R-9**, Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 22.08.2009/27327), Art. 4(1)(ğ); **R-13**, Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674) Art. 3(c); SoD, ¶ 98.

⁵⁹⁷ **C-009**, The 2012 ETIZ Agreement, Art. 8(14).

⁵⁹⁸ See, e.g., **C-043**, Pre-Feasibility Study, pp. 34, 40, 42; **C-045**, Final Feasibility Study, pp. 27, 268, 287-295.

⁵⁹⁹ SoD, ¶ 97.

be qualified as a “mixed OIZ,” in the same manner as Ikitelli,⁶⁰⁰ which is an OIZ that includes factories relating to various industrial sectors.⁶⁰¹

- 4.22. Turkish law requires an EIA only for a specialized OIZ.⁶⁰² Since ETIZ would not have been a specialized OIZ under Turkish law, this requirement would not have applied to it, even if the project were to take place in Turkey. Ethiopia’s arguments to the contrary are therefore completely misleading.
- 4.23. But even if one assumes that ETIZ were considered a “specialized OIZ” under Turkish law and, consequently, that it requires an EIA, Turkish law requires that such an EIA be done prior to the location selection, contrary to what Respondent states.⁶⁰³ Under Turkish law, the MoI is authorized to finalize the land selection process for all types of OIZs, but the Ministry cannot finalize the land selection for a “specialized OIZ” without an EIA:

(1) OIZ location is finalized by the Ministry in line with the site selection commission report prepared as described in Article 20 and the opinions of the institutions and organizations sent to the Ministry, if any, following

a) Preparation of an observational geological survey report in line with the relevant sub-regulatory procedures of the Ministry of Public Works and Settlement,

b) Obtaining Environmental Impact Assessment positive certificate, if the OIZ is specialized,

c) If there is a parcel with forage qualification in the selected land, the qualification change is made with the application to be made to the relevant institution and registered in the name of the treasury,

⁶⁰⁰ *Id.*

⁶⁰¹ **R-9**, Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 22.08.2009/27327), Art. 4(1)(m).

⁶⁰² **R-10**, Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759) Art. 22(a)(b) (this was the law in effect at the time of the signing of the 2012 ETIZ Agreement). See *also* **R-13**, Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674) Art. 9(1)(b); **R-17**, Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), Annex-1, ¶ 33; **R-18**, Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), Annex-1, ¶ 35.

⁶⁰³ SoD, ¶¶ 98-100, 106.

ç) Registration in the name of the treasury, if there are non-registered areas within the selected land under the disposal of the state.

(2) The finalized OIZ location is notified to the relevant governorship and relevant institutions and organizations together with the conditions specified in the location selection commission report and, if any, the opinions of the institutions and organizations sent to the Ministry later.

(3) In case the OIZ location cannot be finalized, other alternative areas specified in Article 19 shall be evaluated.⁶⁰⁴

- 4.24. Turkish environmental laws are also clear on the point that any EIA, if necessary, shall be prepared at the earliest stage of the project, and certainty before any relevant permits and approvals are issued and the contracts are signed:

Unless Environmental Impact Assessment Positive or Environmental Impact Assessment Not Required decisions are obtained, approval, permission, incentive, construction, and utilization licenses concerning the project cannot be issued; investment for the projects cannot start and be contracted.⁶⁰⁵

- 4.25. As such, even if one analyzes the necessity of an EIA for ETIZ under the hypothetical scenario that it was established in Turkey and was a specialized OIZ, Turkish law would suggest that the Mol or other relevant authorities should have verified that an EIA had been performed before they finalized the selection of the land for the project, allocated it, issued multiple permits and licenses, and concluded any contracts.

⁶⁰⁴ **R-10**, Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759) Art. 22(1)(b) (this was the law in effect at the time of the signing of the 2012 ETIZ Agreement). See *also* **R-13**, Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674) Art. 9(1)(b).

⁶⁰⁵ **R-16**, Turkish Environment Law No: 2872, dated 9 August 1983, Art. 10/2 (this was the law in effect at the time of the signing of the 2012 ETIZ Agreement). See *also* **R-18**, Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), Art. 6(3); **R-17**, Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), Art. 6(3).

5. CLAIMS ON THE MERITS

- 5.1. Based on the facts described in its Statement of Claim⁶⁰⁶ and above in Section 2, Claimant asserts four alternative claims: Respondent violated the Treaty's fair and equitable treatment standard;⁶⁰⁷ Respondent breached its non-impairment obligation;⁶⁰⁸ Respondent violated the Treaty's prohibition against expropriation;⁶⁰⁹ and Respondent breached its umbrella clause obligations.⁶¹⁰ Claimant discusses the merits of each of these claims in the succeeding Sections A, B, C and D and shows why Respondent's defenses to those claims must be rejected.

A. Respondent Violated Its Obligation to Treat Akgun Fairly and Equitably

(i) The Applicable FET Standard

- 5.2. Respondent avoids discussing the basic principles that underlie the FET standard, the obligation of which is set forth in the Turkey-Ethiopia BIT. Specifically, the Treaty provides:

Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full 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.⁶¹¹

- 5.3. The FET standard is further interpreted considering the object and purpose of the BIT in question.⁶¹² Here, the Treaty's Preamble provides that its primary purpose is to encourage investment by ensuring fair treatment, stating that "fair and equitable treatment of investment is desirable in order to maintain a

⁶⁰⁶ See SoC, Section 2.

⁶⁰⁷ See *id.*, Section 5.C.

⁶⁰⁸ See *id.*, Section 5.D.

⁶⁰⁹ See *id.*, Section 5.B.

⁶¹⁰ See *id.*, Section 5.E.

⁶¹¹ **CLA-001**, Turkey-Ethiopia BIT, Art. II(2).

⁶¹² **CLA-048**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("*Saluka v. Czech Republic*, Partial Award"), ¶¶ 300-301. See also **CLA-047**, VCLT, Art. 31(2).

stable framework for investment and maximum effective utilization of economic resources.”⁶¹³

5.4. Thus, Respondent unquestionably bound itself to treat the investments of Turkish investors such as Akgun in a fair and equitable manner and to likewise refrain from imposing unreasonable and discriminatory measures on Turkish investors.

5.5. Tribunals defining the contours of a host state’s FET obligation towards investors have coalesced around several elements that frame the analysis of an FET claim. For instance, the *SolEs* tribunal concluded that:

[T]he obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor’s reasonable expectations with respect to the legal framework adversely affecting its investment.⁶¹⁴

5.6. Similarly, the *Siag* tribunal concluded that a host state’s FET obligation includes “transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment.”⁶¹⁵ The *Pezold* tribunal likewise concluded that the FET standard entails an obligation not to frustrate the investor’s legitimate expectations and to provide a stable and predictable legal and business environment for the investment.⁶¹⁶

5.7. In *Flemingo Duty Free v Poland*, the tribunal surveyed the cases discussing the FET standard and articulated a broad view of the standard:

The Tribunal agrees with Claimant that many values other than predictability have been recognised by investment treaty tribunals to be covered by the terms ‘fair and equitable treatment’. Denial of justice, deficient review of administrative actions and the frustration of legitimate expectations are, for instance, other elements which – as so

⁶¹³ **CLA-001**, Turkey-Ethiopia BIT, Preamble.

⁶¹⁴ **CLA-054**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 (“*SolEs Badajoz v. Spain*”), ¶ 308 (citations omitted).

⁶¹⁵ **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*”), ¶ 450.

⁶¹⁶ **CLA-045**, *Pezold v. Zimbabwe*, ¶ 546.

many tribunals have recognised – also constitute breaches of the ‘fair and equitable treatment’ obligation.⁶¹⁷

- 5.8. In *Deutsche Telekom v. India*, the tribunal likewise surveyed the cases discussing FET and noted that “[w]hile formulations have varied across awards” there are certain identifiable “core components” of the FET standard.⁶¹⁸ Those core components include, “the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency.”⁶¹⁹
- 5.9. Further detailing the contours of the FET standard and conduct that constitutes a breach thereof, the *Saluka* tribunal adopted the reasoning of prior cases, holding that “the terms fair and equitable [...] mean just, even-handed, unbiased, legitimate.”⁶²⁰ It further held that the assessment requires “a weighing of the [investor’s] legitimate and reasonable expectations on the one hand and the [host State’s] legitimate regulatory interests on the other,”⁶²¹ concluding that when unjust or arbitrary treatment “rises to the level that is unacceptable from the international perspective,” the FET obligation is breached.⁶²²
- 5.10. Thus, the elements of a host state’s FET obligation are well-established to include protection of legitimate expectations, good faith conduct, transparent and non-discriminatory treatment that is non-arbitrary and affords due process.
- 5.11. In addition to these established elements of the FET obligation, tribunals have also developed analytical guidelines for assessing whether an FET violation

⁶¹⁷ **CLA-078**, *Flemingo DutyFree*, ¶¶ 534-535.

⁶¹⁸ **CLA-053**, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017 (“*Deutsche Telekom v. India*”), ¶ 336.

⁶¹⁹ *Id.*

⁶²⁰ **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 297 (quoting **CLA-046**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (“*MTD v. Chile*”), ¶ 113) (internal quotations omitted)).

⁶²¹ *Id.*, ¶ 306.

⁶²² *Id.*, ¶ 297 (quoting **RLA-11**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263). See also **CLA-006**, *Tecnicas Medioambientales Tecmed S.A. v. United States of Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (“*Tecmed v. Mexico*”), ¶ 154; **CLA-016**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (“*Rumeli v. Kazakhstan*”), ¶ 609.

has occurred. First, whether a host state has violated its FET obligation is a fact-specific inquiry. As the *Mondev* tribunal held, “[a] judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”⁶²³

- 5.12. Second, a series of acts may amount to an FET violation as readily as a singular act:

[I]f 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.⁶²⁴

- 5.13. Finally, although good faith conduct is a requisite element of a host state’s FET obligation, an investor need not demonstrate bad faith conduct to establish the host state’s violation of its FET obligation. According to the *Siag* tribunal, good faith is a “general, if not cardinal, principle of customary international law” that operates as a “useful yardstick by which to measure the [FET] standard.”⁶²⁵ But the absence of good faith, or affirmative bad faith, is not necessarily coextensive with every claim for violation of the FET standard:

The Tribunal believes that the state’s conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard. The Tribunal shares the observation made by the tribunal in *Mondev*, whereby “[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”⁶²⁶

- 5.14. Numerous tribunals have adopted this view.⁶²⁷

⁶²³ **CLA-109**, *Mondev Intl. Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (“*Mondev v. US*”), ¶ 118; **CLA-036**, *Crystallex v. Venezuela*, ¶ 544 (same).

⁶²⁴ **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*”), ¶ 566; **CLA-110**, *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (“*Rompetrol v. Romania*”), ¶ 271 (concluding that the cumulative effect of a series of acts can “together amount to a failure to accord FET, even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach”); **CLA-040**, *El Paso Energy Intl. Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (“*El Paso v. Argentina*”), ¶¶ 459, 516-518.

⁶²⁵ **CLA-044**, *Siag v. Egypt*, ¶ 450.

⁶²⁶ **CLA-036**, *Crystallex v. Venezuela*, ¶ 543 (citing **CLA-109**, *Mondev v. US*, ¶ 116).

⁶²⁷ See, e.g., **CLA-006**, *Tecmed v. Mexico*, ¶¶ 153-154; **CLA-025**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012 (“*Deutsche Bank*”).

- 5.15. In sum, tribunals have consistently concluded that the plain, ordinary meaning of the terms “fair and equitable” is “just, even-handed, unbiased, legitimate” and requiring good faith as a “cardinal” element.⁶²⁸
- 5.16. State acts that individually or cumulatively are taken without good faith, or in a manner that is unjust, not even-handed, biased, or illegitimate violate the fair and equitable treatment standard.⁶²⁹ Arbitrary or unreasonable conduct, which is thus lacking in any legitimate motive, gives rise to a claim for breach of the state’s FET obligations.⁶³⁰
- 5.17. It is equally well settled that a host state’s FET obligation includes the duty to act transparently and consistently⁶³¹ and to avoid frustrating an investor’s legitimate expectations.⁶³²
- 5.18. As demonstrated below, Respondent fails to acknowledge these well settled principles concerning the scope of its FET duty and instead advocates for an unsupported and narrow view of its obligations. Claimant further shows how the facts of this case demonstrate that Ethiopia violated its FET obligations to Akgun.

v. Sri Lanka”), ¶ 420; **CLA-039**, *Azurix v. Argentina*, Award, ¶ 372; **CLA-007**, *LG&E v. Argentina*, ¶ 129; **CLA-057**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (“*Frontier v. Czech Republic*”), ¶¶ 297, 300-301.

⁶²⁸ **CLA-046**, *MTD v. Chile*, ¶ 113 (internal citation omitted); **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶¶ 297 (internal citation omitted); **CLA-007**, *LG&E v. Argentina*, ¶¶ 126, 131 (internal citation omitted); **CLA-036**, *Crystallex v. Venezuela*, ¶ 538 (internal citations omitted); **CLA-044**, *Siag v. Egypt*, ¶ 450.

⁶²⁹ **CLA-030**, *Gold Reserve v. Venezuela*, ¶ 566; **CLA-110**, *Rompetrol v. Romania*, ¶ 271; **CLA-040**, *El Paso v. Argentina*, ¶¶ 459, 516-518.

⁶³⁰ See, e.g., **CLA-071**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (“*Micula v. Romania*”), ¶ 522; **CLA-006**, *Tecmed v. Mexico*, ¶ 154; **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶ 420.

⁶³¹ **CLA-006**, *Tecmed v. Mexico*, ¶ 154; **CLA-007**, *LG&E v. Argentina*, ¶¶ 128, 131 (internal citation omitted); **CLA-036**, *Crystallex v. Venezuela*, ¶ 579 (internal citations omitted).

⁶³² **CLA-054**, *SolEs Badajoz v. Spain*, ¶ 308 (internal citation omitted); **CLA-045**, *Pezold v. Zimbabwe*, ¶ 546; **CLA-111**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (“*Glamis Gold, Ltd v. US*”), ¶ 22 (“Such a breach may be exhibited by a ‘gross denial of justice or manifest arbitrariness falling below acceptable international standards,’ or on the creation by the state of objective expectations in order to induce investment and the subsequent repudiation of those expectations.”) (emphasis added).

(ii) Respondent Argues for an Unduly Narrow View of the FET Standard

- 5.19. Respondent asks this Tribunal to adopt an interpretation of the FET standard that severely curtails the autonomous FET standard that numerous tribunals have adopted, as described above and in Akgun's Statement of Claim.⁶³³ Respondent's argument is ill-founded and should be rejected.
- 5.20. Respondent does not cite a single case that supports its narrow view of the FET standard in these circumstances. Instead, Respondent relies on UN working group papers and academic speeches that have raised and considered debate over the scope of ISDS mechanisms in general and the host state's FET obligation.⁶³⁴ Those working papers, while of academic interest, reach no conclusion on the proper scope of the FET obligation nor do they articulate a rule that purports to limit the scope of the autonomous FET standard as numerous tribunals have defined it.
- 5.21. One of the few instances of the FET obligation having been limited in a fashion like the narrow interpretation that Respondent espouses has been within the context of arbitrations that NAFTA governs, which Respondent cites alongside the provisions of model treaties that involve neither Ethiopia nor Turkey.⁶³⁵ Respondent fails to acknowledge, however, the importance of the fact that a binding interpretation issued by the NAFTA Free Trade Commission in 2001 specifically constrains NAFTA tribunals' interpretation of the FET standard. That binding interpretation instructed NAFTA tribunals that the FET standard means no more than "the customary international law minimum standard of treatment of aliens," which under its most restrictive interpretation would require outrageous, egregious, or bad faith conduct. Respondent also fails to acknowledge that even NAFTA tribunals have called into question such a narrow view, concluding that:

... the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and

⁶³³ SoD, ¶¶ 208-225; see SoC, ¶¶ 5.21-5.31.

⁶³⁴ SoD, ¶¶ 197, 200.

⁶³⁵ *Id.*, ¶¶ 210-213.

exposes the claimant to sectional or racial prejudice, or involves a lack of due process.⁶³⁶

- 5.22. Here, there is no interpretation of the Turkey-Ethiopia BIT, binding or otherwise, that narrows the FET standard to the standard that Respondent espouses or to the minimum standard under customary international law. Nor is there any other indication that the drafters of the Treaty intended to pattern the FET standard after such a narrow interpretation. As the tribunal recognized in *Deutsche Bank v. Sri Lanka*, in the absence of language to the contrary, the parties should be taken to have adopted the autonomous FET standard, and the tribunal accordingly adopted Prof. Schreuer's view to this effect:

[I]t is inherently implausible that a treaty would use an expression such as "fair and equitable treatment" to denote a well-known concept such as the "minimum standard of treatment in customary international law". If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.⁶³⁷

- 5.23. Further, the case law does not support the approach Respondent espouses here. In *Lemire*, in which the U.S.-Ukraine BIT was the operative treaty, the respondent—much like Ethiopia here—argued against the autonomous FET standard and sought instead to limit its FET obligations to the customary international law minimum standard, but the tribunal rejected that effort.⁶³⁸ Because the customary international law standard set the *floor* of the FET

⁶³⁶ **CLA-112**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("*Waste Management v. Mexico*"), ¶ 98; **CLA-109**, *Mondev v. US*, ¶¶ 116, 123 (concluding that "the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s." and finding that "what is unfair or inequitable need not equate with the outrageous or the egregious"); see also **CLA-113**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 147 ("Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."); **CLA-111**, *Glamis Gold, Ltd v. US*, ¶¶ 621-622.

⁶³⁷ **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶ 418 (quoting C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6(3) J. World Investment & Trade 357, p. 360).

⁶³⁸ **CLA-049**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, 14 January 2010 ("*Lemire v. Ukraine*"), ¶¶ 250-253.

standard in the U.S.-Ukraine BIT rather than the *ceiling* (as it would under NAFTA), the tribunal held that

... actions or omissions of the Parties may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith.⁶³⁹

- 5.24. Thus, the *Lemire* tribunal considered the debate between applying the minimum standard of FET under customary international law and the broader autonomous standard, explicitly opting for the autonomous standard: “The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis.”⁶⁴⁰
- 5.25. Other tribunals have likewise adopted a broad autonomous FET standard in lieu of a narrow interpretation under customary international law.⁶⁴¹
- 5.26. For these reasons, Respondent’s narrow view of the FET standard must be rejected. Notably, even under a narrow interpretation of FET, Akgun would still prevail, as the tribunals in *CMS*⁶⁴² and *Crystallex*⁶⁴³ equate fulfillment of legitimate expectations with the minimum standard of FET under customary international law. As shown below in Section 5.A.iii.a, Respondent frustrated Akgun’s legitimate expectations, so even if the Tribunal were to restrict its FET analysis to a narrower standard than the Treaty’s text provides, Akgun’s claim for FET violation would nonetheless succeed.

⁶³⁹ *Id.*, ¶ 254.

⁶⁴⁰ *Id.*, ¶ 284.

⁶⁴¹ See, e.g., **CLA-006**, *Tecmed v. Mexico*, ¶ 155 (“The Arbitral Tribunal understands that the scope of the undertaking of fair and equitable treatment ... is that resulting from an autonomous interpretation, taking into account the text of [the Spain-Mexico BIT] according to its ordinary meaning....”); **CLA-100**, *Enron v. Argentina*, ¶ 258 (“... the Tribunal concludes that the fair and equitable standard, at least in the context of the [U.S.-Argentina BIT] applicable to this case, can also require a treatment additional to, or beyond that of, customary law.”); **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 (“*Vivendi*, Award”), ¶¶ 7.4.5-7.4.11 (rejecting respondent’s argument to limit the FET standard in the Argentina-France BIT to the minimum standard under customary international law and explaining that “if this Tribunal were to limit the claims of unfair and inequitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard.”) (internal citations omitted).

⁶⁴² **CLA-114**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (“*CMS v. Argentina*”), ¶ 284.

⁶⁴³ **CLA-036**, *Crystallex v. Venezuela*, ¶¶ 546-547.

(iii) Respondent Treated Akgun Unfairly and Inequitably

- 5.27. Applying the appropriate standard to Respondent's duty of fair and equitable treatment, Akgun will demonstrate below that Ethiopia failed to comply with that duty by (a) confounding Akgun's legitimate expectations; (b) acting non-transparently and inconsistently towards Akgun; and (c) treating Akgun in an arbitrary fashion.

a. Respondent Confounded Akgun's Legitimate Expectations in Violation of the FET Standard

- 5.28. In the succeeding sections, Akgun will discuss the legal basis for its claim that Ethiopia's failure to meet Akgun's legitimate expectations constitutes a violation of the FET standard, the facts that comprise Akgun's claim, and why Ethiopia cannot find shelter from Akgun's claim by invoking its exercise of its regulatory powers.

1) Legitimate Expectations Form the "Core" of the FET Standard

- 5.29. As the concept of the FET standard has been refined and articulated, it has become accepted that an investor's legitimate expectations, formed from the host state's representations, lie at the heart of the FET standard. Numerous tribunals have advanced this view.
- 5.30. For instance, the *El Paso* tribunal concluded that "[i]t has become clear that the basic touchstone of fair and equitable treatment is to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith."⁶⁴⁴
- 5.31. The *Crystallex* tribunal recounted that "the majority of investment tribunals . . . have concluded that protection of legitimate expectations is now considered part of the FET standard."⁶⁴⁵

⁶⁴⁴ **CLA-040**, *El Paso v. Argentina*, ¶ 339.

⁶⁴⁵ **CLA-036**, *Crystallex v. Venezuela*, ¶ 546.

- 5.32. The *Tethyan* tribunal concluded that “a dominant principle of the FET standard is the protection of the investor’s legitimate investment-backed expectations.”⁶⁴⁶ Other tribunals have reached the same conclusion.⁶⁴⁷
- 5.33. The basis for this conclusion is the aim of providing a stable and predictable legal and business environment for the investor’s investment.⁶⁴⁸ In *Metalclad*, for instance, the tribunal highlighted the representations of Mexican federal officials that had assured Metalclad, an investor that sought to construct and operate a landfill, that a municipal permit was either not required or would be issued as a formality.⁶⁴⁹ The tribunal held that Metalclad had relied on these representations and had proceeded to construct the landfill, in full knowledge of federal and municipal authorities, until the Mexican authorities denied the permit, ending the project.⁶⁵⁰ The *Metalclad* tribunal determined that this conduct violated Mexico’s FET obligation to Metalclad because Mexico “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment.”⁶⁵¹
- 5.34. The tribunal’s conclusion in *SolEs* was in accord with *Metalclad*, holding that “an investor’s legitimate expectations can also arise from [...] statements made by or on behalf of the State for the purpose of inducing investment by a class of investors.”⁶⁵²
- 5.35. In addition, both explicit and implicit representations may give rise to a set of actionable legitimate expectations:

The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-

⁶⁴⁶ **CLA-024**, *Tethyan v. Pakistan*, ¶ 811.

⁶⁴⁷ See, e.g., **CLA-056**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014 (“*Perenco*, Decision on Jurisdiction”), ¶¶ 560-562; **CLA-049**, *Lemire v. Ukraine*, ¶¶ 264, 284; **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 302.

⁶⁴⁸ See, e.g., **CLA-057**, *Frontier v. Czech Republic*, ¶ 285; **CLA-033**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 April 2000 (“*Metalclad v. Mexico*”), ¶ 99.

⁶⁴⁹ **CLA-033**, *Metalclad v. Mexico*, ¶ 88.

⁶⁵⁰ *Id.*, ¶¶ 89-90.

⁶⁵¹ *Id.*, ¶¶ 99-101.

⁶⁵² **CLA-054**, *SolEs Badajoz v. Spain*, ¶ 313.

State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate.⁶⁵³

- 5.36. Reflecting the broad set of representations that permit an inference of legitimate expectations, the *Tethyan* tribunal concluded that contractual undertakings, the regulatory framework in place, and individual assurances could each inform the claimant's expectations in that case.⁶⁵⁴ Moreover, the *Tethyan* tribunal deemed especially important the promise of governmental support in determining that respondent breached claimant's legitimate expectations.⁶⁵⁵
- 5.37. Taking into account various types of representations is consistent with the *Arif* tribunal's observation that legitimate expectations will have "strengthened over time" as the investment has "increased and matured" and "more time passed" and "more efforts were made."⁶⁵⁶ According to the *Arif* tribunal, "the contract was only a first step upon which [the claimant] based his expectation that he was entitled to run [his investment]. The open, transparent and continuous performance of his investment contributed to building legitimate trust in the validity of his position."⁶⁵⁷ Thus, in *Arif* the tribunal concluded that the host state's actions precluding the investor from operating his business on a leased premises after his months-long efforts to commence the business constituted a violation of the investor's legitimate expectations and therefore a violation of the duty of fair and equitable treatment.⁶⁵⁸ The tribunal further held that the respondent had a secondary and related FET obligation to "remedy or ameliorate" its initial violation, which it also failed to do.⁶⁵⁹
- 5.38. Against this robust set of scholarship concerning the concept of legitimate expectations, Respondent can offer no rebuttal. It relies solely on a case from

⁶⁵³ **CLA-115**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 331 (citing **CLA-006**, *Tecmed v. Mexico*, ¶¶ 152, 154; **CLA-112**, *Waste Management v. Mexico*, ¶¶ 114-115; **CLA-114**, *CMS v. Argentina*, ¶ 290).

⁶⁵⁴ **CLA-024**, *Tethyan v. Pakistan*, ¶¶ 854-856, 842, 956-958.

⁶⁵⁵ *Id.*, ¶¶ 956, 958.

⁶⁵⁶ **CLA-019**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 ("*Arif v. Moldova*"), ¶¶ 542-544.

⁶⁵⁷ *Id.*, ¶ 544.

⁶⁵⁸ *Id.*, ¶ 547(f).

⁶⁵⁹ *Id.*

the International Court of Justice that involved an *interstate* conflict, which is utterly inapposite to the concept of legitimate investment-backed expectations that arise out of the investment protection framework between investors and host states.⁶⁶⁰

- 5.39. In sum, to uphold a stable and predictable investment environment for foreign investors, a state is tied to the expectations it creates to induce investment, whether those expectations arise from explicit representations, implicit representations, the legal and factual circumstances surrounding the decision to invest, or a singular moment or series of events over time.

2) *Ethiopia's Representations Created Akgun's Expectation that It Would Be Able to Develop ETIZ*

- 5.40. Numerous facts in this case establish Akgun's reasonable and legitimate expectations that it would be able to develop ETIZ in Ethiopia. As detailed in the Statement of Facts above and further discussed below, those facts include the statements of Ethiopian ministers in support of ETIZ, the permits and licenses that Ethiopian authorities issued to Akgun, the agreements that Respondent signed with Akgun, and the remedial measures it promised to Akgun.
- 5.41. As described above in Section 2.A.i, in 2008 Respondent visited Akgun at the Ikitelli organized industrial zone in Istanbul, which Akgun administered and founded, and set about inducing Akgun to invest in a similar industrial zone in Ethiopia by insisting that the parties sign an initial Memorandum of Understanding, under the terms of which Respondent volunteered to designate for Akgun the location of the proposed industrial zone.⁶⁶¹
- 5.42. Akgun communicated its requirements to Respondent concerning the necessary features of the land and location for the industrial zone and Respondent accordingly selected the region northeast of Addis Ababa, between the towns of Legatafo and Sendafa, near the major highway that ran between those two towns.⁶⁶² During a follow-up visit to Ikitelli shortly thereafter, Respondent's Minister of Foreign Affairs promised his

⁶⁶⁰ SoD, ¶¶ 223-224.

⁶⁶¹ **C-007**, MoU, ¶ 3 ("The location of the [industrial zone] will be shown by the Oromia State"); Yusuf Akgun 1st Statement, ¶¶ 4.3-4.4.

⁶⁶² *Supra* Section 2.A.ii; Yusuf Akgun 1st Witness Statement, ¶¶ 4.5-4.8; Yusuf Akgun 2nd Statement, ¶ 3.6.

“Government’s fullest cooperation and support ... to have firmly establish such visionary project in our country.”⁶⁶³ Later, after Akgun made a high-profile presentation of its feasibility study for the industrial zone to various cabinet ministers in Addis Ababa, the Minister of Foreign Affairs publicly pledged the government’s support for ETIZ.⁶⁶⁴ A few weeks later, during a visit to Ikitelli, Respondent’s Minister of Finance and Economic Development likewise expressed his encouragement and support for ETIZ.⁶⁶⁵

- 5.43. During this same period, Respondent issued Akgun an investment permit, a trade registration certificate, and a development license.⁶⁶⁶
- 5.44. After Akgun supplied its detailed feasibility study to Respondent,⁶⁶⁷ the parties signed the 2010 ETIZ Agreement,⁶⁶⁸ which the 2012 ETIZ Agreement ultimately superseded.⁶⁶⁹
- 5.45. The 2012 ETIZ Agreement identified the ETIZ location and specified that the 1460 ha. location would be used only as an industrial zone in the manner detailed in the 2012 ETIZ Agreement, which prioritized “leather products, goods and articles, textile and garment, chemicals and plastics, pharmaceutical, electric and electronics, printing, packing, automotive, metal and agro-processing Industries.”⁶⁷⁰
- 5.46. Following the 2012 ETIZ Agreement, Akgun paid Respondent to compensate for the expropriation of the local farmers’ land to make way for ETIZ and signed a lease agreement for the land.⁶⁷¹ Respondent also renewed Akgun’s

⁶⁶³ **C-044**, Akgun Guest Book, handwritten note of Mesfin Seyoum dated February 7, 2009.

⁶⁶⁴ **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*, The Ethiopian Herald, 18 August 2009; **C-003**, K. Bekele, *Turkish investors envisage an industrial zone worth USD 10bln in Ethiopia*, The Reporter, 22 August 2009.

⁶⁶⁵ **C-044**, Akgun Guest Book, p.3 (handwritten note of Sufian Ahmed dated 7 October 2009).

⁶⁶⁶ **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009.

⁶⁶⁷ **C-045**, Final Feasibility Study.

⁶⁶⁸ **C-008**, The 2010 ETIZ Agreement.

⁶⁶⁹ **C-009**, The 2012 ETIZ Agreement.

⁶⁷⁰ *Id.*, Arts. 1, 8(1), 8(14).

⁶⁷¹ **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012; **C-012**, Land Lease Certificate.

investment permit,⁶⁷² handed over the land to Akgun,⁶⁷³ and urged Akgun to immediately begin the project, threatening to withdraw the project from Akgun if it did not commence.⁶⁷⁴

- 5.47. Thus, from the initial meeting in Ikitelli in 2008 forward, Respondent induced Akgun to invest in ETIZ, explicitly and implicitly creating the expectation that it would support and facilitate Akgun's efforts to develop ETIZ on a suitable plot of land in Ethiopia. Both publicly and privately, Respondent repeatedly expressed its intention to fully support ETIZ's development, buttressed the expectation of support by selecting the region to situate ETIZ and issuing licenses and permits, and it concretized the expectation by signing the 2012 ETIZ Agreement, accepting Akgun's compensation payment, issuing the land lease, and handing over the land.
- 5.48. In 2013, Respondent asked Akgun to supply an EIA, but did not ask Akgun to cease work on ETIZ.⁶⁷⁵ Indeed, Respondent's Minister of Industry led Akgun to believe the request for an EIA did not pose an impediment to the project's continued progress.⁶⁷⁶ As described above, the EIA process turned out to be far more contentious than Akgun anticipated, but even during that process, Akgun received continued assurances from the Prime Minister's office that the EIA process would not imperil ETIZ and that ETIZ could proceed.⁶⁷⁷ Those assurances were consistent with what Respondent had consistently communicated to Akgun over the course of several years and further demonstrate that it was reasonable for Akgun to expect that it would be able to implement ETIZ.

3) *Akgun's Expectations Were Legitimate and Reasonable*

- 5.49. Akgun formed the expectation that Ethiopia would provide land suitable for the project, which would allow Akgun to implement the ETIZ project. This expectation was reasonable and legitimate considering the way Ethiopia dealt

⁶⁷² **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

⁶⁷³ **C-013**, Land Handover Protocol.

⁶⁷⁴ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012; **C-012**, Land Lease Certificate.

⁶⁷⁵ *Supra* Section 2.D. Yusuf Akgun 1st Statement, ¶ 5.5.

⁶⁷⁶ Yusuf Akgun 1st Statement, ¶ 5.5.

⁶⁷⁷ *Id.*, ¶¶ 5.5-5.6.

with Akgun and the background policy choices involved in a host state's decision to allocate land to a foreign investor.

- 5.50. The facts here demonstrate that Akgun had a legitimate, objective basis for expecting that Ethiopia would provide it with land suitable for implementing ETIZ. That expectation is first reflected in the Memorandum of Understanding, which conferred upon Respondent the duty of locating the appropriate site for ETIZ.⁶⁷⁸ As Mr. Yusuf Akgun explained, he directly communicated the basic requirements of a commercially suitable plot of land for ETIZ to Respondent's authorities, and they provided him three options within several kilometers from one another.⁶⁷⁹ At no point during this land selection process did Respondent indicate that an additional environmental assessment would be required, much less that Akgun itself would be responsible for performing such an analysis.⁶⁸⁰ Akgun was a foreign, private investor, and Ethiopia had solicited Akgun for the project; thus, Akgun could reasonably expect that Ethiopia had pre-determined the environmental suitability of an industrial zone in the region it selected to situate such a zone.⁶⁸¹ Indeed, Akgun's expectations were reflected in its feasibility report for ETIZ, in which it described among its enticements for ETIZ the "one-stop-shop" permitting services that the Ethiopian Investment Commission was to provide to foreign investors in order to handle all bureaucratic hurdles and facilitate rapid start-up.⁶⁸²
- 5.51. This expectation was reinforced after site selection. For instance, under the 2010 ETIZ Agreement, Respondent was a financial partner with Akgun in the ETIZ project.⁶⁸³ Akgun could reasonably expect that Respondent would not select an environmentally unsuitable site for a project in which Respondent itself was a partner. Moreover, Respondent's issuance and renewal of licenses and permits for Akgun to implement ETIZ reinforced the expectation that the site was environmentally suitable, as did the fact that Respondent

⁶⁷⁸ **C-007**, MoU, ¶ 3 ("The location of the [industrial zone] will be shown by the Oromia State").

⁶⁷⁹ Yusuf Akgun 1st Statement, ¶¶ 4.5-4.8; Yusuf Akgun 2nd Statement, ¶¶ 3.1-3.6, Figure 1.

⁶⁸⁰ Yusuf Akgun 2nd Statement, ¶¶ 3.7-3.8; Ufuk Akgun Statement, ¶ 3.1; Yunus Akgun 2nd Statement, ¶ 2.3.

⁶⁸¹ Whittington Report, ¶¶ 6.4-6.6, 6.19-6.20, 6.60-6.65.

⁶⁸² **C-045**, Final Feasibility Study, pp. 102.

⁶⁸³ *Supra* Section 2.B.i.a; **C-008**, The 2010 ETIZ Agreement, Art. 11(7); Yusuf Akgun 1st Statement, ¶¶ 4.15-4.16.

repeatedly urged Akgun to commence work on the project.⁶⁸⁴ Evidently, however, Ethiopia had not bothered with any such assessment until after it had already signed the 2012 ETIZ Agreement and handed over the site to Akgun to begin construction.⁶⁸⁵

- 5.52. These facts show that Akgun's expectations were reasonable and legitimate, and Prof. Tekle's and Prof. Whittington's opinions further reinforce the legitimacy of Akgun's expectations. Prof. Tekle explains that an environmental analysis should be an initial step:

Because the purpose of an EIA is to predict and manage the environmental effects of a proposed activity, the EIA should be performed and approved at the earliest stage of the project and, in any case, before commencement of the planned project activity to the extent EIA is required.⁶⁸⁶

- 5.53. Prof. Whittington explains that no foreign investor could be expected to make the sort of land use and environmental suitability determination that Ethiopia attempts to shift to Akgun here, opining that "it would have been highly inappropriate for a private, foreign firm to attempt to balance the GOE's economic development, environmental quality, and social objectives."⁶⁸⁷
- 5.54. Thus, Akgun's expectation that Ethiopia would provide a site that was environmentally suitable and commercially viable for implementing ETIZ was reasonable and legitimate.

4) Ethiopia Frustrated Akgun's Legitimate Expectations

- 5.55. As Akgun explained in the Statement of Claim, investors' expectations will be deemed frustrated if the host state unjustly 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

⁶⁸⁴ **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009; **C-010**, Receipt issued by Cooperative Bank of Oromia dated 31 July 2012; **C-012**, Land Lease Certificate; **C-013**, Land Handover Protocol; **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013; **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013; Yunus Akgun 1st Statement, ¶ 5.2.

⁶⁸⁵ *Supra* Section 2.E.ii.

⁶⁸⁶ Tekle Report, ¶ 2.30.

⁶⁸⁷ Whittington Report, ¶ 6.61.

the investors relied in making their investments.⁶⁸⁸ Here, Ethiopia's conduct frustrated Akgun's expectations.

- 5.56. In July 2014, Respondent made an about-face and blocked ETIZ from going forward on its designated site, without offering any suitable alternative site, on the purported basis that Akgun had not supplied an adequate EIA.⁶⁸⁹ Respondent did not require an EIA prior to selecting the site, issuing licenses, or receiving Akgun's feasibility study. Nor did it require an EIA before receiving Akgun's feasibility study, signing the 2010 ETIZ Agreement, signing the 2012 ETIZ Agreement, accepting compensation for the land, issuing a lease to Akgun, or handing over the land to Akgun. Respondent only asked for an EIA after all these events, and even when it did so it indicated that the EIA process was not a threat to ETIZ and it did not order site activity to stop pending the outcome of the EIA process.
- 5.57. The facts here are similar to *Metalclad*, where Mexico had assured Metalclad that it could construct and operate a landfill, and that a municipal permit was either not required or would be issued as a formality, but Mexico ultimately denied the permit and terminated the project.⁶⁹⁰ The tribunal held that this conduct violated Mexico's FET obligation.⁶⁹¹ Likewise here, Ethiopia's numerous representations over the course of time and its sudden reversal resulting in the end of the project constitute a violation of Akgun's legitimate expectations and consequent violation of the FET obligation.
- 5.58. Ethiopia's promise and subsequent failure to provide Akgun with an adequate alternative site for ETIZ compounded its error. This is like the situation the tribunal faced in *Arif*, where the host state suspended the claimant's business in violation of the claimant's legitimate expectations.⁶⁹² The tribunal explained:

Where a state creates a legitimate expectation which it cannot subsequently fulfil in breach of the fair and equitable treatment standard under the BIT, then the State has a

⁶⁸⁸ SoC, ¶ 5.33. See, also, e.g., **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶¶ 428, 523; **CLA-040**, *El Paso v. Argentina*, ¶¶ 375-376; **CLA-057**, *Frontier v. Czech Republic*, ¶ 285; **CLA-004**, *Eureko v. Poland*, ¶ 232; **CLA-024**, *Tethyan v. Pakistan*, ¶ 958; **CLA-056**, *Perenco*, Decision on Jurisdiction, ¶¶ 561-562.

⁶⁸⁹ *Supra* Section 2.E.iii.

⁶⁹⁰ **CLA-033**, *Metalclad v. Mexico*, ¶ 88.

⁶⁹¹ *Id.*, ¶¶ 99-101.

⁶⁹² **CLA-019**, *Arif v. Moldova*, ¶ 547.

secondary legal obligation to remedy or ameliorate the consequences of its breach.⁶⁹³

Where the respondent suspended the claimant's business operation on its leased premises and failed to provide a replacement premises or otherwise compensate claimant, the tribunal found that the respondent had breached the legitimate expectation that the claimant could operate his business and its "secondary obligation to remedy or ameliorate its inability to fulfil this legitimate expectation."⁶⁹⁴

- 5.59. Here, Ethiopia likewise breached its obligations to Akgun. Not only did Ethiopia fail to fulfill Akgun's expectation that it could implement ETIZ at the original site by selecting a site that it later deemed environmentally unsuitable for an industrial zone, but it also failed to ameliorate its error. Respondent directly informed Akgun that it would be afforded an alternative site, and it also recognized in its own internal correspondence before suspending the project that it would be obligated to provide Akgun an alternative site.⁶⁹⁵ That Ethiopia itself recognized its obligation to provide an alternative site further demonstrates that it was reasonable for Akgun to expect that it would be provided a suitable site for its investment in Ethiopia. Yet, even after promising that it would offer Akgun an adequate alternative site to establish its project, Respondent continued to frustrate Akgun's expectations by showing it only lands that were unsuitable to the establishment of ETIZ,⁶⁹⁶ and then later proposing that ETIZ could only take on a much narrower scope.⁶⁹⁷ This conduct exacerbates Ethiopia's frustration of Akgun's legitimate expectations and constitutes a violation of the FET obligation.

⁶⁹³ *Id.*, ¶ 547(e).

⁶⁹⁴ *Id.*, ¶ 547(f).

⁶⁹⁵ *Supra* Section 2.G; Yusuf Akgun 1st Statement, ¶¶ 5.20-5.22; **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014; **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014; **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, p. 2; **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014, p. 2; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014, p. 2.

⁶⁹⁶ *Supra* Section 2.G; Yusuf Akgun 1st Statement, ¶¶ 5.25-5.26.

⁶⁹⁷ *Supra* Section 2.G; Yusuf Akgun 2nd Statement, ¶¶ 5.1-5.3.

5) *The Exercise of Regulatory Power Provides Respondent No Defense*

- 5.60. The cases concerning the principle of legitimate expectations recognize a principle of proportionality concerning a state's ability to exercise its regulatory powers and an investor's legitimate and reasonable expectations, in recognition that states must be free to exercise (and investors must expect) some degree of domestic regulation.⁶⁹⁸
- 5.61. A state's right to exercise regulatory power, however, does not provide it *carte blanche* to mistreat investors. As the tribunal in *Gold Reserve* reasoned:
- [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.⁶⁹⁹
- 5.62. The question of proportionality "must be assessed in light of all the factual circumstances surrounding such conduct."⁷⁰⁰ Furthermore, the state's exercise of regulatory power "must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment."⁷⁰¹
- 5.63. In *Tecmed*, for instance, a Spanish company brought a claim against Mexico alleging several violations of the Spain-Mexico BIT concerning Tecmed's investment in a waste landfill, which Tecmed alleged to have lost in 1998 because of the non-renewal, by Mexican authorities, of a license necessary to operate the landfill.⁷⁰² Tecmed argued that because of the decision, the investment was completely lost, as it ceased to represent any economic value

⁶⁹⁸ See, e.g., **CLA-054**, *SolEs Badajoz v. Spain*, ¶¶ 327-328 (recognizing an obligation to make sure that the legitimate policy interest pursued by the State against the impact of the measure on the investment the state's adopted measure vis-à-vis the investment is proportionate); **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 309 (finding that an investor's legitimate expectations must be assessed in light of, and weighed against, a host State's legitimate right to regulate domestic matters in the public interest.); **CLA-055**, *Occidental Petroleum Corp. and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶¶ 403-404 (upholding FET claims and finding that concept of proportionality comprises part of the FET standard.)

⁶⁹⁹ **CLA-030**, *Gold Reserve v. Venezuela*, ¶ 595.

⁷⁰⁰ **CLA-071**, *Micula v. Romania*, ¶ 533.

⁷⁰¹ **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 307.

⁷⁰² **CLA-006**, *Tecmed v. Mexico*, ¶¶ 35-39.

as an ongoing business.⁷⁰³ The tribunal found that Mexico's actions indeed violated its 'fair and equitable treatment' obligation, reasoning that the Mexican authorities did not keep a reasonable proportionality between the interest protected (the environment) and the protection of the investor's rights (as Tecmed was deprived of operating the landfill and lost thereby its investment).⁷⁰⁴ The tribunal noted that regulatory administrative actions are not *per se* excluded from the BIT scope of protections, even if they are beneficial to the society as a whole—such as environmental protection measures.⁷⁰⁵

- 5.64. As in *Tecmed*, Respondent's conduct here fails to find any justification in the use of its regulatory power. It is evident that in or around 2013 Respondent determined that its Bole Arabsa and Yeka Abado condominium developments were going to draw on the same water resources as ETIZ.⁷⁰⁶ It was further apparent that the water resources in place would be insufficient to support both projects and also guarantee water to other competing uses, such as the town of Sendafa and to Addis Ababa.⁷⁰⁷ Because it had already commenced construction of its Condominium Project, Respondent chose to allocate its water resources to that project instead of ETIZ. Thus, although Respondent's choice came about from the exercise of its regulatory power to protect and allocate its natural resources, the choice was governed "by a preference for other investments over the foreign-owned investment."⁷⁰⁸ Moreover, Ethiopia carried out that exercise of regulatory power in a secretive and deceitful fashion. It concluded that it preferred the Condominium Project and determined that it would need to find a new site for ETIZ, but instead of forthrightly communicating that to Akgun, Ethiopia concealed that decision and sent Akgun on a pointless odyssey to address supposed EIA deficiencies that would do nothing to resolve the water scarcity problem Ethiopia had created with its competing Condominium Project.⁷⁰⁹ Thus, Ethiopia's exercise of

⁷⁰³ *Id.*, ¶ 45.

⁷⁰⁴ *Id.*, ¶ 166.

⁷⁰⁵ *Id.*, ¶ 121.

⁷⁰⁶ *Supra* Section 2.E.ii.

⁷⁰⁷ *Supra* Section 2.E.iii.

⁷⁰⁸ **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 307.

⁷⁰⁹ *Supra* Sections 2.F.ii - 2.G; see Whittington Report, ¶ 6.31.

regulatory power here cannot excuse its frustration of Akgun's legitimate expectations.

- 5.65. Nor did Ethiopia comply with its obligation to search “ways and means to satisfy in a balanced way”⁷¹⁰ its environmental responsibility with its commitments to Akgun. Although Ethiopia admitted its siting error internally,⁷¹¹ and then later in meetings with Akgun,⁷¹² it never followed through on offering a suitable alternative site for Akgun to implement ETIZ.
- 5.66. Finally, here, there is no danger of creating any sort of chilling effect on a state's exercise of regulatory power by concluding that Ethiopia frustrated Akgun's legitimate expectations. To the contrary, a decision here that Ethiopia frustrated Akgun's expectations would encourage Respondent to exercise its regulatory powers in a more forthright fashion in contrast to how it treated Akgun.
- 5.67. Respondent suggests that Akgun's agreement to obtain an EIA for ETIZ upon the request of the Mol constitutes an acknowledgement of Ethiopia's ability to exercise regulatory authority and thus precludes Akgun's claims.⁷¹³ The tribunal in *Metalclad* faced a similar argument and rejected it, concluding that the performance of the act of applying for a municipal permit, in circumstances where it was doubtful that such a permit was contemplated or required, but as a matter of pragmatism, is not an acknowledgement of municipal authority.⁷¹⁴ Thus, Akgun's agreement to perform an EIA cannot be weaponized against it or used as a defense to Respondent's FET violation.
- 5.68. Respondent also deploys a novel argument concerning its regulatory authority, asking this Tribunal to adopt a form of the “*Chevron* deference” doctrine that courts in the United States employ in cases dealing with the

⁷¹⁰ **CLA-030**, *Gold Reserve v. Venezuela*, ¶ 595.

⁷¹¹ **C-128**, Letter from Addis Ababa Water & Sewerage Authority to Ministry of Water, Irrigation and Energy et al. dated 16 May 2014; **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible]; **C-130**, Letter from Mayor of Addis Ababa City to Prime Minister dated 3 July 2014.

⁷¹² Yusuf Akgun 1st Statement, ¶¶ 5.20-5.22; **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014; **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014.

⁷¹³ SoD, ¶¶ 294-295.

⁷¹⁴ **CLA-033**, *Metalclad v. Mexico*, ¶¶ 87-90.

propriety of a federal agency's interpretation of a statute that it administers.⁷¹⁵ Under Respondent's view, *Chevron* deference should apply here to leave a presumption that a state's exercise of authority is proper. There is no support for Respondent's position, and it makes no sense to apply it here either.

- 5.69. The *Chevron* deference doctrine emanates from the constitutionally mandated separate status and responsibilities of the legislative, judiciary, and executive branches of the United States government.⁷¹⁶ Under *Chevron* deference, the judicial branch does not supplant the interpretive judgment of executive branch agencies without good reason.⁷¹⁷ This rule is of no aid to Respondent. First, the rationale for applying that rule here is nonsensical because there is no question of ambiguous statutory interpretation at issue in Respondent's conduct. Second, even if the principle of *Chevron* deference is treated more abstractly as a rule that dictates deferring to state regulatory decisions, it would still be inapt. If international tribunals were to adopt such a rule and automatically defer to state regulatory decisions, this would undermine the purpose of the protections that inhere within and form the foundation of BITs. The promise of a neutral arbitral forum is that it will not side with a state simply because of its status as such. Moreover, adopting *Chevron* deference in the form that Respondent proposes would convert the FET standard into something akin to a "shock the conscience" test. As discussed above, even the cases that employ a minimum standard of treatment under customary international law to define the FET standard do not employ so restrictive an interpretation as Respondent suggests.

⁷¹⁵ SoD, ¶ 222; see **RLA-27**, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

⁷¹⁶ See **RLA-27**, *Chevron v. NRDC*, 468 U.S., ¶ 865 ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

⁷¹⁷ *Id.*, ¶ 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

- 5.70. In any event, a certain type of deference is already afforded to the exercise of regulatory power by virtue of the principle of proportionality discussed above; there is no need to extend that principle any further.⁷¹⁸ Thus, the Tribunal should decline Respondent's invitation to employ its novel interpretation of *Chevron* deference to the question of its use of regulatory power in this case.
- 5.71. In sum, Ethiopia's exercise of regulatory power was not proportional to the damage that it wrought.

**b. Respondent Acted Non-Transparently and Inconsistently
in Violation of the FET Standard**

- 5.72. Transparency and consistency are also key elements of the FET standard, and Respondent also violated the FET standard on these grounds.
- 5.73. "Transparency means that the legal framework for the investor's operations is readily apparent and that any decision affecting the investor can be traced to that framework."⁷¹⁹ The *Metalclad* tribunal concluded that the transparency requirement includes:

... the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.⁷²⁰

- 5.74. The *Tecmed* tribunal likewise concluded that in accordance with the FET standard, an investor may expect 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

⁷¹⁸ **RLA-11**, *S.D. Myers v. Canada*, ¶ 263.

⁷¹⁹ **CLA-071**, *Micula v. Romania*, ¶ 530 (quoting R. Dolzer & C. Schreuer, *Principals of International Investment Law* (2008), pp. 133-134 (citing the UNCTAD Series on Issues in International Investment Agreements, Fair and Equitable Treatment (1991), p. 51)).

⁷²⁰ **CLA-033**, *Metalclad v. Mexico*, ¶ 76.

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 commitments as well as to plan and launch its commercial and business activities.⁷²¹

- 5.75. Numerous other tribunals have affirmed that the FET standard entails an obligation for the host state to act with consistency and transparency towards a foreign investor.⁷²²
- 5.76. Akgun's case is like the claims in *Metalclad*, *Bilcon* and *MTD*, in each of which the tribunal concluded that the host state had violated the FET standard with its non-transparent and/or inconsistent conduct.
- 5.77. In *Metalclad*, Mexican federal authorities licensed a waste facility that Metalclad was constructing.⁷²³ The federal officials provided assurances that this federal license was all that the company would need to operate the facility.⁷²⁴ Later, municipal authorities claimed that Metalclad also needed a municipal license.⁷²⁵ Metalclad was told that the easiest and best way forward was to submit to this municipal licensing process.⁷²⁶ Ultimately, the municipal license was denied for purported environmental reasons and the project never operated.⁷²⁷ The panel was concerned by the lack of transparency in this process. The panel was also persuaded by the fact that Metalclad started constructing the landfill and did this openly and continuously with full

⁷²¹ **CLA-006**, *Tecmed v. Mexico*, ¶ 154.

⁷²² **CLA-049**, *Lemire v. Ukraine*, ¶ 284 (concluding that the FET standard includes the obligation to act transparently); **CLA-007**, *LG&E v Argentina*, ¶¶ 128, 131 (concluding that the FET standard includes the obligation to act transparently); **CLA-051**, *Bilcon of Delaware, Inc. et al. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon v. Canada*"), ¶ 602 (concluding that FET includes the obligation to act consistently); **CLA-012**, *Garanti Koza v. Turkmenistan*, ¶¶ 381-383 (concluding that FET includes the obligation to act consistently); **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 307 (FET includes the obligation to act consistently, to act transparently and to refrain from arbitrary and discriminatory behavior).

⁷²³ **CLA-033**, *Metalclad v. Mexico*, ¶¶ 28-30.

⁷²⁴ *Id.*, ¶¶ 32-35.

⁷²⁵ *Id.*, ¶¶ 40-42.

⁷²⁶ *Id.*

⁷²⁷ *Id.*, ¶¶ 47-52, 56.

knowledge of all government officials for a lengthy period (13 months) before this licensing problem arose.⁷²⁸

- 5.78. Like the claimant in *Metalclad*, Akgun received the licenses and permits to implement its investment. It discussed the project in detail with Ethiopia over the course of several years and commenced construction of the project before Ethiopia requested that Akgun submit an EIA. As in *Metalclad*, Akgun was reassured that the EIA was not an impediment to the project and as in *Metalclad*, Akgun carried out its work on ETIZ openly and continuously, and even with Respondent's specific urging and instruction. Yet, as in *Metalclad*, Akgun's project was terminated, reflecting a lack of transparency in the set of expectations that Respondent now says it had for Akgun's compliance with its environmental laws. Moreover, that termination occurred for reasons that Ethiopia discussed internally—it needed the water for its residential developments—but did not fully disclose to Akgun. Thus, Respondent's conduct here was even more opaque than Mexico's conduct in *Metalclad*.
- 5.79. The decision in *Bilcon* also supports Akgun's claim for FET violation. *Bilcon* involved the claims against Canada of an investor that had sought to develop a stone quarry and marine terminal, which the Canadian government had repeatedly encouraged and the claimant had committed to operate in an environmentally sound manner in accordance with all local and federal environmental laws.⁷²⁹ Despite its efforts to comply with the standard development requirements and environmental assessments, the claimant was subjected to additional, unwarranted bureaucratic standards and processes that resulted in cancellation of the project. In finding for the claimant, the *Bilcon* tribunal focused on the repeated encouragements that the investor received from the host state:

In the present case, there were very clear, repeated encouragements by authorities of Nova Scotia that Bilcon was welcome to pursue its coastal quarry and marine terminal project, including at the specific Whites Point location. All the relevant encouragement was in the context of Bilcon being required to present a project that would comply with federal and provincial laws concerning the environment. There was no indication in either the encouragements from government or in the laws themselves that the Whites Point area was a “no go” zone

⁷²⁸ *Id.*, ¶¶ 87, 90.

⁷²⁹ **CLA-051**, *Bilcon v. Canada*, ¶¶ 8-10.

for projects of the kind Bilcon was pursuing, regardless of their individual environmental merits, carefully and methodically assessed.⁷³⁰

The tribunal concluded that Canada's decision to initially promote the project site and then later designate the investment site as a "no-go" zone violated the claimant's rights:

[I]t was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a "no go" zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.⁷³¹

- 5.80. In arriving at its conclusion, the tribunal specifically addressed, and disposed of, the argument that environmental regulation could excuse poor treatment of foreign investors:

Environmental regulations, including assessments, will inevitably be of great relevance for many kinds of major investments in modern times. The mere fact that environmental regulation is involved does not make investor protection inapplicable. Were such an approach to be adopted—and States Parties could have chosen to do so—there would be a very major gap in the scope of the protection given to investors.⁷³²

- 5.81. Similarly here, the facts show that Ethiopia selected and promoted the area where Akgun was to develop ETIZ, Akgun expended significant time, effort, and expense to commence that development, and Akgun promised to operate ETIZ in an environmentally friendly fashion and attempted to satisfy Ethiopia's demands for an environmental assessment.⁷³³ But like Canada's conduct in *Bilcon*, Ethiopia here allowed its residential development policy to eclipse its obligation to Akgun and ultimately designated the Legedadi watershed a "no-go" zone for ETIZ, preventing Akgun from developing ETIZ on that site and failing to offer a suitable alternative site to Akgun. Moreover, the *Bilcon*

⁷³⁰ *Id.*, ¶ 589.

⁷³¹ *Id.*, ¶ 592.

⁷³² *Id.*, ¶ 597.

⁷³³ *Supra* Sections 2.A.ii, 2.A.iii, 2.B.ii, 2.F.ii; Yusuf Akgun 1st Statement, ¶¶ 4.22-4.28, 5.1-5.4.

tribunal's observations concerning environmental regulation squarely apply here: Respondent very broadly invokes its environmental regulations to evade liability here but allowing it to do so would strip investors such as Akgun of the protections that the Treaty promises.

- 5.82. Finally, in *MTD*, the tribunal determined that it was unreasonable, and thus contrary to its FET obligation, for the respondent to have approved an investment via one authority when a separate authority later declared the investment to be contrary to its urban development policy and thus likely to be frustrated.⁷³⁴ In particular: "Approval 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."⁷³⁵ The tribunal highlighted the "inconsistency of action between two arms of the same Government *vis-à-vis* the same investor even when the legal framework of the country provides for a mechanism to coordinate."⁷³⁶ In the tribunal's view, Chile—with all its organs and entities considered as a "monolith"—had "an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is."⁷³⁷
- 5.83. Indeed, inconsistent governmental messages, such as those at issue in *MTD*, are frequently held to violate the FET standard requiring transparency and consistency. For instance, in *Arif*, the tribunal attached weight to the fact that different state entities took different positions with respect to the legality of the claimant's investment.⁷³⁸ Whereas several agencies endorsed and encouraged the claimant's investment, Respondent's courts eventually found the investment to be illegal.⁷³⁹ Similarly, in *PSEG*, the tribunal determined that the host state breached its FET obligation by subjecting the investor to "roller-coaster" effects, such as changes in the "attitudes and policies of the administration."⁷⁴⁰ In *Crystallex*, the tribunal concluded that transparency is linked to "the concept of consistency, which requires that 'one arm of the state

⁷³⁴ **CLA-046**, *MTD v. Chile*, ¶ 163.

⁷³⁵ *Id.*

⁷³⁶ *Id.*

⁷³⁷ *Id.*, ¶¶ 165-166.

⁷³⁸ **CLA-019**, *Arif v. Moldova*, ¶¶ 547, 555(f).

⁷³⁹ *Id.*

⁷⁴⁰ **CLA-037**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 ("*PSEG v. Turkey*"), ¶¶ 250-255.

cannot [...] affirm what another arm denies to the detriment of a foreign investor.”⁷⁴¹

- 5.84. Similarly, the tribunal in *Deutsche Telekom* concluded that a state violates the FET standard when it conceals its true intentions from the investor about the fate of its project:

The lack of transparency and forthrightness is manifest. The Indian authorities continued acting as if the project were on track and it was business as usual, when in fact the contract had been annulled. As a result, DT and Devas continued to take active steps towards the realization of the project. In other words, after the annulment was decided, Devas and DT were affirmatively misled and made to believe that the project was alive when in fact it was dead.⁷⁴²

- 5.85. Here, Akgun received inconsistent messages from Ethiopian authorities that masked Respondent’s conclusion that ETIZ would not proceed at the designated site.⁷⁴³ Those authorities first began to entice and encourage Akgun to develop ETIZ in 2008 and continued to laud the project and proclaim their support throughout the succeeding years.⁷⁴⁴ That positive attitude towards the project continued unabated until late 2013, when powerful authorities from Addis Ababa began to protest the ETIZ location.⁷⁴⁵ Throughout 2014, Akgun received conflicting messages from Ethiopian authorities, as the Mol both told it to cease work and then encouraged it to continue its work and then told it to cease work again, the environmental authorities told Akgun they would never approve ETIZ at its designated site, and the prime minister’s and president’s offices, in contrast, continued to encourage Akgun to proceed with ETIZ.⁷⁴⁶ Even after the prime minister’s office sided with the Addis Ababa and environmental authorities’ conclusion to move ETIZ in order to safeguard the Condominium Project, the Mol

⁷⁴¹ **CLA-036**, *Crystallex v. Venezuela*, ¶ 579 (quoting *EnCana Corporation v. Republic of Ecuador*, Award, 3 November 2006, ¶ 158).

⁷⁴² **CLA-053**, *Deutsche Telekom v. India*, ¶ 387.

⁷⁴³ *Supra* Section 2.E.ii.

⁷⁴⁴ *Supra* Sections 2.A.i – iii, 2.B.i.b, 2.B.ii.

⁷⁴⁵ *Supra* Section 2.D.i.

⁷⁴⁶ *Supra* Section 2.E.ii.

concealed that decision from Akgun and instead encouraged Akgun to keep working on the EIA for the ETIZ site.⁷⁴⁷

- 5.86. These facts are a paradigmatic example of the “roller-coaster” effects and contradictory messages from different arms of the state that constitute non-transparent and inconsistent treatment in violation of the FET standard. Indeed, the entire process that surrounded Respondent’s request from Akgun for an EIA was suffused with non-transparency and inconsistency. Ethiopia failed to tell Akgun that it was pursuing another project that would compete for the same water supply as ETIZ, it failed to deliver a consistent message to Akgun concerning the importance and scope of the EIA it expected, it failed to tell Akgun that the EIA could lead it to suspend the project that Akgun had already commenced, it failed to keep Akgun abreast of the ongoing debate among its federal, state and municipal officials concerning the fate of ETIZ that the EIA prompted, and it failed to communicate its decision to move ETIZ because no EIA would be capable of resolving the resource allocation conflict it had identified.
- 5.87. Ethiopia’s environmental laws and the way Respondent administers those laws further reflect this lack of transparency and consistency. Respondent argues that the requirements of its environmental laws, and in particular its EIA proclamation, would have been clear and straightforward to a foreign investor such as Akgun and that they were universally applied, but that is wrong for several reasons.
- 5.88. First, the EIA Proclamation is not facially applicable to any project at all until there is a “directive” issued pursuant to Art. 5 of the Proclamation. The only directive of record, upon which Respondent itself relies, is the Directive No. 1/2008, which Respondent has been compelled to admit was never signed or published.⁷⁴⁸ Prof. Tekle explains that the effect of Directive No.1/2008 having been left unsigned is that it is ineffective as a matter of law:

Although the 2008 Directive purports to implement Article 5 of the EIA Proclamation by listing projects subject to the EIA requirement, the EPA never adopted it, so it is without legal effect. The Chairperson of the Environmental Council of Ethiopia (the then-Prime Minister of Ethiopia Mr. Meles Zenawi)’s name appears typewritten on the 2008 Directive

⁷⁴⁷ *Supra* Section 2.E.iii.

⁷⁴⁸ **C-100**, Respondent’s Responses to Claimant’s Stern Schedule, Response to Request 1.

for signature; he should have dated and signed the document as required to adopt it. He did not. In fact, it is my understanding from Claimant's Counsel that Ethiopia has admitted that no government official ever signed the 2008 Directive. I also note that Ethiopia's legal expert, Dr. Anabo, does not list the 2008 Directive in his description of the applicable environmental regulatory framework. The 2008 Directive therefore remains a mere draft document without legal effect.⁷⁴⁹

5.89. As a result, a foreign investor such as Akgun would have been unable to determine whether its project fell within the ambit of the EIA Proclamation, or whether the EIA Proclamation was at all effective without any accompanying directive to specify its effect.

5.90. Further, the Ethiopian environmental laws during the time at issue were inconsistently applied, due in part to gaps in the laws, in part to bureaucratic confusion and discretion, and in part, to disinterest.

5.91. The Ethiopian government created this environment of confusion, as Prof. Tekle explains in his report:

Generally, in practice during the 2010-2015 period, the governing bodies did not properly follow and implement the EIA-related laws. Instead, the EPA and regional environmental agencies often unduly delegated their substantive mandate to evaluate EIA reports to sectoral agencies, such as the Ministry of Industry or Investment Agency. These agencies to which the EPA delegated EIA assessment obligations often acted according to their own discretion at the expense of the environment.⁷⁵⁰

5.92. Prof. Tekle's observation is clearly evidenced here, as Respondent has admitted that it failed to perform EIAs for the Condominium Projects that it chose to construct instead of allowing ETIZ to proceed.⁷⁵¹

5.93. The self-interested acts of various governmental agencies pursuing their respective agendas without regard to the EIA Proclamation amplifies this sort of inconsistency:

⁷⁴⁹ Tekle Report, ¶ 2.10.

⁷⁵⁰ Tekle Report, ¶ 2.27.

⁷⁵¹ **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9.

Government officials tended to prioritize investment promotion over environmental protection and issued permits or allowed project commencement without fulfillment of EIA requirements.⁷⁵²

5.94. This is the precise sort of “balkanization” of government agency interests that Prof. Whittington explains a properly administered set of EIA laws is intended to prevent.⁷⁵³

5.95. Moreover, the requirements for EIA consultants were an additional source of confusion. As Prof. Tekle explains:

Although the EIA Proclamation states that “experts that meet the requirements specified under any directive issued by the [EPA]” should undertake EIA, the EPA had not issued any such directive during the 2010 to 2015 timeframe. Thus, there was no licensing requirement under Ethiopian law for conducting EIAs during the relevant period. But only local, Ethiopian firms involving experts across all applicable disciplines were considered competent to undertake them.⁷⁵⁴

5.96. Any investor attempting to comply with these requirements would be therefore left utterly puzzled by whether the consultant it sought to hire would be deemed acceptable and in compliance with the EIA Proclamation.

5.97. Thus, Respondent violated FET by creating an environment with opaque legal and regulatory requirements, which it inconsistently applied. The hash of confusion arising from the conflicting agendas among Respondent’s authorities is manifest in Ethiopia’s treatment of Akgun, which constitutes a violation of the FET standard.

c. Respondent Acted Arbitrarily in Violation of the FET Standard

5.98. Finally, Respondent violated its FET obligations by treating Akgun arbitrarily.

⁷⁵² Tekle Report, ¶ 2.27.

⁷⁵³ Whittington Report, ¶ 5.30.

⁷⁵⁴ Tekle Report, ¶ 2.35.

- 5.99. There is no dispute that behavior that is arbitrary or discriminatory constitutes a violation of the FET standard.⁷⁵⁵ Even the narrower, NAFTA-based conception of the FET standard incorporates this concept: "... the minimum standard of treatment of fair and equitable treatment is infringed by conduct ... [that] is arbitrary, grossly unfair, unjust or idiosyncratic, [or] discriminatory...."⁷⁵⁶
- 5.100. *Bilcon* and *MTD*, the facts of which are discussed in Section 5.A.iii.b above, are again informative on the issue of arbitrary and unfair conduct.
- 5.101. In *Bilcon*, the tribunal concluded that the claimant "was denied a fair opportunity to know the case it had to meet" in submitting its environmental assessment because the state included in its consideration an "overriding factor" of "community core values" over which the claimant had no control.⁷⁵⁷ The tribunal concluded that this effectively precluded claimant's project from succeeding, "even if Bilcon showed in each and every respect mentioned in the EIS Guidelines that the project would, after mitigation, likely have no significant adverse effects on environmental, social and economic conditions."⁷⁵⁸ As a result, the tribunal concluded that the respondent's conduct was arbitrary and therefore violated the FET standard.⁷⁵⁹
- 5.102. In *MTD*, Chile's investment commission approved the claimant's real estate development project and signed a contract for the project, but other Chilean agencies did not allow it to be developed because of conflicting urban planning concerns.⁷⁶⁰ The tribunal granted relief under FET principles, stating "approval of an investment by the [investment commission] for a project that is against the urban policy of the Government is a breach of the obligation to treat an

⁷⁵⁵ **CLA-071**, *Micula v. Romania*, ¶ 522; **CLA-114**, *CMS v. Argentina*, ¶ 290 ("Any measure that might involve arbitrariness or discrimination is in itself contrary to [the FET standard]."); **CLA-036**, *Crystallex v. Venezuela*, ¶¶ 577-578 ("conduct that is arbitrary is contrary to FET" ... "excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision-maker"); **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶ 420 (defining FET to include the obligation to refrain from arbitrary and discriminatory behavior, in particular to comply with the principles of due process in its administrative decision-making and an obligation to act in good faith); **CLA-016**, *Rumeli v. Kazakhstan*, Award, ¶ 681; **CLA-046**, *MTD v. Chile*, ¶¶ 114-115; **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶ 309; **CLA-037**, *PSEG v. Turkey*, ¶ 240.

⁷⁵⁶ **CLA-112**, *Waste Management v. Mexico*, ¶ 98.

⁷⁵⁷ **CLA-051**, *Bilcon v. Canada*, ¶¶ 452-453, 590.

⁷⁵⁸ *Id.*

⁷⁵⁹ *Id.*, ¶ 591.

⁷⁶⁰ **CLA-046**, *MTD v. Chile*, ¶¶ 40-42, 53-54, 74-75, 80-82.

investor fairly and equitably.”⁷⁶¹ The tribunal focused on the fact that the state approved the investment for a particular location and then attempted to use its policy decisions to defend cancelling the project:

... what is unacceptable for the Tribunal is that an investment would be approved for a particular location specified in the application and the subsequent contract when the objective of the investment is against the policy of the Government. Even accepting the limited significance of the Foreign Investment Contracts for purposes of other permits and approvals that may be required, they should be at least in themselves an indication that, from the Government’s point of view, the Project is not against Government policy.⁷⁶²

- 5.103. The decision in *MTD* is in accord with *Tecmed*, where the tribunal concluded that the state’s actions were prejudicial to the investor because the state had, on the one hand, reassured the claimant that it could operate its landfill project on its designated site until it was relocated to new land, but on the other hand, denied the claimant’s license renewal to operate and effectively terminated the project.⁷⁶³
- 5.104. These cases therefore establish the proposition that where a state tells an investor that it can do a particular project at a particular location but then reverses that decision for political reasons unrelated to the investor, then this constitutes unfair and arbitrary conduct for which treaty compensation is appropriate.
- 5.105. Here, Respondent concealed the reason that it suspended the ETIZ project and kept rejecting Akgun’s EIA. Respondent failed to disclose, until much later, that it had made a mistake in selecting the land it had allocated to Akgun. Respondent made political decisions that were unrelated to anything Akgun did or could have done. First, Respondent hatched an urban development plan that situated the Condominium Project, which comprised 35,000 units, in the region that would draw on the same water resources as ETIZ. Second, when it became apparent that the water resources could not sustain both the Condominium Project and ETIZ, Respondent opted for the residential development instead of the ETIZ industrial development. Third, Respondent

⁷⁶¹ *Id.*, ¶ 166.

⁷⁶² *Id.*, ¶ 189.

⁷⁶³ **CLA-006**, *Tecmed v. Mexico*, ¶¶ 164-166, 172.

concluded that there were no mitigative measures that Akgun could employ in constructing ETIZ that would resolve its concerns about the water resources. Each of these decisions were out of Akgun's control. These acts, in combination with Respondent's designating the site and encouraging Akgun to develop ETIZ on that site before reversing course, subjected Akgun to an unfair and arbitrary decision-making process concerning the ETIZ site.

- 5.106. Furthermore, Respondent acted in a grossly unfair fashion by offering numerous conflicting messages to Akgun about the status of its project over the course of more than a year. At times, Respondent encouraged Akgun to continue and at other times it told Akgun that its work on ETIZ must cease. It suggested Akgun could proceed with ETIZ if Akgun revised its EIA, but when Akgun provided revisions, it set Akgun the impossible task of detailing water treatment data for factories that had not yet been established within ETIZ and it concealed its decision to move ETIZ. It told Akgun that it had made a mistake and would provide a replacement site but failed to offer an adequate replacement.
- 5.107. Finally, in further violation of the FET standard, Respondent's actions were both discriminatory towards Akgun and lacked adequate due process. Although Respondent's Directive No. 1/2008 purportedly required an EIA for both "Industrial Zone[s]" and "Condominium construction" alike, Respondent suspended ETIZ in the name of EIA but not its Condominium Project,⁷⁶⁴ even though Respondent has admitted that no EIA at all was submitted for the Condominium Project.⁷⁶⁵ Indeed, Respondent's officials admitted to Akgun that ETIZ was subject to "sabotage" in favor of the Condominium Project, which, unlike ETIZ, involved local developers.⁷⁶⁶ Thus, Respondent's conduct was discriminatory.
- 5.108. Likewise, its treatment of Akgun lacked due process. Respondent's EIA Proclamation required the EPA to make a decision with regard to ETIZ's EIA within fifteen working days.⁷⁶⁷ Respondent, however, suspended and then

⁷⁶⁴ **C-016**, Suspension Letter; **C-082**, Review Comments on ITU Supplement; **C-127**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 6 February 2014; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014.

⁷⁶⁵ See *supra* ¶¶ 2.73, 2.128, 2.155; **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9; Whittington Report, ¶¶ 6.21-6.22, 6.30.

⁷⁶⁶ See Yunus Akgun 1st Statement, ¶¶ 7.7, 7.9; Yusuf Akgun 1st Statement, ¶ 5.20.

⁷⁶⁷ Tekle Report, ¶ 2.63.

deferred development of ETIZ until that suspension became permanent, without genuinely considering the water treatment plan that Akgun submitted.⁷⁶⁸ Moreover, in contrast with international best practices, Ethiopian law affords no true relief to those whom the EPA or MoEF aggrieves with their decision-making.⁷⁶⁹ The aggrieved investor may appeal the EPA's decision only to the EPA.⁷⁷⁰ The EIA Proclamation does not create a private right of action for investors to address any anomalies in the EPA's process or decisions.⁷⁷¹ Respondent's failure to meaningfully consider the water treatment plan in the EIA or provide a formal decision on Claimant's EIA, and its refusal to provide any meaningful avenue for aggrieved investors to appeal an unfavorable EIA assessment, taken together, amount to a denial of due process. For these additional reasons, Respondent violated its FET obligation to Akgun.

5.109. In sum, Respondent's conduct subjected Akgun to a grossly unfair and arbitrary decision-making process, constituting a violation of the FET standard for which Respondent is liable.

B. Respondent Breach Its Non-Impairment Obligation

5.110. In the Statement of Claim, Akgun asserted that Respondent violated its obligation to refrain from impairing Akgun's investment,⁷⁷² which is an obligation that arises from the Treaty's mandate that Ethiopia shall not "impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments."⁷⁷³

⁷⁶⁸ See, e.g., **C-105**, Memorandum dated 3 April 2014, p. 1 (noting that the project should be relocated only "in an event where it is impossible to undertake a measure that can withstand the impacts" and that the "comments" at that time "d[id] not signify" as much, such that the matter should be referred to the Ministry of Environment and Forestry Development "for proper resolution to this end"), p. 3 (assuming that no "effluent treatment technology can[] guarantee [one] hundred percent filtration"), p. 14 (noting that even if the EIA were perfect "the co-existence of the [Legedadi dam and ETIZ]" would be "impossib[le]"). See *also* Yusuf Akgun 1st Statement, ¶¶ 5.23-5.26; Yunus Akgun 1st Statement, ¶ 7.14, 8.2.

⁷⁶⁹ Tekle Report, ¶ 2.23.

⁷⁷⁰ *Id.*, ¶ 2.23 & footnote 88.

⁷⁷¹ *Id.*

⁷⁷² SoC, ¶¶ 5.67-5.69.

⁷⁷³ **CLA-001**, Turkey-Ethiopia BIT, Art. II(2).

- 5.111. Respondent replies with only a single paragraph that does not contest this obligation or cite any legal authority concerning the claim and relies solely on its faulty defenses against Akgun's FET claims.⁷⁷⁴
- 5.112. For the same reasons stated in the Statement of Claim and above regarding Claimant's FET claim, Respondent has breached its non-impairment obligation to Akgun and is consequently liable for damages to Akgun.⁷⁷⁵

C. Respondent Expropriated Claimant's Investment

(i) Respondent Fails to Rebut Claimant's Case with Its Ambiguous Arguments Lacking Legal Support

- 5.113. Respondent's briefing falls far short of the standards set forth in the UNCITRAL Arbitration Rules and this Tribunal's Procedural Order No. 1.
- 5.114. Art. 21 of the UNCITRAL Rules provides the requirements for statements of defense. Among other things, it commands respondents to reply to the Claimant's "legal grounds or arguments supporting [its] claim[s]."⁷⁷⁶
- 5.115. Procedural Order No. 1 adopts the "Memorial system" for this arbitration and includes certain requirements for the parties' written submissions. Specifically, it requires such submissions—including Respondent's Statement of Defense—to "set out in sufficient detail the factual and legal basis for each party's case."⁷⁷⁷ As a result, the Tribunal "will treat the Memorials as containing each Party's best case on fact and law at the time of the exchange."⁷⁷⁸
- 5.116. Yet, Respondent's Statement of Defense neither replies to Claimant's "legal grounds or arguments" nor "set[s] out in sufficient detail the factual and legal basis for [Respondent]'s case." In Claimant's section on expropriation, it relies on twenty-two legal authorities to explain issues such as: indirect expropriation; creeping expropriation; the dominance of the sole effects test; measures giving rise to expropriation; and whether such measures include

⁷⁷⁴ SoD, ¶ 333.

⁷⁷⁵ SoC, ¶¶ 5.67-5.69.

⁷⁷⁶ UNCITRAL Arbitration Rule (as revised in 2010), Art. 21(2) (requiring that a statement of defense "reply to the particulars (b) to (e) of the statement of claim (Art. 20, ¶ 2)"), Art. 20(2)(e) (requiring the following particular for the claimant's statement of claim: "The legal grounds or arguments supporting the claim").

⁷⁷⁷ Procedural Order No. 1, ¶ 10.1.

⁷⁷⁸ *Id.*, ¶ 10.2.

inaction or omissions.⁷⁷⁹ By contrast, in Respondent's six-paragraph explanation of the law applicable to expropriation, it relies on six legal authorities to describe direct expropriation, which is not at issue here, and to argue that the sole effects test for indirect expropriation requires a "substantial deprivation" in this case because it involves a "regulatory taking."⁷⁸⁰

- 5.117. Given Respondent's general failure to rebut Claimant's authorities, it appears that Respondent accepts Claimant's statement of the law applicable to indirect expropriation—in particular, that the sole effects test applies to the exclusion of all other considerations—except to specify that the standard is raised for a regulatory taking. Respondent acknowledges as much when it states that "much of the dispute [between the parties] pertains only to the application of these principles to the present facts."⁷⁸¹
- 5.118. Respondent's expropriation discussion section does not augment or clarify the legal basis of its counterarguments. In fact, that section includes but one reference to legal authority on expropriation (and even then only to quote a provision from Claimant's Statement of Claim).⁷⁸² Nevertheless, in it, Respondent vaguely and without providing explanation or support asserts that Claimant's expropriation claims fail for its alleged "failure to show and prove" "a series of illegitimate or arbitrary regulatory or other state measures," "that the EIA requirement was unlawfully imposed," "that the rejection of the EIA was pretextually rendered," and "any plausible and illegitimate expropriatory intent, motive or purpose."⁷⁸³
- 5.119. This it cannot do. Having failed to challenge Claimant's statement of the standard for indirect expropriation, Respondent cannot graft four additional requirements onto that standard in one throwaway sentence and without explanation or legal authority.
- 5.120. Respondent's failure to connect its authorities to its arguments makes it difficult to understand where in the analysis Respondent's arguments belong. Indeed, much of Respondent's argument is framed as an attack on whether Claimant held an investment capable of being expropriated in the first place, because Respondent "submits"—yet again, with no cite to legal authority—

⁷⁷⁹ SoC, ¶¶ 5.4-5.20.

⁷⁸⁰ SoD, ¶¶ 202-207.

⁷⁸¹ *Id.*, ¶ 207.

⁷⁸² *Id.*, ¶¶ 244-288.

⁷⁸³ SoD, ¶ 288.

“that the inquiry into whether the balance of rights and obligations contained in the Agreement itself would have had a determinable and ascertainable positive economic value to the Claimant is a more exacting one than the Tribunal’s inquiry into whether the Agreement constituted an investment for purposes of jurisdiction.”⁷⁸⁴

- 5.121. Because of Respondent’s near complete failure to explain a legal basis for its arguments in violation of the UNCITRAL Rules and Procedural Order No. 1, its arguments are opaque. Claimant nevertheless endeavors to reply to those arguments. But Claimant reserves its right to request further briefing as seemingly envisioned under section 10.4 of Procedural Order No. 1 to the extent necessary upon review of Respondent’s Rejoinder.

(ii) Claimant Held Multiple Investments Capable of Being Expropriated

- 5.122. In its Statement of Claim⁷⁸⁵ and again at Section 3.A herein, Claimant demonstrates that it held investments as defined in the BIT, and therefore, that this Tribunal has jurisdiction over the dispute. Such investments include Claimant’s rights to develop ETIZ under the 2012 Agreement, materials and equipment needed to perform the 2012 Agreement, and its know-how needed to develop ETIZ. Each of these investments was capable of being expropriated.

a. Claimant’s Rights in the 2012 ETIZ Agreement Were an Investment Capable of Being Expropriated

- 5.123. Focusing solely on Claimant’s investment constituting its rights in the 2012 ETIZ Agreement, Respondent reframes its jurisdictional objection of a lack of investment as a merits-based defense to Claimant’s expropriation claim.⁷⁸⁶ Just like its jurisdictional objection, this argument fails.
- 5.124. First, Respondent’s argument has no basis under the BIT. Respondent “submits that the inquiry into whether the balance of rights and obligations contained in the Agreement itself would have had a determinable and ascertainable positive economic value to the Claimant is a more exacting one than the Tribunal’s inquiry into whether the Agreement constituted an

⁷⁸⁴ *Id.*, ¶ 245.

⁷⁸⁵ SoC, Section 3.

⁷⁸⁶ SoD, ¶ 245.

investment for purposes of jurisdiction.”⁷⁸⁷ Claimant “submits” that Respondent is wrong.

- 5.125. Respondent’s bald submission ignores the plain language of the BIT, which protects all “investments” from expropriation without heightening the requirements as to the investment’s economic value. Art. IV provides in relevant part,

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 and the general principles of treatment provided for in the Article III of [the BIT].⁷⁸⁸

- 5.126. Indeed, Art. IV references the “value” of the expropriated asset only in conjunction with the prescribed “compensation” due when an expropriation in fact occurs.⁷⁸⁹ As such, the issue of economic damage to Claimant arising from Respondent’s expropriation is not a requirement for a finding of expropriation under the BIT.⁷⁹⁰ Nor is a finding of economic benefit to Respondent a prerequisite.⁷⁹¹

- 5.127. Thus, as long as Claimant’s rights in the 2012 ETIZ Agreement constitute an “investment,” they are capable of being expropriated and protected from expropriation under the BIT. Claimant already demonstrated first in its Statement of Claim⁷⁹² and again herein at Section 3 that this Tribunal has jurisdiction over this dispute, which necessarily included an analysis of Claimant’s “investments.” Claimant will not repeat that analysis here except to

⁷⁸⁷ *Id.*, ¶ 245.

⁷⁸⁸ **CLA-001**, Turkey-Ethiopia BIT, Art. IV(1).

⁷⁸⁹ See *id.*, Art. IV(2) (“Compensation shall be equivalent to the market value of the expropriated investment before the expropriatory action was taken or became publicly known.”).

⁷⁹⁰ *Id.*; see also **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶¶ 504-505.

⁷⁹¹ See **CLA-116**, B. Sabahi et al., *Investor-State Arbitration* (2d ed., 2019), ¶ 18.76 (“If the state destroys foreign-owned property (whether by negligence or design), such that its value is simply dissipated rather than transferred, it would be odd to exonerate the government from liability for compensation. Similarly, the elimination of a foreign-owned business may bring benefits to the state or to a private third party that are indirect, for example the elimination of a troublesome competitor or political advantage. Such situations do not entail a transfer of the benefit of the foreign-owned property, but are difficult to distinguish analytically from more obvious forms of indirect expropriation.”); **CLA-033**, *Metalclad v. Mexico*, ¶ 103 (noting indirect expropriation includes instances where there is no “obvious benefit of the host State”).

⁷⁹² SoC, Section 3.

say it is axiomatic that international law protects contractual rights from expropriation.⁷⁹³

- 5.128. Second, Respondent's argument rests on a faulty premise that misrepresents the facts and misconstrues Ethiopian law. Respondent argues that "expropriation is both theoretically and practically impossible" because "the Agreement as it stood when Akgun abandoned the project had no or even negative value."⁷⁹⁴ Yet, Respondent's argument impermissibly relies on its expropriatory measures—namely, its arbitrary imposition of an EIA requirement for ETIZ culminating in its July 2014 suspension letter and its failure to offer suitable alternative land—to arrive at that lack of or negative value. As a result, Respondent's assertion that Claimant's investment had "no or even negative value" is not a defense to Claimant's expropriation claim but rather an admission that an indirect expropriation in fact occurred here under the sole effects test.⁷⁹⁵
- 5.129. Respondent argues that the 2012 ETIZ Agreement obligated Claimant to undertake an EIA for ETIZ. Respondent therefore asserts that "no matter at what stage" its insistence upon an EIA materialized, that insistence was "in accordance with the terms of the Agreement and applicable laws."⁷⁹⁶ Respondent then reasons that Claimant's alleged refusal or inability to comply with the EIA requirement for ETIZ at the allocated site and subsequent refusal to accept the alternative lands Respondent offered prevented Claimant's rights under the 2012 ETIZ Agreement from having any economic value. Yet,

⁷⁹³ See, e.g., **CLA-025**, *Deutsche Bank v. Sri Lanka*, ¶ 506 ("[C]ontractual rights may be expropriated, a position that has been accepted by numerous investment arbitration tribunals."); **CLA-117**, *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, ¶ 151 ("International law has recognized that contractual rights may be subject of expropriation at least since the *Norwegian Shipowners' Claims* case. The *Chorzow Factory* case would come to a similar conclusion. [This] is clear from the fact that their definitions of investments include concessions conferred by law or contract that contractual rights in a concession, like rights in physical assets, are protected from expropriation . . ."); **CLA-118**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 ("*Siemens A.G. v. Argentina*"), ¶ 267 ("The Contract falls under the definition of 'investments' under the Treaty and Article 4(2) refers to expropriation or nationalization of investments. Therefore, the State parties recognized that an investment in terms of the Treaty may be expropriated. There is nothing unusual in this regard. There is a long judicial practice that recognizes that expropriation is not limited to tangible property[, such as] the findings of the Permanent Court of Arbitration ('PCA') in the case of the *Norwegian Shipowners' Claims* and the Permanent Court of International Justice ('PCIJ') in the *Factory at Chorzow Case*."); **CLA-036**, *Crystallex v. Venezuela*, ¶¶ 659-665 (finding contractual rights to be asset capable of being expropriated).

⁷⁹⁴ SoD, ¶ 246.

⁷⁹⁵ SoD, ¶¶ 204-206 (embracing sole effects test); **CLA-033**, *Metalclad v. Mexico*, ¶¶ 103-104 (focusing on effect of measures).

⁷⁹⁶ SoD, ¶¶ 244, 248-258.

neither the 2012 ETIZ Agreement nor Ethiopian law required Claimant to undertake an EIA for ETIZ, and Respondent's imposition of the EIA requirement was mere pretext to allow Respondent to proceed with developing its preferred Condominium Project.⁷⁹⁷

- 5.130. Respondent relies on two provisions of the 2012 ETIZ Agreement to argue that the Agreement obligated Akgun to undertake an EIA. Respondent first points to Art. 8(10), which states as follows:

The Developer shall protect the environment from pollution by using appropriate methods and technologies. In this regard the Developer has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard.⁷⁹⁸

- 5.131. As stated above at Section 2.D.i, Claimant's expert, Prof. Tekle, explains that the "studies" Art. 8(10) references do not encompass EIA and refer instead to Akgun's responsibility under the Environmental Pollution Control Proclamation No. 300/2002 and Prevention of Industrial Pollution Council of Ministers Regulation No. 159/2008 to avoid pollution in project implementation and management.⁷⁹⁹
- 5.132. Respondent also points to Art. 8(12) of the 2012 ETIZ Agreement to argue that it required Akgun to commission an EIA.⁸⁰⁰ Art. 8(12) provides, "The Developer shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."⁸⁰¹ Respondent contends that the EIA Proclamation No. 299/2002 was such a "relevant law," which it concludes required Akgun to obtain an EIA for ETIZ. It does not.
- 5.133. The EIA Proclamation states that projects falling "in[to] any category listed in any directive issued [thereunder] shall be subject to [EIA]."⁸⁰² It then prevents

⁷⁹⁷ See *supra* Sections 2.C, 3.A.ii.b. Respondent argues that, if the EIA were not required under Ethiopian law, "the foundation[]" of Claimant's expropriation claim would be "vitiating." SoD, ¶ 286. Not so. Whether or not Ethiopian law or the 2012 ETIZ Agreement required EIA, Respondent insisted upon one and suspended ETIZ due to Claimant's purported failure to provide a satisfactory EIA (although no EIA could in fact suffice). That very insistence, which did in fact lack any basis in law, is at the heart of Claimant's claims, including its expropriation claim.

⁷⁹⁸ SoD, ¶ 252 (quoting **C-009**, 2012 ETIZ Agreement, Art. 8(10)).

⁷⁹⁹ **C-009**, The 2012 ETIZ Agreement, Art. 8(10); see also Tekle Report, ¶ 2.47.

⁸⁰⁰ SoD, ¶ 251.

⁸⁰¹ **C-009**, The 2012 ETIZ Agreement, Art. 8(12).

⁸⁰² **RLA-1**, EIA Proclamation, Art. 5(1).

implementation of any project prior to EPA “authorization” if the directive referenced in Art. 5 requires an EIA for such project. As Prof. Tekle explains, however, the EPA failed to adopt any such directive, as Respondent has now admitted.⁸⁰³ Moreover, it was Respondent’s responsibility to assess the impacts of ETIZ and determine the suitability of the selected location with an SEA.⁸⁰⁴

- 5.134. Respondent’s conduct belies its late-formed assertion that its laws required an EIA from Claimant. To the extent that the EIA Proclamation required Akgun to undertake an EIA for ETIZ, it prohibited Respondent from issuing any permits or licenses to Claimant for ETIZ or allowing works at the site absent EIA approval.⁸⁰⁵ Yet, Respondent issued several licenses and permits to Claimant in 2009 and 2013 without so much as referencing any EIA, much less requiring an approved EIA before ETIZ could proceed.⁸⁰⁶ In arranging for renewal of Claimant’s investment permit, Respondent, acting through its Mol, even represented that “the investment ha[d] been approved by the government.”⁸⁰⁷ Further, on multiple occasions, Respondent urged Claimant to commence works at the site under threat of “terminat[ing] the agreement” and “snatch[ing] the land” for ETIZ.⁸⁰⁸ Indeed, because Respondent did not request an EIA before Claimant’s payment to Oromia State to compensate farmers who were then occupying the land, the provisions of the 2012 ETIZ Agreement would have penalized Akgun had it halted work on ETIZ to obtain a comprehensive EIA as Respondent now suggests was required.⁸⁰⁹ Following Claimant’s payment, the contract required Respondent to hand over the land, which then started the clock on Claimant’s six-month window to commence works or else forfeit its rights under the contract.⁸¹⁰ Claimant in

⁸⁰³ **C-100**, Respondent’s Responses to Claimant’s Stern Schedule, Response to Request 1.

⁸⁰⁴ See Tekle Report, ¶¶ 2.38-2.42.

⁸⁰⁵ *Id.*, ¶¶ 2.31, 2.42.

⁸⁰⁶ See **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

⁸⁰⁷ **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013.

⁸⁰⁸ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012.

⁸⁰⁹ Tekle Report, ¶¶ 2.50-2.53.

⁸¹⁰ **C-009**, The 2012 ETIZ Agreement, Arts. 7(1), 7(5-6), 8(6), 9(2), 9(5).

fact commenced such works before Respondent's request for EIA, as Respondent was well aware.⁸¹¹

- 5.135. It is apparent from the EIA Proclamation, Respondent's admissions, and Respondent's conduct that Ethiopian law did not require EIA for ETIZ. As a result, the 2012 ETIZ Agreement did not incorporate any EIA requirement in stating, "The Developer shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."⁸¹²
- 5.136. Respondent's contention that Claimant's rights under the 2012 ETIZ Agreement lacked economic value because Claimant could not or would not abide by the alleged EIA requirement in that Agreement or under Ethiopian law therefore fails. Neither the 2012 ETIZ Agreement nor Ethiopian law required Akgun to undertake an EIA for ETIZ. If, as Respondent argues, Akgun's rights under the 2012 ETIZ Agreement now lack economic value, it is as a result of Respondent's expropriatory measures. In attempting to refute Akgun's expropriation claim, Respondent instead proves it.

**b. Claimant's Materials and Equipment and Know-How
Likewise Constitute Investments Protected from
Expropriation**

- 5.137. Respondent fails to address Claimant's claim for expropriation as it relates to Claimant's materials and equipment and know-how. In its Statement of Claim and elsewhere herein, Claimant demonstrated that its materials and equipment and know-how were investments capable of being expropriated.⁸¹³ Claimant will reiterate that point briefly here.
- 5.138. The BIT expressly lists "movable property" among the assets constituting an investment.⁸¹⁴ Claimant indeed contributed movable property to ETIZ, including the machinery, equipment, and other materials that it rented or purchased and the funds expended on employees and consultants, all to undertake works on the project.⁸¹⁵

⁸¹¹ See Yunus Akgun 1st Statement, ¶ 4.9.

⁸¹² **C-009**, The 2012 ETIZ Agreement, Art. 8(12).

⁸¹³ See, e.g., SoC, ¶ 3.7; *supra* ¶¶ 3.4-3.5, 3.12-3.13.

⁸¹⁴ See **CLA-001**, Turkey-Ethiopia BIT, Art. I(2)(c).

⁸¹⁵ **C-053**, Letter from Akgun Construction to Ministry of Industry dated 12 March 2013; **C-057**, Akgun's work report dated 6 August 2013; **C-058**, Akgun's work report dated 5 September 2013; Yunus Akgun 1st Statement, ¶¶ 4.9, 5.3; SoC, ¶¶ 6.82-6.84.

- 5.139. The BIT also lists “know-how” among the assets constituting an investment.⁸¹⁶ Although Respondent now mischaracterizes the Akguns as amateurs obviously incapable of undertaking a project such as ETIZ, that is not the case. Respondent’s representatives visited Claimant’s similar facility in Turkey, Ikitelli, on multiple occasions over several years and were impressed by the project.⁸¹⁷ The evidence shows that Respondent specifically recruited Claimant to develop an industrial zone in Ethiopia due to its considerable know-how as demonstrated in Ikitelli.⁸¹⁸ Claimant’s considerable know-how is evident from its feasibility studies, marketing materials, and pursuit of investors.
- 5.140. As noted above, the BIT protects all “investments” from expropriation.⁸¹⁹ Thus, because Claimant’s know-how and movable property are investments, they are assets protected from expropriation.⁸²⁰
- 5.141. Because Respondent has affirmed the economic value of these investments on multiple occasions, they are capable of being expropriated even under Respondent’s heightened, bogus standard. The 2012 ETIZ Agreement clearly contemplated that developing ETIZ would involve contributions from Claimant. As a result, it provides for remedies to Claimant under Ethiopian law and the BIT for Claimant’s “direct and indirect losses” resulting from any suspension of ETIZ by administrative decision.⁸²¹ In accordance with this provision, Respondent’s representatives indicated that it would reimburse Claimant for its expenses in developing ETIZ at the originally allocated site.⁸²²
- 5.142. In sum, Claimant held several investments protected from expropriation and capable of being expropriated.

⁸¹⁶ See **CLA-001**, Turkey-Ethiopia BIT, Art. I(2)(d).

⁸¹⁷ **C-044**, Akgun Guest Book.

⁸¹⁸ *Id.*; Yusuf Akgun 1st Statement, ¶¶ 4.2-4.4.

⁸¹⁹ See **CLA-001**, Turkey-Ethiopia BIT, Art. IV(1).

⁸²⁰ See *id.*

⁸²¹ **C-009**, The 2012 ETIZ Agreement, Art. 11(11).

⁸²² Yusuf Akgun 1st Statement, ¶ 5.21; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014.

(iii) Respondent Concurs in Claimant's Position Regarding the Expropriation Standard and Admits Liability Thereunder

- 5.143. As Claimant explained in its SoC, a finding of creeping, indirect expropriation depends on the aggregate effect of the series of contested measures on the investment.⁸²³
- 5.144. Respondent does not dispute in principle that an expropriation may occur indirectly and through many measures—whether action or omission—that together have the effect of depriving the investor of its investment.⁸²⁴ Nor does Respondent dispute that the primary concern in determining whether a contested measure is expropriatory is its effect on the investment.⁸²⁵ Respondent instead chooses to cloud the analysis with misstatements of fact and law, but it cannot avoid the inescapable conclusion that a creeping expropriation in fact occurred here.

⁸²³ SoC, ¶¶ 5.7-5.8.

⁸²⁴ SoD, ¶¶ 204-207.

⁸²⁵ *Id.*, ¶¶ 204-206.

a. This is a Case of Creeping Expropriation

- 5.145. The Turkey-Ethiopia BIT protects against indirect expropriation as much as against direct expropriation. This is evident from the language of the BIT itself, and it is a well-worn maxim of international law.⁸²⁶
- 5.146. It is likewise beyond question that an indirect expropriation may occur through a series of discrete acts that may seem innocuous when considered alone yet in the aggregate amount to a taking.⁸²⁷ The separate steps adding up to a creeping expropriation may encompass both action and inaction.⁸²⁸
- 5.147. The Respondent engaged in the following eight measures, which amounted in the aggregate to an expropriation of Claimant's investments:

⁸²⁶ See **CLA-001**, Turkey-Ethiopia BIT, Art. IV(1) ("Investments shall not be expropriated . . . *directly or indirectly* . . .") (emphasis added); **CLA-034**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 ("*CME v. Czech Republic*"), ¶ 604 ("De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law."); **CLA-033**, *Metalclad v. Mexico*, ¶ 103 (noting expropriation includes "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 economic benefit of property even if not necessarily to the obvious benefit of the host State"); **CLA-006**, *Tecmed v. Mexico*, ¶¶ 113-114, 116 (acknowledging indirect expropriation and categories thereof).

⁸²⁷ **CLA-119**, W.M. Reisman and R. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, Yale Law School Faculty Scholarship Series, 1 January 2004, pp. 123-124 ("Discrete Acts, analysed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.") ; **CLA-036**, *Crystallex v. Venezuela*, ¶ 667 ("[T]he expression 'creeping expropriation' is used to refer to a specific form of expropriation that results from a series of measures taken over time that cumulatively have an expropriatory effect, rather than from a single measure or group of measures that occur at one time."); **CLA-005**, *Vivendi*, Award, ¶ 7.5.31 ("It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached. . . . '[A] measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or a transfer of title.'" (internal citation omitted)); **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*"), ¶ 331 ("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. For the present case, this means that the Tribunal need not examine whether Respondent's taxation changes, administrative decisions taken, or the introduction of the Erzsebet voucher and the SZEP Card, each by themselves, caused a dispossession. Rather, the Tribunal must examine whether these measures together had the effect of dispossession.") (emphasis in original).

⁸²⁸ **CLA-042**, Draft Articles on State Responsibility, Art. 2, ¶ 4 ("Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an 'omissions' from

- 5.147.1. Failing to assess in advance whether the land that it allocated and leased to Claimant for ETIZ was suitable for the purpose for which it was leased—*i.e.*, the ETIZ project;⁸²⁹
- 5.147.2. Implying that it would not demand an EIA for ETIZ by participating in the following without requesting or even referencing—much less requiring—any EIA: executing the MOU in 2008; selecting the land allocated for ETIZ in 2009; issuing permits to Claimant for ETIZ in 2009; receiving and reviewing the pre- and final feasibility studies in 2009; negotiating and executing the 2010 Agreement; negotiating and executing the 2012 ETIZ Agreement; leasing, receiving payment for, and handing over the land allocated for ETIZ; renewing Claimant's investment permit for ETIZ in 2013; encouraging, demanding, and then observing Claimant's commencement of works at the site between September 2012 and April 2013;⁸³⁰
- 5.147.3. Including in the 2012 ETIZ Agreement certain provisions that required Claimant to commence works within a timeframe that clearly left no time for a comprehensive EIA;⁸³¹
- 5.147.4. Observing that proceeding with the Condominium Project and ETIZ would cause water allocation issues and choosing to proceed with the Condominium Project that involved local developers and that it preferred over ETIZ;⁸³²
- 5.147.5. Understanding the "impossibility" of proceeding with ETIZ at the allocated site and yet continuing to push for revisions to the EIA and misrepresenting to Claimant that such revisions could resolve the matter;⁸³³

the surrounding circumstances which are relevant to the determination of responsibility."); **CLA-034**, *CME v. Czech Republic*, ¶ 605 ("[I]t makes no difference whether the deprivation was caused by actions or by inactions."); **CLA-120**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and Principles of Quantum, 30 December 2016, ¶ 394 (noting that "measures" of expropriation references "all acts or omissions by the State that could amount to expropriatory conduct").

⁸²⁹ See *infra* ¶¶ 5.149 and related footnotes.

⁸³⁰ See *infra* ¶¶ 5.150 and related footnotes.

⁸³¹ See *infra* ¶¶ 5.150 and related footnotes.

⁸³² See *infra* ¶¶ 5.151 and related footnotes.

⁸³³ See *infra* ¶¶ 5.152 and related footnotes.

- 5.147.6. Ordering Akgun to suspend works in the name of a purported EIA “requirement” that did not in fact exist under the 2012 ETIZ Agreement or Ethiopian law;⁸³⁴
- 5.147.7. Failing to propose suitable alternative lands for ETIZ after admitting that it made a mistake with the initial land selection or allocation;⁸³⁵ and
- 5.147.8. Failing to reimburse Claimant for (1) its materials and completed works associated with the unsuitable site that Respondent selected after stating that it would do so, or (2) its rights in the 2012 ETIZ Agreement to develop ETIZ.⁸³⁶
- 5.148. Indeed, each of the above eight acts or omissions of Respondent contributed to the expropriation of Claimant’s investments.
- 5.149. First, as Claimant’s expert explains, Respondent had the duty to consider the suitability of the site that it allocated and leased to Claimant for ETIZ.⁸³⁷ Under the EIA Proclamation and as a matter of policy and common sense, Respondent should have conducted an SEA for the area in which it planned to locate ETIZ.⁸³⁸ Any such SEA would have revealed that the allocated site lacked sufficient water resources to support ETIZ as well as the Condominium Project and led to the selection of a suitable site. Under Ethiopian law related to the lease of an immovable more generally, the Oromia Regional State warranted in leasing the land to Claimant that such land was suitable for ETIZ.⁸³⁹ It was not. Its failure to consider the suitability of the land for ETIZ in advance meant that the fundamental problems related to water allocation did not appear until it was too late.
- 5.150. Second and third, if indeed Respondent believed an EIA was required or even just advisable under Ethiopian law, it should have required or requested an EIA for ETIZ much earlier in the project’s planning. If it had done so, the problems with the allocated site would have come to light before Claimant poured its resources into an unsuitable site and at a stage during which it would have been easy to correct course. The EIA Proclamation clearly

⁸³⁴ See *infra* ¶¶ 5.152 and related footnotes.

⁸³⁵ See *infra* ¶¶ 5.153 and related footnotes.

⁸³⁶ See *infra* ¶¶ 5.154 and related footnotes.

⁸³⁷ Tekle Report, ¶¶ 2.20-2.21, 2.32, 2.36, 2.40-2.42.

⁸³⁸ See *id.*, ¶¶ 2.36, 2.40-2.42.

⁸³⁹ *Id.*, ¶ 2.32; **MBT-15**, Ethiopian Civil Code, Art. 2900.

envisions that any EIA will be conducted prior to granting licenses or permits for the project at issue.⁸⁴⁰ Instead, the Mol impliedly represented that no EIA would be required or requested until it determined that it wished to halt progress on ETIZ under the guise of an alleged EIA requirement to cover up Ethiopia's mistake in allocating unsuitable land and to favor its Condominium Project.⁸⁴¹

- 5.151. Fourth, because Respondent failed to examine the allocated site's suitability in advance, it allowed both ETIZ and the Condominium Project to proceed through the planning and into the implementation phases within the same watershed. Yet, according to Respondent, that watershed lacked sufficient water resources to support all the projects.⁸⁴² Respondent then made a policy decision to favor the Condominium Project over ETIZ.⁸⁴³ Respondent effected this policy decision by continuing to insist on a satisfactory EIA from Claimant for ETIZ although by its own admission no EIA could ever resolve the water allocation issues.⁸⁴⁴ At the same time, Respondent allowed the Condominium Project to proceed with no EIA at all, as Respondent has now admitted in this case.⁸⁴⁵ Respondent made this decision even though under its own interpretation of its environmental laws, those laws would require an EIA for the Condominium Project to the same extent it would require one for ETIZ.⁸⁴⁶
- 5.152. Fifth and sixth, even as the Mol received reports from various agencies that it would be "impossib[le]" for ETIZ to proceed at the allocated site due primarily to water allocation issues, it continued to demand revisions to Claimant's EIA.⁸⁴⁷ Even as it ordered Claimant to suspend works on ETIZ pending

⁸⁴⁰ **RLA-1**, EIA Proclamation, Art. 3(3).

⁸⁴¹ See *supra* Section 2.D.

⁸⁴² See, e.g., **C-105**, Memorandum dated 3 April 2014 (noting water allocation issues).

⁸⁴³ **C-084**, Details of the Meeting with President dated 9 December 2014, p. 1 ("Many investors applied to us for this area and your project is subject to sabotage. They are wishing to build housing.").

⁸⁴⁴ **C-016**, Suspension Letter (continuing to request revisions to EIA); **C-105**, Memorandum dated 3 April 2014, pp. 6, 9, 10 (revealing that no EIA could resolve Respondent's stated concerns).

⁸⁴⁵ See *supra* Section 2.E.iii; **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9; Whittington Report, ¶¶ 6.21-6.22, 6.30.

⁸⁴⁶ See **RLA-2**, A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority ("2008 Directive"), (listing both industrial zones and condominium projects among the projects requiring EIA at items 21 and 22, respectively).

⁸⁴⁷ See, e.g., **C-105**, Memorandum dated 3 April 2014, p. 9 (noting "impossibility" of ETIZ proceeding at the allocated site no matter the sufficiency of the EIA produced); **C-016**, Suspension Letter (demanding suspension of ETIZ pending receipt of EIA Respondent deemed satisfactory); **C-027**, Letter from Ministry of Industry to Akgun Construction dated 20 November 2014 and numbered 02.1.30/126 (requesting revised EIA).

approval of an EIA for the project, it insisted that its rejection of the EIA was based on deficiencies within the document.⁸⁴⁸ Yet no revisions to that EIA could have fixed the true problem: there simply was not enough water for ETIZ and the Condominium Project given the pre-existing (and growing) water demands of Addis Ababa. The MoI imposed what it knew was an impossible condition to further works on ETIZ and caused Claimant to expend additional funds on futile EIA revisions in the process.

- 5.153. Seventh, after learning that its water resources could not support both ETIZ at the allocated site and the Condominium Project and choosing to proceed with the latter over the former, Respondent—after concealing its decision from Akgun for several months and causing Akgun to expend further efforts analyzing water treatment options for the site—stated it would offer suitable alternative land for ETIZ. Ethiopian President Dr. Mulatu Teshome Wirtu and Minister and Special Adviser to the Prime Minister Dr. Arkebe each admitted during meetings with Claimant that it was the government that made a mistake in selecting the site for ETIZ.⁸⁴⁹ Dr. Arkebe assured Claimant that Respondent would allocate new suitable land for ETIZ.⁸⁵⁰ State Minister of Industry Tadesse Haile later repeated this promise.⁸⁵¹ Respondent failed to make good on that promise. Instead, Respondent proposed three alternatives that were equally unsuitable due to their distance from a major population center.⁸⁵² “This factor makes it harder to find both blue-collar and white-collar workers, increases transportation costs, and discourages investors because they would like to live close to a developed city, otherwise they have security concerns.”⁸⁵³ In addition, one proposed alternative was located on a hill, which “it would not [have] be[en] financially or technically feasible to flatten.”⁸⁵⁴
- 5.154. Eighth, Respondent failed to compensate Claimant for its expenses or Claimant’s rights to develop ETIZ under the 2012 ETIZ Agreement. Respondent’s Dr. Mulatu and Dr. Arkebe both admitted during meetings with

⁸⁴⁸ **C-016**, Suspension Letter.

⁸⁴⁹ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014.

⁸⁵⁰ **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014, p. 4.

⁸⁵¹ Yusuf Akgun 1st Statement, ¶ 5.25.

⁸⁵² *Id.*

⁸⁵³ *Id.*

⁸⁵⁴ *Id.*

Claimant that it was the government that made a mistake in selecting the site for ETIZ.⁸⁵⁵ Dr. Arkebe further promised to reimburse Claimant for its expenses in connection with the development of ETIZ at the allocated site.⁸⁵⁶ Respondent's acknowledgement that ETIZ failed due to its own mistakes and promise to reimburse Claimant show that Respondent knew it needed to compensate Claimant for its losses. Respondent never in fact compensated Claimant for its hard expenses or its rights in the 2012 ETIZ Agreement to develop ETIZ.

- 5.155. In this way, each of the above-referenced measures contributed to the expropriation of Claimant's investments. Because of Respondent's belated and discriminatory insistence on an EIA for ETIZ when no such EIA could address the underlying problem with the allocated site—*i.e.*, insufficient water resources for ETIZ and the competing Condominium Project—Claimant was left with nothing. Claimant started with a right to develop ETIZ, from which Claimant very reasonably expected to make substantial profits. Later, after Respondent's expropriatory measures, Claimant was left with nothing but empty promises. Such a substantial deprivation surely amounts to expropriation.

b. The Sole Effects Test Reveals that Respondent's Many Measures Were Expropriatory

- 5.156. Tribunals recognize that the primary concern in determining whether an expropriation occurred is the effect of the complained-of measure on the investment.⁸⁵⁷ Thus, even "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 economic benefit of property" constitutes expropriation.⁸⁵⁸

⁸⁵⁵ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014.

⁸⁵⁶ **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014.

⁸⁵⁷ **CLA-005**, *Vivendi*, Award, ¶ 7.5.20 (noting the primacy of "the *effect* of the measure on the investor" in determining whether the measure is expropriatory) (emphasis in original); **CLA-006**, *Tecmed v. Mexico*, ¶ 116 ("The government's intention 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-033**, *Metalclad v. Mexico*, ¶¶ 103-104 (focusing on effect of measures).

⁸⁵⁸ See SoC, ¶ 5.7 (quoting **CLA-033**, *Metalclad v. Mexico*, ¶ 103).

- 5.157. As explained above, Respondent apparently concurs. Respondent agrees that one must look to the effects of a state's measures on an investment's value to determine whether such measures amount to an indirect expropriation.⁸⁵⁹ Respondent, however, would require a showing that the measures caused a "substantial deprivation" or even a "total loss of the investment's value."⁸⁶⁰
- 5.158. By Respondent's own admission, the facts of this case satisfy even its most stringent expression of the standard: According to Respondent, Claimant's rights to develop ETIZ under the 2012 Agreement "had no or even negative economic value" by the end of 2014 and into 2015.⁸⁶¹ Given that Respondent would later fail to provide a suitable alternative site, Claimant agrees,⁸⁶² but that "no or even negative value" Respondent observes resulted from Respondent's expropriatory measures.
- 5.159. Claimant has already spelled out the series of Respondent's measures giving rise to its expropriation claim and will not repeat them here.⁸⁶³ Taken together, those measures caused the irreparable cessation of the works necessary to exercise Claimant's investment and bring ETIZ to life. Tribunals have held that such an outcome amounts to a substantial deprivation indicative of expropriation.⁸⁶⁴ Respondent's empty promise of alternative lands or an alternative project on the existing lands did nothing to prevent that deprivation.
- 5.160. The tribunal's analysis in *Biloune et al. v. Ghana Investment Centre et al.* is instructive here. In *Biloune*, the claimant, Mr. Biloune, invested in a company, MDCL, which entered a lease agreement with the Ghana Tourist Development Company ("GTDC") through which MDCL would renovate, expand, and operate a resort restaurant in Ghana.⁸⁶⁵ MDCL then entered a contract with the Ghana Investments Centre ("GIC") for certain concessions, including an establishment/manufacturing license and assorted benefits for foreign

⁸⁵⁹ SoD, ¶¶ 204-206.

⁸⁶⁰ *See id.*

⁸⁶¹ SoD, ¶ 246.

⁸⁶² Claimant does not agree, however, that it "abandoned" the project. *See* SoD, ¶ 246 (framing the ultimate failure of ETIZ as Claimant's "abandon[ment]" of the same). Claimant addresses that contention below.

⁸⁶³ *See supra* Section 5.C.iii.a.

⁸⁶⁴ *See, e.g., CLA-033, Metalclad v. Mexico*, ¶¶ 108-109; **CLA-006**, *Tecmed v. Mexico*, ¶ 117.

⁸⁶⁵ **CLA-121**, *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and The Government of Ghana*, 95 I.L.R. 183 ("*Biloune v. Ghana*"), pp. 184, 187, 191-192.

investors.⁸⁶⁶ The GIC approved the investment.⁸⁶⁷ MDCL applied for a construction permit from the municipality and, based upon representations that such permit would be forthcoming or was a mere formality, commenced works on the project before its receipt.⁸⁶⁸ That permit was never granted, in part because the original structure that the claimant sought to renovate had not been properly permitted.⁸⁶⁹ One year later, the government issued a stop work order due to MDCL's lack of a building permit.⁸⁷⁰ When Mr. Biloune appealed to the GIC regarding his predicament, the GIC informed him "that his problems did not arise directly out of the lack of a building permit, but rather were 'political.'"⁸⁷¹ Mr. Biloune "received no satisfactory assurances that the Government's reservations about his project were resolved[,] concluded that the Government was not willing to permit the project to proceed[, and] placed the project in the hands of administrators."⁸⁷² The tribunal concluded that the totality of the circumstances effected an indirect expropriation, because together they caused an "irreparable cessation of work on the project."⁸⁷³ The tribunal specified that the claimant was entitled to rely on the state's representations to the effect that the permit was a mere formality and that the works could continue even in its absence.⁸⁷⁴

- 5.161. The facts of this case bear a striking resemblance to those of *Biloune*, and they differ only in ways that are even more indicative of expropriation in this case. As in *Biloune*, Respondent knew of Claimant's works on ETIZ without the EIA but nevertheless allowed them to continue for some time before making any issue of the lack of EIA.⁸⁷⁵ As in *Biloune*, Respondent issued a stop work order despite previously representing that the allegedly unfulfilled condition—here an EIA and in *Biloune* a building permit—would not interrupt

⁸⁶⁶ *Id.*, pp. 193-194.

⁸⁶⁷ *Id.*

⁸⁶⁸ *Id.*, pp. 194, 208.

⁸⁶⁹ *Id.*, pp.194-95, 208.

⁸⁷⁰ *Id.*, p. 195.

⁸⁷¹ *Id.*, p. 208.

⁸⁷² *Id.*, p. 209.

⁸⁷³ *Id.*

⁸⁷⁴ *Id.*, p. 208.

⁸⁷⁵ See, e.g., **C-057**, Akgun's work report dated 6 August 2013; **C-058**, Akgun's work report dated 5 September 2013.

the works or was a mere formality.⁸⁷⁶ As in *Biloune*, Claimant learned after the fact that the true problem was unrelated to the missing EIA or permit and, instead, related to a political issue—here, the competing Condominium Project.⁸⁷⁷ As in *Biloune*, that political issue represented a permanent roadblock causing “irreparable cessation” of Claimant’s investments.⁸⁷⁸ Finally, as in *Biloune*, Respondent’s rejection of Claimant’s EIA was tied to its own failure to obtain a prior environmental assessment of the site, a fact which only came to light after-the-fact.⁸⁷⁹ Yet, unlike *Biloune*, where the building permit program may have been haphazardly implemented but there was no allegation that the law did not in fact provide for it, Claimant shows both that Respondent arbitrarily applied the alleged EIA requirement *and* that the EIA was not required under Ethiopian law or the 2012 ETIZ Agreement.⁸⁸⁰ Moreover, Respondent’s request for the EIA came *years* after Claimant and Respondent agreed to work together on the project.⁸⁸¹

- 5.162. Respondent nevertheless suggests that the true reason for any deprivation was Claimant’s failure to accept alternative land or to alter the scope of the project at the existing site.⁸⁸² Respondent attempts to reframe the issue as Claimant’s voluntary abandonment of ETIZ.⁸⁸³ Respondent is incorrect as a matter of fact and law.
- 5.163. First, Respondent argues it did not expropriate Claimant’s rights under the 2012 ETIZ Agreement, because Claimant could have negotiated with Respondent to build something else at the allocated site once it became clear

⁸⁷⁶ **C-016**, Suspension Letter.

⁸⁷⁷ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014, pp. 1-2, 4 (“Many investors applied to us for this area and your project is subject to sabotage. They are wishing to build housing. . . . Certain real-estate companies that are foreign and local wish to construct housing in this region. . . . Problem is more related with the fact that it is desired to build housing on this land and it is related with current value of this land *more than being an issue of environment*.” (emphasis added)).

⁸⁷⁸ See **C-016**, Suspension Letter; Yunus Akgun 1st Statement, ¶¶ 7.1-8.7 (describing events following suspension letter and Respondent’s failure to make good on its promise of alternative land for ETIZ).

⁸⁷⁹ See, e.g., **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014, p. 1 (“The failure and guilt relating with this subject completely belongs to us. Your company does not have any responsibility in that respect. In fact at the stage of location selection, a high quality consultancy firm should have been hired and proposals should have been presented to you accordingly.”).

⁸⁸⁰ See *supra* Section 2.C.

⁸⁸¹ See Yusuf Akgun 1st Statement, ¶ 5.5.

⁸⁸² SoD, ¶¶ 261-266, 274.

⁸⁸³ SoD, ¶¶ 275-287.

that it could not proceed with ETIZ.⁸⁸⁴ Yet, Claimant did not negotiate and then commit to undertake just any project, but, specifically, *ETIZ*, the scope and details of which Akgun had presented to Respondent in its pre-feasibility and final feasibility reports in 2009 and which were further reflected in that 2010 ETIZ Agreement and 2012 ETIZ Agreement.⁸⁸⁵ Thus, Respondent cannot transform its substantial deprivation of Claimant's right to develop ETIZ into a mere incidental limitation on a right to develop some nondescript project by claiming that Claimant could have entered a new agreement with Respondent to build that nameless, shapeless project. The investment was the right to develop ETIZ in the manner the parties had envisioned and agreed. In entirely depriving Claimant of that right, Respondent expropriated Claimant's investment.

- 5.164. Second, Respondent argues that any substantial deprivation was Claimant's fault for not accepting alternative land for the project. Respondent goes so far as to question Claimant's motives and claims Claimant valued its rights only for the real estate involved.⁸⁸⁶ But the facts tell a different story. Respondent promised to provide an alternative location for ETIZ.⁸⁸⁷ Each of the locations it informally offered in August 2015, however, were unsuitable for ETIZ due to their distance from a population center.⁸⁸⁸ One was unsuitable for the additional reason that it was located on a hill.⁸⁸⁹ Claimant fully intended to work with Respondent to find suitable alternative lands, but it soon became clear that Respondent did not take its obligation to provide a suitable alternative seriously.
- 5.165. Respondent suggests that Claimant's rejection of alternatives shows that it in fact voluntarily abandoned ETIZ.⁸⁹⁰ That is plainly not the case. A claimant's departure in the wake of the state's expropriation of its investment does not amount to a "voluntary" abandonment.⁸⁹¹ Respondent ordered Claimant to suspend works on ETIZ in July 2014. Although Respondent had previously promised to compensate Claimant for the damages it suffered in developing

⁸⁸⁴ SoD, ¶ 274(iv).

⁸⁸⁵ See, e.g., *supra* ¶¶ 2.20, 2.23-2.27, 2.37-2.38.

⁸⁸⁶ SoD, ¶¶ 259-265.

⁸⁸⁷ See, e.g., Yusuf Akgun 1st Statement, ¶¶ 5.23-5.24, 5.26.

⁸⁸⁸ Yusuf Akgun 1st Statement, ¶ 5.25.

⁸⁸⁹ *Id.*, ¶ 5.25.

⁸⁹⁰ SoD, ¶¶ 259-65, 274(v).

⁸⁹¹ See **CLA-014**, *UP v. Hungary*, ¶ 353.

the originally allocated site for ETIZ, by November 2015, Respondent's State Minister of Industry Tadesse Haile had reversed course and disclaimed any responsibility for such compensation.⁸⁹² Minister Haile stated that the Oromia Regional State would allocate an alternative location for ETIZ, but that never occurred.⁸⁹³ It was clear that Respondent did not take its responsibility to allocate suitable alternative land seriously.

- 5.166. Respondent's measures effected a substantial deprivation on Claimant's investments. Respondent's attempts to place the blame on Claimant fail: Claimant did not reject any suitable alternative land or voluntarily abandon the project. Respondent's claim that even if its measures caused a substantial deprivation, it is immune from liability under the police powers doctrine likewise fails.

(iv) Respondent's Expropriation of Claimant's Investments Was Unlawful

- 5.167. To be lawful, the BIT requires that the expropriation be 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"⁸⁹⁴ Respondent's expropriation of Claimant's investments meets *none* of these requirements; certainly, it does not satisfy *all* these requirements, as necessary for a lawful expropriation under the BIT.⁸⁹⁵
- 5.168. It is undisputed that Respondent has not provided any compensation for Claimant's expropriated investments, much less "prompt, adequate and effective compensation."⁸⁹⁶ The Tribunal need not consider any other factor.
- 5.169. If the Tribunal nevertheless wishes to consider whether the expropriation was for a "public purpose," "non-discriminatory," and "in accordance with due process," it should conclude that Respondent did not satisfy these factors either.
- 5.170. First, Respondent's stated reason for its ultimate suspension of ETIZ on the land that it allocated for the project was Claimant's alleged failure to procure

⁸⁹² Yusuf Akgun 1st Statement, ¶ 5.26.

⁸⁹³ *Id.*, ¶ 5.26.

⁸⁹⁴ **CLA-001**, Turkey-Ethiopia BIT, Art. IV(1).

⁸⁹⁵ **CLA-044**, *Siag v. Egypt*, ¶¶ 428, 433; **CLA-036**, *Crystallex v. Venezuela*, ¶¶ 716-717; **CLA-045**, *Pezold v. Zimbabwe*, ¶¶ 496-497.

⁸⁹⁶ **CLA-036**, *Crystallex v. Venezuela*, ¶¶ 716-717; **CLA-045**, *Pezold v. Zimbabwe*, ¶¶ 496-497; **CLA-044**, *Siag v. Egypt*, ¶¶ 433-435.

a satisfactory EIA.⁸⁹⁷ But this cannot serve as a “public purpose” under the circumstances of this case. As Claimant explained above in Section 5.C.iii.a, Respondent’s expropriation of Claimant’s rights to develop ETIZ under the 2012 ETIZ Agreement occurred due to Respondent’s initial allocation of unsuitable land for ETIZ, which Claimant could not fix with futile revisions to its EIA. Although Respondent at one time admitted its mistake and offered to compensate Claimant for its expenses as required under the 2012 ETIZ Agreement,⁸⁹⁸ it ultimately failed to do so and instead chose to claim the fault was Claimant’s for its failure to present a satisfactory EIA.⁸⁹⁹ Respondent cannot shield itself from liability by arguing that its decision to suspend the progress of ETIZ on that unsuitable land was for a “public purpose.” Respondent created the problem and then weaponized its EIA procedures to suspend ETIZ without compensation.

- 5.171. Second, Respondent’s stated justification of an unsatisfactory EIA reveals that its actions were discriminatory. Although Respondent’s Directive No. 1/2008 purportedly required EIA for both ETIZ and the Condominium Project, Respondent demanded an EIA and then suspended development of the project due to a lack of EIA only with respect to ETIZ.⁹⁰⁰ Respondent’s officials admitted to Akgun that ETIZ was subject to “sabotage” in favor of the Condominium Project, which, unlike ETIZ, involved local developers.⁹⁰¹ Respondent’s expropriation was therefore discriminatory.
- 5.172. Third, Respondent’s expropriation was not in accordance with due process. Respondent’s EIA Proclamation required the EPA to make a decision with regard to ETIZ’s EIA within fifteen working days.⁹⁰² Rather than actually considering Claimant’s EIA—and, in particular, its water treatment plan—Respondent simply suspended and then deferred development of ETIZ until the prolonged state of limbo turned permanent.⁹⁰³ Claimant’s expert confirms

⁸⁹⁷ **C-016**, Suspension Letter, p. 2 (“[Y]ou are hereby informed that any type of construction activity is prohibited until the EIA is conducted and approved by the appropriate governmental body.”).

⁸⁹⁸ **C-009**, The 2012 ETIZ Agreement, Art. 11(11); Yunus Akgun 1st Statement, ¶¶ 7.7, 7.14; Yusuf Akgun 1st Statement, ¶ 5.21.

⁸⁹⁹ **C-016**, Letter from Akgun Construction to Ministry of Industry dated 24 July 2014.

⁹⁰⁰ **C-100**, Respondent’s Responses to Claimant’s Stern Schedule, Response to Request 9.

⁹⁰¹ See Yunus Akgun 1st Statement, ¶¶ 7.7, 7.9; Yusuf Akgun 1st Statement, ¶ 5.20.

⁹⁰² Tekle Report, ¶ 2.63.

⁹⁰³ See, e.g., **C-105**, Memorandum dated 3 April 2014, p. 1 (noting that the project should be relocated only “in an event where it is impossible to undertake a measure that can withstand the impacts” and that the “comments” at that time “d[id] not signify” as much, such that the matter should be referred to

that, in fact, Akgun's water treatment plan was more detailed than those included in other EIA for similar industrial zones around the same time.⁹⁰⁴ Moreover, in contrast with international best practices, Ethiopian law affords no true relief to those who are aggrieved by the EPA or MoEF's EIA assessments.⁹⁰⁵ The aggrieved investor may appeal the EPA's decision only to *the EPA*.⁹⁰⁶ The EIA Proclamation does not create a private right of action for investors to address any anomalies in the EPA's process or decisions.⁹⁰⁷ Respondent's refusal to meaningfully consider Claimant's water treatment plan in the EIA, permanent deferral on making any actual decision on Claimant's EIA, and refusal to provide any meaningful avenue for aggrieved investors to appeal an unfavorable EIA assessment, taken together, denied Claimant due process over the course of the expropriation.

5.173. Because Respondent's expropriation was not in accordance with each condition in the BIT, it was unlawful.

(v) Respondent's Expropriatory Measures Are Not Justified as Lawful Government Actions Falling Within Its Police Powers

5.174. Respondent generally asserts that the expropriation "standard" is "more exacting" "when the relevant government action is within the police powers of the State" and later argues that the complained-of measures were "lawful" under the 2012 ETIZ Agreement and Ethiopian law.⁹⁰⁸ Claimant assumes without knowing that Respondent intends for these fragments to be read together as an invocation of the police powers doctrine. Unfortunately for Respondent, the police powers doctrine does not shield it from liability for its expropriatory measures.

the Ministry of Environment and Forestry Development "for proper resolution to this end"), p. 3 (assuming that no "effluent treatment technology can[] guarantee [one] hundred percent filtration"), p. 14 (noting that even if the EIA were perfect "the co-existence of the [Legedadi dam and ETIZ]" would be "impossib[le]"); see also Yusuf Akgun 1st Statement, ¶¶ 5.18, 5.23-5.26; Yunus Akgun 1st Statement, ¶ 7.14, 8.2.

⁹⁰⁴ Whittington Report, ¶¶ 6.39-6.42.

⁹⁰⁵ Tekle Report, ¶ 2.23.

⁹⁰⁶ *Id.*, ¶ 2.23 & footnote 88.

⁹⁰⁷ *Id.*

⁹⁰⁸ SoD, ¶¶ 204, 272-274.

a. Respondent is Liable for Its Expropriatory Measures Regardless of Any Purported Beneficial Purpose

- 5.175. As an initial matter, it is the complained-of measure's effect, not its purpose, that determines whether the measure is expropriatory.⁹⁰⁹ At the very least, "intent" is less important than "effect."⁹¹⁰ Thus, even if Respondent's measures could be explained away as a legitimate exercise of its police powers—which they cannot—such measures would nevertheless constitute expropriation because they deprived Claimant of its investments as shown above.
- 5.176. That Respondent's allegedly lawful purpose is, standing alone, no absolute defense to Claimant's expropriation claim is evident from the text of the BIT itself. Art. IV protects investments against expropriation or "measures of similar effects," whether direct or indirect, except when they are made "for a public purpose" and with "payment of prompt, adequate and effective compensation," among other requirements.⁹¹¹ It is undisputed that Respondent has not provided "prompt, adequate and effective compensation."

⁹⁰⁹ See **CLA-033**, *Metalclad v. Mexico*, ¶¶ 103, 111 ("[E]xpropriation [includes] 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 economic benefit of property *even if not necessarily to the obvious benefit of the host State*. . . . *The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree.*") (emphasis added); **CLA-122**, *Phelps Dodge Corp. and Overseas Investment Corp. v. Islamic Republic of Iran*, IUSCT Case No. 99, Award No. 217-99-2, 19 March 1986, ¶ 22 ("[T]he Tribunal fully understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve [Iran] of the obligation to compensate [claimant] for its loss."); **CLA-066**, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 ("*Santa Elena v. Costa Rica*"), ¶ 71 ("[T]he purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid."); **CLA-118**, *Siemens A.G. v. Argentina*, ¶ 270 (holding that because Treaty refers only "to measures that have the effect of an expropriation" without mentioning "the intent of the State to expropriate," it need not consider intent); **CLA-121**, *Biloune v. Ghana*, p. 209 ("The motivations for the actions and omissions of the Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in this case. What is clear is that the conjunction of the [measures] had the effect of causing the irreparable cessation of work on the project.").

⁹¹⁰ See **CLA-121**, *Biloune v. Ghana*, p. 209; see also **CLA-034**, *CME v. Czech Republic*, ¶ 608 ("The intent of the government is less important than the effects of the measure on the owner, and the form of the measures of control or interference is less important than the reality of their impact.") (internal citations omitted). Even when the complained-of measure arises through regulation, the effect of the measure on the investor's investment is the primary factor examined to determine whether an expropriation occurred. **CLA-006**, *Tecmed v. Mexico*, ¶ 115 (focusing on whether the claimant "was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist" because "it is one of the main elements to distinguish" between a "regulatory measure" and a *de facto* expropriation"), ¶ 116 ("The government's intention 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.").

⁹¹¹ See **CLA-001**, Turkey-Ethiopia BIT, Art. IV(1).

Thus, even if Respondent's indirect expropriation had been undertaken for a "public purpose," which is denied, the BIT would require Respondent to compensate Claimant for the expropriated investment as provided therein.⁹¹²

5.177. Other tribunals agree that a state's public purpose—no matter how laudable—will not exonerate it for an expropriation without compensation. For example, in *Santa Elena v. Costa Rica*, the tribunal accepted as true that Costa Rica expropriated the claimant's property for environmental reasons but ordered compensation to be paid regardless.⁹¹³ The tribunal reasoned that Costa Rica's taking of the investor's land for environmental purposes "d[id] not affect either the nature or the measure of the compensation to be paid for the taking. [W]here property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."⁹¹⁴

5.178. Here, too, Respondent expropriated Claimant's investment allegedly for environmental reasons. As in *Santa Elena*, those reasons cannot negate Respondent's obligation under international law to compensate Claimant for its investment. That is especially so in this case, because Respondent discriminatorily imposed the purported environmental hurdles as mere pretext for its policy decision to pursue additional housing instead of ETIZ.

b. Because Respondent Capitalized on Its Police Powers to Discriminate Against ETIZ in Favor of Other Projects, it Cannot Avail Itself of the Police Powers Doctrine

5.179. Some tribunals have held that a state's bona fide regulations falling within its police powers will not amount to expropriatory measures even when they effect some level of deprivation.⁹¹⁵ To avail itself of the police powers doctrine, however, a state must show that its regulatory or administrative measures were *non-discriminatory*.⁹¹⁶ Indeed, "[t]he discriminatory character of the taking has long been an influential factor in determining expropriation."⁹¹⁷

⁹¹² See *id.*; see also *id.*, Art. IV(2) (providing the standard of compensation for lawful expropriation).

⁹¹³ **CLA-066**, *Santa Elena v. Costa Rica*, ¶ 71.

⁹¹⁴ See *id.*, ¶¶ 71-72.

⁹¹⁵ See, e.g., **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶¶ 254-255.

⁹¹⁶ See *id.*, ¶ 255.

⁹¹⁷ See **CLA-123**, C. McLachlan et al., *International Investment Arbitration* (2d ed., 2017), ¶ 8.145 (citing American Law Institute, *Restatement (Third)* § 712 comment g).

- 5.180. Respondent argues ETIZ failed due to Ethiopia's legitimate environmental laws that subjected ETIZ to an EIA requirement that Claimant would not or could not meet.⁹¹⁸ Respondent further argues that the 2012 ETIZ Agreement incorporated that EIA requirement.⁹¹⁹ As shown above, neither Ethiopian law nor the 2012 ETIZ Agreement required Claimant to undertake an EIA for ETIZ.⁹²⁰ Rather, Respondent belatedly invoked the EIA requirement as part of its discriminatory machinations to halt the ETIZ project in favor of the Condominium Project it preferred.⁹²¹
- 5.181. Respondent's admissions prove the discriminatory nature of its conduct. Respondent argues that the EIA Proclamation, which is the so-called "centerpiece of Ethiopian environmental law," required an EIA for ETIZ because Directive No. 1/2008 lists "Industrial Zone[s]" among the projects requiring EIA under such Proclamation.⁹²² Yet, since filing its Statement of Defense, Respondent has admitted that Directive No. 1/2008 was never signed by anyone from the Ethiopian government.⁹²³ As a result, Directive No. 1/2008 remains in draft form. Claimant's expert confirms that due to the chairman of the EPA's Environmental Council's failure to sign Directive No. 1/2008 such Directive is without legal effect.⁹²⁴
- 5.182. Respondent's contemporaneous conduct and its admissions drive this point home. The evidence shows that much of Respondent's hesitation with respect to ETIZ related to its concern that ETIZ would rely on the same water source as the large Condominium Project it was developing nearby, possibly resulting in water scarcity.⁹²⁵ Faced with these competing projects, Respondent made the policy decision to bring development of ETIZ to a screeching halt while giving the Condominium Project the green light. Respondent's failure to require an EIA for the Condominium Project while demanding that Akgun

⁹¹⁸ See, e.g., SoD, ¶ 255.

⁹¹⁹ See, e.g., *id.*, ¶¶ 251-252.

⁹²⁰ See *supra* Sections 2.C & 3.A.ii.b.

⁹²¹ See *supra* ¶¶ 5.105, 5.107.

⁹²² SoD, ¶ 6 (noting EIA Proclamation's provision prohibiting implementation of projects requiring EIA as stated in a directive to be issued under that Proclamation and Directive No. 1/2008's inclusion of industrial zones among projects requiring EIA).

⁹²³ **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 1.

⁹²⁴ Tekle Report, ¶¶ 2.6, 2.9-2.10.

⁹²⁵ **C-016**, Suspension Letter; **C-082**, Review Comments on ITU Supplement; **C-127**, Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry dated 6 February 2014; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014.

provide an EIA for ETIZ proves the arbitrary and discriminatory nature of that demand. Directive No. 1/2008 purports to require EIA for both “Industrial Zone[s]” and “Condominium construction” alike, yet Respondent held up only ETIZ in the name of EIA.⁹²⁶ As Respondent has admitted since filing its Statement of Defense, Respondent neither commissioned nor received any EIA reports in connection with the Condominium Project.⁹²⁷ Ethiopian President Mulatu Teshome Wirtu explained Respondent’s preference for the Condominium Project as follows:

Many investors applied to us for this area and your project is subject to sabotage. They are wishing to build housing. . . . Problem is more related with the fact that it is desired to build housing on this land and it is related with current value of this land more than being an issue of environment.⁹²⁸

- 5.183. International law does not sanction a state’s use of its police powers to target an individual investor in this way.⁹²⁹ In *UP*, the tribunal examined whether the police powers doctrine protected Hungary’s amendments to the regulatory scheme through which it operated a state-wide voucher program when those amendments intentionally frustrated an investor’s investment.⁹³⁰ The investor held shares in a business in Hungary that offered certain vouchers.⁹³¹ Hungary altered its voucher program and imposed certain eligibility requirements for those who could offer the vouchers under its revised system.⁹³² Those requirements or conditions were specific and had the effect of excluding or discriminating against the claimant.⁹³³ As a result, the value of the claimant’s

⁹²⁶ See **RLA-2**, 2008 Directive.

⁹²⁷ **C-100**, Respondent’s Responses to Claimant’s Stern Schedule, Response to Request 9 (confirming that it neither received nor commissioned any EIA in relation to the Condominium Project).

⁹²⁸ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014.

⁹²⁹ See **CLA-041**, *UP v. Hungary*, ¶ 415 (“Measures deliberately targeting an investor . . . cannot be a legitimate exercise of a state’s police powers.” (citing **CLA-006**, *Tecmed v. Mexico* and **CLA-029**, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (“*ADC v. Hungary*”), ¶¶ 429 et seq)).

⁹³⁰ See **CLA-041**, *UP v. Hungary*, ¶¶ 410-419.

⁹³¹ *Id.*, ¶ 111.

⁹³² *Id.*, ¶ 156.

⁹³³ *Id.*, ¶¶ 156, 341, 347, 414-415.

shareholding in the company offering vouchers under the previous system plummeted.⁹³⁴ The tribunal held that this amounted to an expropriation.⁹³⁵

- 5.184. The same result should obtain here. Respondent's insistence upon an EIA for ETIZ was far from the "lawful" exercise Respondent claims it to have been. Even Respondent's application of the EIA requirement to ETIZ was at odds with what Respondent argues its laws to be; to the extent that the EIA Proclamation requires an EIA for ETIZ, it required EIA approval prior to any Ethiopian agency's granting of a license or permit for ETIZ.⁹³⁶ But that did not occur here. Respondent issued and renewed multiple permits or licenses before it even requested an EIA for ETIZ, much less approved one.⁹³⁷ Claimant's expert, Prof. Tekle, confirms that Ethiopian agencies in the 2010 to 2015 period were inconsistent in applying the country's environmental laws, often choosing to prioritize investments and economic development over environmental protection.⁹³⁸ He further opines that it was exactly that preference for economic development and investment that prevented the EPA, acting through its Environmental Council, from ever formally adopting and giving legal effect to Directive No. 1/2008.⁹³⁹ Unfortunately for Akgun, Respondent's development preferences manifested in its support for the Condominium Project—but not ETIZ. Respondent's continued insistence on an EIA for ETIZ where no contract or law required an EIA and no EIA could satisfy Respondent was intended and did in fact target ETIZ and cause its demise. Respondent's EIA requirement therefore did not constitute a legitimate exercise of its police powers but, instead, an expropriatory measure.
- 5.185. Because Respondent's purported EIA requirement was not, in fact, a requirement under Ethiopian law or the 2012 ETIZ Agreement and only

⁹³⁴ *Id.*, ¶¶ 164, 334, 353-354.

⁹³⁵ *Id.*, ¶ 419.

⁹³⁶ **RLA-1**, EIA Proclamation, Art. 3(3).

⁹³⁷ See **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

⁹³⁸ See, e.g., Tekle Report, ¶ 2.11.

⁹³⁹ See *id.*

applied arbitrarily and discriminatorily as a bar to ETIZ, the police powers doctrine does not immunize Respondent from liability here.⁹⁴⁰

5.186. Respondent's limited authorities do nothing to save it. Respondent relies upon *S.D. Myers, Inc. v. Government of Canada*, *Saluka Investments BV v. Czech Republic*, *Burlington Resources v. Republic of Ecuador*, and *Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela*.⁹⁴¹ None of these authorities lends any support to the notion that the police powers doctrine shields Respondent from liability even for its arbitrary and discriminatory application of the EIA requirement in this case and the resultant substantial deprivation to Claimant:

5.186.1. First, in *SDMI*, the tribunal addressed whether regulatory measures limiting the export of certain hazardous wastes from Canada to the United States were measures "tantamount" to expropriation.⁹⁴² The Claimant's business was in disposing of the regulated hazardous wastes, and it planned to transport wastes from Canada to its facility in the United States to conduct such disposal.⁹⁴³ It created Myers Canada to carry out its business in Canada.⁹⁴⁴ Canada temporarily closed its border to movements of those wastes.⁹⁴⁵ Claimant argued that the regulations were "tantamount to expropriation" and deprived it of its investment, Myers Canada.⁹⁴⁶ The tribunal reasoned, however, that a measure could be "tantamount" to expropriation only to the extent that it was equivalent to an expropriation.⁹⁴⁷ Yet, the regulation at issue effected not a permanent deprivation but imposed only an eighteen-month-long delay upon Claimant, and with no benefit to Canada.⁹⁴⁸ As such, the complained-of measures

⁹⁴⁰ As addressed at Section 5.A.iii.a.5, Respondent's failure to allocate alternative land or to provide compensation to Claimant for its lost investments evidence the disproportionate nature of the complained-of conduct. That Respondent's acts were disproportionate further demonstrates that Respondent's acts were not a legitimate exercise of its police powers but rather expropriatory measures. See **CLA-006**, *Tecmed v. Mexico*, ¶ 122.

⁹⁴¹ SoD, ¶¶ 203-206.

⁹⁴² **RLA-11**, *SD Meyers v. Canada*, ¶¶ 279-288.

⁹⁴³ See *id.*, ¶¶ 92-93.

⁹⁴⁴ See *id.*, ¶¶ 93, 111.

⁹⁴⁵ See *id.*, ¶ 284.

⁹⁴⁶ See *id.*, ¶¶ 279, 285.

⁹⁴⁷ See *id.*, ¶¶ 285-286.

⁹⁴⁸ See *id.*, ¶¶ 284, 287.

resembled ordinary management of public affairs, not expropriation, although they violated NAFTA Arts. 1102 and 1105—*i.e.*, the National Treatment and FET obligations, respectively.⁹⁴⁹

5.186.2. Second, in *Saluka*, the tribunal rejected the claimant's expropriation claim arising from the Czech Republic's forced administration of the bank in which it held shares where the administration was entirely lawful.⁹⁵⁰ The laws of the state authorized forced administration in a bank if its deficiencies "endanger[ed] the stability of the [nation's] banking system."⁹⁵¹ The Czech Republic instituted forced administration when it became clear that the bank's low liquidity threatened its ability to perform its clients' payment instructions, which, in turn, threatened the stability of the nation's banking system due to the bank's size and status as a shareholder of other major banks in the Czech Republic.⁹⁵² The tribunal was not presented with any evidence that the Czech Republic "erred or acted otherwise improperly in reaching its decision."⁹⁵³ It therefore reasoned that the Czech Republic's decision was lawful even if subject to some discretion.⁹⁵⁴

5.186.3. Lastly, the tribunals in *Burlington Resources* and *Venezuela Holdings, B.V.* determined that certain fiscal measures did not amount to an expropriation where they caused no permanent and substantial deprivation of the claimant's investment as a whole.⁹⁵⁵ Both awards recognize that even where the complained-of measure arises through the state's "permissible exercise of regulatory powers," it is the measure's effect that determines whether it gives rise to an expropriation.⁹⁵⁶ The claimants were still able to make

⁹⁴⁹ See *id.*, ¶¶ 282-284.

⁹⁵⁰ **CLA-048**, *Saluka v. Czech Republic*, Partial Award, ¶¶ 271-275.

⁹⁵¹ *Id.*, ¶ 270 (quoting the forced administration decision).

⁹⁵² *Id.*

⁹⁵³ *Id.*, ¶ 273; see also *id.*, ¶ 255 (noting that the police powers doctrine applies to "*bona fide* regulations that are aimed at the general welfare" and "adopt[ed] in a non-discriminatory manner").

⁹⁵⁴ See *id.*, ¶¶ 271-275.

⁹⁵⁵ **RLA-12**, *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶¶ 425-426, 445, 450, 456-47; **RLA-13**, *Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, ¶¶ 286-287.

⁹⁵⁶ **RLA-12**, *Burlington v. Ecuador*, ¶¶ 395-397; **RLA-13**, *Venezuela Holdings, B.V. v. Venezuela* ¶ 286-287.

money on their investments, though less, and therefore suffered no expropriation.⁹⁵⁷ In both cases, the tribunals found that subsequent measures constituted expropriation: the takeover of claimant's oilfields and the enactment of a decree to partially nationalize the investment, respectively.⁹⁵⁸ The *Burlington* tribunal specifically held that "Ecuador's entry and taking possession of the [oilfields] was not justified under the police powers doctrine" because (1) the claimant's actions that Ecuador used as grounds for its takeover of the oilfields was justified under Ecuadorian law, and (2) Ecuador's takeover was not necessary "to prevent serious and significant damage" to the oilfields.⁹⁵⁹

5.187. The reasoning in Respondent's authorities with respect to the export ban, forced administration, and fiscal measures are inapplicable here. Unlike the export ban, forced administration, and fiscal measures that the claimants argued constituted expropriatory measures in *SDMI*, *Saluka*, *Burlington*, and *Venezuela Holdings*, Respondent's purported EIA requirement has no place in Ethiopian law or the 2012 ETIZ Agreement.⁹⁶⁰ Ethiopia chose not to adopt Directive No. 1/2008, which would have established such a requirement for ETIZ.⁹⁶¹ Respondent's discriminatory decision to apply the EIA requirement to ETIZ was therefore not lawful. Such decision was not subject to *some* discretion—as in *Saluka*—but was made with nothing but discretion, because Ethiopia's laws do not require EIA. Because Respondent exercised that discretion in a discriminatory manner,⁹⁶² in this case, unlike in *Saluka*, the State in question acted improperly in coming to its decision. Also, in contrast to *SDMI*, *Saluka*, *Burlington*, and *Venezuela Holdings*, Ethiopia's insertion of the EIA requirement, eventual suspension of works on ETIZ purportedly in the name of such requirement, and failure to propose suitable alternative lands

⁹⁵⁷ See **RLA-12**, *Burlington Resources v. Ecuador*, ¶¶ 425-426, 445, 450, 456-47; **RLA-13**, *Venezuela Holdings, B.V. v. Venezuela*, ¶¶ 286-87.

⁹⁵⁸ **RLA-12**, *Burlington Resources v. Ecuador*, ¶ 535; **RLA-13**, *Venezuela Holdings, B.V. v. Venezuela*, ¶ 108.

⁹⁵⁹ **RLA-12**, *Burlington Resources v. Ecuador*, ¶¶ 508-529.

⁹⁶⁰ Tekle Report, ¶¶ 2.6-2.10, 2.36.

⁹⁶¹ *Id.*, ¶¶ 2.6-2.10.

⁹⁶² **C-100**, Respondent's Responses to Claimant's Stern Schedule, Response to Request 9 (confirming that it neither received nor commissioned any EIA in relation to the Condominium Project that involved local developers).

effected a permanent and total deprivation of Claimant's rights to develop ETIZ under the 2012 ETIZ Agreement as shown above.⁹⁶³

- 5.188. International law does not immunize a state's discriminatory conduct even where it is carried out via regulation. The state is nevertheless liable for expropriation where its discriminatory regulation effects a substantial deprivation. As a result, Respondent's police powers defense fails.

D. Ethiopia Violated its Umbrella Clause Obligation

(i) Ethiopia Violated Its Contractual Commitments

- 5.189. Ethiopia takes little effort to contest the specific violations of its contractual commitments and merely states—without any analysis or support whatsoever—that no violation has occurred.⁹⁶⁴ In doing that, it supplies only general references to other sections of its Statement of Defense.⁹⁶⁵ Claimant will demonstrate below that Respondent's superficial criticism must be rejected and that Ethiopia did indeed violate multiple contractual commitments envisaged in the 2012 ETIZ Agreement as well as other related commitments.

a. Ethiopia Breached Its Obligation to Allocate the Land Suitable for the ETIZ Project

- 5.190. Multiple provisions in the 2012 ETIZ Agreement relate to setting out the definition and purpose of the land on which ETIZ was to be located. Art. 1 of the 2012 ETIZ Agreement defines the "Land" as follows:

[T]he Land means the land with an area of 1460 (One Thousand Four Hundred Sixty) hectares in Sendafa Town, Oromiya Special Zone Surrounding Addis Ababa on which the IZ will be built ...⁹⁶⁶

- 5.191. Furthermore, Art. 2 indicates that the land to be allocated is "to be used for the establishment and development of the IZ."⁹⁶⁷

⁹⁶³ See *supra* Section 5.C.iii.b.

⁹⁶⁴ SoD, ¶¶ 334-336.

⁹⁶⁵ *Id.*

⁹⁶⁶ **C-009**, The 2012 ETIZ Agreement, Art. 1 (definition of "Land") (emphasis added).

⁹⁶⁷ *Id.*, Art. 2.

- 5.192. Art. 3 of the 2012 ETIZ Agreement, entitled “Purpose of Land Lease Agreement,” specifies that the Mol and Oromia Regional State are entering into the land lease agreement “for the development, construction, and operation of the IZ.”⁹⁶⁸
- 5.193. It is clear from these contractual provisions that the Land to be provided for the project was supposed to be suitable for the ETIZ development.⁹⁶⁹ This is also consistent with Ethiopian law, which identifies suitability as an inherent feature of the leased property.⁹⁷⁰
- 5.194. The Mol and the Oromia Regional State undertook the duty to provide the Land to Akgun⁹⁷¹ As already discussed, the land options for ETIZ were all around the Legedadi Dam.⁹⁷² This was known to the Ethiopian authorities from the very beginning since it was Ethiopia which selected these options and showed them to Akgun for the latter to choose the ultimate site for ETIZ.⁹⁷³ Akgun’s choice, however, was limited to the three options adjacent to the Legedadi Dam that Ethiopia selected.
- 5.195. Additionally, Prof. Tekle explains that the Ethiopian government is directly responsible for managing the natural resources areas such as Legedadi basin areas:
- Article 51(11) of the Constitution requires the federal Government to “determine and administer the utilization of waters or rivers and lakes linking two or more States or crossing the boundaries of the national territorial jurisdiction.” Here, the Lege Dadi and Dire Dam basin areas are transboundary resources, which the Oromia Regional State and Addis Ababa City share.⁹⁷⁴
- 5.196. Furthermore, Prof. Tekle states that as an entity responsible for management of the Legedadi basin area the Ethiopian Government must have performed an SEA to determine the plan concerning the use of this area:

⁹⁶⁸ **C-009**, The 2012 ETIZ Agreement, Art. 3.

⁹⁶⁹ See *supra* Sections 2.A. and 2.B.

⁹⁷⁰ Tekle Report, ¶ 2.32; **MBT-15**, Ethiopian Civil Code, Art. 2900.

⁹⁷¹ **C-009**, The 2012 ETIZ Agreement, Art. 7(1).

⁹⁷² *Supra* Section 2.A.

⁹⁷³ *Supra* Section 2.A., ¶ 5.42.

⁹⁷⁴ Tekle Report, ¶ 2.40.

SEAs are necessary for projects involving the use of a crucial water resource (surface or underground) that may affect more than just the immediate area; in such cases, the SEA must be performed by the Government or under its close supervision. . . . Moreover, water is a crucial strategic resource commonly owned by all citizens under the Ethiopian Water Resources Management Proclamation, and its allocation must be decided by the Federal Government based on the principles laid down under Article 6 of the Proclamation.⁹⁷⁵

5.197. By deciding to site ETIZ near the Legedadi dam and providing the land for ETIZ to Akgun, Respondent created the clear and obvious expectation that it had determined, through an SEA or otherwise, that this site was suitable for development as an industrial zone.⁹⁷⁶ Yet, it was the location of the ETIZ site that ultimately prompted Ethiopia to suspend the project.⁹⁷⁷

5.198. Since the Mol and Oromia Regional State were responsible for designating the Land and the Ethiopian Government was responsible for conducting an SEA, any defect associated with the ETIZ site location shall be attributed to the actions of Ethiopia. Therefore, Ethiopia breached its obligation to allocate the land suitable for the project as per Arts. 1 and 7(1) of the 2012 ETIZ Agreement.

b. Ethiopia Breached Its Obligation to Provide Akgun with the 80-Year Right of Use of the ETIZ Site for the Purpose of ETIZ Development

5.199. The 2012 ETIZ Agreement indicates that it is not only an investment agreement for the development and construction of an industrial zone but also a lease agreement whereby Ethiopia, represented by the Mol and Oromia Regional State, leases the Land to Akgun for the purpose of ETIZ development.

5.200. Art. 6(1) of the 2012 ETIZ Agreement states: “The Land lease under this Agreement shall remain in force for a period of 80 (eighty) years as of the Hand Over Date.”⁹⁷⁸

⁹⁷⁵ Tekle Report, ¶ 2.20.

⁹⁷⁶ *Supra* Sections 2.A. and 5.A.iii.2.

⁹⁷⁷ *Supra* Section 2.E.

⁹⁷⁸ **C-009**, The 2012 ETIZ Agreement, Art. 6(1).

- 5.201. Furthermore, Art. 7(1) of the 2012 ETIZ Agreement provides that the Mol and the Oromia Regional State “shall deliver and allocate the Land to the Developer with the rights of management, operation and usage of the Land for the project”⁹⁷⁹ The 2012 ETIZ Agreement further obliged Akgun to only use the Land for the intended purpose as described under the ETIZ Agreement.⁹⁸⁰
- 5.202. Therefore, Ethiopia clearly had an obligation to provide Akgun with the 80-year right of use of the allocated Land for the purpose of ETIZ development that is spelled out in the 2012 ETIZ Agreement.
- 5.203. As discussed, Ethiopia suspended the ETIZ project for policy reasons and decided to move ETIZ to an alternative location.⁹⁸¹ Yet, it failed to relocate the site and amend the 2012 ETIZ Agreement accordingly. By suspending the ETIZ project and failing to relocate ETIZ to an alternative site, Ethiopia breached its obligation.

c. Ethiopia Breached Its Obligation to Facilitate Implementation of the Project

- 5.204. The 2012 ETIZ Agreement contains multiple provisions in relation to Ethiopia’s obligation to ensure and facilitate the realization of the Project and assist Akgun in its implementation. Art. 11(1) of the agreement provides Ethiopia’s general obligation “to facilitate possible supports of all governmental organs of various levels, during the construction, development and operation of the IZ.”⁹⁸²
- 5.205. More specifically, Arts. 11(8) and 11(9) set out Ethiopia’s obligation to provide adequate energy power including energy lines and telecommunication up to red line of the Project.⁹⁸³ Ethiopia also undertook to ensure that “the IZ will not suffer undue power interruption.”⁹⁸⁴

⁹⁷⁹ **C-009**, The 2012 ETIZ Agreement, Art. 7(1).

⁹⁸⁰ *Id.*, Art. 8(2).

⁹⁸¹ *Supra* Section 2.E.

⁹⁸² **C-009**, The 2012 ETIZ Agreement, Art. 11(1).

⁹⁸³ *Id.*, Arts. 11(8), 11(9).

⁹⁸⁴ *Id.*, Art. 11(8).

- 5.206. Akgun requested the Mol on multiple occasions to provide the promised energy and telecommunication lines.⁹⁸⁵ Yet, neither were supplied. As a result, Akgun had to work with generators and without telecommunication lines through the early stages of construction.⁹⁸⁶
- 5.207. In addition, Ethiopia substantially delayed relocation of the farmers from the site⁹⁸⁷ and the various Ethiopian authorities' multiple and inconsistent requests to stop and then renew construction due to the EIA-related issues frustrated and delayed ETIZ's construction.⁹⁸⁸
- 5.208. Through all these actions, Ethiopia breached its obligation to support and facilitate implementation of the project.

d. Ethiopia Breached Its Obligation Not to Expropriate

- 5.209. Art. 11(2) of the 2012 ETIZ Agreement states:

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, established over the Land.⁹⁸⁹

- 5.210. As Claimant has already demonstrated, Respondent expropriated Claimant's investments in violation of its express obligation in the contract and in the Turkey-Ethiopia BIT.⁹⁹⁰

⁹⁸⁵ See, e.g., **C-058**, Akgun's work report dated 5 September 2013; **C-057**, Akgun's work report dated 6 August 2013; **YUN-16**, Akgun's work report dated 4 October 2013 (with all work reports noting pending power requests to EELPA, Ethiopian Electric Power Authority); **C-067**, Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu dated 3 February 2014; **C-072**, Letter from Akgun Construction to Ministry of Industry dated 15 March 2014; **C-073**, Report of Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 27 March 2014; **C-021**, Letter from Akgun Construction to Ministry of Industry and Ethiopian Investment Agency dated 17 July 2014; **C-022**, Letter from Akgun Construction to Ethiopian Electric Utility dated 27 August 2014.

⁹⁸⁶ Yunus Akgun 1st Statement, ¶ 5.4.

⁹⁸⁷ **C-019**, Letter from Akgun Construction to Ministry of Industry dated 28 April 2014; **C-020**, Letter from Akgun Construction to Bereh Voreda Police dated 6 June 2014; Yunus Akgun 1st Statement, ¶¶ 4.9, 5.1.

⁹⁸⁸ SoC, ¶¶ 2-66-2.93. *Supra* Section 2.E.ii.

⁹⁸⁹ **C-009**, The 2012 ETIZ Agreement, Art. 11(2).

⁹⁹⁰ *Supra* Section 5.C.

e. Ethiopia Breached Its Obligation to Pay Direct and Indirect Losses in Case of Suspension for No Fault of Akgun

- 5.211. The 2012 ETIZ Agreement specifically provides that if the project is suspended or stopped, including through an administrative decision, without any fault attributable to Akgun, “any and all direct and indirect losses of [Akgun] shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the BIT.”⁹⁹¹
- 5.212. The facts of this case clearly show that the suspension of the project was not Akgun’s fault. ETIZ failed because Respondent’s ministries did not observe their obligations under Ethiopia’s environmental laws,⁹⁹² made a mistake in locating ETIZ within the Legedadi watershed and concealed that mistake from Akgun,⁹⁹³ deceived Akgun into thinking that ETIZ could go forward on the designated site if only Akgun would supply a little more detail on its water treatment plans⁹⁹⁴ and revise its EIA,⁹⁹⁵ and eventually decided that ETIZ should be re-located to an alternative site but failed to provide an adequate alternative site.⁹⁹⁶
- 5.213. All of these reasons behind the stoppage of the project are of Respondent’s making. At the time, Respondent expressly acknowledged that this was the case. Notably, Respondent recognized in an internal letter that its error regarding ETIZ’s location stemmed from its failure to conduct a suitability analysis in the first instance, remarking that “a Strategic Environmental Assessment should be conducted in advance” of site allocation⁹⁹⁷ and that “industrial zones and other projects should be subject to environmental and social impact assessments prior to assignment of construction sites.”⁹⁹⁸

⁹⁹¹ **C-009**, The 2012 ETIZ Agreement, Arts. 11(10) and 11(11).

⁹⁹² *Supra* ¶¶ 1.3.3, 2.44-2.58, 2.5, 2.160, 2.181.

⁹⁹³ *Supra* ¶¶ 1.3.3, 2.156-2.158, 2.170, 2.183, 2.186.

⁹⁹⁴ *Supra* ¶¶ 1.3.3, 2.132-2.138, 2.172, 2.173-2.180, 2.184.

⁹⁹⁵ *Supra* ¶¶ 1.3.3, 2.132-2.138, 2.159, 2.163, 2.174, 2.175.

⁹⁹⁶ *Supra* ¶¶ 1.3.3; 2.188, 2.190, 2.196-197.

⁹⁹⁷ **C-106**, Letter from Ministry of Environment and Forest to Ministry of Industry dated 14 April 2014, p. 2.

⁹⁹⁸ **C-129**, Letter from Ministry of Water, Irrigation and Energy to Ministry of Industry [date illegible], pp. 1-2.

5.214. Respondent also concluded that it should provide “a mechanism to make up for the investor in regards to motivation, financially (considering the expenses thus far)” and that Akgun should “be availed with an alternative site that suits the intended development.”⁹⁹⁹ Furthermore, at no point prior to initiation of this arbitration did Respondent allege that the failure of ETIZ was Akgun’s fault.¹⁰⁰⁰

5.215. Because Respondent suspended and stopped the project through no fault of Akgun, Ethiopia is under an obligation to pay both direct and indirect damages to Akgun. Yet, it has not done so. In that, it breached its obligation under the 2012 ETIZ Agreement.

(ii) Ethiopia Violated Other Specific Commitments It Entered into With Respect to Akgun’s Investment

5.216. The scope of operation of umbrella clauses is not limited to contractual promises of the host State contained in investor-State contracts. It also encompasses other specific promises the host State made, including by means of individual administrative instruments, and the like. Indeed, “any commitment independent of its legal basis can be covered by an umbrella clause as long as it is of a specific and investment-related character.”¹⁰⁰¹

5.217. Ethiopia provided a specific commitment to relocate ETIZ. Ethiopia decided to relocate ETIZ by mid-2014 at the latest.¹⁰⁰² The Prime Minister’s instructions to the Mol given on 22 July 2014 confirmed that “the government shall devise a resolution for the dispute as to the industrial village with an alternative site.”¹⁰⁰³

5.218. In December 2014, in the course of a series of meetings Akgun held with the officials from the President and Prime Minister’s Offices, Respondent verbally

⁹⁹⁹ **C-105**, Memorandum dated 3 April 2014, p. 10.

¹⁰⁰⁰ See, e.g., **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014; **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014. See also *supra* ¶ 2.186.

¹⁰⁰¹ **CLA-099**, Schill, p. 71. See also **CLA-007**, *LG&E v. Argentina*, ¶¶ 174-175 (stating that Argentina’s enactment of the Gas Law and other regulations “became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause.”)

¹⁰⁰² *Supra* Section 2.G.

¹⁰⁰³ **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014, p. 2.

notified Akgun of its administrative decision to relocate ETIZ.¹⁰⁰⁴ Finally, on June 17, 2015, Respondent provided the specific written commitment to Akgun to relocate ETIZ to an alternative site.¹⁰⁰⁵ Yet, to date Respondent has not complied with its commitment. Therefore, Respondent is in breach of its commitment to relocate ETIZ.

6. QUANTUM

A. Respondent Must Make “Full Reparation,” Including Claimant’s Lost Profits

6.1. Respondent’s arguments as to damages are a jumble. Overrun by arguments germane to jurisdiction and liability, Respondent’s actual arguments as to the measure of damages appear as an afterthought afforded only slight attention and almost entirely devoid of supporting authority. The standard for awarding Akgun damages is full reparation, and the measure is lost profits. Respondent cites nothing to the contrary. And, in the event this Tribunal does not afford Akgun lost profits as the measure for that full reparation, loss of opportunity fills in—particularly given that any difficulty in showing Akgun’s lost profits is due to Respondent’s breach. Finally, there can be no question Akgun has sustained out of pocket damages. Those damages are definite and documented.

(i) Respondent’s Characterization of the EIA as a “Precondition” Fails and, Thus, Undermines the Whole of Respondent’s Arguments as to Damages

6.2. Pervading Respondent’s discussion as to damages are questions central to jurisdiction and liability—namely, whether Akgun has identified an investment under the Treaty, the impairment of which gives rise to claims arbitrable by this Tribunal, and whether Akgun has identified “which treaty standard is alleged to have been breached by which act of Ethiopia” and “the causation of injury therefrom.”¹⁰⁰⁶

¹⁰⁰⁴ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; **C-085**, Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014; **C-086**, Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 11 December 2014.

¹⁰⁰⁵ **C-031**, Letter from Ministry of Industry to Akgun Construction dated 17 June 2015.

¹⁰⁰⁶ SoD, ¶ 344.

- 6.3. As to the latter, Respondent's contention is not only conclusory but unsubstantiated.
- 6.4. Indeed, it disregards the entirety of Akgun's Statement of Claim. As outlined in detail there¹⁰⁰⁷ and further addressed here, Respondent breached the obligations it owed to Akgun under the BIT, and, as a result of these breaches, Respondent has caused great harm to Akgun for which Respondent now owes Claimant compensation.
- 6.5. As to the question whether Akgun has identified an investment under the Treaty, as a general matter, 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.¹⁰⁰⁸
- 6.6. More particularly, however, Respondent's arguments turn entirely on its characterization of the EIA as a "precondition."¹⁰⁰⁹ Respondent baldly asserts that "Akgun has failed to show any harm it may have incurred has been caused by any wrongful conduct attributable to Ethiopia"¹⁰¹⁰ and insists instead that **"the Agreement holds precisely zero value** unless and until this regulatory requirement [the EIA] is cleared."¹⁰¹¹
- 6.7. Thus, as a threshold matter, for Respondent's arguments as to damages to have any relevance at all, the Tribunal would first need accept Respondent's characterization of the EIA as a "precondition," which precondition Akgun must have first satisfied before it can claim breach and attendant harm.
- 6.8. Yet, as borne out in Akgun's Statement of Claim and further addressed here, Respondent's characterization of the EIA as a precondition fails as a matter of fact, common sense, and Ethiopian law. That is, ETIZ did not fail for lack of satisfying some precondition for an EIA. ETIZ failed because Respondent's ministries concealed from Akgun the conclusion that they had made a mistake in situating ETIZ within the Legedadi watershed,¹⁰¹² insisted on an EIA for

¹⁰⁰⁷ See, e.g., SoC, Section 5.

¹⁰⁰⁸ *Supra* Sections 3.i.b and 3.iii.b.

¹⁰⁰⁹ SoD, ¶ 349.

¹⁰¹⁰ *Id.*, ¶ 340; see also *id.*, ¶ 378 ("Akgun cannot prove that it has lost any opportunities for reasons that are not attributable to its own default.")

¹⁰¹¹ *Id.*, ¶ 356 (emphasis in original).

¹⁰¹² *Supra* ¶¶ 1.3.3, 2.156-2.158, 2.170, 2.183, 2.186, 5.209.

ETIZ although Ethiopian law did not require it and then deceived Akgun into thinking that ETIZ could go forward on the designated site if only Akgun would supply a little more detail on its water treatment plans¹⁰¹³ and revise its EIA,¹⁰¹⁴ and fooled Akgun with empty promises to provide Akgun with an adequate alternative site for ETIZ.¹⁰¹⁵

- 6.9. Respondent's characterization of the EIA fails to hold and, without that, Respondent's arguments as a whole fail.

(ii) The Standard for Awarding Damages Is Full Reparation, Measured by Akgun's Lost Profits

- 6.10. Respondent cites no authority whatsoever contravening the authority cited in Akgun's Statement of Claim as to the standard for awarding Akgun damages.¹⁰¹⁶ As such, Respondent has effectively conceded that the standard Akgun outlines is the proper one.
- 6.11. That standard can be summarized as full reparation which requires that the award "wipe out all the consequences of the illegal act."¹⁰¹⁷
- 6.12. Again, Respondent's Statement of Defense is entirely devoid of any competing standard or authority.
- 6.13. In this case, there can be no real question that Akgun incurred significant damages; Akgun worked on the industrial zone project for six years and spent millions of dollars on the effort, only for Respondent to stop the project by administrative order.

¹⁰¹³ *Supra* ¶¶ 1.3.3, 2.132-2.138, 2.172, 2.173-2.180, 2.184, 5.209.

¹⁰¹⁴ *Supra* ¶¶ 1.3.3, 2.132-2.138, 2.159, 2.163, 2.174, 2.175, 5.209.

¹⁰¹⁵ *Supra* ¶¶ 1.3.3, 2.188, 2.190, 2.196-197, 5.209.

¹⁰¹⁶ SoC, ¶¶ 6.1-6.49.

¹⁰¹⁷ **CLA-063**, *Case Concerning the Factory at Chorzów (German v. Poland)*, Decision on the Merits, 13 September 1928, PCIJ Rep. Series A. – No. 17, p. 47 ("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").

- 6.14. There also can be no real question that the parties contemplated that Akgun would be compensated in this scenario as Akgun's contract with the Mol contains a provision that entitles Akgun to compensation.¹⁰¹⁸
- 6.15. The reasonable expectations of Akgun and Ethiopia contemplate compensation. Aside from the contractual implications of this provision that may be directly relevant to the umbrella clause claim, this provision informs the reasonable expectations of Akgun under the circumstances.
- 6.16. There can be little doubt that the consequences of Ethiopia's unfair treatment extend significantly beyond the sums of money Akgun expended and time that Akgun wasted.
- 6.17. Considering the full reparation standard in this context, Akgun has established that it is entitled to the full suite of lost profits damages calculated by its valuation expert, A&M.¹⁰¹⁹
- 6.18. Lost profit damages must be based upon facts that show that the damages are more than speculation. Here, there are various noteworthy aspects of this project that, taken together, create an objective likelihood that it would have generated significant quantifiable profits:
- 6.18.1. Akgun had already built from scratch a similar, highly successful industrial zone in Istanbul.¹⁰²⁰ There can be no question that Akgun had the necessary know-how to succeed on a world class scale.
- 6.18.2. An industrial zone is a well-known business model and the viability of such zones is neither speculative nor technically unfeasible. Such zones exist world-wide and the economics of such zones are established and well-understood.¹⁰²¹

¹⁰¹⁸ The 2012 ETIZ Agreement expressly acknowledged that if ETIZ was stopped because of some governmental action without fault on the part of Akgun, the government would pay Akgun's direct and indirect losses. See **C-009**, The 2012 ETIZ Agreement, Arts. 11.10-11.11.

¹⁰¹⁹ See Expert Report of Laura Hardin dated 19 November 2020 ("A&M Report"), Section 5.

¹⁰²⁰ Of this Respondent is well aware. See *supra* Sections 2.A.i, 2.A.iii.

¹⁰²¹ See, e.g., **C-144**, UNCTAD, *Global competition for investment prompts a surge in special economic zones*, 12 June 2019, <https://unctad.org/news/global-competition-investment-prompts-surge-special-economic-zones> (last accessed 14 October 2021), p. 1 ("The global tally of zones has increased to nearly 5,400, up from 4,000 five years ago, and more than 500 new [special economic zones] are in the pipeline. The industrial zones, which offer fiscal incentives and streamlined regulations to attract foreign direct investment (FDI), are common in most developing and many developed economies. More than 145 economies operate such zones today.").

- 6.18.3. Ethiopia cannot credibly challenge market demand for ETIZ since Ethiopia itself made the creation of such zones a cornerstone of its economic policy.¹⁰²² The market reaction to the zone had been enthusiastic with many committed industrialists in place before the zone was complete and strong indications that there were many more industrialists who were interested in building factories in the zone.¹⁰²³
- 6.18.4. Akgun had obtained the requisite investment licenses and permits.¹⁰²⁴
- 6.18.5. Akgun's plan of finance did not require third-party investment of loans.¹⁰²⁵
- 6.18.6. The fact that many industrialists had committed to build factories in ETIZ substantiated Akgun's projected revenues.¹⁰²⁶

¹⁰²² See, e.g., **C-101**, PASDEP, p. 157 (outlining the goal "to promote public-private partnerships in infrastructure development for industrial development and speeding up implementation of industrial zones"); **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), 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; A&M Report, ¶¶ 32-40, 91-95. And, as recently as 2017, Respondent contacted Akgun to inquire about setting up an industrial zone. See Yusuf Akgun 2nd Statement, ¶¶ 5.1-5.3. While the inquiry was for a zone comprised of a mix of industries different than what was originally planned and demanded by Ethiopia for ETIZ, that inquiry itself confirms Respondent's ongoing interest in these zones.

¹⁰²³ Indeed, Akgun had over 100 interested investors and a significant number of preliminary commitments. See **C-093**, Letter from Akgun Construction to Ministry of Industry dated 7 July 2014 and the attached Business Plan for 15 years; **C-094**, Letter from Akgun Construction to Ministry of Industry dated 2 January 2012; **C-028**, 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 2014; Yusuf Akgun 1st Statement, ¶ 4.28; Yunus Akgun 1st Statement, ¶¶ 5.8-5.9; Ufuk Akgun Statement, ¶ 2.9.

¹⁰²⁴ See **C-038**, Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009; **C-039**, Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009; **C-041**, Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009; **C-055**, Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013; **C-056**, Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013; **C-063**, Commercial Registration Certificate of Akgun Construction's Ethiopia Branch issued by Ethiopian Investment Agency dated 29 November 2013.

¹⁰²⁵ Yunus Akgun 1st Statement, ¶ 9.1; see also Yusuf Akgun 1st Statement, ¶¶ 2.6, 4.19; A&M Report, Section 5.1(C) (confirming the high probability of Akgun's success on ETIZ is supported by the ETIZ development model, namely a "cost-plus" model that was to be "demand driving and essentially self-funding").

¹⁰²⁶ Again, as noted above, interest in the zone was enthusiastic.

- 6.18.7. Akgun's pricing for the construction of the factories and the ongoing lease payments were in line with the experience at other similar projects.¹⁰²⁷
- 6.18.8. Akgun's costs were also reasonably concrete because they were based on indications of interest from various Ethiopian vendors and have been cross-checked against costs experienced at other similar projects.¹⁰²⁸
- 6.18.9. Akgun had commissioned and circulated feasibility studies for the project¹⁰²⁹ that Ethiopian officials had enthusiastically endorsed.¹⁰³⁰
- 6.19. The foregoing facts add up to a project that was on its way to financial success. Given the joint enthusiasm for the project plan, the Mol's contractual commitment to support the project, Akgun's contractual entitlement to build the zone in a favorable logistical location close to Ethiopia's largest city, sited favorably on desirable property under an 80 year lease, and the commitments from numerous industrialists and the demonstrated interest of many others, this project was at a stage where it evidenced significant and highly probable future cash flows that meant that the project itself had significant value at the time it was stopped.
- 6.20. The awards in *Sapphire Intl. Petroleum, Ltd. v. National Iranian Oil Company* and *Gemplus v. Mexico* make the point that where the respondent's misconduct occasions the uncertainty in the business outcome and the calculations, the burden of proof should be relaxed or perhaps even reversed.¹⁰³¹

¹⁰²⁷ By way of comparison, 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. See Yusuf Akgun 1st Statement, ¶¶ 2.3-2.5.

¹⁰²⁸ See A&M Report, Section 5.1(C) ("The ETIZ Project was Financially Feasible"); see also DCF Assumptions and Annex I referenced therein.

¹⁰²⁹ See **C-043**, Pre-Feasibility Study; **C-045**, Final Feasibility Study.

¹⁰³⁰ *Supra* Section 2.A.iii; **C-042**, *Turkish firm proposes feasibility study to establish large industrial zone*, The Ethiopian Herald, 18 August 2009; **C-003**, K. Bekele, *Turkish Investors Envisage an Industrial Zone Worth USD 10bn in Ethiopia*, The Reporter, 22 August 2009.

¹⁰³¹ See **CLA-032**, *Gemplus S.A. et. al v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010 ("*Gemplus v. Mexico*"), ¶¶ 13-92 ("At this point, confronted by evidential difficulties created by respondent's own wrongs, the tribunal considers that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise"), ¶¶ 13-84 (citing *Sapphire Intl. Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963)).

- 6.21. Respondent contends that “lost profits may only ever be awarded in the case of an enterprise or going concern with a proven record of profitability,”¹⁰³² but that is not so—not in the least. Tribunals adopt a forward-looking damages model even when a claimant’s investment does not qualify as a “going concern” where other indicia show that model to be reliable.
- 6.22. For example, in *Crystallex v. Venezuela*, the tribunal examined whether to award lost profits damages to a claimant who had been granted a mining concession but was ultimately denied necessary permits before it began mining gold deposits. As the tribunal explained, “once 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.”¹⁰³³ Even despite the claimant’s lack of “a proven track record of profitability,” the tribunal reasoned that the claimant was able to show with sufficient certainty that it “*would have engaged* in a profitmaking activity but for the [r]espondent’s wrongful act” “due to the nature of the investment at stake” and “the development stage of the project.”¹⁰³⁴ The tribunal specifically relied upon (1) the importance of the mine at issue, which was deemed “one of the most important mines in Latin America,” as the claimant’s contemporaneous feasibility studies, among other documents, showed and (2) the stability in the market for gold, which allowed the tribunal to determine “with greater certainty” the “costs and future profits” of the gold mining activities.¹⁰³⁵ The tribunal then concluded that only a forward-looking valuation method taking into account future lost profits could approximate the lost investment’s fair market value, because “the fair market value of an object is not related to its historical cost but to its future performance.”¹⁰³⁶

¹⁰³² SoD, ¶ 374.

¹⁰³³ **CLA-036**, *Crystallex v. Venezuela*, ¶ 875 (emphasis in original).

¹⁰³⁴ *Id.*, ¶¶ 875, 877 (emphasis in original).

¹⁰³⁵ *Id.*, ¶¶ 878-880.

¹⁰³⁶ *Id.*, ¶¶ 882-885, 911.

- 6.23. As outlined in Akgun’s Statement of Claim, the discounted cash flow method that Akgun’s expert, A&M, employed is the preferred method to determine compensation in expropriation cases.¹⁰³⁷ This is so even when a project has not started operations. Indeed, there is extensive case law to this effect.¹⁰³⁸
- 6.24. Although in former times it might have been accurate to state that investment tribunals were generally unwilling to award lost value under a DCF analysis without several years of normalized operating results, that is no longer the case. The trend is plainly away from such a dogmatic rule, and in recent years many panels have awarded damages under a DCF model even where the business was damaged or destroyed before it had demonstrated its full potential.¹⁰³⁹
- 6.25. In *Rumeli v. Kazakhstan*, the tribunal grappled with the question of how to determine the fair market value of the claimant’s lost investment—namely, its shares in a mobile telecommunications company. The tribunal acknowledged that the said company “had not been in existence for long enough to have generated the data required for the calculation of future income,” and that its balance sheet in fact reflected its insolvency leading up to the time of respondent’s BIT breaches.¹⁰⁴⁰ Yet, the tribunal reasoned that “a DCF valuation would likely have formed one of the measures which would have informed a discussion between a willing seller and a willing buyer.”¹⁰⁴¹ As a result, the tribunal considered the claimant’s DCF valuation in determining reparations due from respondent under the fair market value standard.¹⁰⁴²
- 6.26. In *Kardassopoulos v. Georgia*, the claimant’s investment in an oil and gas concession was in its nascent stages—with some testing, design, and construction works completed but operations not yet commenced—when the respondent expropriated the claimant’s interest and breached its FET

¹⁰³⁷ SoC, ¶ 6.15 (citing **CLA-052**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 575 (stating that “the DCF valuation method is presumptively appropriate, absent persuasive reasons making it inappropriate in particular cases”).

¹⁰³⁸ See **CLA-029**, *ADC v. Hungary*, ¶ 502; **CLA-005**, *Vivendi*, Award, ¶ 8.3.4.

¹⁰³⁹ See, e.g., **CLA-016**, *Rumeli v. Kazakhstan*; **CLA-124**, *Ioannis Kardassopoulos and Ron Fuchs. v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (“*Kardassopoulos v. Georgia*”); **CLA-030**, *Gold Reserve v. Venezuela*.

¹⁰⁴⁰ **CLA-016**, *Rumeli v. Kazakhstan*, ¶¶ 806, 811.

¹⁰⁴¹ *Id.*, ¶ 810.

¹⁰⁴² See *id.*, ¶¶ 810, 813-814.

obligation.¹⁰⁴³ Although not a going concern, the tribunal determined, “This is not an appropriate case in which to value the [c]laimants’ interest in [the project] on the basis of a costs approach, much less the wasted costs approach advocated by the [r]espondent.”¹⁰⁴⁴ The tribunal instead adopted the claimants’ proffered approach, which combined an income-based model using the DCF method with a market approach using three transactions or proposed transactions involving the expropriated rights around the date of expropriation.¹⁰⁴⁵

- 6.27. The tribunal in *Gold Reserve v. Venezuela* assessed the appropriate measure of damages to award in satisfaction of a fair market value standard to a claimant whose mining concessions had been terminated in breach of the FET standard.¹⁰⁴⁶ The tribunal concluded that the applicable standard of proof for damages was the balance of probabilities.¹⁰⁴⁷ It nevertheless reasoned that it retained “a certain amount of discretion or a ‘margin of appreciation’ when assessing damages, which [would] necessarily involve some approximation,” due to the element of “imprecision” involved.¹⁰⁴⁸ Although the claimant had not yet begun mining operations under its concession contracts, the tribunal applied the DCF method to calculate the measure of compensation due as a result of respondent’s FET breach.¹⁰⁴⁹
- 6.28. At most, the *World Bank Guidelines on the Treatment of Foreign Direct Investment* cited by Respondent advise “caution” in applying the DCF method and advise against it where damages are “speculative or indeterminate.”¹⁰⁵⁰ Those guidelines do not foreclose the method.
- 6.29. Respondent’s reliance on *Tecmed v. Mexico* is equally misplaced; it did not foreclose the method either. While the tribunal there elected to disregard the DCF method, it did so given the “difficulties in obtaining objective data”

¹⁰⁴³ See **CLA-124**, *Kardassopoulos v. Georgia*, ¶ 105.

¹⁰⁴⁴ *Id.*, ¶ 602.

¹⁰⁴⁵ See *id.*, ¶¶ 539, 544, 553, 562-563, 595-603.

¹⁰⁴⁶ See **CLA-030**, *Gold Reserve v. Venezuela*, ¶ 681.

¹⁰⁴⁷ See *id.*, ¶ 685.

¹⁰⁴⁸ *Id.*, ¶ 686.

¹⁰⁴⁹ See *id.*, ¶¶ 848-849.

¹⁰⁵⁰ **RLA-35**, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, World Bank Group (1992), 31 ILM 1366, ¶ 42.

allowing for application of that method.¹⁰⁵¹ And, Akgun does not dispute that objective data is requisite to application of the DCF method in calculating lost profits.

6.30. Per the line of cases on which Akgun relies, an award of lost profits, including those calculated based on the DCF method, is appropriate for newly established projects which have not yet become operational so long as a claimant can demonstrate that (1) it was engaged or would have engaged in a profit-making activity but for respondent's breach and (2) the activity would have been profitable. Furthermore, the tribunal explained in *Vivendi v. Argentina*, a claimant might demonstrate as much simply "by presenting sufficient evidence of its expertise and proven record of profitability ... in similar circumstances."¹⁰⁵²

6.31. The *Vivendi v. Argentina* panel recognized that lost profits were not theoretically foreclosed to a new business:

A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first-hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of the Treaty violation.¹⁰⁵³

6.32. This is consistent with the way such investments would be valued in the capital markets where early-stage businesses are bought and sold every day based on DCF analysis.¹⁰⁵⁴ In all these cases, although the subject businesses were just getting started and did not have stable operating histories, qualified

¹⁰⁵¹ **CLA-006**, *Tecmed v. Mexico*, ¶ 186. Notably, while the tribunal elected to disregard the DCF method, it did not disregard lost profits as a measure of damages. Rather, citing to authority for full reparation as the standard for damages, the tribunal noted that "compensation of such loss must amount to an integral compensation for the damage suffered, **including lost profits**." *Id.* ¶ 195 (emphasis added).

¹⁰⁵² **CLA-005**, *Vivendi*, Award, ¶ 8.3.4.

¹⁰⁵³ *Id.*, ¶ 8.3.10.

¹⁰⁵⁴ See, e.g., **C-145**, M. Mauboussin and A. Callahan, Everything Is a DCF Model: A Mantra for Valuing Cash-Generating Assets, Morgan Stanley Investment Management, 3 August 2021, https://www.morganstanley.com/publication/insights/articles/article_everythingisadcfmodel_us.pdf (last accessed 18 October 2021), p. 1 (positing "that whenever investors value a stake in a cash-generating asset, they should recognize that they are using a discounted cash flow (DCF) model," including "for start-ups") (citing, *inter alia*, A. Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset*, (3rd ed., 2012), pp. 643-665).

financial analysts performed sophisticated due diligence to investigate and support revenue and cost inputs to create detailed, well-supported operating projections. These “financial scientists,” using well-established and peer reviewed practices and techniques that are regularly deployed in real life transactions, demonstrated that the significant revenue, price and cost variables could be reliably estimated and created reliable pro formas for the businesses involved.

- 6.33. A&M has done exactly what *Vivendi v. Argentina* required: it has established based on the balance of probabilities that ETIZ would have produced profits if Ethiopia had not stopped it.¹⁰⁵⁵
- 6.34. The calculation of damages under international law follows the science of the valuation of private investments in modern finance. The marketplace teaches that enterprises often have significant value before their business plans are fully deployed. The value of such enterprises often greatly exceeds the amounts invested or the value of the hard assets. In the finance world, the value of an enterprise, even one that has not yet begun its profit-making phase, is related to its potential future cash flows discounted by the probability of risks involved in obtaining them.
- 6.35. Many tools and techniques have been established in the finance industry to estimate the value of nascent businesses. International law borrows the analytic tools to estimate damages;¹⁰⁵⁶ the theory being that if the investor has suffered a loss of value in the real world that can be quantified in the marketplace, the law should also compensate for this loss. A&M has used the same analytic tools that are used to value businesses for finance transactions in the business world.¹⁰⁵⁷
- 6.36. The common ground for such analytical tools is that they are based on modeling future cash flows and discounting them for risk.

¹⁰⁵⁵ A&M Report, Section 5.

¹⁰⁵⁶ See **CLA-125**, N. Rubins et al., *Approaches to Valuation in Investment Treaty Arbitration*, in C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Law*, (2018), p. 172 *et seq.* (observing that, with regard to the appropriate measure of compensation and “[a]bsent guidance from the relevant treaty, arbitral awards reflect a general consensus that the answer lies in customary international law; and further surveying and explaining the finance analytical tools employed to do so).

¹⁰⁵⁷ See A&M Report, ¶¶ 66-67.

- 6.37. The discount rate is a reflection of the particular risks facing a business. Its components are a factor that represents expected inflation (the risk-free rate), a factor that represents a cost of capital and a factor that represents the specific risks of the project, the risk premium.
- 6.38. Ethiopia has articulated a variety of risks that it suggests are not included in the A&M damage calculations.¹⁰⁵⁸ It claims that the cash flows do not reflect the risks inherent in the project, but are undiscounted blue-sky estimates. It describes other project-specific risks and claims that A&M failed to factor in the risk that Ethiopia would not allow the project to proceed. But these risks are included in the risk premium which A&M has applied.¹⁰⁵⁹
- 6.39. And, of course, the risk that Ethiopia will behave unfairly and violate its international treaty is the precise wrong that is being addressed in this case so the risk of that event is not a part of the risk premium included in the DCF calculation.¹⁰⁶⁰
- 6.40. International law tends to lag developments in the banking world as it should until novel theory becomes established wisdom, but international law does not stand still. As theory advances, what was novel and cutting edge becomes established, and at this point, the law of valuation and damages also evolves. That is exactly where we are here.
- 6.41. The specific arguments Ethiopia offers are not compelling in these circumstances in light of the probability of a successful business outcome in this circumstance.

(iii) If This Tribunal Does Not Award Lost Profits, Loss of Opportunity is the Appropriate Measure of Damages

- 6.42. If for some reason the Tribunal does not believe that the evidence regarding the DCF value is sufficiently supported, the Tribunal could turn to the concept of lost opportunity damages to remedy the breaches.

¹⁰⁵⁸ See SoD, ¶¶ 361, 370-372.

¹⁰⁵⁹ A&M Report, Section 5.G.

¹⁰⁶⁰ See generally, **CLA-126**, J. Alberro, *Should Expropriation Risk Be Part of the Discount Rate?*, 33(5) J. of Intl. Arb. (2016). pp. 525-544 (reviewing five arbitral awards spanning 2005-2010 each of which considered the exclusion of “confiscation risk” from the discount rate), p. 546 (concluding that “[t]ribunals are increasingly incorporating into their awards compensation standards that are different depending on whether the government actions (e.g. expropriation) are considered to be lawful or not”).

- 6.43. With regard to the award of damages for loss of opportunity, Respondent errs in its contention that “loss of opportunity” or “loss of chance” does not enjoy the wide acceptance across legal systems such that it could be considered a generally recognized principle of law and that, as such, it is not a rule of international law.”¹⁰⁶¹
- 6.44. To the contrary, and as outlined in Akgun’s Statement of Claim, there is a long line of cases demonstrating that loss of opportunity may indeed be awarded as part of ensuring a claimant’s full reparation.¹⁰⁶²
- 6.45. This theory is recognized under the UNIDROIT Principles on International contracts.¹⁰⁶³
- 6.46. The one case on which Respondent relies to support its position is actually in line with these cases. In *Chevron v. Ecuador*, the tribunal did indeed observe that “the ‘loss of chance’ principle does not have wide acceptance across legal systems such that it can be considered a ‘general principle of law recognized by civilized nations,’”¹⁰⁶⁴ but that was not the end of the tribunal’s observation. Rather, the tribunal went on to note that “it can be said that the ‘loss of chance’ principle is applied in exceptional situations where there exists a ‘harm whose existence cannot be disputed but which is difficult to quantify.’”¹⁰⁶⁵ Respondent failed to cite this second half of the tribunal’s observation, and it is this second half that fits squarely within the body of cases on which Akgun relies.

¹⁰⁶¹ SoD, ¶ 379.

¹⁰⁶² SoC, ¶ 6.15. See also **CLA-073**, *Société Ouest Africaine des Bétons Industriels (“SOABI”) v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, ¶ 6.18; **CLA-072**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (“*SPP v. Egypt*”), ¶ 215; **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-91; **CLA-036**, *Crystallex v. Venezuela*, ¶¶ 870-871; **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; **CLA-064**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 278-279; **CLA-075**, *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award, 27 September 2019 (“*Perenco*, Award), ¶¶ 220-221; **CLA-076**, *Bilcon v. Canada*, ¶¶ 175-176.

¹⁰⁶³ See **CLA-077**, 2016 UNIDROIT (Intl. Institution for the Unification of Private Law), Principles of Intl. Comm. Contracts, Art. 7.4.3.

¹⁰⁶⁴ **RLA-36**, *Chevron Corp. and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, ¶ 382.

¹⁰⁶⁵ *Id.*

- 6.47. As in *Chevron v. Ecuador*, those cases make clear that loss of opportunity may indeed be awarded as part of ensuring a claimant’s full reparation and, more precisely, that loss of opportunity is the proper measure when proof of damages is impossible or difficult.¹⁰⁶⁶
- 6.48. As the tribunal in *SPP v. Egypt* stated, “the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.”¹⁰⁶⁷ Indeed, as the tribunal in *Gemplus v. Mexico* cautioned, such would “produce a harsh and unfair result.”¹⁰⁶⁸
- 6.49. Moreover, as noted, loss of opportunity has been recognized as an appropriate measure of damages when the respondent’s breach causes any difficulty on claimant’s part in proving a lost profits claim; and, in that case, the burden of proving future profits should be reversed and the onus imposed on respondent to dispute claimant’s proof.¹⁰⁶⁹
- 6.50. Thus, here, not only is Respondent wrong as to the overall acceptance of loss of opportunity as a measure of damages, given the fact that any difficulty in Akgun’s ability to prove a lost profits claim is attributable to Respondent’s precipitous breach, the onus is on Respondent to show there was no chance Akgun could have developed ETIZ as anticipated.
- 6.51. Respondent fails to even attempt such an evidentiary lift.
- 6.52. Instead, Respondent rests its argument against loss of opportunity on the single assertion that “Akgun cannot prove that it has lost any opportunities for reasons that are not attributable to its own default.”¹⁰⁷⁰
- 6.53. But, as discussed, the question of default—and more specifically, the characterization of the EIA as a precondition Akgun failed to satisfy¹⁰⁷¹—does

¹⁰⁶⁶ See **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-84 (citing *Sapphire Intl. v. Iranian Oil* (“...in such cases the existence of damage is uncertain, case law has looked to the position at the time when the opportunity was lost and has accepted that this opportunity itself has value whose loss gives rise to compensation”).

¹⁰⁶⁷ **CLA-072**, *SPP v. Egypt*, ¶ 215.

¹⁰⁶⁸ **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-91; see also **CLA-075**, *Perenco*, Award, ¶¶ 220, 221 (refusing to award lost profits where “too remote, uncertain and ultimately too speculative,” but nonetheless recognizing compensation for loss of opportunity).

¹⁰⁶⁹ **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-92.

¹⁰⁷⁰ SoD, ¶ 378.

¹⁰⁷¹ *Supra* Section 3.A.ii.

not hold. Respondent did not suspend ETIZ because of any failure on Akgun's part regarding the EIA or otherwise. Rather, the evidence demonstrates Respondent suspended ETIZ without any regard for its obligations toward Akgun simply because of Respondent's own error in siting ETIZ in a location that drew on the same limited water resources that served Addis Ababa and Respondent's ambitious residential development on Addis Ababa's outskirts. There was no default by Akgun, only breach by Respondent.¹⁰⁷²

- 6.54. There is little else, if anything at all, other than blame-shifting to Respondent's arguments against loss of opportunity.
- 6.55. As such, Akgun submits that, in addition to lost profits due to Akgun's inability to develop ETIZ on the original land plot of 1460 ha as envisaged in the 2012 ETIZ Agreement, Akgun must be awarded damages for the loss of its opportunity to expand ETIZ into the additional area of 2000 ha.
- 6.56. Moreover, in the event the Tribunal considers that Akgun cannot be awarded lost profits, Akgun at the very least must be awarded damages for its loss of opportunity to develop ETIZ on the original area of 1460 ha.
- 6.57. Indeed, in some cases, damages for the loss of chance can be awarded on top of out-of-pocket expenses.¹⁰⁷³

(iv) Akgun is Entitled to Out-of-Pocket Damages

- 6.58. Finally, Respondent's argument as to out-of-pocket damages also fails.
- 6.59. Respondent contends that the expenses Akgun incurred are not compensable as they were incurred based on "unauthorized acts."¹⁰⁷⁴
- 6.60. That contention could not be further from the truth. The facts demonstrate conclusively that Akgun commenced and continued construction on ETIZ with Respondent's full knowledge and encouragement before, during, and after the point at which Respondent requested an EIA.¹⁰⁷⁵

¹⁰⁷² *Supra* Section 2.F.

¹⁰⁷³ See, e.g., **CLA-074**, *Gavazzi v. Romania*, Award.

¹⁰⁷⁴ SoD, ¶ 382.

¹⁰⁷⁵ *Supra* Sections 2.D.iii, 2.F, 3.A.ii.

- 6.61. In fact, multiple articles contained in the 2012 ETIZ Agreement required Akgun to begin development within specified time frames and to complete development on specified timelines. Under certain of those articles, failure to do so could even have resulted in penalties such as forfeiture of the land allocated for ETIZ.¹⁰⁷⁶
- 6.62. The record is rife with evidence of instances in which Respondent not only encouraged Akgun to commence and/or continue development, but evidence of instances in which Respondent imposed on Akgun the onus to do so under threat of forfeiture.¹⁰⁷⁷
- 6.63. In sum, Akgun acted not only with authorization, but at the behest of Ethiopia, and the idea that Akgun's activities were in any way unauthorized thereby precluding damages has no basis whatsoever.

7. COUNTERCLAIMS

A. Preliminary Statement

- 7.1. In this Section, Akgun provides its defense to the counterclaims that Ethiopia raised in its Statement of Defense.
- 7.2. On the jurisdictional level, Ethiopia argues that (i) the arbitration clause in the Treaty allows Ethiopia to raise counterclaims, (ii) Akgun's invocation of the umbrella clause invites Ethiopia's counterclaims, and (iii) concepts like "equitable estoppel" and "fairness" should allow Ethiopia to advance counterclaims. On the merits, Ethiopia claims that Akgun (i) failed to comply with its obligations in Art. 10 of the 2012 ETIZ Agreement (by failing to develop an industrial zone) and (ii) did not finance ETIZ in violation of Art. 12. Finally, Ethiopia alleges that it was deprived of the land for about eight years and demands Akgun to pay USD 1 per sqm for its alleged damages. All these counterclaims are destined to fail.
- 7.3. Ethiopia has invented unfounded and ill-reasoned concepts to establish jurisdiction in disregard of the most basic principles of arbitration and public international law for the protection of foreign investments. As a threshold

¹⁰⁷⁶ See *supra* ¶¶ 2.39, 3-26-3.29.

¹⁰⁷⁷ See *supra* ¶¶ 3.129, 5.46. See also SoC, ¶¶ 2.57-2.58.

matter, those jurisdictional defects mandate dismissal of Ethiopia's counterclaims in their entirety, as explained below in Section C.

- 7.4. But even if Ethiopia could somehow overcome the jurisdictional defects, its counterclaims fail on the merits. As Akgun explains below in Section F, Ethiopia has failed to (i) establish a clear case with an adequately identifiable dispute, (ii) substantiate its counterclaims, and (iii) show that Akgun has committed any breach of the 2012 ETIZ Agreement.
- 7.5. Therefore, Akgun owes Ethiopia no compensation for any damages. However, regardless of whether Akgun is liable for paying compensation to Ethiopia, the way Ethiopia calculates its damages is absurd, as Akgun explains below in Section G.

B. Parties to the Dispute

- 7.6. The Parties to this dispute are the Federal Democratic Republic of Ethiopia (Counterclaimant) and Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. (Counter-respondent).
- 7.7. Akgun's identification of Ethiopia as the counterclaimant in this Reply should not be construed as Akgun's admission that Ethiopia qualifies as a counterclaimant. As further elaborated in this submission, Ethiopia does not have any right to bring any contractual claims against Akgun based on the 2012 ETIZ Agreement.

C. Jurisdiction

(i) Akgun's Claims in This Arbitration Are Treaty Claims

- 7.8. In presenting its counterclaims, Ethiopia falsely contends that Akgun has brought contractual claims under the cloak of treaty claims¹⁰⁷⁸ and then uses this contention as a basis to argue that these purported contract-based claims invited Ethiopia's counterclaims.¹⁰⁷⁹
- 7.9. However, Akgun's claims are clearly treaty claims. As explained in detail above in Section 3.B,¹⁰⁸⁰ the fact that Akgun's claims partially involve

¹⁰⁷⁸ SoD, ¶¶ 399-403.

¹⁰⁷⁹ *Id.*, ¶ 404.

¹⁰⁸⁰ See *supra* Section 3.B.

Ethiopia's violations of the 2012 ETIZ Agreement does not transform its treaty-based claims into contractual claims.¹⁰⁸¹ To reiterate:

[T]he fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.¹⁰⁸²

7.10. Therefore, characterizing Akgun's treaty claims as contractual claims is Ethiopia's attempt to establish the foundation for advancing its counterclaims but that attempt fails at this first step, rendering every subsequent argument that flows from it equally futile and irrelevant. Nonetheless, for good order, Akgun addresses the further, faulty bases for Ethiopia's counterclaims below.

(ii) The Dispute Resolution Clause in the Turkey–Ethiopia BIT Does Not Allow Ethiopia to Bring Counterclaims

7.11. Ethiopia argues that the plain language of Art. VII of the Treaty allows it to raise counterclaims.¹⁰⁸³ This is wrong. Art. VII of the Treaty limits *locus standi* to investors. It states:

1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, **by the investor to the recipient Party of the investment**. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith.

2. If the disputes, cannot be settled in this way within six months following the date of the written notification mentioned in paragraph I, the dispute can be submitted, **as the investor may choose** [...].¹⁰⁸⁴

7.12. The above cited dispute resolution clause is noteworthy for two reasons. First, it states that **only the investor can initiate arbitration by dispatching a dispute notice**. Second, it makes clear that **only the investor has the right to choose the venue**.

¹⁰⁸¹ See *supra* Section 3.D.iv.

¹⁰⁸² RLA-30, *Impregilo v. Pakistan*, ¶ 258.

¹⁰⁸³ SoD, ¶ 397.

¹⁰⁸⁴ CLA-001, Turkey-Ethiopia BIT, Arts. VII(1), VII(2) (emphasis added).

- 7.13. In its Statement of Defense, Ethiopia argues that once Akgun initiated the dispute resolution mechanism as per Art. VII of the BIT, it opened the gate for all counterclaims.¹⁰⁸⁵ This argument is ludicrous and completely unsupported.
- 7.14. Numerous investment tribunals have concluded that host states are not allowed to bring counterclaims if the dispute resolution clause in a bilateral investment treaty does not allow the host state to initiate arbitration against a foreign investor. *Saluka Investments BV v. Czech Republic* is illustrative here.¹⁰⁸⁶ Rendered in 2004, *Saluka* is a seminal case that supplies the test to determine the admissibility of host states' counterclaims in investment arbitration.
- 7.15. In *Saluka*, the claimant brought its claims under the Czech Republic–Netherlands BIT. The Czech Republic, in turn, advanced counterclaims.¹⁰⁸⁷
- 7.16. Art. 8 of the Czech Republic–Netherlands BIT is as follows:
- 1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
 - 2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.¹⁰⁸⁸
- 7.17. In determining whether it had jurisdiction over the host state's counterclaims, the tribunal analyzed the scope of the dispute resolution clause. The *Saluka* tribunal observed the broad wording of the dispute resolution clause in the Czech Republic–Netherlands BIT and concluded that it allowed the Czech Republic to raise counterclaims.¹⁰⁸⁹ The idea behind the *Saluka* tribunal's ruling was straightforward: if under the dispute resolution clause of the

¹⁰⁸⁵ SoD, ¶ 397.

¹⁰⁸⁶ **CLA-022**, *Saluka v. Czech Republic*, Decision on Jurisdiction.

¹⁰⁸⁷ *Id.*, ¶ 12.

¹⁰⁸⁸ *Id.*, ¶ 21 (quoting Czech Republic–Netherlands BIT, Arts. 8(1), 8(2)).

¹⁰⁸⁹ *Id.*, ¶ 39.

applicable Treaty the host state is allowed to initiate arbitration, it can also raise counterclaims.¹⁰⁹⁰

- 7.18. The tribunal in *Rousalis v. Romania*¹⁰⁹¹ followed the *Saluka* tribunal's approach. In *Rousalis*, the respondent raised various counterclaims, which heavily relied on the claimant's alleged breach of the investment agreement.
- 7.19. After it cited ICSID Arbitration Rules Art. 40 and ICSID Convention Art. 46, the tribunal considered the existence of the parties' consent as a condition precedent for it to have jurisdiction over the counterclaims.¹⁰⁹² The parties' consent was embodied in Art. 9 of the BIT between Greece and Romania:

Disputes between an investor of a Contracting Party and the other Contracting Party concerning **an obligation of the latter under this Agreement, in relation to an investment of the former**, shall, if possible, be settled by the disputing parties in an amicable way [...] (emphasis added)

If such disputes cannot be settled within six months from the date either party requested amicable settlement, **the investor concerned may submit** the dispute either to the competent courts of the Contracting Party in the territory of which the investment have been made or to international arbitration.¹⁰⁹³

- 7.20. To the majority of the *Rousalis* tribunal, the scope of the consent embodied in the dispute resolution clause was apparent. Under the first paragraph of Art. 9 of the Greece-Romania BIT, the definition of "disputes" is limited to those arising from the host state's breach of its BIT obligations towards the investor's investment.¹⁰⁹⁴ Under the second paragraph, only the investor is given the right to submit the disputes to arbitration.¹⁰⁹⁵ For those reasons, the majority of the tribunal refused to hear the counterclaims for the lack of jurisdiction.¹⁰⁹⁶

¹⁰⁹⁰ *Id.*

¹⁰⁹¹ **CLA-127**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011 ("*Spyridon Roussalis v. Romania*").

¹⁰⁹² *Id.*, ¶ 865.

¹⁰⁹³ *Id.*, ¶ 43 (quoting Romania-Greece BIT, Arts. 9(1), 9(2)) (emphasis added).

¹⁰⁹⁴ *Id.*, ¶ 869.

¹⁰⁹⁵ *Id.*

¹⁰⁹⁶ *Id.*

- 7.21. *Gavazzi*¹⁰⁹⁷ added further gloss to the discussion in *Rousalis* and *Saluka*. The *Gavazzi* tribunal dismissed the respondent's counterclaims because the applicable BIT did not allow the respondent to raise counterclaims.¹⁰⁹⁸
- 7.22. The first two paragraphs of Art. 8 of the Italy-Romania BIT in question read as follows:
1. Any dispute that arises between a Contracting Party and an investor from the other Contracting Party relating to an investment by that investor in the territory of the first contracting party, including disputes relating to compensation for expropriation, and those relating to the amount of corresponding payments, will, as far as possible, be resolved amicably through consultations and negotiations between the Parties to the dispute.
 2. In the event that this dispute cannot be resolved amicably within six months of date of a written request, **the investor in question will be able to submit the dispute at his discretion [...]**.¹⁰⁹⁹
- 7.23. Although the majority of the tribunal held that the definition of "disputes" in the first paragraph was broad enough to cover the respondent's counterclaims,¹¹⁰⁰ it nevertheless concluded that the second paragraph granted the right to raise claims solely to the investors.¹¹⁰¹
- 7.24. The majority further stated: "Where there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the 'spirit' of the BIT."¹¹⁰² Therefore, an investor does not "open the gate to all"¹¹⁰³ counterclaims when it initiates arbitration as per the arbitration clause that allows only investors to initiate arbitration.

¹⁰⁹⁷ **CLA-128**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 ("*Gavazzi v. Romania*, Decision on Jurisdiction").

¹⁰⁹⁸ *Id.*, ¶ 159.

¹⁰⁹⁹ *Id.*, ¶ 145, fn. 165 (quoting Italy-Romania BIT, Arts. 8(1), 8(2)) (emphasis added).

¹¹⁰⁰ *Id.*, ¶ 151.

¹¹⁰¹ *Id.*

¹¹⁰² *Id.*, ¶ 154.

¹¹⁰³ SoD, ¶ 397.

- 7.25. Furthermore, the *Gavazzi* tribunal noted that “it is not unusual for parties to be in asymmetrical positions” when a dispute relating to an obligation in a bilateral investment treaty arises.¹¹⁰⁴ Indeed, one should not ignore the fact that states intentionally create the asymmetrical nature of most dispute resolution clauses and the parties’ respective obligations in the bilateral investment treaties to encourage foreign investments. Otherwise, all dispute resolution clauses in all BITs would be the same and as broad as the dispute resolution provision before the *Saluka* tribunal.¹¹⁰⁵
- 7.26. The tribunal in *Rusoro v. Venezuela* came to the same conclusion.¹¹⁰⁶ In that case, the claimant argued that the respondent breached six separate obligations set forth in the Canada-Venezuela BIT.¹¹⁰⁷ In turn, the respondent raised a counterclaim based on the claimant’s alleged improper mining activities, which allegedly caused damage to the respondent’s natural resources.¹¹⁰⁸
- 7.27. The *Rusoro* tribunal stated that Venezuela had the right to raise counterclaims as long as the counterclaims came within the ambit of Art. XII of the Canada-Venezuela BIT.¹¹⁰⁹ Art. XII of the BIT stated:
1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.
 2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purpose of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the

¹¹⁰⁴ **CLA-128**, *Gavazzi v. Romania*, Decision on Jurisdiction, ¶ 154.

¹¹⁰⁵ *Supra* ¶ 7.17.

¹¹⁰⁶ **CLA-129**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.

¹¹⁰⁷ *Id.*, ¶ 179.

¹¹⁰⁸ *Id.*, ¶ 185.

¹¹⁰⁹ *Id.*, ¶ 621.

other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party

is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.

3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) [...].¹¹¹⁰

7.28. Having analyzed Art. XII of the applicable BIT, the *Rusoro* tribunal concluded that only the claimant had the *locus standi* to initiate international arbitration.¹¹¹¹ The tribunal put forward the following reasons for its conclusion:

7.28.1. The first paragraph of Art. XII limits the scope of disputes to investors' claims against the host states.¹¹¹²

7.28.2. Under the second paragraph of Art. XII, only investors have the right to define the dispute by sending a dispute notice.¹¹¹³

7.28.3. If amicable settlement negotiations fail at the end of six months, the third paragraph grants the right to file an arbitration only to investors.¹¹¹⁴

7.29. Therefore, the tribunal held that, according to the BIT and the applicable rules of international law, only the investors had the right to initiate arbitration; consequently, the tribunal had jurisdiction to hear only the investors' claims.¹¹¹⁵

7.30. The awards in the above referenced cases echo the same settled rule: the source of an arbitral tribunal's jurisdiction is the dispute resolution clause in the applicable BIT, which embodies the parties' consent to arbitration. Indeed, as stated in a leading treatise on international arbitration:

¹¹¹⁰ *Id.*, ¶ 622 (quoting Canada-Venezuela BIT, Arts. XII(1), XII(2), XII(3)).

¹¹¹¹ *Id.*, ¶ 627.

¹¹¹² *Id.*, ¶ 623.

¹¹¹³ *Id.*, ¶ 624.

¹¹¹⁴ *Id.*, ¶ 625.

¹¹¹⁵ *Id.*, ¶ 627.

An arbitral tribunal may validly resolve only those disputes that the parties have agreed that it should resolve. This rule is an inevitable and proper consequence of the voluntary nature of arbitration. It is the parties who give to a private tribunal the authority to decide disputes between them, and the arbitral tribunal must take care to stay within the terms of its mandate.¹¹¹⁶

- 7.31. The dispute resolution clause at issue in *Saluka* contrasts sharply with Art. VII of the Turkey-Ethiopia BIT regarding who has *locus standi* to initiate arbitration. The plain text of the dispute resolution clause at issue in *Saluka* clearly allowed the Czech Republic to initiate arbitration.¹¹¹⁷ Here, under Treaty Art. VII—*i.e.*, the dispute resolution clause that empowers this Tribunal—it is obvious that the host state is not granted the ability to advance claims under the Treaty because: i) the first paragraph of Art. VII clearly states that only the investor can initiate an amicable negotiation period by notifying the host state of the disputes;¹¹¹⁸ and ii) the second paragraph of Art. VII provides that the investor, and only the investor, is given the right to choose the venue.¹¹¹⁹ These paragraphs indicate that the right to submit disputes to arbitration belongs solely to investors under the Treaty. As per this analysis, only Akgun has *locus standi* to submit disputes to arbitration. Since Ethiopia is not given the right to submit disputes to arbitration, it cannot raise counterclaims.
- 7.32. This straightforward reading of the Turkey-Ethiopia BIT also accords with the *Gavazzi*, *Rousalis*, and *Rusoro* tribunals' interpretations of similarly narrow dispute resolution clauses which limited the right to resort to arbitration to investors. All three tribunals refused to hear the host state's counterclaims because the dispute resolution clauses in question were not drafted in a way that allowed the host states to submit disputes to arbitration. The dispute resolution clause in *Rusoro* in particular is comparable to the dispute

¹¹¹⁶ **CLA-130**, N. Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015) (“Blackaby et al.”), ¶ 5.91.

¹¹¹⁷ *Supra* ¶ 7.17.

¹¹¹⁸ **CLA-001**, Turkey-Ethiopia BIT, Art. VII (1): “Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, **by the investor to the recipient Party of the investment**. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith” (emphasis added).

¹¹¹⁹ *Id.*, Art. VII (2): “If the disputes, cannot be settled in this way within six months following the date of the written notification mentioned in paragraph I, the dispute can be submitted, **as the investor may choose**” (emphasis added).

resolution clause in this case. Both clauses allow only the investors to dispatch a dispute notice, initiate an amicable negotiation period, and submit disputes to arbitration.

- 7.33. Moreover, as discussed above,¹¹²⁰ all BITs tend to be asymmetrical in terms of host states' rights and obligations towards investors.¹¹²¹ That is why dispute resolution clauses in some BITs, like the one before the *Saluka* tribunal, are broad enough to allow the host states to submit their disputes with the investors to arbitration, while dispute resolution clauses in some other BITs, like the ones before the *Gavazzi*, *Rousalis*, and *Rusoro* tribunals, are narrower, in terms of the host states' right to bring claims against the investors.
- 7.34. Not all dispute resolution clauses in the BITs that Ethiopia executed are worded in the same manner as Art. VII of the Turkey-Ethiopia BIT, which is instructive regarding the bargain that Ethiopia struck vis-a-vis Turkish investors in the Turkey-Ethiopia BIT. For example, Art. 8 of the Egypt-Ethiopia BIT states:

1. Any dispute concerning investment occurring between a Contracting Party and an investor shall be settled amicably between the two parties concerned.

2. If the dispute cannot be settled amicably within six months from the date of written notice of the party concerned it may be submitted upon the request of the party concerned either to:

[...]¹¹²²

- 7.35. Unlike Art. VII of the Turkey-Ethiopia BIT, Art. 8 of the Egypt–Ethiopia BIT does not distinguish between the investor and the host state when it describes who has the right to give a dispute notice and to choose the venue. Therefore, unlike Art. VII of the Turkey-Ethiopia BIT, Art. 8 of the Egypt–Ethiopia BIT can be interpreted to allow for Ethiopia to assert counterclaims vis-à-vis Egyptian investors. While Ethiopia is in a better position to explain the underlying reason for the clear difference between the two dispute resolution clauses, it is evident that the wording of the Egypt-Ethiopia BIT would afford Ethiopia a better—

¹¹²⁰ *Supra* ¶ 7.25.

¹¹²¹ See, e.g., **CLA-128**, *Gavazzi v. Romania*, Decision on Jurisdiction, ¶154.

¹¹²² **CLA-131**, Agreement for the Promotion and Protection of Investments between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia, signed 27 July 2006, Arts. 8(1), 8(2) (emphasis added).

though still unsound—basis for its counterclaims against Akgun, were such a wording replicated in the Turkey-Ethiopia BIT. Yet, even under the wording of a dispute resolution clause such as the one in the Egypt-Ethiopia BIT, Ethiopia would still need to overcome additional hurdles, as further discussed below.

(iii) Claimant’s Invocation of an Umbrella Clause Does Not Extend the Tribunal’s Jurisdiction to Ethiopia’s Counterclaims

7.36. Ethiopia argues that Akgun’s invocation of the umbrella clause in the Denmark–Ethiopia BIT allows it to raise its contractual claims against Akgun.¹¹²³ Ethiopia misapprehends the function of an umbrella clause, which is to elevate contractual claims to a treaty level. Once an investor invokes the umbrella clause, the contractual claims become treaty claims.¹¹²⁴

7.37. The umbrella clause in the Ethiopia-Denmark BIT, contained in Art. 2(3) of the BIT, states as follows:

Each Contracting Party shall observe any commitment it may have entered in to with regard to investors of the other Contracting Party.¹¹²⁵

7.38. The wording of the umbrella clause suggests that the host states’ commitments “with regard to investors,” such as contractual commitments, are taken under the umbrella of the BIT. Hence, if the host state violates any contractual commitment, that violation functions as a violation of the Treaty. Notably, the clause does not involve investors’ contractual commitments to the host states. In other words, the clause operates unilaterally. Ethiopia agrees with Akgun on this very point by recognizing that “it” in Art. 2(3) “refers to Ethiopia or Denmark,” not the investor.¹¹²⁶

7.39. Since the umbrella clause relates only to the host states’ obligations and not to the obligations of the investors, Ethiopia cannot successfully rely on Akgun’s umbrella clause claim as a basis for its right to raise contract-based counterclaims.

¹¹²³ SoD, ¶ 398.

¹¹²⁴ **CLA-060**, K. Hober, *State Responsibility and Attribution*, in P. Muchlins et al. (eds.), *International Investment Law* (2008), p. 575. See *supra* Section 3.D.

¹¹²⁵ **CLA-003**, Denmark-Ethiopia BIT, Art. 2(3).

¹¹²⁶ SoD, ¶ 229.

7.40. This is the same approach the *Rousalis* tribunal adopted towards Romania's similar arguments. The tribunal determined that the umbrella clause contained in the BIT would not help Romania overcome this jurisdictional hurdle since the umbrella clause only confirmed that the host states would comply with their contractual obligations towards the investors but did not impose a reciprocal duty on the investors.¹¹²⁷ The umbrella clause at issue in *Rousalis* reads as follows:

Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party.¹¹²⁸

7.41. Similarly, in *Oxus*,¹¹²⁹ the tribunal held that the claimant's recourse to the umbrella clause would not be helpful to the respondent in raising contractual counterclaims because the umbrella clause only referred to obligations the host states owed.¹¹³⁰ The umbrella clause the claimant invoked in *Oxus* provided:

2) [...] Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.¹¹³¹

7.42. Obviously, umbrella clauses, like the one in the Denmark–Ethiopia BIT, solely incorporate host states obligations into treaties, and they do not do the same for investors' obligations. Therefore, Ethiopia's argument that "[i]f the umbrella clause contract claims are admitted, there could be no doubt that the Claimant has consented to the jurisdiction of the Tribunal to adjudicate all disputes arising out of the same contract"¹¹³² is totally alien to the fundamental principles of investment arbitration. Yet, even if Ethiopia's argument were valid, which is denied, it would still need to overcome one more hurdle: Under the governing law, it is not a party to the 2012 ETIZ Agreement, and Akgun assumed no obligations towards Ethiopia in the agreement.¹¹³³

¹¹²⁷ **CLA-127**, *Spyridon Roussalis v. Romania*, ¶ 875.

¹¹²⁸ *Id.*, ¶ 781.

¹¹²⁹ **CLA-132**, *Oxus Gold plc v Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015.

¹¹³⁰ *Id.*, ¶ 958(i).

¹¹³¹ *Id.*, ¶ 364 (quoting UK-Uzbekistan BIT, Art. 2(2)).

¹¹³² SoD, ¶ 398.

¹¹³³ See *supra* Section 7.B.

(iv) Equity Concerns Cannot Form the Basis for this Tribunal's Jurisdiction over Ethiopia's Counterclaims

7.43. Ethiopia further argues that the Tribunal has jurisdiction over the counterclaims because it would be unjust and inequitable to deny jurisdiction over Respondent's counterclaims while accepting jurisdiction over Claimant's claims, which Respondent, in disregard of its Treaty obligations, flippantly casts as "contract claims masquerading as treaty claims."¹¹³⁴ Ethiopia also relies on the equitable estoppel doctrine to support its bizarre argument that this Tribunal must undertake the function of a tribunal that would otherwise be constituted under the dispute resolution clause of the 2012 ETIZ Agreement.¹¹³⁵

7.44. First, as was already explained, Akgun's claims are not contract claims, they are Treaty claims.¹¹³⁶ Thus, the very premise on which Respondent bases its argument is wrong.

7.45. In any case, jurisdiction in international arbitration does not work in the way Respondent contends. As explained above, what empowers an arbitral tribunal is the parties' consent to arbitration contained within the dispute resolution clause,¹¹³⁷ not fundamental justice or equity concerns.¹¹³⁸ Even the authority Ethiopia cites in its Statement of Defense to support its argument indicates that a state can raise counterclaims as long as the instrument of consent allows it:

Both the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, **subject to the terms of the instrument of consent**, interpreted in accordance with the principle of the equality of the parties.¹¹³⁹

¹¹³⁴ SoD, ¶ 404.

¹¹³⁵ SoD, ¶¶ 404-405.

¹¹³⁶ *Supra* Section 3.B.

¹¹³⁷ *See supra* ¶ 7.30.

¹¹³⁸ SoD, ¶ 405.

¹¹³⁹ *Id.*, at note 441 (emphasis added).

- 7.46. The instrument of consent the authors of the Ethiopia's cited authority refer to therein is the consent to arbitration contained within the dispute resolution clause, and nothing else.
- 7.47. The *Saluka* and *Gavazzi* cases further support the approach to consent to arbitration outlined in the preceding two paragraphs.
- 7.48. In *Saluka*, the Czech Republic argued that the tribunal had to exercise jurisdiction over its counterclaims because it would "advance the goals of economy and efficiency in international dispute resolution."¹¹⁴⁰ The tribunal disagreed:
- Policy considerations concerning the alleged advantages of economy and efficiency being best served by allowing the Respondent's counterclaim are insufficient to override the principle that the scope of the Tribunal's jurisdiction is determined by the scope of the parties' consent.¹¹⁴¹
- 7.49. The *Gavazzi* tribunal echoed *Saluka*'s reasoning:
- Where there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the "spirit" of the BIT [...] [because] it is the letter of the BIT, interpreted under international law, that binds the Parties.¹¹⁴²
- 7.50. Consequently, equity-based concerns cannot supersede the parties' explicit consent found in the dispute resolution clause of the relevant treaty. Where the wording of the BIT is explicit enough to exclude jurisdiction over the host state's counterclaim, like in the case at hand, no jurisdiction can be inferred merely from the principles of equity.
- 7.51. In addition, the parties had the opportunity to explicitly empower this Tribunal to decide this case *ex aequo et bono* as per Art. 35 of the UNCITRAL Rules and elected not to do so; therefore, the Tribunal cannot base its decision on the principles of equity and/or fairness.

¹¹⁴⁰ **CLA-022**, *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 24.

¹¹⁴¹ *Id.*, ¶ 27.

¹¹⁴² **CLA-128**, *Gavazzi v. Romania*, Decision on Jurisdiction, ¶ 154.

**(v) The Respondent Lacks Standing to Raise Counterclaims
Based on Alleged Breaches of the ETIZ Agreement**

- 7.52. Respondent also lacks party standing here to raise contractual counterclaims in response to Akgun's treaty claims against it. This standing requirement flows from the *Saluka* tribunal's "*cardinal principle*" of counterclaims, according to which the appropriate parties to the counterclaim must be the same as the parties to the main, or "primary," claim.¹¹⁴³
- 7.53. In *Saluka*, a part of the Czech Republic's counterclaims relied on a share purchase agreement between the investor's parent company and the Czech National Fund,¹¹⁴⁴ a state agency the Czech Republic controlled.¹¹⁴⁵ To the tribunal, that a party to the agreement was not the Czech Republic itself but rather its agency was yet another hurdle that prevented the tribunal from taking jurisdiction over the Czech Republic's counterclaims.¹¹⁴⁶
- 7.54. The tribunal in *Tethyan v. Pakistan*¹¹⁴⁷ observed this *cardinal principle*. In *Tethyan*, against the investor's treaty claims, Pakistan raised three counterclaims, one of which was based on the investor's alleged breach of an investment contract between the investor and the Province of Balochistan.¹¹⁴⁸ The tribunal concluded that Pakistan could not rely on the investment contract because that investment contract was executed between the claimant and the autonomous province of Balochistan, and that only the Province of Balochistan had the right to enforce the contract claims.¹¹⁴⁹ Notably, the tribunal concluded that international rules on attribution under the Draft Articles on State Responsibility do not apply to non-treaty claims, including counterclaims under domestic instruments.¹¹⁵⁰
- 7.55. In its Statement of Defense, Ethiopia admits that the Ethiopian Law of Obligations is the principal applicable law to the counterclaims.¹¹⁵¹ Therefore,

¹¹⁴³ **CLA-022**, *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 49 (emphasis added).

¹¹⁴⁴ *Id.*, ¶¶ 9, 48.

¹¹⁴⁵ *Id.*, ¶ 51.

¹¹⁴⁶ *Id.*

¹¹⁴⁷ **CLA-024**, *Tethyan v. Pakistan*.

¹¹⁴⁸ *Id.*, ¶¶ 556, 559.

¹¹⁴⁹ *Id.*, ¶ 1421.

¹¹⁵⁰ *Id.*

¹¹⁵¹ SoD, ¶ 407.

in line with the *Tethyan* tribunal's exegesis, the rules on international attribution of the acts of state organs, such as the Mol, and the acts of regional units, such as the Oromia Regional State, to that of the State do not apply to Ethiopia's counterclaims.

- 7.56. Ethiopia also argues that “[Ethiopia] cannot respond to a claim for breach of commitments contained in a contract that it has not itself concluded.”¹¹⁵² Ethiopia raises this argument against Akgun's invocation of an umbrella clause without truly grasping the function of an umbrella clause. However, this argument, without a doubt, shows that Ethiopia has acknowledged that the parties to this arbitration and the parties to the contract upon which Ethiopia basis its counterclaim are different, thereby destroying the party identity necessary to establish contractual counterclaim standing.
- 7.57. Ethiopia's arguments in its claim for damages also support Akgun's above arguments.
- 7.58. Ethiopia argues that Akgun's alleged failure to develop an organized industrial zone caused “valuable land” to remain idle since the handover day.¹¹⁵³ Thus, according to Ethiopia, it was deprived of the value of the land for eight years.¹¹⁵⁴
- 7.59. However, assuming *arguendo* that Akgun breached the 2012 ETIZ Agreement by not realizing the investment, it is the Oromia Regional State which would suffer directly from the alleged breach; therefore, the State of Oromia—not Ethiopia—would be entitled to enforce its contractual rights against Akgun and claim damages. The Ethiopian Constitution does not grant that power to the federal government.
- 7.60. According to Art. 52(2)(d) of the Ethiopian Constitution, the power “to administer land and other natural resources in accordance with Federal Laws” belongs to the federal states.¹¹⁵⁵ Having the power to administer land inherently includes entering into lease contracts, deriving benefits therefrom, and enforcing legal rights arising out of them. This regime in Ethiopia's Constitution creates an apparent juridical distinction between Ethiopia and

¹¹⁵² *Id.*, ¶ 229.

¹¹⁵³ *Id.*, ¶ 438.

¹¹⁵⁴ *Id.*, ¶ 438.

¹¹⁵⁵ **RLA-32**, Constitution of the Federal Democratic Republic of Ethiopia, Art. 52(2)(d).

Oromia Regional State, and this Tribunal must therefore give effect to this juridical distinction in Ethiopian law.

- 7.61. Tribunals recognize this distinction in assessing jurisdiction over counterclaims. For example, in *Tethyan*, the tribunal reasoned:

[I]n the present case, Respondent did not become party to the CHEJVA and its related agreements and Respondent further did not enact the 2002 BM Rules, but in both cases, its autonomous province Balochistan did so. **While Balochistan's actions can be attributed to Respondent pursuant to the ILC Articles for the purposes of Treaty claims, i.e., claims under international law, such attribution does not apply for non-Treaty claims under domestic law.** In the context of Respondent's claims based on the CHEJVA and the 2002 BM Rules, **the Tribunal must therefore give effect to the juridical distinction between the Islamic Republic of Pakistan and the Province of Balochistan under Pakistani law.**¹¹⁵⁶

(vi) **This Tribunal Does Not Have an Inherent Power to Review the Contract-Based Counterclaims**

- 7.62. Ethiopia finally states that this Tribunal has “an inherent power to review the contract-based counterclaims” because this “would serve the necessary purpose of completeness of its analysis” of Claimant’s claims.¹¹⁵⁷ Ethiopia is wrong.
- 7.63. As discussed above, whether a particular claim falls within a tribunal’s jurisdiction is a matter of whether the parties’ consent to arbitration contained within the relevant treaty’s dispute resolution clause covers such claims.¹¹⁵⁸ The most fundamental principle of international arbitration is that the parties’ consent to arbitration governs and limits the tribunal’s jurisdiction.¹¹⁵⁹ The idea that a tribunal may have an inherent power to review counterclaims that otherwise fall outside the scope of the parties’ consent to arbitration contravenes that principle.

¹¹⁵⁶ **CLA-024**, *Tethyan v. Pakistan*, ¶ 1421 (emphasis added).

¹¹⁵⁷ SoD, ¶ 406.

¹¹⁵⁸ See *supra* ¶¶ 7.11-7.34.

¹¹⁵⁹ **CLA-130**, Blackaby et al., ¶ 5.91.

- 7.64. It is true that some tribunals have analyzed whether the counterclaims alleged fell within their “inherent power” because they bore a close connection to the claimant’s treaty claims. Such tribunals undertook this analysis, however, in parallel to their review of the literal wording of the relevant arbitration clauses.
- 7.65. For example, in *Saluka*, the tribunal analyzed whether there was a “close connection” between the investor’s treaty claims and the Czech Republic’s counterclaims.¹¹⁶⁰ Yet, the tribunal did so only after satisfying itself that the arbitration clause in the BIT was broad enough to allow the Czech Republic to bring counterclaims.¹¹⁶¹
- 7.66. Similarly, in *Tethyan*, the tribunal reviewed Art. 46 of the ICSID Convention¹¹⁶² and Art. 40(1) of the ICSID Arbitration Rules¹¹⁶³ and held that there were three requirements for the tribunals to hear counterclaims: “(a) the counterclaims must arise directly out of the subject matter of the dispute; (b) they must be within the scope of consent of the Parties; and (c) they must otherwise be within the jurisdiction of ICSID.”¹¹⁶⁴
- 7.67. In relation to the first jurisdictional requirement, the tribunal reviewed both the investor’s claims and the host state’s counterclaims to examine whether there was a “close” and “intimate[]” connection between them.¹¹⁶⁵ After concluding that there was such a connection, it went on to analyze whether the arbitration clause in the Australia–Pakistan BIT allowed Pakistan to raise counterclaims.¹¹⁶⁶ After reviewing the arbitration clause in the treaty, the tribunal held that “[t]he language used in Article 13(1) and (2) of the Treaty makes clear that both sides, i.e., the investor and the host State, may initiate ICSID proceedings with regard to disputes relating to an investment.”¹¹⁶⁷ The relevant paragraphs of Art. 13 of the Australia–Pakistan BIT state as follows:

1. In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to

¹¹⁶⁰ **CLA-022**, *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 61.

¹¹⁶¹ *Id.*, ¶¶ 37-39.

¹¹⁶² **CLA-024**, *Tethyan v. Pakistan*, ¶ 1410.

¹¹⁶³ *Id.*, ¶ 1411.

¹¹⁶⁴ *Id.*, ¶ 1412.

¹¹⁶⁵ *Id.*, ¶ 1415.

¹¹⁶⁶ *Id.*, ¶ 1416.

¹¹⁶⁷ *Id.*, ¶ 1417.

the dispute shall initially seek to resolve the dispute by consultations and negotiations.

2.If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:

(b) [...] refer the dispute to the International Centre for Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention[.]¹¹⁶⁸

- 7.68. *Saluka, Tethyan*, and all other cases Akgun relies on in this Reply agree on one fundamental principle: In investment-treaty arbitrations, the host states can raise counterclaims as long as the counterclaims fall within the scope of the arbitration clause in the BIT. If the relevant arbitration clause is limited in scope and does not cover host states' counterclaims, it means that the tribunal does not have jurisdiction, "*inherent*" or otherwise, to hear the counterclaim.
- 7.69. Consequently, the notions of "fundamental justice," "equitable estoppel," and "fairness" that Ethiopia resorts to cannot constitute a standalone basis for this Tribunal's jurisdiction over Ethiopia's counterclaims. This is because the "*instrument of consent*" to arbitration in the Treaty does not grant Ethiopia the right to initiate arbitration or raise counterclaims.

D. Applicable Law

- 7.70. Akgun agrees with Ethiopia that the principal applicable law is the Ethiopian Law of Obligations.¹¹⁶⁹

E. Statement of Facts

- 7.71. Ethiopia does not state the facts specific to its counterclaims in its Statement of Defense.¹¹⁷⁰ Akgun respectfully refers to the facts stated in its Statement of Claim¹¹⁷¹ and this Reply.¹¹⁷² In the below sections, Claimant refers to each fact it deems relevant to a specific point at issue.

¹¹⁶⁸ *Id.*, ¶ 567 (quoting Australia-Pakistan BIT, Arts. 13(1), 13(2)).

¹¹⁶⁹ SoD, ¶ 407.

¹¹⁷⁰ *Id.*, ¶ 413.

¹¹⁷¹ See SoC, Section 2.

¹¹⁷² See *supra* Section 2.

F. Substantive Claims

(i) Ethiopia's Counterclaims Submission is Not in Compliance with the Requirements in the UNCITRAL Rules.

7.72. The UNCITRAL Rules set the standards for the parties' submissions. According to Art. 21(4), counterclaims are subject to the same requirements as statements of claim.

7.72.1. The second paragraph of Art. 20(2) sets forth the mandatory components of a statement of claim. According to this provision, a statement of claim must include (a) the names and contact details of the parties; (b) a statement of the facts supporting the claim; (c) the points at issue; (d) The relief or remedy sought; and (e) the legal grounds or arguments supporting the claim.

7.72.2. Also, Art. 20(4) requires the claimant to substantiate its claims with evidence and other supporting documents "as far as possible." While the rule set forth in Art. 20(4) is not mandatory, it is still considered to impose a procedural duty upon the claimant.¹¹⁷³

7.72.3. The purpose of Art. 20(2), along with Art. 20(4), is to make sure that the claimant substantiates its claims as specifically as possible to ensure that the respondent can comprehend all the claims and has a fair chance to defend itself.

7.73. Yet, Ethiopia's counterclaims are far from meeting these requirements. They are undeveloped, unsubstantiated, and poorly drafted.

7.73.1. The substantive claims of Ethiopia begin with a short discussion of the 2012 ETIZ Agreement's preamble and proceed with an allegation that Akgun violated its obligations by failing to "bring its highest level of know-how, experience, financial, technical and technological resources to the Federal Democratic Republic of Ethiopia for the purpose of establishing an industrial zone."¹¹⁷⁴ However, Ethiopia fails to elaborate on this further. For example, Ethiopia is silent about the kind of technology or expertise it deems necessary to establish an industrial zone in Ethiopia that Akgun allegedly failed to bring.

¹¹⁷³ **CLA-133**, J. Paulsson and G. Petrochilos, *UNCITRAL Arbitration* (2018), p.166.

¹¹⁷⁴ SoD, ¶ 420.

- 7.73.2. Ethiopia then proceeds to a section entitled “Breach of Obligation to Develop an Industrial Zone.”¹¹⁷⁵ This heading creates the impression that under this section Ethiopia would further elaborate on Akgun’s alleged failure to develop an industrial zone. Instead, Ethiopia simply reproduces the text of Art. 10 of the 2012 ETIZ Agreement, which imposes no obligation on Akgun to develop an industrial zone and concludes with a one-sentence paragraph alleging that Akgun “has failed to perform any one of its development obligations under Art. 10 of the 2012 ETIZ Agreement.”¹¹⁷⁶
- 7.73.3. Art. 10 consists of twenty-two sub-articles, thirteen of which do not impose any obligation on Akgun. Akgun is left to guess whether Ethiopia refers to those remaining nine sub-articles when alleging that Akgun failed to perform its “development obligations.”¹¹⁷⁷ However, even obligations in those remaining sub-articles are minor and cannot objectively constitute Akgun’s “most specific obligations towards the development of an industrial zone.”¹¹⁷⁸ To the contrary, it is unclear what the term “development obligations” means or why Ethiopia refers to any obligations as “development obligations.” Furthermore, Ethiopia completely fails to explain how Akgun failed to meet those obligations.¹¹⁷⁹
- 7.73.4. Similarly, Ethiopia’s claims in connection with Akgun’s alleged breach of its obligation to finance ETIZ also suffer from vagueness and negligence. In the relevant section, Ethiopia again only reproduces the text of Art. 12 of the 2012 ETIZ Agreement and does not explain how Akgun failed to comply with the obligation to finance the project.
- 7.73.5. Consequently, Ethiopia’s counterclaims are confusing and not sufficiently clear to enable Akgun to formulate its defenses against them. Ethiopia’s pleading on its counterclaims is therefore inconsistent with the requirements of the UNCITRAL Rules Art. 20(2) and Art. 20(4) and must be rejected on this ground alone.

¹¹⁷⁵ SoD, p. 166.

¹¹⁷⁶ *Id.*, ¶ 423.

¹¹⁷⁷ *Id.*

¹¹⁷⁸ *Id.*, ¶ 422.

¹¹⁷⁹ *Id.*, ¶ 423.

(ii) **Akgun Did Not Breach Art. 10 of the 2012 ETIZ Agreement**

- 7.74. To begin with, Akgun may not breach sub-paragraphs 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20 and 21 of Art. 10 because those paragraphs do not impose any obligation on Akgun.
- 7.75. Regarding Art. 10(1), Akgun indeed brought the highest level of know-how, experience, technical, financial resource, and technological equipment to the Federal Democratic Republic of Ethiopia.¹¹⁸⁰
- 7.76. In connection with Art. 10(2), Akgun did submit a business plan to Ethiopia, and Ethiopia did not contest it.¹¹⁸¹
- 7.77. Art. 10(3) seems to grant rights to Akgun, rather than imposing obligations on it. Nevertheless, Akgun did submit a feasibility report and a business plan.¹¹⁸²
- 7.78. Akgun did plan Architectural, Static, Mechanical, Electrical, Installation, Landscaping and Furnishing works and all other related works related to the project in line with the 2012 ETIZ Agreement and the relevant Ethiopian laws as per Art. 10(4).¹¹⁸³ But it could not implement its plans fully due to Ethiopia's suspension of ETIZ.
- 7.79. Art. 10(10) grants a right to Akgun, so there is no obligation to breach here.¹¹⁸⁴ However, Akgun commenced its construction mobilization in compliance with the standards referred to in the provision.
- 7.80. In line with Art. 10(11), Akgun hired solely Ethiopian nationals as unskilled employees.¹¹⁸⁵

¹¹⁸⁰ **C-009**, The 2012 ETIZ Agreement, Art. 10(1); SoC, ¶¶ 6.38-6.82.

¹¹⁸¹ *Id.*, Art. 10(2).

¹¹⁸² *Id.*, Art. 10(3); SoC, ¶¶ 2.9-2.10. *See also supra* ¶¶ 2.11, 2.21–2.27.

¹¹⁸³ **C-009**, The 2012 ETIZ Agreement, Art. 10(4).

¹¹⁸⁴ *Id.*, Art. 10(10).

¹¹⁸⁵ *Id.*, Art. 10(11).

- 7.81. Akgun submitted monthly progress reports as per Art. 10(12).¹¹⁸⁶ Those reports contained the events that caused delays. However, the Mol did not take any action to eliminate the factors that caused the delays.¹¹⁸⁷
- 7.82. According to Art. 10(13), Akgun submitted its annual report as a part of its 15-year business plan.¹¹⁸⁸
- 7.83. Art. 10(22) requires Akgun to submit a master plan within three months after executing the 2012 ETIZ Agreement.¹¹⁸⁹ However, Akgun had submitted master plans even before the 2012 ETIZ Agreement.¹¹⁹⁰

(iii) Akgun Did Not Breach Its Obligation to Finance ETIZ

- 7.84. As noted earlier,¹¹⁹¹ Ethiopia's argument is defective because it is incomplete and unsubstantiated. Nevertheless, contrary to Ethiopia's incompetent argument,¹¹⁹² Akgun did finance ETIZ until Ethiopia suspended it, and Akgun would have continued to finance it but for Ethiopia's illegitimate suspension.
- 7.85. First, Akgun implemented a financing plan in line with the 2012 ETIZ Agreement.
- 7.86. Under the 2010 ETIZ Agreement, Ethiopia had an obligation to finance thirty percent of the infrastructure costs, and Akgun was obligated to secure outside financing.¹¹⁹³ Upon Mr. Meles Zenawi's request, Ethiopia was relieved of its obligation to contribute to the infrastructure costs, and Akgun was relieved of

¹¹⁸⁶ **C-009**, The 2012 ETIZ Agreement, Art. 10(12). See **C-014**, Letter from Akgun Construction to Ministry of Industry dated 12 June 2013; **C-021**, Letter from Akgun Construction to Ministry of Industry and Ethiopian Investment Agency dated 17 July 2014; **C-057**, Akgun's work report dated 6 August 2013; **C-058**, Akgun's work report dated 5 September 2013; **YUN-16**, Akgun's work report dated 04 October 2013; **C-065**, Letter from Akgun Construction to Ministry of Industry dated 22 November 2013.

¹¹⁸⁷ See **C-021**, Letter from Akgun Construction to Ministry of Industry and Ethiopian Investment Agency dated 17 July 2014. The Mol did not assist Akgun in resolving the issues complained of in this letter.

¹¹⁸⁸ **C-009**, The 2012 ETIZ Agreement, Art. 10(13); **C-093**, Letter from Akgun Construction to Ministry of Industry dated 7 July 2014 and the attached Business Plan for 15 years.

¹¹⁸⁹ **C-009**, The 2012 ETIZ Agreement, Art. 10(22).

¹¹⁹⁰ See **C-046**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2011; **C-146**, Master Plan by Sadettin Ozdonmez dated 26 April 2012.

¹¹⁹¹ See *supra* ¶¶ 7.72, 7.73.

¹¹⁹² SoD, ¶ 425.

¹¹⁹³ SoC, ¶ 2.45.

its obligation to secure outside financing.¹¹⁹⁴ Under this new understanding, Akgun would develop ETIZ in a self-funded fashion.¹¹⁹⁵

- 7.87. The new understanding was later incorporated into the 2012 ETIZ Agreement. That is why the first paragraph of Art. 12 allows Akgun to use any sources to finance ETIZ and the second paragraph explicitly allows Akgun to recruit investors or execute partnership agreements to secure financing.
- 7.88. The self-funding method devised by Akgun is not contrary to Art. 12. Under this method, the industrialists, meaning the investors, would be the source of finance.¹¹⁹⁶ In fact, Ethiopia knew about and authorized this financing model.¹¹⁹⁷
- 7.89. Consequently, Akgun implemented its financing model, and absent Ethiopia's suspension, this financing model would have allowed Akgun to finance ETIZ.
- 7.90. Furthermore, Akgun did finance ETIZ until Ethiopia expropriated ETIZ.
- 7.90.1. Akgun paid its employees, contractors, and construction equipment suppliers.
- 7.90.2. Akgun paid farmers' compensation to Oromia Regional State as per Art. 8(1) of the 2012 ETIZ Agreement.
- 7.90.3. Akgun paid its tax and overhead.
- 7.90.4. Akgun realized the construction site mobilization, constructed a police station, began excavation of the roads, and completed the basic structure of its showroom.
- 7.90.5. Akgun financed all of the above.
- 7.91. In light of the above, and contrary to Ethiopia's scant argument, Akgun did not fail to finance ETIZ.

¹¹⁹⁴ SoC, ¶ 2.45.

¹¹⁹⁵ *Id.*, ¶ 2.45.

¹¹⁹⁶ A&M Report, Section 5.1(A).

¹¹⁹⁷ **C-046**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2011.

(iv) Since There is No Failure to Perform, No Justification is Needed

- 7.92. Ethiopia argues that Akgun failed to perform its contractual obligations without any justification to perform.¹¹⁹⁸ This contention is wrong for two simple reasons: (i) Akgun does not need to prove the existence of any sort of justification because it did not breach any of its obligations in Art. 10 and Art. 12, and (ii) even assuming that it failed to perform its obligation to develop an industrial zone, such non-performance is justified due to Ethiopia's unlawful suspension of ETIZ.
- 7.93. First, as was explained above, Akgun did not breach any obligations towards Ethiopia. In any case, the fact that Akgun does not claim that it had complied with its obligations in the Statement of Claim does not constitute an admission of non-performance.¹¹⁹⁹ Akgun did not need to claim that it had complied with those obligations because those obligations are obviously not related to the primary dispute between Akgun and Ethiopia, which arose out of Ethiopia's breach of the Treaty.¹²⁰⁰ Ethiopia's argument that non-performance of those obligations is not disputed because Akgun did not claim to have performed them before is absurd.¹²⁰¹
- 7.94. Further, Akgun did not undertake any obligations towards Ethiopia as per the 2012 ETIZ Agreement.¹²⁰²
- 7.95. Moreover, according to Ethiopia, "[i]n performance of their obligations under the 2012 ETIZ Agreement, the Mol and the Oromia Regional State took numerous steps."¹²⁰³ It is evident that if the obligations in the 2012 ETIZ Agreement belong to the Mol and Oromia Regional State, the rights in the same contract belong to them, too. As Ethiopia agrees, there is no privity of contract between Akgun and Ethiopia that allows Ethiopia to raise its contract-based claims under Ethiopian law against Akgun. To reiterate, the attribution

¹¹⁹⁸ SoD, ¶ 426.

¹¹⁹⁹ *Id.*, ¶ 427.

¹²⁰⁰ For the discussion about the primary dispute *see supra* Section 7.C.v.

¹²⁰¹ SoD, ¶ 427.

¹²⁰² *See supra* Section 7.C.v.

¹²⁰³ SoD, ¶ 435.

of the Mol's and other state organs or entities' acts under the international law does not apply to the non-treaty claims under Ethiopian law.

- 7.96. Akgun began to develop ETIZ, but Ethiopia made the project's implementation impossible by suspending ETIZ.¹²⁰⁴ Ethiopia argues that the suspension of ETIZ was not a prohibition of performance and thus did not constitute a force majeure event that justifies Akgun's alleged breach to develop an industrial zone because allegedly, Akgun failed to submit an EIA report.¹²⁰⁵ However, as discussed at length in Akgun's Statement of Facts in this Reply, Akgun had no obligation to submit an EIA either as a matter of contract or Ethiopia's laws.¹²⁰⁶
- 7.97. Therefore, contrary to Ethiopia's arguments,¹²⁰⁷ Ethiopia's suspension of ETIZ indeed qualifies as a force majeure to Akgun's promise to develop ETIZ under Art. 1793(b) of the Ethiopian Civil Code. And the Mol committed this suspension. Since the Mol caused the force majeure situation, contrary to Ethiopia's argument,¹²⁰⁸ it is absurd to expect Akgun to give a notice of force majeure to the Mol.
- 7.98. Furthermore, under Art. 1772 of the Ethiopian Civil Code, the party aggrieved by the other party's contract breach must dispatch a default notice to rely on the breaching party's non-performance:
- A party may only invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract.¹²⁰⁹
- 7.99. Therefore, the Mol and Oromia Regional State had to notify Akgun if they genuinely believed that Akgun breached its obligations under Art. 10 and Art.12 of the 2012 ETIZ Agreement, but they did not.

¹²⁰⁴ SoC, ¶ 2.93.

¹²⁰⁵ SoD, ¶ 430.

¹²⁰⁶ See *supra* Section 2.C.

¹²⁰⁷ SoD, ¶ 430.

¹²⁰⁸ *Id.*, ¶ 431.

¹²⁰⁹ **RLA-38**, Ethiopian Civil Code, Art. 1772.

G. Damages

- 7.100. The absurdity of Ethiopia's counterclaims reaches its climax in the "*Damages*" section of its counterclaim submission.
- 7.101. Ethiopia's claim for damages is allegedly based on two foundations. First, Ethiopia argues that it limited its claim to its material damages that have actually and already occurred.¹²¹⁰ Second, it argues that Akgun allegedly detained the land for about eight years, so it was deprived of benefits of the land.¹²¹¹
- 7.102. Before Ethiopia allocated the land to Akgun, it was already idle and occupied by random farmers. If the land had not been allocated to Akgun, it would have remained the same. Nothing in Ethiopia's pleading establishes that if the land had not been given to Akgun, Oromia Regional State would rent it to others and earn USD 1 per sqm. To the contrary, Ethiopia decided against proceeding with an industrial zone development on that land. Ethiopia cannot now rely on the figure an investor, such as Afro Oil, was going to pay for its sublease in ETIZ as a measure of its alleged damages when it is Respondent who prevented ETIZ from coming to fruition.
- 7.103. Further, Ethiopia takes the rent Afro Oil undertook to pay Akgun as a basis of its damages calculation because, according to Ethiopia, USD 1 per sqm reflects the land's fair market value.¹²¹² However, Afro Oil agreed to pay USD 1 per sqm for 46.973 sqm. Ethiopia offers no basis for its assumption that an investor would pay the rate of USD 1 per sqm for a 1.000.000 sqm plot. Ethiopia's logic is flawed and without foundation.
- 7.104. Finally, Ethiopia's alleged reasons for suspending ETIZ in July 2014 were to protect the environmentally sensitive Legedadi watershed and the need for groundwater to supply water to 35.000 condominiums.¹²¹³ However, Ethiopia also argues that if Akgun had not detained the land for eight years, it could lease the land to industrialists and earn USD 1 per sqm,¹²¹⁴ and deprivation of

¹²¹⁰ SoD, ¶ 437.

¹²¹¹ *Id.*, ¶ 438.

¹²¹² *Id.*, ¶ 440.

¹²¹³ **C-016**, Suspension Letter.

¹²¹⁴ SoD, ¶ 440.

this value is certain to occur.¹²¹⁵ Ethiopia is blowing hot and cold. Either Ethiopia's environmental concerns are unreal, or its basis for damages is illogical.

7.105. Also, according to Ethiopia, USD 1 per sqm reflects the land's fair market value **from the date of allocation**.¹²¹⁶ However, there is no such thing as a fair market value from a fixed date. An asset has a fair market value **on a fixed date, not from a date**.

7.106. According to International Valuation Standards Council , the market value of an asset is as follows:

Market Value is the estimated amount for which an asset or liability should exchange **on the valuation date between a willing buyer and a willing seller** in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.¹²¹⁷

7.107. IFRS Standard 13 provides a similar definition:

IFRS 13 defines fair value as the price that would be received **to sell an asset or paid to transfer a liability** in an orderly transaction between market participants **at the measurement date (an exit price)**.¹²¹⁸

7.108. First, in its fair market value calculation, Ethiopia fails to identify a fixed date. Second, Ethiopia's underlying logic in assuming that the fair market value method applies to lease agreements is flawed. Rental income can only be taken into account as part of calculating hypothetical sale and purchase price by adopting the "income approach." However, the rental income itself cannot be the fair market value of a property. Ethiopia could use rental income to calculate the hypothetical sale and purchase price of the land but, since land in Ethiopia cannot be sold, there is no sale and purchase price for any land in Ethiopia.

¹²¹⁵ SoD, ¶ 437.

¹²¹⁶ *Id.*, ¶ 440.

¹²¹⁷ **C-147**, IVSC, *Glossary*, https://www.ivsc.org/standards/glossary#letter_m (last accessed 5 October 2021) (emphasis added).

¹²¹⁸ **C-148**, IFRS, *IFRS 13 Fair Value Measurement*, <https://www.ifrs.org/issued-standards/list-of-standards/ifrs-13-fair-value-measurement/> (last accessed 5 October 2021), p. 1 (emphasis added).

- 7.109. Moreover, it bears repeating that Ethiopia has no right to claim damages from Akgun because even if Akgun had breached the 2012 ETIZ Agreement, Oromia Regional State would have suffered damages from that breach, not Ethiopia.
- 7.110. First, constitutionally, the right to administer the land belongs to Oromia Regional State,¹²¹⁹ and according to Ethiopia, “[t]he Oromia Regional State is an indispensable party to the Agreement as administrator of the land, and hence an indispensable party to any dispute that might arise out of [the 2012 ETIZ Agreement].”¹²²⁰
- 7.111. Second, according to the 2012 ETIZ Agreement, the lessor of the land is Oromia Regional State.¹²²¹
- 7.112. Third, if Akgun undertook to develop an industrial zone, it undertook that obligation towards the Mol and Oromia State.¹²²²
- 7.113. In conclusion, Ethiopia has no rights in the 2012 ETIZ Agreement that it can pursue against Akgun. Hence, Ethiopia's counterclaims must fail on their merits. As a further consequence, and for the reasons discussed above, no damages are owed to Ethiopia.

8. CLAIMS FOR RELIEF

- 8.1. Claimant, accordingly, requests that the Arbitral Tribunal grant the following relief in favor of Claimant:
- i. FIND and DECLARE that this Tribunal has jurisdiction over Claimant's claims under the Turkey-Ethiopia BIT;
 - ii. FIND and DECLARE that Respondent has violated Article 2(2) of the Turkey-Ethiopia BIT by failing to provide fair and equitable treatment to Claimant's investments and impairing by unreasonable and discriminatory measures the use and enjoyment of such investments;
 - iii. FIND and DECLARE that Respondent has violated Article 4 of the Turkey-Ethiopia BIT by expropriating Claimant's investments;

¹²¹⁹ See *supra* ¶ 7.110.

¹²²⁰ SoD, ¶ 231.

¹²²¹ **C-009**, The 2012 ETIZ Agreement, Art. 2(2).

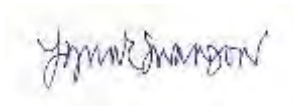
¹²²² SoD, ¶ 231.

- iv. FIND and DECLARE that Respondent has violated the umbrella clause obligation, incorporated into the Turkey-Ethiopia BIT through Article 3 of the Treaty, by breaching its contractual obligations and other commitments;
- v. ORDER Respondent to pay Claimant damages:
 - a. in an amount of USD 241,515,079 (excluding pre-award interest) as compensation for its aforementioned violations related to the Claimant's investments in ETIZ, as set out in Section 6.C.iv of Claimant's Statement of Claim dated 20 November 2020; and
 - b. in an amount to be determined by the Tribunal for the loss of opportunity to expand ETIZ into the additional area of 2,000ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020.
- vi. Or alternatively ORDER Respondent to pay Claimant damages in the amounts for loss of opportunity to establish ETIZ in the original area of 1460ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020 and the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;
- vii. Or alternatively ORDER Respondent to pay Claimant damages in the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;
- viii. ORDER Respondent to pay Claimant pre-award interest as set out in Section 6.F of Claimant's Statement of Claim;
- ix. ORDER Respondent to pay Claimant all costs and fees incurred in connection with this Arbitration;
- x. ORDER Respondent to pay Claimant post-award interest at a rate to be compounded;
- xi. AWARD Claimant any other relief to which it may be entitled in law or equity; and
- xii. DISMISS Respondent's counterclaims in their entirety.

9. RESERVATION OF RIGHTS AND FUTURE SUBMISSIONS

- 9.1. 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.
- 9.2. 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.



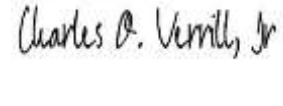
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