

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

between

AKGUN INSAAT MAKINA SANAYII VE DIS TICARET LTD. STI.

Claimant

and

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Respondent

**STATEMENT OF REJOINDER ON THE MERITS AND
REPLY ON JURISDICTIONAL OBJECTIONS AND COUNTERCLAIMS**

21 January 2022

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I. SUMMARY OF ARGUMENTS

1. The Federal Democratic Republic of Ethiopia (“Ethiopia,” “GOE,” or the “Respondent”) respectfully submits (i) its Statement of Rejoinder to the Reply submitted by Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. (“Akgun” or the “Claimant”); and (ii) its Reply to the Claimant’s Jurisdictional Objections and Statement of Defense against Ethiopia’s Counterclaims under the Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments.¹
2. The exchange of extensive written pleadings and the disclosure of documents since the commencement of this case have now made it abundantly clear that there is no genuine claim of treaty violation and as such all of the claims must be summarily dismissed as a matter of law.
3. The gravest of all GOE actions that the Claimant puts forth to prove allegations of treaty violation are two: (i) a request for an adequate EIA, failing which (ii) relocation with compensation. To find a treaty violation, the Tribunal must accept the following two propositions cumulatively: (i) the initial allocation of land had irrevocably and permanently placed the burden of environmental studies on the State thereby granting the developer absolute and permanent immunity from environmental scrutiny; and (ii) the initial allocation of the site also gave the developer the exclusive discretion to reject all alternate relocation sites without objective justification.
4. Neither of Akgun’s propositions has legal or contractual basis. The most basic principles of international investment protection law such as FET are designed to serve the legitimate objective of ensuring that States “create and maintain a *system of justice* which ensures that

¹ Treaty, [CLA-001](#). Terms defined in Ethiopia’s Statement of Defense, Objections to Jurisdiction, and Counterclaims of 12 March 2021 (hereinafter “Statement of Defense”) are intended to carry the same meaning in this memorial.

unfairness to foreigners either does not happen, *or is corrected*.”² They are not there to reallocate contractual obligations or the risk of business loss, or to correct routine administrative decisions that the investor dislikes.³

5. A finding of liability under an investment treaty is an international delict, a conclusion that cannot be casually arrived at on the basis of administrative disputes on the adequacy of an EIA or the suitability of an alternate location. Akgun’s proposed use of the Treaty does in this case trivialize the investor-State dispute settlement régime altogether.
6. A closer look at each of the Claimant’s claims reveals that all of them reside within the boundaries of frivolity. If this Tribunal reaches the merits, the only one worthy of the Tribunal’s time is perhaps the FET claim because of the unreasonably expansive meaning that recent tribunals have given it. Even that must be summarily dismissed for the reasons summarized below and elaborated throughout this memorial.
7. The Claimant does not dispute that the FET standard was traditionally limited to “the customary international law of minimum standard of treatment” requiring “*outrageous, egregious, or bad faith conduct*.”⁴ The Claimant offers no evidence whatsoever that in concluding the Treaty, Ethiopia and Turkey wanted to subject the interpretation of FET to inventive subsequent arbitral jurisprudence that they were never a part of. This Tribunal is *ad hoc* and as such the sources of its rules of decisions are limited to the Treaty, customary international law and other sources of international law recognized under the Statute of the International Court of Justice, as well as rules of interpretation under the Vienna Convention on the Law of Treaties.

² JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), [RLA-26](#), p. 7 (emphasis in original).

³ Discussing the denial of justice as the core of the FET principle, Paulsson has summarized its core elements as follows: (i) the denial of justice is essentially procedural in nature; (ii) it does not require the State to create a perfect system of justice but rather a system of justice that could correct serious errors; and, more importantly, (iii) the denial of justice requires the exhaustion of local remedies and the showing of a system failure. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), [RLA-26](#), pp. 7-8.

⁴ [Statement of Reply and Defense to Respondent’s Jurisdictional Objections and Counterclaims](#), dated 22 October 2021, para. 5.21 (emphasis added) (hereinafter “Reply”).

8. Akgun admits that at a minimum the complained government conduct must be “arbitrary, grossly unfair, unjust or idiosyncratic, [be] discriminatory and expose[] the claimant to sectoral or racial prejudice, or involve[] a lack of due process.”⁵ Relaxing the standard a little bit further, it asks the Tribunal to adopt the *proportionality* standard. It states in particular that “[t]he 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 the states must be free to exercise (and investors must expect) some degree of domestic regulation.”⁶ It further states that “[t]he question of proportionality ‘must be assessed in light of all the factual circumstances surrounding such conduct.’”⁷ More importantly, the Claimant approvingly quotes: “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.”⁸
9. Ethiopia maintains its position that the FET provision contained in the Treaty must only be interpreted in light of customary international law and as such it is not bound by subsequent unduly expansive interpretations that it is not a part of. However, Ethiopia also believes that the resolution of the issue of the outer limits of the most contentious FET standard would only have been necessary if there were any doubt about Akgun’s inability to meet its own preferred and expansive standard under the facts of this particular case. Ethiopia further submits that the application of Akgun’s preferred *proportionality-reasonableness-rational relations* standard leads to the rejection of all of Akgun’s claims for reasons stated below.
10. There are at least fourteen uncontested relevant facts:

⁵ Reply, para. 5.21 (quoting *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, **CLA-112**, para. 98).

⁶ Reply, para. 5.60 (citations omitted).

⁷ Reply, para. 5.62 (quoting *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013 **CLA-071**, para. 533).

⁸ Reply, para. 5.62 (quoting *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, **CLA-048**, para. 307) (emphasis added).

- (1) Ethiopia initially showed three possible sites to the Claimant for the possible location of the ETIZ project and the Claimant chose one of them;⁹
- (2) The Parties signed the 2010 ETIZ Agreement in which the GOE took a 30 percent stake;¹⁰
- (3) The 2010 ETIZ Agreement was replaced by the 2012 ETIZ Agreement;
- (4) In the 2012 ETIZ Agreement, the Parties agreed: “[Akgun] shall respect this Agreement *and all other conditions stated in the relevant laws of Ethiopia*”;¹¹
- (5) The Agreement also expressly required that “[Akgun] shall protect the environment from pollution by using appropriate methods and technologies,” and that “[i]n this regard [Akgun] 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*”;¹²

⁹ See, e.g., [Second Witness Statement of Yusuf Akgun](#), dated 17 October 2021, paras. 3.1-3.8.

¹⁰ See 2010 ETIZ Agreement, [Exhibit C-008](#).

¹¹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(12) (emphasis added).

¹² 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added). Under Ethiopian environmental law, the Environmental Impact Assessment Proclamation No. 299 of 2002 establishes the general rule in its Article 3(1):

“Without authorization from the [Environmental Protection] Authority or from the relevant regional environmental agency, no person shall commence implementation of any project that requires environmental impact assessment as determined in a directive issued pursuant to Article 5 of this Proclamation.”

Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 3(1) (emphasis added). The Environmental Protection Authority’s Directive No. 1/2008, entitled “A Directive Issued to Determine Projects Subject to Environmental Impact Assessment,” includes, at Item No. 21, “*Establishment of Industrial Zone*.” A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, [RLA-2](#) (emphasis added).

- (6) The Ministry of Industry requested an EIA in May 2013,¹³ within two months of the handover of the first one hundred hectares of land,¹⁴ and within one month of Akgun's claim of beginning of mobilization;¹⁵
- (7) The Claimant submitted two EIAs and extensive inter-agency discussions were held with the participation of the Claimant;¹⁶
- (8) Ethiopia finally decided the EIAs were inadequate and suspended the project until a satisfactory EIA was submitted;¹⁷
- (9) Only a brief addendum to the earlier rejected EIA was thereafter submitted, which was equally rejected;¹⁸
- (10) The Claimant was offered to stay if it adopted a different mix of industries or chose one of numerous alternate locations,¹⁹ and rejected both options in its own discretion;²⁰
- (11) Ethiopia offered to compensate the Claimant to relocate;²¹

¹³ See, e.g., [Statement of Claim](#), para. 2.65.

¹⁴ See, e.g., [Reply](#), para. 2.89.13.

¹⁵ See, e.g., [Reply](#), para. 2.89.17.

¹⁶ See [Statement of Defense](#), Sec. III.C and Secs. II.D, II.E and II.F *infra*.

¹⁷ See Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, [Exhibit C-016](#).

¹⁸ See, e.g., Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#).

¹⁹ See, e.g., [Second Witness Statement of Yusuf Akgun](#), dated 17 October 2021, paras. 5.1-5.2.

²⁰ See, e.g., [First Witness Statement of Yusuf Akgun](#), dated 19 November 2020, para. 5.25; *see also* [Reply](#), para. 2.194 (“[i]n any case, 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”).

²¹ See, e.g., Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, [Exhibit C-017](#) (“H.E. Dr. Arekebe Oqubay also expressed that [Ethiopia] can allocate a land for free in Hawasa or Dire Dawa cities to Akgun GROUP and provide tax exemption for 15 years”).

- (12) The Claimant and the Respondent finally agree that relocation was a reasonable option under the circumstances;²²
- (13) Ethiopia never terminated the 2012 ETIZ Agreement; and
- (14) Akgun relinquished the rights and obligations under the 2012 ETIZ Agreement voluntarily.

11. There are at least ten disputed facts:

- (1) Whether the GOE required the EIA as a pretext to justify a relocation decision secretly made without the Claimant's participation? Ethiopia answers, **no**.
- (2) Whether Ethiopian law required an EIA for a project of the ETIZ magnitude located within a few miles of the Legedadi reservoir? Ethiopia answers, **yes**.
- (3) Whether Ethiopian law on the requirement of the EIA was ascertainable to a reasonable investor at the time of signing of the 2012 ETIZ Agreement? Ethiopia answers, **yes**.
- (4) Whether the EIAs submitted by Akgun were adequate under Ethiopian law? Ethiopia answers, **no**.
- (5) Whether Ethiopian law provided remedy for administrative grievance? Ethiopia answers, **yes**.

²² See [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 7.4. See also, in this respect, Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 10 ("Akgun Group could take part at committee as a stakeholder before the implementation of OIZ and [the] committee could decide to move the OIZ land to another place if the committee would consider as a result of a study that [the] current land has risks in terms [of] water pollution").

- (6) Whether the decision to relocate was made because of a discriminatory preference for a competing condominium development? Ethiopia answers, **no**.
 - (7) Whether the decision to relocate ETIZ was finally made because of a competing condominium development? Ethiopia answers, **no**.
 - (8) Whether Akgun was offered the opportunity to develop the ETIZ project with a less environmentally sensitive mix of industries? Ethiopia answers, **yes**.
 - (9) Whether the GOE genuinely desired to accommodate ETIZ at a different location and took steps toward that end? Ethiopia answers, **yes**.
 - (10) Whether Akgun rejected alternative locations for ETIZ without proper justification? Ethiopia answers, **yes**.
12. Ethiopia submits that the application of the undisputed statement of the law to the undisputed facts must lead to the dismissal of all of Akgun's claims for the following reasons. The undisputed facts show that the initial site selection was a result of mutual consultation involving at least three alternative potential locations. One was selected from among the three. It is clear that both Parties believed it would potentially be suitable for the intended purpose. Environmental considerations were, however, at the center of the 2012 ETIZ Agreement. Akgun could not have reasonably assumed, as it now claims, that all environmental studies were conducted by the government for all three sites and that it was offered each one of them free of all environmental obligations. And, indeed, what was memorialized in the Agreement shows the opposite of that, i.e., an acute awareness by the parties of environmental issues at the time.
13. In the Agreement, Akgun expressly assumed certain environmental obligations under the referenced laws. Akgun's argument that it did not know that it had the EIA obligations is

not credible. It follows, therefore, that Ethiopia's request for an acceptable EIA was not arbitrary or disproportionate in the circumstances.

14. The Claimant knew and, of course, should have known its EIA obligations. In any case, it was notified to bring an EIA immediately as it attempted to mobilize, the extent of which will be discussed later. It was offered numerous opportunities to defend its EIAs and show the GOE how it could acceptably address concerns of contamination but failed to do so. It was offered to stay if it changed the mix of industries or to develop an alternate location with compensation but rejected both options.
15. Akgun was offered more than adequate due process. Ethiopia's procedural conduct was not arbitrary or disproportionate. Indeed, the Claimant's own environmental expert Professor Whittington concludes: "In my professional judgment, it is reasonable from a public health and watershed planning perspective for GOE to decide against allowing a large industrial park – such as the GOE/Akgun project – to locate in the Lege Dadi Reservoir Watershed."²³
16. The reasonableness of the relocation decision and Ethiopia's offer of alternate location and compensation being established, the Claimant's remaining argument is the initial site selection immunized it from all EIA obligations and that Ethiopia must have permitted the ETIZ development to go forward at that particular location no matter what the consequences might have been because environmental standards and expectations have generally been lower in Ethiopia. In other words, in the Claimant's telling, *the Treaty required the GOE to permit Akgun to develop the ETIZ project in the originally selected site despite the environmental risks, or risk a treaty claim for full compensation.*
17. Its own preferred proportionality standard fails this claim. Ethiopia's conduct was measured and consistent with the Agreement and its preexisting clear and ascertainable law. As such, the response was proportionate to what the circumstances required. Allowing the development to proceed would have been unreasonable. Akgun did not have the singular

²³ [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 7.4.

discretion to reject alternate locations. It has made no effort to show why those relocation options were unreasonable or otherwise denied it fair treatment. It has also made no effort to show why or how discussions about the adequacy of the water supply for both the ETIZ project and a condominium development which predated ETIZ suggested any nefarious discriminatory purpose.

18. As such, Ethiopia submits that this case must be dismissed on the basis of the undisputed facts and law alone. Ethiopia also submits that this case must be dismissed on the merits of each claim for reasons stated above and elaborated throughout this memorial and Ethiopia's previous submissions.
19. Overall, the Claimant has failed to meet its own lower standard requiring that the exercise of regulatory power did not "*bear[] a reasonable relationship to rational policies.*"²⁴
20. Considering the outstanding disputed facts and law, there are at least five issues requiring resolution:
 - (1) Whether, under the applicable law, Ethiopia's regulatory request for an acceptable EIA was arbitrary and disproportionate?
 - (2) Whether, under the applicable law, Ethiopia's conduct denied Akgun of procedural due process?
 - (3) Whether the decision to relocate ETIZ at the time it occurred was arbitrary and disproportionate?
 - (4) Whether, under the applicable law, Akgun has the singular discretion to reject alternate locations?

²⁴ Reply, para. 5.62 (quoting *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, CLA-048, para. 307) (emphasis added).

- (5) Whether, overall, Ethiopia violated FET when it asked Akgun to agree to develop ETIZ with a different mix of industries or relocate with compensation, all for serious environmental concerns?

21. Ethiopia responds to each of these questions in a summary form as follows and will further elaborate throughout this submission:

EIA Requirements: The GOE's EIA request is not only predicated on the terms of the contract and preexisting and express Ethiopian law but is also a matter of common sense for the scale of the project and its proximity to the water source that supplied sixty percent of the water needs of one of Africa's largest cities. An experienced developer cannot argue that it did not know that it had EIA obligations under these circumstances. Unable to convince itself of such argument, Akgun embarks on a futile exercise of impeaching the mechanics of the ratification of the relevant Ethiopian laws. The reality is that the relevant laws were in effect. They are unambiguous. And Akgun knew or should have known about them when it signed the 2012 ETIZ Agreement referring to them. As a matter of treaty law, the unavoidable conclusion is that GOE's request for an acceptable EIA was not arbitrary or disproportionate.

Due Process: The facts of this case are now very clear that Akgun was offered several opportunities to present and defend an acceptable EIA. There were at least three consultation workshops during which Akgun was represented. The record is replete with letters and memoranda from various agencies showing good faith efforts to assist Akgun to meet the EIA requirements including extensive and helpful comments. Akgun never explored any domestic legal remedies that were available to it. It now says that no administrative remedies existed. That is totally untrue. Ethiopia has extensive administrative and judicial review procedures. Akgun would have found out. The suspension letter could have arguably qualified as a final

agency action for judicial review. Akgun could have sought internal administrative and judicial remedies but did not make any effort at any point beyond saying that there were none. It cannot meet its burden of proof by mere allegations. In any case, Ethiopia has submitted the expert report of Dr. Mellese Damtie Dandi showing the availability of such processes.²⁵

Relocation Decision: There is now no serious dispute that the relocation decision was reasonable, even by Professor Whittington’s own environmental reckoning. A reasonable and sound relocation decision cannot be used to prove that the same measure was arbitrary or disproportionate for purposes of treaty violation. To the contrary, it shows a reasonable accommodation and as such a fair and equitable treatment.

Rejection of the Alternate Location: Akgun admits that it was offered three alternate relocation sites, which it visited within the same day.²⁶ Akgun rejected all three because they were not “suitable” for industrial development. Akgun appears to believe that it has the unreviewable discretion to reject a reasonable accommodation and make a treaty claim for violation of FET. Akgun has not even attempted to prove that the relocation sites were objectively unsuitable. As such, the rejection proves Akgun’s own arbitrary action rather than the GOE’s.

Cumulation: Akgun was an active participant of the whole planning process from start to finish. It was the one who claimed expertise of industrial development. It was actively involved in the selection of the initial ETIZ site. It admits having visited three locations out of which it selected one. The selection was thus a collaborative effort. The record clearly shows that no reasonable person under the circumstances surrounding the site selection process would have believed that an EIA had already been done for all three sites and that Akgun would have never to

²⁵ See [Expert Report of Dr. Mellese Damtie Dandi](#), dated 20 January 2022, para. 2.45.

²⁶ See [First Witness Statement of Yusuf Akgun](#), dated 19 November 2020, para. 5.25 (“I remember visiting three different properties in one day”).

worry about it. Indeed, unsurprisingly, the Parties have expressly mentioned environmental obligations in the Agreement given the sensitivity of the location. The argument that the officials who visited Ikitelli or showed Akgun the various sites waived all environmental obligations is not credible. The location was approved subject to express and inherent environmental obligations. Akgun was asked to provide an EIA immediately as it sought to mobilize. It did indeed bring three EIAs that were not acceptable. It was offered to stay with a different mix of industries or relocate with compensation. It rejected all options. If there is anyone who acted arbitrarily, it is Akgun, not Ethiopia. As such, overall, Akgun cannot prove a violation of FET even under its own expansive standard.

22. Akgun’s remaining claims are found in expropriation and an imported umbrella clause. Beyond the mechanics, neither claim has the slightest indicia of credibility. Akgun’s downgraded claim of expropriation ends before it begins because it cannot even intelligibly define the abstract proprietary interest that is capable of being expropriated.²⁷ Its best articulation yet is “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.”²⁸
23. The Claimant advocates for a hypothetical expropriation régime that does not transfer or even deprive economic value. In its own words, “the issue of economic damage to Claimant arising from Respondent’s expropriation is not a requirement for a finding of expropriation under the [Treaty],” nor is “a finding of economic benefit to the Respondent a prerequisite.”²⁹ The academic authority that it relies upon supports Ethiopia’s argument, not the Claimant’s implausible theory of recovery. The quoted proposition is the following:

²⁷ In Akgun’s Notice of Arbitration and its first memorial, expropriation had featured as its first substantive claim. See [Notice of Arbitration](#), Sec. V.A and [Statement of Claim](#), Sec. 5.B. In Akgun’s Reply, expropriation is second to last, followed only by the imported umbrella clause. See [Reply](#), Sec. 5.C.

²⁸ [Reply](#), para. 5.122.

²⁹ [Reply](#), para. 5.126.

“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.”³⁰

24. This statement does not say that there could be expropriation where there is no economic value but simply says that when there is a destruction or transfer, such does not exonerate the party that did so from liability, while suggesting that typically there needs to be a transfer of benefits from one party to another. Indeed, in its most established formulation in domestic and international law, expropriation at a minimum requires “a compulsory transfer of property rights”³¹ or simply a “taking” of property.³²
25. Ethiopia submits that Akgun has not shown that the balance of rights and obligations it assumed under the 2012 ETIZ Agreement constituted property let alone prove that it was taken by Ethiopia’s unlawful conduct. The Claimant’s argument that “Respondent’s imposition of the EIA requirement was mere pretext to allow Respondent to proceed with developing its preferred Condominium Project”³³ is so lacking in evidentiary support that it sounds ill in the Claimant’s own mouth whenever it is uttered.³⁴ Akgun’s half-hearted claim that the decision to relocate was made for any reason other than a genuine concern by all parties involved about the potentially irreparable environmental effect is further evidence of the incredibility of its entire case. If the Tribunal finds this to be untrue, Akgun’s claims must be dismissed as devoid of factual basis.

³⁰ Reply, note 791 (quoting B. Sabahi et al., *Investor-State Arbitration* (2d ed., 2019), [CLA-116](#), para. 18.76) (emphasis added).

³¹ *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, 15 Iran-U.S. C.T.R. 189, Partial Award of 14 July 1987, [RLA-10](#), para. 191.

³² *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, [RLA-11](#), para. 280.

³³ Reply, para. 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.’ 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, 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.”).

³⁴ Another instance is seen at Reply, para. 5.178 (“Here, too, Respondent expropriated Claimant’s investment allegedly for environmental reasons... Respondent discriminatorily imposed the purported environmental hurdles as mere pretext for its policy decision to pursue additional housing instead of ETIZ.”).

26. Akgun's umbrella clause claim has only degenerated further. Its breach of contract claim is now the very act of allocation of the land because environmental studies later raised doubts about its suitability for the intended purpose. Akgun would have this Tribunal believe that the GOE bore the exclusive responsibility for environmental studies and that Akgun assumed it got the land free of any environmental obligations.³⁵ It is simply impossible that Akgun believed this at the time. If it did, it was not justified, not only because it signed an agreement containing numerous express provisions concerning the developer's environmental obligations but also because of the high sensitivity of the initial location, which sensitivity was expressly stated in the same agreement. Beyond the contractual provisions, Akgun cannot credibly assert that it thought it could embark on the largest industrial development project in Africa next to the water supply basin of one of the largest cities in Africa without conducting environmental studies. Indeed, it is saying that the GOE's request for an acceptable EIA was a breach of contract. Beyond the dubious mechanics of importation of an umbrella clause from a different treaty, on its own merits, this claim is quite simply frivolous.
27. This memorial proceeds with an overview of the key factual matters in this case, followed by a further statement of Ethiopia's jurisdictional objections. It then further distills the applicable law and the standard of review that this Tribunal must apply if it elects to exercise jurisdiction over the substantive claims. It then shows the Claimant's failure to prove any one of those substantive claims, demonstrates the lack of any compensable harm, reaffirms Ethiopia's counterclaims, and states Ethiopia's entitlement to all costs of this arbitral proceeding. The submission concludes with a request for relief.
28. In support of its submission, Ethiopia introduces thirty further fact exhibits (numbered R-42 to R-71) and thirty-two further legal authorities (numbered RLA-44 to RLA-75).

³⁵ See [Reply](#), para. 5.198 ("Since the [Ministry of Industry] 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.").

29. Finally, Ethiopia presents an expert report by Dr. Mellese Damtie Dandi of Addis Ababa University (in response to the expert report of Professor Mekete Bekele Tekle that has been proffered by the Claimant).

II. OVERVIEW OF KEY FACTS

30. The Claimant has in its Reply memorial put forth numerous erroneous factual assertions that require correction.
31. Faced with simple facts, the Claimant chooses to rely heavily upon evidence in respect of various events reaching back some fifteen years, which evidence it seeks to carry through the mutual extinction of a first contractual agreement and into the phase of a second failed agreement (i.e. the 2012 ETIZ Agreement), which latter instrument governs the relevant relationship in this case.³⁶
32. The Claimant seems to suggest that its accumulated narration of chosen events beginning in 2008 somehow displaces or supersedes the applicable requirements of law and contract. They do not and cannot render this result. As will be seen in Akgun's unapologetic disregard of the environmental obligations attendant to its proposed project, Akgun ultimately thought it better to beg for exemption than to seek permission. This error was its default.
33. In setting out, in its words, the "key facts that bear on this dispute and set[] the record straight," Akgun now submits the seven following summations:³⁷
- "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"³⁸

³⁶ See 2012 ETIZ Agreement, [Exhibit C-009](#).

³⁷ [Reply](#), para. 2.1.

³⁸ [Reply](#), para. 2.1.1.

Ethiopia’s “full knowledge” of the intended project is apparently presumed on the basis of reference to Akgun’s own various feasibility studies from late 2009. Thus, Akgun feigns to impute, on the basis of its own promotional documents, an overarching super-approval from which attendant regulatory requirements and later-accepted contractual obligations would simply fall away.

- “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, 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”³⁹

In point of fact, the 2012 ETIZ Agreement expressly incorporates all applicable Ethiopian law while setting out stringent requirements of environmental study.⁴⁰ Further, Akgun took only partial possession of one hundred hectares of land at the Sendafa site in March 2013,⁴¹ and only received its investment permit in April 2013.⁴² Ethiopia then reminded Akgun of its unfulfilled legal and contractual obligations of environmental study not at a “much later point” in time but rather in May 2013.

- “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

³⁹ Reply, para. 2.1.2.

⁴⁰ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10)-(12).

⁴¹ Contrary to any suggestion by the Claimant that the delay in handover following execution of the 2012 ETIZ Agreement was somehow the fault of Ethiopia, these events occurred pursuant to a contractual provision, just as did Ethiopia’s requests for environmental review. Thus, in August 2012, the Ministry of Industry wrote to Akgun offering two options under Article 7 of the Agreement, namely (i) pay additional compensation for immediate vacancy of the land by remaining farmers; or (ii) wait until the new year to take possession. Letter from Ministry of Industry to Akgun Construction, dated 20 August 2012, [Exhibit C-049](#). The referenced provision allows that “[w]here there are crops on the Land, farmers shall be allowed to harvest and collect their produces within 7 months maximum before the handover is effected.” 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 7(3).

⁴² See Investment Permit issued by Ethiopian Investment Agency for Akgun Construction, dated 9 April 2013, [Exhibit C-056](#). The Claimant now seeks to make much of the fact that it had earlier been granted a different investment permit for a different purpose in February 2009. See Investment Permit issued by Ethiopian Investment Agency for Akgun Construction, dated 19 February 2009, [Exhibit C-039](#). As may be plainly seen from the face of that document, it refers only to general construction. It is the April 2013 document whose permitted investment activity is “**INDUSTRIAL ZONE DEVELOPMENT AND LEASING.**” Investment Permit issued by Ethiopian Investment Agency for Akgun Construction, dated 9 April 2013, [Exhibit C-056](#).

indicates that it was Respondent’s duty to assess whether it had selected a suitable location for executing its industrial development strategy”⁴³

These two sentences are in logical tension at best. The Claimant here abruptly abandons its elsewhere-stated submissions that it definitively bore no duty of environmental study under Ethiopian law, which law suddenly does not lend itself to “reasonabl[e] conclu[sion]” either way. This passage equally fails to acknowledge the contractual obligation of environmental study that Akgun freely undertook and further disregards the fact that, regardless of whatever Akgun may or may not have reasonably (or unreasonably) concluded, Akgun was, from May 2013, on actual notice that Ethiopia held a different view.

- “Despite having no obligation to perform an EIA, Akgun nevertheless voluntarily and at the [Ministry of Industry]’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”⁴⁴

Evidently without irony, Akgun here pivots from the equivocal statement that it could not “reasonably conclude” whether it was obligated to perform an EIA to an affirmative statement that it was not so obligated. Akgun then seems to suggest that if only it had politely declined to commission the requested EIA, it could have enjoyed a different result, somehow evading regulatory scrutiny and proceeding to construction with a free hand. Such suggestion is, needless to say, untrue.

- “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 EIA—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

⁴³ Reply, para. 2.1.3 (emphasis added).

⁴⁴ Reply, para. 2.1.4.

selected location if it provided additional water usage and treatment data to Respondent and amended its EIA”⁴⁵

Because Akgun cannot make out a case that its proffered EIAs were sufficient to discharge the requirements of environmental review, it has imaginatively chosen to argue that Ethiopia’s countless requests for revision were entirely pretextual and has assumed the burden to prove this very grave allegation. As has been extensively set out in Ethiopia’s Statement of Defense,⁴⁶ and as will be revisited here,⁴⁷ the record plainly belies the insidious suggestion.

- “Respondent’s conclusion to relocate ETIZ reflected the fact that the GOTA EIA unveiled environmental concerns that the [Ministry of Industry] had ignored in pressing Akgun to implement the 2012 ETIZ Agreement. Respondent’s complaints about the quality of the GOTA EIA are therefore disingenuous since no changes or additions to the EIA would have altered Respondent’s decision to relocate ETIZ”⁴⁸

With these words, Akgun concedes (as it must) any defense of the quality of its proffered EIAs and further entrenches itself in the theory of secret decisions and pretext. The Claimant yet again ignores the exhaustive chronological presentation of Ethiopia’s meticulous review of those proffered EIAs, as has been set out at great length in Ethiopia’s Statement of Defense and as will be revisited herein.⁴⁹

- “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”⁵⁰

This statement marks a culmination of the Claimant’s most indulgent allegations, for Akgun’s extravagant suggestion that various high officials of the Ethiopian State engaged in a concerted act of deception is as unfortunate as it is untrue. Having selectively fixated upon

⁴⁵ Reply, para. 2.1.5.

⁴⁶ See Statement of Defense, Sec. III.C.

⁴⁷ See Sec. II.E *infra*.

⁴⁸ Reply, para. 2.1.6.

⁴⁹ See Sec. II.E *infra*.

⁵⁰ Reply, para. 2.1.7.

certain views that were aired during the inter-agency consultation process, the Claimant presents these views as if they were the final disposition of the matter. They were not.⁵¹ After the ITU Addendum to the GOTA EIA failed to win necessary endorsement, Ethiopian officials offered numerous suitable sites (in proximity to Addis Ababa and otherwise) attended by generous offers of rent abatement and tax forgiveness.⁵² Akgun declined these offers and instead elected to exit as its business ventures in Ethiopia failed.⁵³

34. In this section, Ethiopia now offers its corrections to the Claimant's factual contentions in more or less the same order as presented by Akgun in its Reply memorial.

a. Neither Ethiopia's Invitation to Enter into Negotiations for the Establishment of an Industrial Zone nor Ethiopia's Sovereign Role in Land Allocation Alters the Obligations of Environmental Study that the Developer Assumed

35. Akgun begins by reaching back in time to a visit by Ethiopian officials to the Ikitelli Industrial Zone in Istanbul in 2008. Its apparent purpose in doing so is to suggest a comprehensive pre-approval of the entire ETIZ project at that time, in the following words:

"Akgun could reasonably expect that Ethiopian governmental ministries had approved [the project] and would support it."⁵⁴

36. The apparent suggestion that both (i) exogenous obligations under law of general applicability; and (ii) contractual obligations that Akgun voluntarily accepted at a later point in time would somehow fall away by virtue of Ethiopia's opening invitation to enter into negotiations for an industrial zone project is incredible and unworthy. If Akgun truly believed that the visit of a high-ranking delegation whose members left complimentary messages in Yusuf Akgun's guestbook portended an overarching pre-approval in respect of a nascent megaproject whose technical aspects had not yet remotely begun to be elaborated,

⁵¹ See paras. 126-131 *infra*.

⁵² See Sec. II.G *infra*.

⁵³ See paras. 197-198 *infra*.

⁵⁴ Reply, para. 2.5.

then this belief would reveal the Claimant's fundamental misapprehensions about Ethiopia from the time of project inception.

37. As the Claimant earlier observed in its Statement of Claim, "by the end of 2009, Akgun had responded to Ethiopia's invitation to develop an industrial zone in Ethiopia," and only at this time did Akgun and Ethiopia "beg[i]n negotiating the terms" of their agreement.⁵⁵ These negotiations were extensive, lasting over a period of some six months and resulting in the 2010 ETIZ Agreement.⁵⁶ As is by now well known, Article 8 of the 2010 ETIZ Agreement contains an obligation that the developer "shall protect the environment from pollution by using appropriate methods and technologies"⁵⁷ and "shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."⁵⁸

38. Akgun failed in its obligation to obtain financing for the project.⁵⁹ Concurrently, Ethiopia wished to exit from its position as a partner in the venture. For these reasons, following the failure of the 2010 ETIZ Agreement, it was mutually agreed to alter the terms of the deal, ultimately resulting in the 2012 ETIZ Agreement.⁶⁰ As is also well known, the 2012 ETIZ Agreement equally provides that "[t]he Developer shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia,"⁶¹ while further setting out the following developer's obligation:

⁵⁵ [Statement of Claim](#), paras. 2.42-2.43.

⁵⁶ See 2010 ETIZ Agreement, [Exhibit C-008](#) (dated 11 June 2010).

⁵⁷ 2010 ETIZ Agreement, [Exhibit C-008](#), Art. 8(9).

⁵⁸ 2010 ETIZ Agreement, [Exhibit C-008](#), Art. 8(11).

⁵⁹ See 2010 ETIZ Agreement, [Exhibit C-008](#), Art. 13(1); see also Letter from Akgun to the Ministry of Industry, dated 19 December 2011, [Exhibit C-046](#), which states as follows:

"On May 17, 2011, H.E. Prime Minister had been visited in his office and a brief presentation had been given to H.E. with respect to financial works and negotiations executed with international funds and financial institutions pursuant to Land Lease and Organized Industrial Development Agreement. The difficulties in finding finance for the project due to events occurred with Arab Spring in the region had been explained to H.E. Prime Minister. Accordingly, H.E. confirmed the situation and requested to fulfill the project in smaller sizes and phase by phase to be able to get the finance and to abolish all time limitations and penalties in the Agreement."

⁶⁰ See [Statement of Defense](#), paras. 37-38.

⁶¹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(12).

10. 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.

2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10)

39. Akgun has not hazarded any suggestion that any provision of the 2012 ETIZ Agreement is defective or inoperative in any way. In the face of extant Ethiopian law and these contractual obligations which the developer freely accepted in 2012, Akgun's latent suggestion that the project's environmental compliance was somehow certified on the grounds of Ikitelli in 2008 is nothing short of entirely frivolous.
40. The Claimant's indulgent pre-approval theory further resides in its enduring fixation upon the site designation process.⁶² Contrary to its suggestion, Akgun does not hold (and never held) any unconditional entitlement to land at the Sendafa site (or any other). Any specification of land is notably absent from the contractual instruments, and Akgun's right of possession and use of land was at all times subject to its performance of attendant obligations under law and contract.⁶³

⁶² The 2008 memorandum of understanding between Oromia Regional State and Akgun as well as the 2010 and 2012 ETIZ Agreements acknowledge Oromia's role in this regard, which role is an incident of sovereignty. *See* note 63 *infra*. Under Ethiopia's Constitution, the States "shall have the [] power[] and function[] [t]o [a]dminister land and other natural resources in accordance with Federal laws." Constitution of the Federal Democratic Republic of Ethiopia, [RLA-32](#), Art. 52(2)(d).

⁶³ Thus, the 2008 memorandum provided that "[t]he location of the [contemplated industrial zone] will be shown by the **Oromia State**" without more. Memorandum of Understanding between the President of Oromia State H.E. Abadula Gameda and Mr. Yusuf Akgun, dated 13 October 2008, [Exhibit C-007](#) (emphasis in original). Under the failed 2010 ETIZ Agreement, "Land" is defined to be "the land with an area of 1460 (one thousand four hundred sixty) hectares in Lagatafo Town, Oromiya Special Zone Surrounding Addis Ababa." 2010 ETIZ Agreement, [Exhibit C-008](#), p. 3. The 2012 ETIZ Agreement refers to "the land with an area of 1.460 (One Thousand Four Hundred Sixty) hectares in Sendafa Town, Oromiya Special Zone Surrounding Addis Ababa." 2012 ETIZ Agreement, [Exhibit C-009](#), p. 4. The instrument which finally conferred conditional rights of use over one hundred hectares of identified land is the Land Lease Certificate issued by Oromia Bureau of Rural Land and Environmental Protection, dated 2 January 2013, [Exhibit C-012](#). *See also* 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 5 ("**TOTAL AREA OF THE LEASED LAND**") (establishing a mechanism for phased handover of land whereby each successive step is contingent upon achieving a certain occupancy rate in the prior one, and whereby further handover is fully discretionary following the first 660 hectares).

41. Now seeking to stand on supposition alone, Akgun submits that because Ethiopia

“*never hinted* to Akgun during [the site selection] 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.”⁶⁴

42. With these words, Akgun concedes (as it must) that *Ethiopia never, never gave any representation whatsoever* in respect of the project’s prospective environmental compliance. Instead, the Claimant extracts an ostensibly reasonable belief of the absence of authorizations on the basis of Ethiopia’s failure to “hint.”

43. The Claimant next turns to its presentations of a project proposal in Addis Ababa. In the Claimant’s words, “[t]hroughout 2009, officials throughout the Ethiopian government became familiar with Akgun and ETIZ,” and “this began in early 2009 when the site visits occurred and continued throughout 2009 with various meetings, speeches, and ceremonies related to ETIZ.”⁶⁵

44. As the chronology would show, all these “various meetings, speeches, and ceremonies” occurred before such time as any project agreement ever existed between the parties, as even the failed first ETIZ Agreement would not be signed until mid-2010.⁶⁶ Thus, the Claimant refers extensively to its own public relations efforts and now submits that its “feasibility studies, [the] surrounding events and public announcements demonstrate the following” five points:

“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.

Various ministries and regional authorities knew the planned location for ETIZ.

⁶⁴ Reply, para. 2.12 (emphasis added).

⁶⁵ Reply, para. 2.13.

⁶⁶ See 2010 ETIZ Agreement, [Exhibit C-008](#) (dated 11 June 2010).

The feasibility studies defined the scope of ETIZ and the various types of industries that it would host.

The feasibility studies specifically committed to adopt environmentally sensitive water treatment methods in accord with whatever state and [federal] regulations were in place.

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

45. In respect of the first statement, Ethiopia presented three possibilities for the project site, from which the Claimant made the final selection, subject to a phased handover consisting of an initial piloting phase at a mere one hundred hectares, with subsequent allocations contingent upon progressive performance milestones.⁶⁸
46. The second and third statements are true but unhelpful to the Claimant for the reason that they cannot and do not displace obligations existing in law or contract.
47. The fourth statement is true but equally meaningless. It serves no purpose to simply affirm intended compliance with "whatever... regulations [are] in place." Rather, apparent in this passage within Akgun's feasibility studies is an understanding that such compliance will be evaluated by State authorities and must, therefore, be proven. The failure of the ETIZ project demonstrates precisely why environmental compliance must be proven *prospectively*. If Akgun had been permitted to construct its project and *thereafter* been found unable (or

⁶⁷ Reply, para. 2.27.

⁶⁸ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 5 ("**TOTAL AREA OF THE LEASED LAND**") (establishing a mechanism for phased handover of land whereby further handover becomes fully discretionary following the first 660 hectares).

unwilling) to meet environmental quality requirements (as it was), such would result in senseless economic waste for all parties involved.⁶⁹

48. As for the fifth statement, the Claimant relies once again upon its own feasibility studies in seeking to extract some representation by Ethiopia where there is none. Here, too, the Claimant's submission is founded upon supposition and silence alone. Implicit is the recurrent and resounding admission that *Akgun did not seek, and Ethiopia did not give, any representation or warranty whatsoever* in respect of environmental review.⁷⁰

b. The Claimant's Proposed Interpretation of Key Provisions of the 2012 ETIZ Agreement is Incorrect and, in Any Event, Unhelpful to It

49. Akgun begins its discussion of contract terms with reference to the failed 2010 ETIZ Agreement, and submits that Ethiopia "has not offered a single shred of evidence that suggests that it told Akgun anytime from the signing of the 2008 [memorandum of understanding] to the 2010 ETIZ Agreement" that Akgun would need to submit an EIA for the project.⁷¹ Thus, the Claimant persists in its reliance upon nothing more than non-representation by Ethiopia, and this during the tenure of the 2010 ETIZ Agreement. During the term of that failed instrument, Akgun failed ever to approach the stage of site handover or commencement of works for, as the Claimant concedes, "neither party was able to finance the project."⁷²
50. Akgun acknowledges (as it must) Article 8(10) of the new 2012 ETIZ Agreement, writing that the governing agreement "*added some additional terms*, including that Akgun perform '*necessary studies*' to protect the Legedadi watershed."⁷³ A correct quotation of the

⁶⁹ The same logic underpins the express contractual obligation of environmental study. See, in this respect, the following Sec. II.B *infra*.

⁷⁰ The Claimant's false contention that the EIA process was not "later mentioned or included in the agreement the parties signed for ETIZ" is addressed in the following Sec. II.B *infra*.

⁷¹ Reply, para. 2.31.

⁷² Reply, paras. 2.32-2.33.

⁷³ Reply, para. 2.36 (emphasis added). The 2012 ETIZ Agreement equally provides that "[t]he Developer shall seek, *on its own*, opportunities to get financing from natural persons, legal entities, private equity or venture capital funds, international banks, financial institutions or any other sources with interest to invest in and/or finance the Project in

contractual provision would show that the 2012 ETIZ Agreement obliges the developer to prepare not “necessary studies” but rather “necessary *environmental* studies.”⁷⁴ Akgun then strains and contorts itself in seeking to suggest that (i) this provision excludes the EIA studies it was in fact asked to prepare; and/or (ii) Ethiopia was not entitled to request such studies at the time that it did; and/or (iii) the provision did not “suggest” that such studies “would preclude ETIZ from going forward at the designated site.”⁷⁵

51. Akgun first refers to Article 8(1) of the 2012 ETIZ Agreement which states that the site allocated is to be used as an industrial zone while any other use requires approval by the Ministry of Industry.⁷⁶ Akgun then submits that this provision “renders puzzling Respondent’s contention that the GOTA EIA was defective because it did not sufficiently identify alternative uses for the land.”⁷⁷
52. Akgun misses the point. The requirement to consider alternative uses is an exogenous requirement of the EIA process under law; it is a tool that is commonly used in the course of impact assessment by considering those possible uses aside from the given project altogether, in order to reliably confirm that that project represents a desirable choice.⁷⁸
53. The Claimant’s next submission that the 2012 Agreement included “time-sensitive” performance deadlines that are somehow not compatible with an EIA requirement is similarly unavailing to its favored contract interpretation.⁷⁹ Nothing precluded Akgun from expeditiously producing a quality EIA report; indeed, one proposal that Akgun solicited foresaw a project duration of some one hundred days.⁸⁰ Further, provisions stipulating timely

accordance to the rules and regulations of Ethiopia,” 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 12(1) (“**FINANCING OF THE PROJECT**”) (emphasis added), while omitting any obligation to finance on the part of Ethiopia.

⁷⁴ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added).

⁷⁵ [Reply](#), para. 2.36.

⁷⁶ [Reply](#), para. 2.38 (citing 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(1)).

⁷⁷ [Reply](#), para. 2.38.

⁷⁸ See, e.g., [Expert Report of Professor Susan Murcott](#), dated 7 March 2021, paras. 8.3-8.5.

⁷⁹ See [Reply](#), para. 2.39.

⁸⁰ See Technical and Financial Proposal for ESIA for Ethio-Turkish Industry Zone, Ernst & Young, dated 11 February 2014, [Exhibit R-42](#), p. 30 (anticipating “a 3.5 month period”); see also paras. 114-116 *infra*.

performance may routinely be tolled (and were in fact tolled) in the event of reasonable delay in attaining necessary approvals. In the event, during the *more than eighteen months* which passed from partial handover of the land in March 2013 to Akgun’s final failed attempt to produce an adequate EIA in October 2014, Ethiopia never took steps to terminate the agreement or enter the land.

54. In fact, Ethiopia never terminated the agreement at all, and the land remains idle to this day.



Photograph of the Sendafa Site, dated February 2021, [Exhibit R-7](#)

55. The Claimant’s next submission that there was “no indication” that Ethiopia believed Akgun “bore the risk of a future regulatory impediment halting ETIZ” and accompanying reliance

upon a contractual provision respecting project delays incurred by “governmental action without fault on the part of Akgun” is logically unsound and entirely misconceived.⁸¹

56. *It is precisely Article 8(10) itself which establishes that Akgun “bore the risk” of the project being halted in the event of Akgun’s failure to discharge the very obligation that provision sets forth.* In this sense, Article 8(10) is not an “indication” of a “regulatory impediment” but is rather the very embodiment thereof. The referenced contract provision regarding delay without fault on the part of Akgun is simply inapplicable, for here, the project stalled *precisely because of* Akgun’s failure to discharge its duty of environmental study.⁸²

57. Finally, the Claimant lists various works that it claims to have undertaken in commencement of the project.⁸³ Each and every one of these activities was undertaken after signing of the 2012 ETIZ Agreement, and thus after Akgun gave its assent therein to be bound by Ethiopian law and to conduct all “necessary environmental studies.”⁸⁴ These steps were thus undertaken at Akgun’s own risk in respect of any failure on its part to meet the stringent obligations of environmental review it freely accepted, for Akgun was bound to perform a project EIA under both law and contract. The 2012 ETIZ Agreement refers to sensitive environmental conditions and obliges Akgun to “carryout *the necessary environmental studies required* in this regard.”⁸⁵ Article 8(10) refers to environmental studies “*required*” because they are so required by law, which requirement the contract here affirms.

58. If, conversely, Article 8(10) were considered not to affirm or incorporate exogenous provisions of law, the result is no different, for it could then only be an autonomous contract provision to be applied on its own terms. In such a case, Article 8(10) would confer upon the Ministry of Industry and Oromia Regional State the right to demand “*environmental*

⁸¹ Reply, para. 2.40 (citing 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(10)-(11)).

⁸² Furthermore, even in the absence of fault on the part of Akgun, the Claimant’s submission that the cited contractual provisions would require Ethiopia to “pay Akgun’s direct and indirect losses” is not correct. Rather, the agreement provides that, in such a case, any losses “shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the [Treaty].” 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(10)-(11).

⁸³ Reply, para. 2.41.

⁸⁴ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10).

⁸⁵ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added).

studies” as may be “*necessary*” to ensure that the developer “*shall*” take “*maximum care* to safeguard the Legedadi and Dire Dams underground water basin from pollution,” with entitlement residing in the Ministry of Industry and Oromia Regional State to determine the sufficiency of those studies to this end.⁸⁶ Studies sufficient to ensure the environmental safety of the intended project in view of sensitive hydrological conditions at the contemplated site are, of course, precisely what the Ministry of Industry and Oromia Regional State sought to attain, but which Akgun failed to deliver.⁸⁷

59. Akgun’s abject failure to meet the obligation of Article 8(10) of the 2012 ETIZ Agreement—however interpreted—irredeemably dooms its case.

c. Ethiopian Law Requires Proponents of Industrial Parks Projects to Produce a Rigorous EIA

60. In framing its submissions, the Claimant has written that an investor such as itself was “*unable to reasonably conclude*” whether or not it was obligated to perform an EIA under

⁸⁶ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added). Ethiopian law contains the foundational rule of contract and statutory interpretation that where a provision is clear, plain meaning must govern. Ethiopian courts apply this principle as codified at Article 1733 of the Ethiopian Civil Code, which provides that “[w]here the provisions of a contract are clear, the court may not depart from them and determine by way of interpretation the intention of the parties.” Civil Code, [RLA-38](#), Art. 1733. Thus, “judges may not render arbitrary decisions based merely on their dislike of a [contract] which may be unjust or unreasonable or work hardship in a particular case.” George Krzeczunowicz, *Statutory Interpretation in Ethiopia*, Journal of Ethiopian Law, Vol. 1, No. 2 (1964), [RLA-44](#), p. 318.

⁸⁷ See [Statement of Defense](#), Sec. III.C and Sec. II.E *infra*. Whether or not Article 8(10) leads to a condition precedent is inconsequential, as no different result turns upon this question. Article 8(10) is a material provision of the 2012 ETIZ Agreement. See, in this respect, 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 18(3) (“either Party may immediately terminate the Agreement if there has been a material breach” where the breaching party fails upon notice to remedy within ninety days). The Ministry of Industry was entitled to demand performance of the obligation (and to withhold its own counter-performance of the contract until such a time as the obligation was met) (which, in the event, the Ministry of Industry finally did in July 2014, fully two years after the contract entered into effect). See Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, [Exhibit C-016](#). In addition to any administrative remedies, Akgun enjoyed access to contractual remedies (namely contractual arbitration) if it believed the Ministry of Industry or Oromia Regional State to be in breach of Article 8(10) (by, for example, unreasonably withholding approval of its studies and thus wrongfully suspending works on that basis). Ethiopia recalls, in this regard, the elaborate mechanism set out at Article 21 of the 2012 ETIZ Agreement. See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21 (“Settlement of Disputes”).

Ethiopian law.⁸⁸ The Claimant then offers a later heading within its same memorial to confidently state that “**Ethiopian Law Did Not Require Akgun to Obtain an EIA.**”⁸⁹

61. These two statements emanating from the Claimant are not reconcilable. If one is “unable to reasonably conclude” whether a given act is required or not, *ergo*, any conclusion as to the requirement of that act is not reasonable. The Claimant has sunk its own submissions on the contents of Ethiopian law before they ever begin.⁹⁰
62. Ethiopia submits that its environmental laws in general and its régime for assessment of environmental impact in particular are well established and elaborated in numerous instruments, consistent with internationally accepted norms and best practices, and fully accessible to investors and the public at large.⁹¹ Ethiopian law and practice require the proponent developer of a megaproject industrial zone to present and gain approval of an environmental impact assessment.⁹² This requirement is readily discoverable to the diligent foreign investor, and it is any expectation to the contrary that is not “reasonably conclude[d].”
63. For this reason, the Claimant seeks a diversion by submitting that the “Respondent grounds its defense in the argument that Akgun’s woes result from the GOTA EIA, which Respondent alleges was fundamentally deficient,” adding “[i]t is clear, however, that Respondent concluded that it made a mistake” in selecting the project site and that “the sufficiency of the GOTA EIA could not fix that mistake.”⁹³ Here, the Claimant yet again concedes the inadequacy of its EIA and voluntarily assumes the burden of proving mistake and deceit on

⁸⁸ Reply, para. 2.1.3 (emphasis added).

⁸⁹ Reply, Sec. 2.C.

⁹⁰ The Claimant’s vacillation is on further display where, in the very first paragraph falling under its categorical heading that “**Ethiopian Law Did Not Require Akgun to Obtain an EIA,**” it immediately tempers the assertion by stating only that Akgun “could not have been expected” to commission an EIA at any point prior to the Ministry of Industry’s request “as a matter of Ethiopian law.” Reply, para. 2.43.

⁹¹ See Statement of Defense, Sec. III.C; see also Expert Report of Dr. Ayele H. Anabo, dated 12 March 2021, Secs. II, III, and V.

⁹² See Statement of Defense, Sec. III.C.

⁹³ Reply, para. 2.44. Notably, the singular evidence the Claimant cites in support of this proposition is found in its own “[d]etails” of meetings. See Reply, note 97.

the part of Ethiopia as necessary to the success of its case. It is a burden that Akgun does not and cannot sustain.⁹⁴

64. Akgun’s case thus rests upon the premise that site selection is somehow outcome-determinative. This theory of absolute regulatory pre-approval by virtue of site selection is a *post hoc* argument invented for purposes of litigation, entirely detached from law or practice. To see the weakness of the foundation upon which it is conceived, one need only glance upon Yusuf Akgun’s inopportune February 2015 letter to the Minister of Industry, wherein he refers repeatedly to “Part 2, Article 7, Clause 2 of [the 2012 ETIZ Agreement], which states ‘The Ministry shall deliver the Land to the Developer free of any encumbrance.’”⁹⁵ This flailing attempt is repeated no fewer than five times in the course of that letter, wherein Akgun sought to discard its burden of environmental study by reference to a property law title assurance.⁹⁶
65. Having come to terms with the baselessness of this earlier urged contractual interpretation, Akgun has abandoned it altogether, and now seeks to recast its argument for pre-approval on the basis of Ethiopian law. This argument fares no better.⁹⁷
66. The Claimant’s expert Professor Tekle puts forth an assertion that is incorrect as a matter of both Ethiopian and international law. He opines as follows:

“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

⁹⁴ See, in this respect, Sec. II.E *infra*.

⁹⁵ Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 3.

⁹⁶ See, in this respect, 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(8) (“[t]he Developer shall notify the Ministry immediately where any claim or interference arises by third parties on its use right, including the title deed certificate on the Land”).

⁹⁷ See [Expert Report of Dr. Mellese Damtie Dandi](#), dated 20 January 2022, para. 2.27 (wherein he explains that the Claimant’s expert “cites to no credible authority that the grant of a lease or an investment permit waives EIA requirements”).

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 completing an EIA of the ‘significant environmental impact[s]’ involved—i.e., an SEA—of ETIZ.”⁹⁸

67. Contrary to the expert’s contention, the given definition of “public instrument” that is found in Article 2(10) of the EIA Proclamation does not include contractual instruments concluded with a private party. Rather, its definition of a “public instrument” as being “a policy, a strategy, a programme, a law or an international agreement” plainly contemplates treaty instruments as may be concluded *inter nations*.⁹⁹ Professor Tekle’s conclusion, founded as it is upon the faulty premise that the 2012 ETIZ Agreement “may qualify” as a “public instrument,” is incorrect.
68. The Claimant concludes its submissions on site selection as outcome-determinative by quoting its proffered expert Professor Tekle, *who concedes that Ethiopia may request Akgun “to conduct an EIA of the proposed project.”*¹⁰⁰ Professor Tekle further opines, however, that “it would be presumed that [the] land has [already] undergone the necessary EIA or SEA study requirements” and that “[i]f a lack of a proper EIA or SEA leads to the project’s failure,” the government is responsible “in this scenario.”¹⁰¹
69. The expert’s opinion is here difficult to respect.

⁹⁸ Reply, para. 2.51 (quoting Expert Report of Professor Mekete Bekele Tekle, dated 18 October 2021, paras. 2.38-2.39) (further citations omitted).

⁹⁹ Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 2(10). See also Expert Report of Dr. Mellese Damtie Dandi, dated 20 January 2022, para. 2.35.

¹⁰⁰ Reply, para. 2.56 (quoting Expert Report of Professor Mekete Bekele Tekle, dated 18 October 2021, para. 2.32) (emphasis added).

¹⁰¹ Reply, para. 2.56 (quoting Expert Report of Professor Mekete Bekele Tekle, dated 18 October 2021, para. 2.32).

70. In point of fact, Akgun was only ever asked “to conduct an EIA of the proposed project.”¹⁰² Professor Tekle’s professed belief that Ethiopia may permissibly request the investor to conduct an EIA study, but that it would all the while be “presumed” that necessary studies had already been conducted and approved, defies all rationality. The suggestion that Akgun may legitimately be requested to produce an EIA (as it was) but bears no responsibility in the event that its EIA fails (as it did) is both logically and factually unsound; it is extravagant, unsupported, and baseless.¹⁰³
71. Once Akgun leaves behind its bold suggestion that site selection be outcome-determinative, it commences an evaluation of Ethiopian law in respect of EIA by timidly submitting that those laws are “not as sharply defined or enforced” as Ethiopia would suggest.¹⁰⁴ Here, too, Akgun’s submission amounts to a suggestion that (i) “we were never told”; and thus (ii) “we bear no fault.” In Akgun’s telling, because Ethiopia’s EIA laws would supposedly have been a “bewildering maze,”¹⁰⁵ the investor is somehow absolved of its duties of diligence altogether.
72. In point of fact, reasonable investor diligence would have readily revealed the expectation and requirement of an investor’s EIA. Akgun’s present submission in this arbitration that the contents of Ethiopia’s EIA laws and practices were somehow unascertainable to the point of meaninglessness is lacking in all credibility. Ethiopia here recalls that, upon Akgun being reminded of its outstanding obligations of environmental review, Akgun’s own chosen consultant confirmed the applicable law in the very opening words of his study:

¹⁰² [Expert Report of Professor Mekete Bekele Tekle](#), dated 18 October 2021, para. 2.32.

¹⁰³ Following Akgun’s failures in its multiple proffered studies, Ethiopia was entitled to give notice and terminate the 2012 ETIZ Agreement for the developer’s default of its obligations. *See* 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10)-(12) and Art. 18(3). Instead, Ethiopia offered suitable and numerous alternative sites, in proximity to Addis Ababa and otherwise, all of which Akgun declined. *See* Sec. II.G *infra*.

¹⁰⁴ [Reply](#), para. 2.58.

¹⁰⁵ [Reply](#), para. 2.58.

EXECUTIVE SUMMARY

The FDRE Proclamation (No 299/2002) determines the modalities of protection, conservation and promotion of environment in Ethiopia stipulates that every development project shall be required to undergo an Environmental Impact Assessment prior to its commencement.

Furthermore The Environment Protection Authority (EPA) has established an Environmental Impact Assessment system for Ethiopia including the preparation of Procedural and Sectoral Guidelines as a prerequisite for the approval of new development activities and projects. The EIA Process as applicable to development projects is detailed in the ‘Environmental Impact Assessment Procedural Guidelines Series 1’ of November 2003. As per Schedule I of the Guidelines, construction of industries, factories and activities carried out have significant environmental impacts, and, therefore, require a full EIA/ EM study.

Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, [Exhibit R-4](#), p. i

73. The various items of Ethiopia’s elaborate régime in respect of EIAs have been set out extensively in Ethiopia’s Statement of Defense.¹⁰⁶ Ethiopia further adopted an official Climate-Resilient Green Economy Strategy by November 2011.¹⁰⁷ The core of the assumptions underlying the strategy is stated in its foreword as follows:

“Ethiopia is experiencing the effects of climate change. Besides the direct effects such as an increase in average temperature or a change in rainfall patterns, climate change also presents the necessity and opportunity to switch to a new, sustainable development model. The Government of the Federal Democratic Republic of Ethiopia has therefore initiated the Climate-Resilient Green Economy (CRGE) initiative to protect the country from the adverse effects of climate change and to build a green economy that will help realize its ambition of reaching middle income status before 2025. Since February 2011, the CRGE initiative, under the leadership of the Prime Minister’s Office, the Environmental Protection Authority, and the Ethiopian Development Research Institute, has been developing a strategy to build a green economy. Seven sectoral teams involving more than 50 experts from more than 20 leading government institutions have been driving the initiative. The objective is to identify green economy opportunities that could help Ethiopia reach its ambitious growth targets while keeping greenhouse gas emissions low. The government intends

¹⁰⁶ See [Statement of Defense](#), Sec. III.C.

¹⁰⁷ See Ethiopia’s Climate-Resilient Green Economy Strategy, Federal Democratic Republic of Ethiopia, dated November 2011, [Exhibit R-43](#).

to attract development partners to help implement this new and sustainable growth model.”¹⁰⁸

74. At the broader policy level, it is further stated therein as follows:

“Ethiopia aims to achieve middle-income status by 2025 while developing a green economy. Following the conventional development path would, among other adverse effects, result in a sharp increase in GHG emissions and unsustainable use of natural resources. To avoid such negative effects, the government has developed a strategy to build a green economy. It is now starting to transform the strategy into action and welcomes collaboration with domestic and international partners.

The vision: Achieve middle-income status by 2025 in a climate-resilient green economy. Both the government and the International Monetary Fund expect Ethiopia’s economy to continue as one of the world’s fastest growing over the coming years. Building on its positive recent development record, Ethiopia intends to reach middle-income status before 2025. As set forth in the Growth and Transformation Plan (GTP), reaching this goal will require boosting agricultural productivity, strengthening the industrial base, and fostering export growth.

As a responsible member of the world, Ethiopia is also aware of the important role that developing countries play in fighting climate change and has consequently taken on a constructive role in international climate negotiations. Ethiopia’s ambition to become a ‘green economy front-runner’ is an expression of its potential for and belief in a sustainable model of growth.”¹⁰⁹

75. Under Ethiopia’s EIA Proclamation, it is Akgun who bears the burden of EIA study:

“1) A proponent shall undertake an environmental impact assessment, identify the likely adverse impacts of his project, incorporate[] the means of their prevention or containment, and submit to the Authority or the relevant regional environmental agency the environmental impact study report together with the documents determined as necessary by the Authority or the relevant regional environmental agency.”¹¹⁰

Furthermore,

¹⁰⁸ Ethiopia’s Climate-Resilient Green Economy Strategy, Federal Democratic Republic of Ethiopia, dated November 2011, [Exhibit R-43](#), p. 7.

¹⁰⁹ Ethiopia’s Climate-Resilient Green Economy Strategy, Federal Democratic Republic of Ethiopia, dated November 2011, [Exhibit R-43](#), p. 12.

¹¹⁰ Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 7(1) (“Duties of a Proponent”).

“[a] proponent shall ensure that the environmental impact of his project is conducted and the environmental impact study report prepared by experts that meet the requirements specified under any directive issued by the Authority.”¹¹¹

Finally,

“[t]he cost of undertaking an environmental impact assessment and preparing an environmental impact study report shall be borne by the proponent.”¹¹²

76. Ethiopian law quite sensibly requires that the project proponent must produce the EIA because only the project proponent *knows what the project is*. The relevant EIA evaluation criteria set out considerable technical requirements; it is thus an impossibility for any party but the developer to conduct the EIA, as only the developer is privy to its own intended technical specifications.¹¹³
77. The Claimant contests Directive No. 1/2008 of Ethiopia’s Environmental Protection Authority, entitled “A Directive Issued to Determine Projects Subject to Environmental Impact Assessment,”¹¹⁴ submitting that the directive never formally entered into force (and would thus be, in the Claimant’s telling, entirely irrelevant to the Tribunal’s inquiry).¹¹⁵

¹¹¹ Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 7(2).

¹¹² Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 7(3).

¹¹³ See, e.g., Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 8, which provides in full as follows:

“1) An environmental impact study report shall contain sufficient information to enable the Authority or the relevant regional environmental agency to determine whether and under what conditions the project shall proceed. 2) An environmental impact study report shall contain, as a minimum, a description of: (a) the nature of the project, including the technology and processes to be used; (b) the content and amount of pollutant that will be released during implementation as well as during operation; (c) source and amount of energy required for operation; (d) information on likely trans-regional impacts; (e) characteristics and duration of all the estimated direct or indirect, positive or negative impacts[;] (f) measures proposed to eliminate, minimize, or mitigate negative impacts; (h) contingency plan in case of accident; and (i) procedures of self-auditing and monitoring during implementation and operation.”

¹¹⁴ A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, [RLA-2](#).

¹¹⁵ [Reply](#), para. 2.61.

78. As Dr. Mellese Damtie Dandi explains, the reality is that the directive has the effect of law.¹¹⁶ Further than this, the suggestion that an investor is entitled to ignore a high-level document that had been in circulation for several years and declare that it therefore “*could not have been expected*” to commission an EIA is deeply disingenuous,¹¹⁷ for expectations, by their nature, are formed on the basis of reasonable notice.
79. Finally, Akgun suggests that owing to “gaps” in the EIA Proclamation, it was thereby rendered nothing less than “*ineffective for a foreign investor such as Akgun*,”¹¹⁸ thereby taking the extraordinary leap from “gaps” in a law to its apparent nullity.
80. In seeking to suggest an inconsistent application of Ethiopia’s laws in respect of EIA, the Claimant states that Ethiopia “admits that it failed to perform an EIA for the 35,000-unit Condominium Project” concurrently underway at Yeka Abado and Bole Arabsa on the northeastern outskirts of Addis Ababa.¹¹⁹
81. What Akgun fails to appreciate is not only that public housing projects may be exempted from the EIA requirement,¹²⁰ but also that such argument compares apples and oranges. The environmental impacts of industrial park megaprojects and condominium units are simply not comparable.
82. Akgun submits that “[e]ven accepting *arguendo*” it “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.”¹²¹ This statement ignores (i) prior practice by the Ethiopian authorities of which Akgun’s principals

¹¹⁶ See [Expert Report of Dr. Mellese Damtie Dandi](#), dated 20 January 2022, para. 2.5.

¹¹⁷ [Reply](#), para. 2.43 (emphasis added).

¹¹⁸ [Reply](#), para. 2.66 (emphasis added).

¹¹⁹ [Reply](#), para. 2.73.

¹²⁰ See, e.g., Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, [RLA-3](#), Schedule 3 (exempting “Social Infrastructure and Services”).

¹²¹ [Reply](#), para. 2.77.

were actually aware;¹²² (ii) the stringent contractual obligation of environmental study that Akgun freely undertook;¹²³ and (iii) the sequences of land grant, permitting and environmental study as Dr. Mellese Damtie Dandi explains.¹²⁴

83. In sum, the evidence is that (i) a reasonably diligent industrial developer would know of the requirement and expectation of an EIA in Ethiopia; and (ii) Akgun’s principals both should have known and did actually know.

d. The EIA Process Was Initiated and Conducted in Accordance with Ethiopian Law and Practice

84. The Claimant puts forth a heading in its Reply entitled “**Respondent Initiated the EIA Process Far Too Late.**”¹²⁵ This assertion is leveled in the abstract, conveniently untethered from any indication as to what indicia “lateness” might be measured against.
85. Instead, the Claimant begins by simply submitting that Ethiopia’s request that Akgun supply an EIA for the ETIZ project occurred “after numerous steps had already been taken to bring the project to fruition.”¹²⁶ These “numerous steps” are by now well familiar and may be distributed into two categories, namely (i) those occurring before conclusion of the 2012 ETIZ Agreement (and thus, on the Claimant’s own case, occurring in the absence of any

¹²² See Letter from the Environmental Protection Authority to Oyap, dated 11 April 2005, [Exhibit R-1](#), Letter from the Environmental Protection Authority to Oyap, dated 29 November 2006, [Exhibit R-2](#), and Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007, [Exhibit R-3](#); see also Statement of Defense, Sec. III.A (“**The Akguns Approach the Ethio-Turkish Industrial Zone Project with Specific Knowledge and Experience of Ethiopia’s Environmental Regulatory Practices**”). Akgun’s principals now claim not to have any recollection of these letters. See, e.g., Second Witness Statement of Yunus Akgun, dated 17 October 2021, paras. 2.1-2.2. One bears a stamp in the bottom right-hand corner indicating its receipt by the Ethiopian Investment Commission, to whom it was copied. See Letter from the Environmental Protection Authority to Oyap, dated 11 April 2005, [Exhibit R-1](#). The letters presumptively reached their intended recipients.

¹²³ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10); see also Sec. II.B *supra*.

¹²⁴ See [Expert Report of Dr. Mellese Damtie Dandi](#), dated 20 January 2022, paras. 2.25-2.26.

¹²⁵ [Reply](#), Sec. 2.D.

¹²⁶ [Reply](#), para. 2.89.

“investment”);¹²⁷ and (ii) those occurring after the agreement came into effect (and thus, on the Claimant’s own case, occurring subject to the agreement’s obligations).¹²⁸

86. The contractual rights forming the very subject of Akgun’s claims did not vest until June 2012.¹²⁹ Only at that time did Akgun enter into a contract conferring rights that are the subject of its present claims, those rights themselves being subject to its own counter-performance of countervailing obligations, including stringent obligations of environmental review under both existing law and specific provision of the contractual instrument itself. Thus, Ethiopia reminded Akgun of its unfulfilled legal and contractual obligations of environmental study in May 2013, shortly following partial handover of land and issuance of Akgun’s investment permit.

87. Akgun admits the following:

“That it was the [Ministry of Industry] who delivered the EIA request was *not surprising* since industrial development is the [Ministry of Industry]’s remit and the [Ministry of Industry] was designated as Respondent’s ‘face’ to Akgun; moreover, the 2012 ETIZ Agreement provided that the [Ministry of Industry] would assist Akgun in its dealings with other Ethiopian authorities in bringing ETIZ to fruition.”¹³⁰

88. Akgun further writes that “[t]o the extent approvals were required, the 2012 ETIZ Agreement explicitly obligated the [Ministry of Industry] to assist in obtaining any necessary regulatory approvals,” that “[a]ssisting foreign investors in avoiding regulatory friction was also part of the [Ministry]’s legal mandate,” and that “[u]nder the Ethiopian law, the [Ministry] is supposed to:

¹²⁷ See [Reply](#), Sec. 3.A.

¹²⁸ See, e.g., [Reply](#), para. 2.89.9 (stating that in 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”). Amongst those events occurring post contract conclusion, Akgun features a September 2012 letter in which it was “strongly urge[d]” to undertake the works of its industrial zone. [Reply](#), para. 2.89.11 (quoting Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012, [Exhibit C-051](#)). This letter marks an obvious administrative error on the part of the Oromia regional authorities, for partial site handover was achieved only in March 2013, pursuant to a contractually agreed mechanism. See note 41 *supra*.

¹²⁹ 2012 ETIZ Agreement, [Exhibit C-009](#) (dated 8 June 2012).

¹³⁰ [Reply](#), para. 2.91 (emphasis added).

- ‘enter into contracts and international agreements in accordance with the law’;
- ‘promote the expansion of industry and investment’;
- ‘create conducive conditions for the acceleration of industrial development’;
- ‘create [an] enabling environment for domestic and foreign investment’;
- ‘facilitate the provision of efficient one-stop shopping services to investors’; and
- The [Ministry]’s duties later expanded to explicitly include: ‘provide support to industries so as to ensure compliance with environmental protection requirements.’”¹³¹

89. This is all true, as has been expressly affirmed by the then Minister of Industry Mr. Ahmed Abtew:

“In general, the Ministry’s core mandate was to facilitate the smooth functioning of industries and to provide necessary support by liaising with other government agencies. It also assists foreign investors to discharge their legal responsibilities in a timely manner. In this regard, from the date the Ministry was informed by other government regulatory bodies that Akgun had not submitted an EIA, we provided unhindered support to Akgun, explaining how this matter was so crucial for Ethiopia and there was no way to escape it.”¹³²

90. Neither Akgun’s proffered expert opinion to the effect that “it was the [Ministry of Industry] 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”¹³³ nor Akgun’s guarded submission that “[t]here is no evidence” that “any [Ministry of Industry] official mentioned the supposed EIA ‘requirement’ to Akgun until mid-2013” sits well with Akgun’s willing acceptance of environmental obligations

¹³¹ Reply, para. 2.94 (quoting Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 691/2010, [Exhibit C-111](#), Arts. 10(1) and 20(1) and Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 1097/2018, [Exhibit MBT-02](#), Art. 19(1)(x)).

¹³² Witness [Statement of Mr. Ahmed Abtew](#), dated 12 March 2021, para. 23.

¹³³ Reply, para. 2.93.

expressly recorded precisely in the June 2012 “investment agreement” now forming the basis of its claims.

91. Akgun here presents a creative new argument. While acknowledging (as it must) that “[t]he 2012 ETIZ Agreement called for Akgun to carry out ‘necessary studies,’” the Claimant submits that “this provision cannot be interpreted to require” an *environmental* impact assessment, suggesting instead that “this is a provision that addresses pollution control measures.”¹³⁴
92. Here, Akgun once again misquotes the 2012 ETIZ Agreement, which establishes an obligation to prepare “necessary *environmental* studies.”¹³⁵ As earlier set out, Akgun was bound to perform a project EIA under both law and contract.¹³⁶ The 2012 ETIZ Agreement refers to sensitive environmental conditions and obliges Akgun to “carryout *the necessary environmental studies required in this regard*.”¹³⁷ Article 8(10) refers to environmental studies “required” because they are so required by law.
93. Even if Article 8(10) were not considered to affirm or amplify obligations already existing in law, then it can only establish a heightened and autonomous obligation of its own. In such a case, Article 8(10) confers upon the Ministry of Industry and Oromia Regional State (as Akgun’s contractual counterparties) the right to demand “environmental studies” as may be “necessary” to ensure that the developer “shall” take “*maximum care*” to “safeguard the

¹³⁴ [Reply](#), para. 2.97. In his testimony, Yusuf Akgun objects only to the “scope” of the studies that Akgun was requested in May 2013 to conduct:

“In or around mid-2013, the Ministry of Industry verbally asked Akgun to prepare an Environmental Impact Assessment (‘EIA’). As the full-scale EIA proposed by the Ministry of Industry exceeded the scope of the studies on how to protect the nearby watershed from pollution that were required by Art. 8(10) of the 2012 ETIZ Agreement, I expressed concern about undertaking such an EIA and the delay it might cause.”

[First Witness Statement of Yusuf Akgun](#), dated 19 November 2020, para. 5.5.

Thus, Yusuf Akgun does not put forth any suggestion that Ethiopia acted wrongfully by requesting studies when it did so in May 2013, but rather quarrels only with their “scope.”

¹³⁵ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added).

¹³⁶ See Secs. II.B and II.C *supra*.

¹³⁷ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added).

Legedadi and Dire Dams underground water basin from pollution,” with entitlement residing in the Ministry of Industry and Oromia Regional State to determine the sufficiency of those studies to this end.¹³⁸

94. Studies sufficient to ensure the environmental safety of the project are precisely what the Ministry of Industry and Oromia Regional State sought to attain, but which Akgun failed to deliver.¹³⁹ The contractual provision does not offer any distinction as between, e.g., construction or operation phases but rather applies with equal force across all; even on the Claimant’s own submission, Article 8(10) of the 2012 ETIZ Agreement thus “defines obligations that begin after the Agreement is signed and continue as long as it is in effect.”¹⁴⁰
95. The Claimant submits in its Reply that the “Respondent does not dispute Mr. Yusuf Akgun’s recollection that an Ethiopian official asked [him] to retain a consultant to prepare [an EIA]” while noting that “Akgun could do that without creating as much delay as if Respondent took on the EIA preparation.”¹⁴¹ In point of fact, the mentioned “Ethiopian official,” then Minister of Industry Mr. Ahmed Abteu, does dispute Mr. Yusuf Akgun’s recollection, in the following words:

“Mr. Yusuf’s [] suggestion that I offered for the Ministry of Industry to perform the EIA is not only untrue but also impossible. The Ministry is a supervisory body. It has absolutely no permission or mandate to conduct an EIA and has never done so. If Mr. Yusuf really thought that I said that, he must have misunderstood. I wonder if perhaps something was lost in translation as we were communicating through an interpreter.”¹⁴²

96. Akgun goes so far as to suggest that GOTA was thereafter endorsed (or even chosen) to conduct the EIA by the Ministry of Industry itself.¹⁴³ This suggestion is misleading, for it is

¹³⁸ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added). *See also, in this respect*, notes 86 and 87 *supra*.

¹³⁹ *See Statement of Defense*, Sec. III.C and Secs. II.D, II.E, and II.F *infra*.

¹⁴⁰ *Reply*, para. 2.102.

¹⁴¹ *Reply*, para. 2.104 (citing First Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.5).

¹⁴² *Witness Statement of Mr. Ahmed Abteu*, dated 12 March 2021, para. 20. In the Claimant’s Reply memorial, the evidence of Ethiopia’s witnesses has gone unaddressed and, apparently, unnoticed.

¹⁴³ *See Reply*, para. 2.106.

the privilege of the project proponent to select his vendor (and, thereafter, the duty of the project proponent to ensure the quality of the vendor's product). Select the vendor is precisely what Yunus Akgun did, as he openly confirms.¹⁴⁴

97. Notably, Akgun's protests at Ethiopia's initial silence on the choice of GOTA as EIA consultant relate only to the period prior to Akgun's delivery of GOTA's visibly defective report:

"Neither the [Ministry of Industry] nor any other authority complained about GOTA *at that time* or suggested that a different consultant would be better, nor *at that time* did [the Ministry of Industry] or any other authority suggest to Akgun that it was committing a fatal error by hiring a local Ethiopian firm to perform the EIA."¹⁴⁵

98. By the time of the January 2014 multi-stakeholder consultation, those officials assembled expressed their "unanimous disappointment" in the GOTA EIA that Akgun had delivered,¹⁴⁶ which report was "roundly rejected."¹⁴⁷ Akgun cannot (and does not) suggest that it was unaware of Ethiopia's guidance to engage a professional vendor after this point in time.¹⁴⁸ Although Akgun was advised of the insufficiency of the GOTA EIA offering, it did not commission a higher quality EIA report, choosing instead to submit only revisions rendered by GOTA itself, for reasons known only to Akgun.¹⁴⁹

¹⁴⁴ See [First Witness Statement of Yunus Akgun](#), dated 19 November 2020, para. 5.15 ("I personally interviewed and engaged GOTA").

¹⁴⁵ [Reply](#), para. 2.108 (emphasis added).

¹⁴⁶ [Witness Statement of Mr. Sisay Gemechu Edo](#), dated 12 March 2021, para. 15.

¹⁴⁷ [Witness Statement of Mr. Fekadu Zeleke](#), dated 12 March 2021, para. 11.

¹⁴⁸ Indeed, Akgun sought (and received) a proposal for the preparation of an EIA study from Ernst & Young in February 2014. See Technical and Financial Proposal for ESIA for Ethio-Turkish Industry Zone, Ernst & Young, dated 11 February 2014, [Exhibit R-42](#). The proposal was evidently declined.

¹⁴⁹ See Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, [Exhibit C-068](#), Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, [Exhibit C-069](#), and Environmental Impact Assessment Plan of ETIZ by GOTA (Summary Document), dated 3 March 2014, [Exhibit C-070](#).

99. Akgun now submits that “Ethiopia [] promoted the Afro Oil factory” and “knew about and supported its construction at the time.”¹⁵⁰ In respect of Afro-Oil, Mr. Ahmed Abteu, then Minister of Industry, has testified as follows:

“Around May 2013, I remember that in consultation with the various concerned government agencies, we asked Akgun to produce an environmental impact assessment (‘EIA’) as required under the Agreement and the laws of the country. I later discovered that Akgun did two contradictory things at the same time. It commissioned a local company to conduct an EIA but also went forward with a sublease of land to Afro-Oil, which in turn commenced construction work. They did this without my permission. At that point in time, I was the only lawfully mandated official who could have permitted the sublease and commencement of construction. I never did. Akgun went forward without lawful authorization anyway.”¹⁵¹

100. In conclusion, to the extent that Akgun undertook or allowed any works at the Sendafa site prior to gaining environmental approval, it did so at its own risk in respect of any failure on its part to meet its obligations of environmental review under law and contract.

e. The Claimant’s Inappropriate Allegation that Ethiopia “Secretly Decided” to Relocate ETIZ Is Demonstrably False

101. In seeking to suggest a concerted act of deceit, the Claimant begins by referring to a May 2012 letter from AAWASA to the Ministry of Industry in which AAWASA observes that land anticipated for the industrial zone falls inside the Legedadi catchment area.¹⁵² The Claimant now protests that “[n]either this letter nor AAWASA’s concerns were shared with Akgun at that time” but that “[i]nstead, [the Ministry of Industry] pushed forward with concluding the 2012 ETIZ Agreement.”¹⁵³

102. Indeed, the 2012 ETIZ Agreement was thereafter willingly concluded by both parties. That agreement carries the familiar obligation that Akgun shall “take maximum care to safeguard

¹⁵⁰ Reply, para. 2.110.

¹⁵¹ Witness Statement of Mr. Ahmed Abteu, dated 12 March 2021, para. 12.

¹⁵² See Reply, para. 2.115. The referenced document is the Letter from Addis Ababa Water and Sewerage Authority to the Ministry of Industry, dated 24 May 2012, **Exhibit R-24**, whose motivation has been related by Mr. Fekadu Zeleke of AAWASA. See Witness Statement of Mr. Fekadu Zeleke, dated 12 March 2021, Sec. II.

¹⁵³ Reply, para. 2.116.

the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard.”¹⁵⁴ Akgun’s implicit suggestion that it could not have been aware (and was not actually aware) of environmental sensitivities at the site is insincere. Rather, Ethiopia openly inserted an exacting obligation into the contractual instrument, which obligation Akgun freely accepted.

103. Akgun adds that it 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.”¹⁵⁵

104. First, it is quite true that the “concerns and conclusions” Akgun refers are merely views “expressed in internal correspondence” and do not reflect any decision over the matter. Second, no authority had any intentions to conceal but these are internal correspondence, just as there is undoubtedly internal correspondence of Akgun not shared with Ethiopia. Third and most important, Akgun openly acknowledges its full awareness of concerns about the project within certain governmental agencies for, in Yunus Akgun’s own words, “*they told us explicitly*.”¹⁵⁶ The suggestion that such concerns were somehow concealed from Akgun is not only disingenuous. It is actually false by Akgun’s own admission.

105. The Claimant has, in its Reply, declined to counter the sheer weight of the evidence that demonstrates Ethiopia’s meticulous review of the EIAs proffered by Akgun in respect of the ETIZ project. Ethiopia here surveys that extensive (but ignored) body of evidence once more, with certain key additions to the record.

106. Not having received any environmental report since the time of contract signing in June 2012, Ethiopia requested Akgun to perform the requisite study in May 2013, shortly

¹⁵⁴ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10).

¹⁵⁵ [Reply](#), para. 2.117.

¹⁵⁶ [First Witness Statement of Yunus Akgun](#), dated 19 November 2020, para. 6.7 (emphasis added).

following partial handover of land and issuance of Akgun's investment permit.¹⁵⁷ This timeline was in accord with prior practice by the Ethiopian authorities of which Akgun's principals were actually aware.¹⁵⁸ Upon hearing Ethiopia's request, Akgun elected to engage GOTA to perform the requisite study, and thereafter proffered its assessment in early October 2013.¹⁵⁹

107. On 13 November 2013, the Ministry of Industry responded to Akgun by letter noting the following:

- Amongst the “[p]oints which are not included within the baseline environmental conditions” is “[p]roject description/water bodies in the area: river, dam, wetland and others as regards to their linkage with the project”;
- “Regarding the positive and negative impacts analysis of the project,” “[i]ts positive and negative impacts... are not analyzed adequately,” and “[g]iven the vastness of the project, its impact on the locality, the community, humans and other living things should be analyzed thoroughly”; and
- “Regarding the impact mitigation measures of the project,” “[i]t needs to be revised in conformity with the negative and positive impact analysis,” and “[i]mportant feedback collected during public consultation of the project should [also] be included within the negative and positive impact analysis of the project.”¹⁶⁰

108. On 28 November 2013, the AAWASA wrote to the Ministry of Industry requesting a workshop to be convened so that “the issue can be reviewed extensively and a recommendation can be forwarded to the government.”¹⁶¹

¹⁵⁷ See, e.g., [Witness Statement of Mr. Ahmed Abtew](#), dated 12 March 2021, para. 12; see also, in this respect, note 42 *supra*.

¹⁵⁸ See Letter from the Environmental Protection Authority to Oyap, dated 11 April 2005, [Exhibit R-1](#), Letter from the Environmental Protection Authority to Oyap, dated 29 November 2006, [Exhibit R-2](#), and Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007, [Exhibit R-3](#); see also note 122 *supra*.

¹⁵⁹ See Letter from Akgun Construction to Ministry of Industry, dated 4 October 2013, [Exhibit C-059](#); see also Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, [Exhibit R-4](#).

¹⁶⁰ Letter from Ministry of Industry to Akgun Construction and the attached “Comments on Ethio-Turkish International Industry Zone,” dated 13 November 2013, [Exhibit C-060](#).

¹⁶¹ Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry, dated 28 November 2013, [Exhibit C-062](#).

109. Akgun now submits that “[a]fter Akgun submitted its first draft EIA from GOTA in October 2013, the [Ministry of Industry] evidently shared the report with other authorities.”¹⁶² Indeed, this fact was well known to Akgun at the time, for the Ministry of Industry openly forwarded AAWASA’s letter to Akgun on 18 December 2013, writing of possible impacts “[w]ith regard to the daily water consumption” and also “[s]ewerage to be released from the industry zone” and concluding “we strongly suggest that the company shall put a special focus on [these] major points... and carry out or revise the study report.”¹⁶³

110. One week later, Akgun wrote to the principal of GOTA as follows:

¹⁶² Reply, para. 2.118.

¹⁶³ Letter from Ministry of Industry to Akgun Construction, dated 18 December 2013, Exhibit C-026.

Date: December 25/2013

Ref no. AKGUN/089/13

To: Ato.Getachew Bel's-go to Management and Development Consulting PLC
General Manager
Addis Ababa

[Handwritten signature]
27/12/13

The Ministry of Industry of the Federal Democratic Republic of Ethiopia has informed us by a letter Ref.No.02.01.30/1484 dated Tahisas 11/2006 that a work shop is organized on our Industry Zone Environmental impact assessment report. The workshop will be conducted on Tahisas 23/2006 Starting from 3:00 O'clock (Ethiopian calendar and time) or January 1,2014 at 9:00 AM in capital hotel around 22 mazoria.

The Ministry of industry has given the following comments to be considered in the study.

1. The international technological and scientific mechanisms to be used to avoid chemical effluents that affect the Legedadi water Dum.
2. The chemical discharges from industries and their negative impact on the constructed underground water wheels for Legedadi water Dum.

You are therefore, advised to finalize the Ethio-Turkish International Industrial City Environmental impact assessment study based on the comments given by the ministry of Industry and you are also requested to present the environmental Impact assessment study to the participants of the workshop for around 30 minutes.

With best regards,

Serkan Ufuk Akgun
General Manager

C.C

Ministry of Industry



Letter from Akgun Construction to Getachew Belis of GOTA, dated 25 December 2013, [Exhibit R-44](#)

111. The stakeholders' forum was convened in Addis Ababa on 2 January 2014 and attended by nearly thirty participants.¹⁶⁴ Akgun submits that it was “surprised” by the “hostility” of certain participants as it had “consistently committed to apply all necessary environmental

¹⁶⁴ See List of Attendees to Ethio Turkish Industry Zone Environmental Assessment Meeting, dated 2 January 2014, [Exhibit C-066](#).

measures to establish ETIZ as an exemplary industrial zone.”¹⁶⁵ In point of fact, the proffered GOTA EIA report was “respectfully but roundly rejected” on its merits.¹⁶⁶ Akgun cannot (and does not) contend in this arbitration that the GOTA EIA report demonstrated, to use its own words, “all necessary environmental measures to establish ETIZ as an exemplary industrial zone.”¹⁶⁷ Ethiopia, for its part, was not content merely with kind aspirational words in respect of a key watershed for its capital city but rather expected Akgun to furnish the “necessary environmental studies” to prove it.¹⁶⁸

112. Akgun submits that it was “further surprise[d]” by Ethiopia’s response to its report “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.”¹⁶⁹ The evidence to which Akgun here refers consists in amateurish and anecdotal videos reflecting supposed discharges from a few small facilities.¹⁷⁰ The reference is, however, very telling, for it bares Akgun’s mistaken belief that it could casually disregard Ethiopia’s requests for environmental review with impunity.

113. As recounted by the then State Minister of Industry Mr. Sisay Gemechu Edo, the various officials assembled thus expressed their “unanimous disappointment” in the EIA that Akgun had delivered.¹⁷¹ Mr. Sisay further testifies as follows:

“The comments were all constructive and designed to help Akgun understand the seriousness of the environmental concerns as the location was near Addis Ababa’s water supply dams and main water basin. I believed at that time that Akgun would take note of the seriousness of the issue, engage more purposefully, and address the concerns in a scientific and methodical manner. I believed that it was possible to address the adverse impact through careful planning and a proper treatment scheme. As a matter of fact, zero liquid discharge is achievable, although it takes a high level of expertise and the commitment of significant resources.”¹⁷²

¹⁶⁵ Reply, para. 2.119.

¹⁶⁶ Witness Statement of Mr. Fekadu Zeleke, dated 12 March 2021, para. 11.

¹⁶⁷ Reply, para. 2.119.

¹⁶⁸ 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(12).

¹⁶⁹ Reply, para. 2.119.

¹⁷⁰ Reply, para. 2.119 (citing Witness Statement of Serkan Ufuk Akgun, dated 17 October 2021, paras. 3.3-3.7).

¹⁷¹ Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021, para. 15.

¹⁷² Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021, para. 17.

114. After the workshop, Akgun sought a proposal for the conduct of an EIA by the firm of Ernst & Young.¹⁷³ Within the enclosed terms of reference, Akgun wrote that “[t]he consultant is required to analyze the relevant national and international legislations and policy requirements” and to identify “[a]ny environmental and social liabilities associated with the operation of the [industrial zone] such as any fatal flaws related to development or resettlement requirements.”¹⁷⁴
115. On 11 February 2014, Akgun received in response a “Technical and Financial Proposal for ESIA for Ethio-Turkish Industry Zone” whose cover letter carries a note establishing that its terms “shall be valid and remain binding upon [the vendor] for [a] period of 90 days.”¹⁷⁵ The proposal includes the following at its “**Task 3**”:

Task 3: Determine Legal and Regulatory Considerations

It will be necessary to comply with national EIA legislation and procedures, and other relevant environmental/social regulations, as well as leading practice performance standards.

According to Annex III of the FDR of Ethiopia's Environmental Protection Authority (EPA)'s "Environmental Impact Assessment Procedural Guideline Series 1" it is clear that this project (as an Industrial Estate) will require a full EIA. The EPA Guidelines will be reviewed to determine their more specific requirements for a development of this kind. The Guidelines recommend a "pre-screening consultation" and this will be carried out with representatives of the EPA, the Ministry of Industry and the Consultant's team to agree on how best to proceed with the ESIA. As mentioned in the Guidelines "pre-screening consultation is advisable for it saves time and fosters a mutual understanding about the requirement"; it can also be used to clarify national environmental regulations (other than EIA) that the project must comply with.

Technical and Financial Proposal for ESIA for Ethio-Turkish Industry Zone, Ernst & Young,
dated 11 February 2014, [Exhibit R-42](#), p. 25

116. The proposal was evidently declined. Instead, Akgun chose on 5 March 2014 to submit only revisions rendered to the earlier report by GOTA, requesting the Ministry of Industry's “positive feedback [] in the shortest possible time.”¹⁷⁶ Two weeks later, on 18 March 2014,

¹⁷³ See Letter from Akgun Construction to Ernst & Young, dated 31 January 2014, [Exhibit R-45](#).

¹⁷⁴ Letter from Akgun Construction to Ernst & Young, dated 31 January 2014, [Exhibit R-45](#), enclosed Terms of Reference, p. 3.

¹⁷⁵ Technical and Financial Proposal for ESIA for Ethio-Turkish Industry Zone, Ernst & Young, dated 11 February 2014, [Exhibit R-42](#), p. 1.

¹⁷⁶ Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, [Exhibit C-068](#). See also Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, [Exhibit C-069](#), and Environmental Impact Assessment Plan of ETIZ by GOTA (Summary Document), dated 3 March 2014, [Exhibit C-070](#). The subject heading of the submission letter does not feature the enclosed EIA report but rather tellingly reads “**PURPOSE OF THE ETHIO TURK INDUSTRY ZONE PROJECT**,” wherein Akgun wrote of “approximately \$ 10 billion of exports per annum” as well as “employment opportunities to 1 million people” which “makes us

the Oromia Bureau of Rural Land and Environmental Protection rendered its comments to the GOTA EIA, telling of both “general and specific but major comments that need to be considered before [a] final decision is to be given on the project,” and further noting that “the consultant did not consider [the] recently established EIA proclamation” of the Oromia Regional State.¹⁷⁷

117. Akgun refers to a memorandum dated 3 April 2014 annexing notes of an ETIZ project workshop, which workshop was attended by eleven Ethiopian officials (representing the Ministry of Industry, MOEF, AAWASA, the Oromia Rural Land and Environmental Protection Bureau, and the Oromia Investment Commission) but by Mr. Hagos Sequar alone on behalf of Akgun.¹⁷⁸ Akgun submits that this document “demonstrates the confusion” that it encountered.¹⁷⁹ In fact, the document demonstrates the routine inter-agency airing of views that Akgun’s own expert confirms is the core function of the EIA process.¹⁸⁰

118. Furthermore, Akgun here recognizes a handwritten note to the State Minister of Investment Industry Zone Development (the designated recipient of the memorandum) on the document’s very first page as “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.”¹⁸¹

119. A full quotation of the handwritten note would have read as follows:

understand the importance of the project more clearly,” before giving any mention to the EIA in its final paragraphs. See Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, [Exhibit C-068](#).

¹⁷⁷ Comments on the EIA Report of Ethio-Turkish Industrial Zone Project, Oromia Bureau of Rural Land and Environmental Protection, dated 18 March 2014, [Exhibit R-5](#), p. 1. The referenced document is the Oromia National Regional State Environmental Impact Assessment Proclamation, Proclamation No. 176/2012, [RLA-45](#).

¹⁷⁸ See [Reply](#), para. 2.121 (citing Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#)).

¹⁷⁹ [Reply](#), para. 2.121.

¹⁸⁰ See [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 5.30 (stating that an important goal of the EIA process when first conceived was to “foster dialogue between balkanized, mission-driven government agencies”).

¹⁸¹ [Reply](#), para. 2.121 (quoting Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#), p. 1).

“Should the environmental assessment demand a change of site, it may only be granted in the event that it is impossible to undertake a measure that can withstand the impacts. *The comments do not signify this*; and it should be referred to the Federal Ministry of Environment and Forestry Development, for proper resolution to this end.”¹⁸²

120. Akgun submits that following this workshop, it “sought guidance” from the Prime Minister’s office and from the Ministry of Industry who, in Akgun’s telling, offered “the full support of the government” as well as the “suggestion” that additional study might “help persuade the authorities” who had voiced opposition to ETIZ.¹⁸³ In Akgun’s telling, “[a]s far as [it] 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.”¹⁸⁴

121. If Akgun genuinely believed that statements of encouragement and support by high officials constituted a waiver of its obligations under law and contract, Akgun tragically misunderstood the nature of governance in Ethiopia.¹⁸⁵

122. Also on 3 April 2014, less than one month after delivery of the revised GOTA report, the MOEF rendered its full comments, opining that “*proper experts with the required capacity should be engaged to prepare an acceptable report*.”¹⁸⁶ The MOEF wrote that “we are strongly recommending the owner of the project to revisit the submitted document based on [its review comments] so as to enable decision makers to decide on the implementation of the projects in the delineated zone.”¹⁸⁷ Thus, the MOEF considered that “these factors made the establishment of the industry zone in Sendafa area very difficult” and “recommended” that Akgun “get a replacement site” in view of “the importance and significance of the

¹⁸² Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#), p. 1 (emphasis added).

¹⁸³ [Reply](#), para. 2.122.

¹⁸⁴ [Reply](#), para. 2.123.

¹⁸⁵ Akgun’s legal obligations were equally unaltered by advertising billboards or provision of electricity. *See* [Reply](#), para. 2.122.

¹⁸⁶ Review Comments on “Environmental Impact Assessment and Management Plan of Ethio-Turkish Industrial Zone, Oromia Regional State, Bereh Woreda, Lega Beri-Lega Bolo and Girar Berak Kebele,” Ministry of Environment and Forest, dated 3 April 2014, [Exhibit R-6](#), p. 3 (emphasis added) (hereinafter the “April 2014 MOEF Review Comments”).

¹⁸⁷ April 2014 MOEF Review Comments, [Exhibit R-6](#), p. 4.

industry zone.”¹⁸⁸ The MOEF did not reach a conclusion as to the achievability of environmental safety at the Sendafa site. The MOEF concluded that the proponent developer had thus far failed to show it.

123. At this juncture, Ethiopia granted Akgun a third opportunity to demonstrate its commitment to environmental stewardship. As Mr. Sisay testifies, “Akgun was [] strongly advised to seek a more robust EIA by experienced international firms.”¹⁸⁹ On 17 July 2014, Akgun finally reported that “[a] consultant firm which can undertake the environmental impact assessment of the project is identified” and that its experts would “come to Ethiopia at the beginning of August to start their study.”¹⁹⁰

124. The Claimant now presents the very grave allegation that Ethiopia reached a decision to relocate the project but concealed this decision from Akgun. The narrative adventurism would seem to begin in various documents dating from early 2014 in which various views were expressed in the course of inter-agency review. Akgun then seizes upon these views and treats them as if they were the final disposition of the matter, aided by erroneous presentation of one key letter.

125. First, as noted, Akgun acknowledges full awareness that certain governmental bodies expressed concerns regarding the project. Thus, in his first witness statement, Yunus Akgun testified that “[a]fter the second workshop we knew, because they told us explicitly at that workshop,” that certain agencies “did not want our project to be built on the land Ethiopia had allocated for ETIZ,” and that “[w]e therefore understood that certain elements within the government opposed our project” while others supported it.¹⁹¹ As seen, a vigorous airing of

¹⁸⁸ Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#) (describing its April 2014 conclusions).

¹⁸⁹ [Witness Statement of Mr. Sisay Gemechu Edo](#), dated 12 March 2021, para. 18.

¹⁹⁰ Letter from Akgun Construction to Ministry of Industry and Ethiopian Investment Agency, dated 17 July 2014, [Exhibit C-021](#).

¹⁹¹ [First Witness Statement of Yunus Akgun](#), dated 19 November 2020, para. 6.7. Yusuf Akgun similarly testifies that “we clearly understood that certain elements within the government were opposed [to] ETIZ proceeding on the land the Ministry of Industry had allocated for it.” [First Witness Statement of Yusuf Akgun](#), dated 19 November 2020, para. 5.15.

views by all stakeholders concerned is a hallmark of the properly functioning EIA process, as the Claimant's own expert witness confirms.¹⁹²

126. The brave suggestion that a decision to relocate the project was taken and kept hidden from Akgun is flatly false. Although the Claimant does not identify with precision the point in time at which this "secret" decision would supposedly have taken place, it seems to suggest that this occurred by virtue of an exchange of letters in July 2014.

127. First, the Mayor of Addis Ababa wrote to the Prime Minister on 3 July 2014 requesting the allocation of an alternative site "until a common understanding is attained through alternative details that can assure absence of any impacts on the Legedadi deep well underground water" or "the Legedadi and Dire surface water source."¹⁹³

128. Mr. Eshetu Dessie, Minister of Cabinet Affairs, thereafter wrote to the Ministry of Industry (with copy to the Office of the Mayor and others) on behalf of the Prime Minister on 22 July 2014.¹⁹⁴ Within this letter, the Claimant leans upon the final passage of the penultimate paragraph as establishing a relocation decision by the Prime Minister.¹⁹⁵ The relevant passage reads:

"[A]nd hence 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, until the details thereof are presented leading to mutual understanding."¹⁹⁶

129. The Claimant's conclusion is in error. To any reader of these two letters, it is evident that the passage relied upon does not reflect any decision in the matter but rather marks the

¹⁹² See [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 5.30 (stating that an important goal of the EIA process when first conceived was to "foster dialogue between balkanized, mission-driven government agencies").

¹⁹³ Letter from Mayor of Addis Ababa City to Prime Minister, dated 3 July 2014, [Exhibit C-130](#), p. 2.

¹⁹⁴ Letter from Prime Minister to Ministry of Industry, dated 22 July 2014, [Exhibit C-131](#).

¹⁹⁵ See [Reply](#), para. 2.127.6.

¹⁹⁶ Letter from Prime Minister to Ministry of Industry, dated 22 July 2014, [Exhibit C-131](#), p. 2.

completion of a summary of the Mayor's earlier-communicated request, to which the Prime Minister thereafter responds.

130. Disposition by the Prime Minister, the highest executive authority in the land, is thus reached in the following and final paragraph of the 22 July 2014 letter:

“As such, this is to notify that no further construction shall be conducted prior to authorization by the concerned entities *following adequate environmental impact assessment*.”¹⁹⁷

131. The Minister of Industry promptly delivered the Prime Minister's decision to Akgun two days later by the so-called suspension letter of 24 July 2014, wherein the Minister faithfully conveyed the Prime Minister's instructions “to ensure that no construction shall take place *before the EIA is presented and approved*.”¹⁹⁸ As Mr. Ahmed Abteu, author of the letter affirms, “[t]he decision was taken on the basis of our unaddressed environmental concerns; nothing more, and nothing less.”¹⁹⁹

132. One week later, on 31 July 2014, Akgun's local employee Mr. Hagos Sequar sent the three core guideline documents for preparation and review of an EIA in Ethiopia to Messrs. Yusuf, Yunus, and Ufuk Akgun.²⁰⁰ Mr. Hagos implored the Akguns: “[P]lease strictly advise the *consultant* to do the assessment study based on the requirements that are attached for you.”²⁰¹

133. In late August 2014, Akgun wrote to the Ministry of Industry to offer five pages of overview of intended mitigation practices at the ETIZ project site.²⁰² Akgun confessed the failure of

¹⁹⁷ Letter from Prime Minister to Ministry of Industry, dated 22 July 2014, [Exhibit C-131](#), p. 2 (emphasis added).

¹⁹⁸ Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, [Exhibit C-016](#) (emphasis added).

¹⁹⁹ Witness Statement of Mr. Ahmed Abteu, dated 12 March 2021, para. 29.

²⁰⁰ Email from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 31 July 2014, [Exhibit R-46](#).

²⁰¹ Email from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 31 July 2014, [Exhibit R-46](#) (emphasis added). Mr. Yusuf Akgun would forward the three attachments to Professor Ismail Toroz of Istanbul Technical University more than one month later, on 2 September 2014. See Email from Mr. Yusuf Akgun to Ismail Toroz, dated 2 September 2014, [Exhibit R-47](#).

²⁰² Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, [Exhibit C-025](#). These five pages include mention of the Bartın industrial zone as a “sample Organized Industrial Zone” in respect of waste treatment practices. *Id.*, p. 5. The Bartın industrial zone had previously been linked to extensive pollution of the Bartın River

the GOTA EIA where it wrote that “the time spent for having the Environmental Report made in Ethiopia was spent for nothing” and that it was “sorry about that.”²⁰³ Openly demonstrating its disregard for Ethiopia’s process, Akgun added that “[t]he Environmental Report *is only a procedure*” that “*doesn’t prevent the work.*”²⁰⁴

134. Akgun wrote again two days later, on 21 August 2014, this time promising to complete and submit a new EIA with the assistance of two US-based consultants.²⁰⁵ In a different letter of the same date, Akgun wrote to the Prime Minister that “we have employed a consultant called ‘Yeditepe University’ ... from Turkey and the consultant is ... ready to come to Ethiopia to carry out the detail [sic] environmental impact study of the project.”²⁰⁶

135. Countering Akgun’s unseemly suggestion that a decision on its project had already been taken by this time, AAWASA dispatched a letter to Akgun on 1 September 2014 in prompt reply to Akgun’s inquiries and in aid of its ongoing studies, in accordance with the Prime Minister’s instructions, and in the utmost good faith:

in northern Turkey as early as May 2012. See “CLA reacted to pollution in Bartın River,” *Ihlas Nes Agency*, dated 5 May 2012, [Exhibit R-48](#).

²⁰³ Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, [Exhibit C-025](#).

²⁰⁴ Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, [Exhibit C-025](#) (emphasis added).

²⁰⁵ See Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#) (“Meanwhile, the company sent us a letter with a copy to your ministry on August 21/2014 with Ref. No. NVGUN/06/14 in which it promised to complete and submit the EIA report for the industry zone in Sendafa area with the help of two US based consultants within 30 days”).

²⁰⁶ Letter from Akgun Construction to the Prime Minister, dated 21 August 2014, [Exhibit C-028](#). The anticipated “environmental impact study” would eventually be rendered by Istanbul Technical University in the form of the ITU Addendum. See *Ethio-Turkish Industry City Environmental Study*, prepared by Istanbul Technical University, dated 10 October 2014, [Exhibit C-078](#). It is apparent that personnel of Yeditepe University did participate in its production. See, e.g., Email from Funda Cihan to Ismail Toroz et al, dated 11 September 2014, [Exhibit R-49](#) (including amongst its recipients Seyda Dogan of Yeditepe University).

 በአዲስ አበባ ከተማ አስተዳደር CITY GOVERNMENT OF ADDIS ABABA	 የኢ.አ.ው.ፍ.ገ. ውሃና ሣኒታሪያን ልማትና ማስፋፊያ ንግድና ጽ/ቤት A.A.W.S.A. Water and sanitation Development & Rehabilitation Project Office
ቁጥር <u>5-7-1497/15/60</u> Ref. No. ቀን <u>26/12/2014</u> Date.	
 AKGUN Construction Machinery Industry & Foreign Trade LTD Company <u>Addis Ababa</u> Subject: <u>Reply for Information Request</u> It is to be remembered that your company has requested us, with Ref. No. AKGUN/090/14 dated August 21, 2014, relevant information about Legedadi area where your Industry Zone lays in order to carry environmental impact assessment. Therefore, we have given the following information that you may consider in your E.I.A. assessment: 1. The amount of groundwater prospect from Legedadi- Dre Area is 46.3 million m³ per annum. This amount only assumes that the groundwater potential that can be developed for water supply by which the full-scale development of this groundwater resource, is already underway by our authority. 2. About the distance of Ethio-Turkish International from Legedadi and Dire Dams by taking the center of your industry zone map which has a geographic coordinate of 499000E 1009000N, and by projecting the shortest possible air distance to the verge of the reservoirs, your industry zone has 3.88Km and 5.92Km distance to Legedadi and Dire Dams respectively. 3. Protection line of Legedadi and Dre Dams to your industry zone will be determined after the result of the E.I.A. 4. Regarding soil ground survey and yearly mean rainfall data, we suggest that it's better to acquire them from the relevant governmental institutions such as Ministry of Water, Irrigation and Energy as well as Ministry of Agriculture. Finally, wishing you a good luck in your investment in Ethiopia, for better acceptability of the E.I.A to be carried out, we recommend that the consultant to conduct its study in close relation and follow up of our office and other stakeholders. <u>C.C.</u> - Project Manager - Technical Depute Manager Office - Water Study, Design & Construction Sup Process <u>Addis Ababa</u>  With regards,  Brhane Hagos Technical Deputy Manager	

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Letter from AAWASA to Akgun Construction, dated 1 September 2014, [Exhibit C-136](#)

136. On 5 September 2014, Mr. Hagos Sequar sent a further document by attachment to the three Akguns which, in his words, “may help the consultant who has taken the assignment of doing the environmental impact assessment study.”²⁰⁷ From this document, one may see all that was foremost in the mind of Mr. Hagos as he sought to advance the project, advising Akgun’s principals from the ground as follows:

“Dear

Mr.Yusuf Akgün

Mr.Ufuk Akgün

Mr.Yunus Akgün

Please advise the consultant who has taken assignment to conduct the environmental impact assessment study of the Ethio-Turkish Industry zone in addition to his professional knowledge of how to do the study to consider or pay attention also to the following points.

- ***To understand that Ethiopia is dedicated to implement green economy.***
- ***To follow the EIA guide lines, legal and policy requirements*** (environmental administrative, the constitution, environmental protection establishment proclamation, environmental impact assessment proclamation, environmental pollution assessment proclamation and solid waste management proclamation of Ethiopia).
- ***To assess the real situation of the surrounding of the site*** and carry out stake holders consultation and data collection by sending its experts to Addis Ababa.
- ***To carefully look in to the concerns and comments of the ministry of industry and Addis Ababa water and sewerage Authority*** (letter No 1,2 and 3) and come up with modern technological means that can perfectly solve the problems that may exist or pollute the whole surrounding area of the site ***with special emphasis to the Legedadi and Dire dams*** such as how to protect the dams (Mitigation measures)
 - a) From liquid effluents
 - b) Solid wastes

²⁰⁷ Email from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 5 September 2014, [Exhibit R-50](#).

- c) Run of water with pollutant things from the compound of industries to be located in the industry zone.
- d) Under ground water leakages
- e) Shortage of water or alternative water supply for the industry zone
- Note [sic] to forget to attach terms of reference (TOR) and study team profile (CV) to the study document.
- ***To carefully see or read the agreement signed in June 8, 2012 and do the assignment accordingly.***
- To see different alternatives on how to mitigate liquid, solid other wastes to safeguard the surrounding of the site from any pollution.
- To work out or present ***internationally acceptable study*** because the final study will be evaluated at higher level professionals including the Addis Ababa University.”²⁰⁸

137. The pleas of Mr. Hagos would go unheeded.

138. On 15 October 2014, Akgun delivered its third attempt at an ETIZ project EIA. This document of thirty pages came in the form of the addendum prepared by Istanbul Technical University.²⁰⁹ The MOEF offered its review of the document by letter of 13 November 2014, finding as follows:

“[Akgun] sent us a letter ... on August 21/2014 ... in which it promised to complete and submit the EIA report for the industry zone in Sendafa area with the help of two US based consultants within 30 days ... However, the document we received from your ministry [i.e. the ITU Addendum] along with the letter does not indicate that a detailed EIA was conducted ... ***[w]e, therefore, believe that the company has not submitted a comprehensive EIA report*** ... [w]e herewith attached the conclusion and recommendation of our ministry which includes the required points that should be included in the report and our opinion on the project implementation.”²¹⁰

²⁰⁸ Letter from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 5 September 2014, [Exhibit R-51](#) (emphasis added). As noted, Ethiopia adopted a federal-level green economy strategy in 2011, which was evidently well-known to Mr. Hagos. See Ethiopia’s Climate-Resilient Green Economy Strategy, Federal Democratic Republic of Ethiopia, dated November 2011, [Exhibit R-43](#) and paras. 73-74 *supra*.

²⁰⁹ Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, [Exhibit C-078](#); see also Letter from Akgun Construction to Ministry of Industry, dated 15 October 2014, [Exhibit R-8](#) and Letter from Akgun Construction to Ministry of Industry, dated 17 October 2014, [Exhibit C-080](#).

²¹⁰ Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#) (emphasis added). The enclosed document is the one entitled “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,” [Exhibit C-082](#) (hereinafter the “November 2014 MOEF Review Comments”).

139. The MOEF summarized its April 2014 findings in respect of the GOTA EIA, which concerns remained unaddressed:

- “the [revised GOTA] EIA report did not employ the EIA research methodology which could have indicated whether it is compatible with the planned industry zone in Sendafa area”;
- “it has not thoroughly identified the potential impact of the industry zone on Legedadi basin, especially on the Legedadi groundwater and dams”; and
- “the corrective measures for halting or minimizing the negative impacts on the environment lack transparency.”²¹¹

140. The MOEF nonetheless concluded in November 2014 that “[w]e would support the implementation of the project under the condition that the company will confirm us to give due considerations of all the above comments.”²¹²

141. In a striking admission of its own failure, the Claimant reverts to the GOTA EIA and submits that Ethiopia “criticized [the report’s] details regarding the amounts of effluents and treatment processes to be used,” that “[t]hese criticisms were founded on the assumption that there would be no treatment plant in ETIZ,” but that “the project-related materials that Akgun provided to Respondent going back to 2009 contradicted that assumption.”²¹³ ***Thus, the Claimant suggests that it be excused from properly elaborating its treatment plans in the phase of environmental impact review because it had included three sparse pages on the topic in a pre-contract feasibility study four years prior.***

²¹¹ Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#) (describing its April 2014 conclusions).

²¹² November 2014 MOEF Review Comments, [Exhibit C-082](#), p. 15 (emphasis added).

²¹³ Reply, para. 2.130 (citing Ethio-Turkish Industrial Zone Feasibility Study by Casta, dated December 2009, [Exhibit C-045](#), pp. 328-331).

142. Ethiopia extensively examined Yusuf Akgun’s February 2015 letter to the Minister of Industry in its Statement of Defense.²¹⁴ That letter features this telling passage:

effects are also well-known. For instance, exit quality standards can be provided by implementation of a suitable treatment plant. However, each treatment plants can dispose effluents with a specific ratio and it can not be expected to have %100 purification. Close percentages to %100 in terms of efficiency can be also provided by very advanced but expensive techniques. On the other hand, sustainability of such issues is not possible. If the cost can not be compensated, it is possible that enterprise will burst up.

Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 9

143. As earlier noted, Mr. Sisay Gemechu Edo reaches the following conclusion:

“As a past and present CEO of industrial parks enterprises in Ethiopia, with a vast experience both at the federal and Oromia state levels, I now conclude that Akgun didn’t want to engage an experienced international consulting company to produce an acceptable EIA because it knew very well that construction of a water treatment plant for this mega-project covering an area of up to one thousand hectares or more would have a heavy cost. I came to know about this from the zero-liquid-discharge water treatment plant that we built a few years ago in Hawassa Industrial Park.”²¹⁵

144. Consistent with its sentiment that “[t]he Environmental Report is only a procedure” that “doesn’t prevent the work,”²¹⁶ Akgun’s thirty-page ITU Addendum of 15 October 2014 fell far short of the threshold that Ethiopia required. Ethiopia’s then Minister of Industry Mr. Ahmed Abtew has testified emphatically to this fact:

“In the event, Akgun only submitted what appeared to be a mere annex or addendum to the initial EIA from an engineering professor at Istanbul Technical University... only after we had felt compelled to order a suspension of any project works. Although it was quite evident from its face that this document of about thirty pages

²¹⁴ See [Statement of Defense](#), Sec. III.E (“Rather Than Respond to the Merits of Ethiopia’s Concerns, Akgun Dispatches a Dismissive and Disparaging Letter”).

²¹⁵ [Witness Statement of Mr. Sisay Gemechu Edo](#), dated 12 March 2021, para. 19. Notably, a zero-liquid-discharge water treatment plant also features prominently in the EIA as approved for the Kilinto Industrial Park in March 2017. See Updated Environmental and Social Impact Assessment for Kilinto Industrial Park, dated March 2017, [Exhibit C-107](#), pp. 97-104.

²¹⁶ Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, [Exhibit C-025](#).

was nowhere near to being a sufficient and comprehensive EIA, we forwarded the document to the Ministry of Environment and Forest for their review. Their experts gave it due consideration and asked Akgun to further explain its environmental mitigation plans in the face of hydrological and other sensitivities. Akgun was not willing or not able to do so.”²¹⁷

[...]

“In summary, Akgun acted against my Ministry’s guidance to take the EIA matter seriously and ended up submitting substandard EIA reports that were not acceptable by concerned Ethiopian regulatory bodies.”²¹⁸

145. In sum, the cumulation of the evidence firmly establishes two facts: (i) Ethiopia’s review of Akgun’s proffered EIAs was earnestly conducted by dedicated civil servants; and (ii) Akgun simply failed, whether by negligence or intent, to dedicate to the matter the attention that it deserved. In so doing, it failed to meet its obligations under law and contract.
146. Akgun’s singular response is to wildly suggest that (i) the entire process was pretextual; and (ii) Ethiopia reached a decision to relocate the project but purposefully concealed this from Akgun. As is now seen, both suggestions are demonstrably false.
147. The Claimant finally submits (referring to the so-called suspension letter) that “the [Ministry of Industry]’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” but that Akgun did not know “it had been sent on a wild goose chase.”²¹⁹
148. The Ministry suggested so much because it was true. It is rather Akgun that has now embarked on a wild goose chase in its erroneous presentation of the evidence of this case.

f. Akgun’s Inability or Unwillingness to Demonstrate Environmental Stewardship Undermined the ETIZ Project

²¹⁷ Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 14.

²¹⁸ Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 24.

²¹⁹ Reply, para. 2.137.

149. Akgun next returns to its favored theme, relying upon its expert Professor Whittington to suggest anew that site selection implies an overarching pre-approval by Ethiopia and is thus outcome-determinative.²²⁰
150. Akgun further submits that Ethiopia “has failed to protect the Legedadi reservoir when compared to the management of other reservoirs” and that its expert’s study of the Legedadi watershed shows this “in vivid depiction,” referring to “heavy agricultural use” and “increasing urbanization.”²²¹ The implicit suggestion distinctively resonates with Yusuf Akgun’s views from the time of project failure, where he openly wrote to the Minister of Industry that “*many developing countries have ignored environmental sensitivities for years that are impositions in developed countries.*”²²²
151. Upon review of Akgun’s expert evidence in respect of the watershed, it may be seen that Professor Whittington does refer to heavy agricultural use of the land, and indeed Ethiopia’s remains a heavily agrarian economy.²²³ As explained by Mr. Fekadu Zeleke of AAWASA, “[t]he water treatment plant at Legedadi, being conventional in nature, is equipped to treat turbid water by neutralizing the effects of organic wastes only.”²²⁴ As for the “threat” of “increasing urbanization,” this is a universal challenge of development that Ethiopia endeavors to manage as best as it can.
152. The Claimant next engages in a comparison of strategic environmental assessment as opposed to environmental impact assessment and the context of each in Ethiopia.²²⁵ In the event, the fact remains that Akgun was only ever asked to conduct an EIA, not an SEA.

²²⁰ On the inauspicious origin of this theory, *see* paras. 64-65 *supra*.

²²¹ [Reply](#), para. 2.142.

²²² Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 18 (emphasis added). Despite Ethiopia’s extensive exposition of this letter, *see* [Statement of Defense](#), Sec. III.E (“**Rather Than Respond to the Merits of Ethiopia’s Concerns, Akgun Dispatches a Dismissive and Disparaging Letter**”), the Claimant has tellingly chosen to ignore it.

²²³ *See* [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, Sec. 5.ii.

²²⁴ [Witness Statement of Mr. Fekadu Zeleke](#), dated 12 March 2021, para. 9.

²²⁵ *See, e.g.,* [Reply](#), para. 2.147.

Ethiopia made this request pursuant to both Ethiopian law and the contractual undertaking Akgun freely accepted. Akgun's long-winded pleas for a finding of regulatory pre-approval reaching back to 2008 ignore the fact that *the contractual rights forming the very subject of its claim did not vest until June 2012*.²²⁶ With the granting of these rights came attendant obligations of environmental study, under both Ethiopia's laws of general applicability and specific provision of the contractual instrument itself, to which Akgun freely assented.²²⁷

153. Because Akgun cannot defend the quality of its proffered EIAs, it seeks to deflect attention by suggesting that "[Ethiopia's] criticisms of the GOTA EIA and the supplement to the EIA, which Istanbul Technical University (ITU) supplied" are "largely irrelevant."²²⁸ This is so because, in the Claimant's telling, "[b]efore considering Akgun's proposed treatment measures [Ethiopia] reached the peremptory conclusion that the project needed to be suspended."²²⁹

154. Here, the Claimant employs the correct word: it is of course quite true that, by July 2014, Ethiopia elected to suspend any project works pending presentment of a proper EIA.²³⁰

155. Akgun submits that "[t]o the extent Prof. Murcott contends that [the] GOTA EIA and ITU Supplement are lacking in certain [] particulars, those issues became irrelevant once Ethiopia realized its site selection error."²³¹ In support of this assertion, the Claimant relies upon factual findings undertaken by its environmental expert, who testifies that "[i]t 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."²³² With these words, the expert not only engages in fact-finding but reaches his conclusion on the basis of an erroneous factual finding, as well.²³³ Indeed, relying upon his own factual

²²⁶ See Reply, Sec. 3.A and 2012 ETIZ Agreement, [Exhibit C-009](#).

²²⁷ See Secs. II.B and II.C *supra*.

²²⁸ [Reply](#), para. 2.152.

²²⁹ [Reply](#), para. 2.155.

²³⁰ See Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, [Exhibit C-016](#).

²³¹ [Reply](#), para. 2.159.

²³² [Reply](#), para. 2.160 (quoting Expert Report of Prof. Dale Whittington, dated 18 October 2021, para. 6.50).

²³³ See paras. 126-131 *supra*.

findings, Professor Whittington stunningly concludes nothing less than that “*Prof. Murcott’s attention on the quality of the EIA itself is thus misplaced.*”²³⁴

156. Following this quotation, Akgun submits that “[e]ven 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,” which was, in its telling, “confirmed” by “Ethiopian officials’ contemporaneous notes.”²³⁵ In support of this notion Akgun then quotes a single chosen passage from the 3 April 2014 memorandum examined above,²³⁶ the memorandum which bore, on its first page, a summary executive note that “[t]he comments *do not signify*” it is impossible to implement successful mitigation measures.²³⁷

157. Akgun next hazards to submit that the “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 projects in Ethiopia, including for industrial parks that are now operational,”²³⁸ and refers to EIAs that Ethiopia expressly approved in respect of Bole Lemi and Kilinto industrial parks.²³⁹

²³⁴ [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 6.52 (emphasis added).

²³⁵ [Reply](#), para. 2.161.

²³⁶ See [Reply](#), para. 2.161 (quoting Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#), p. 9).

²³⁷ Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#), p. 1 (emphasis added).

²³⁸ [Reply](#), para. 2.162.

²³⁹ [Reply](#), para. 2.162. Pursuant to the Tribunal’s document production order, Ethiopia produced to the Claimant the approval letters that it rendered in respect of the environmental impact assessments prepared for these three projects. See Tribunal Communication No. 28, dated 2 August 2021, Annex A, Document Request No. 4. The three letters are Letter from the Addis Ababa City Government Environmental Protection Authority to the Ministry of Industry regarding Bole Lemi I, dated 31 March 2014, [Exhibit R-52](#), Letter from the Addis Ababa City Government Environmental Protection Authority to the Industrial Parks Development Corporation regarding Bole Lemi II, dated 21 June 2017, [Exhibit R-53](#), and Letter from the Addis Ababa City Government Environmental Protection Authority to the Industrial Parks Development Corporation regarding Kilinto, dated 21 June 2017, [Exhibit R-54](#).

158. Akgun’s proffered comparators are not comparable at all. These industrial parks do not fall within sensitive environmental spaces,²⁴⁰ for which reason Akgun was requested to undertake (and did freely undertake) the express obligation 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.”²⁴¹

159. Akgun submits that, “[i]ronically,” “the facts of this case demonstrate the need for robust policy processes that EIAs were originally implemented to address,” for “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.”²⁴²

160. Indeed, this is precisely what happened. As opined by Professor Whittington, “[t]he EIA process achieved its primary purpose.”²⁴³ There was a vigorous airing of views in the inter-agency consultation phase. Akgun’s matter was then ultimately heard by no lesser authority than the Prime Minister himself, who overruled those agencies opposed and elected to grant Akgun a third opportunity to prove its environmental stewardship.²⁴⁴

161. Akgun proved itself, for a third time, unable or unwilling to do so.

g. Ethiopia Sought a Resolution in the Utmost Good Faith Following Akgun’s Failure to Present Sufficient Environmental Studies, including by the Offer of Suitable Alternative Sites, In Proximity to Addis Ababa and Otherwise, All of Which Akgun Declined

²⁴⁰ As has been noted, *see* note 215 *supra*, a zero-liquid-discharge water treatment plant did nonetheless feature prominently in the EIA as approved for the Kilinto Industrial Park. *See* Updated Environmental and Social Impact Assessment for Kilinto Industrial Park, dated March 2017, [Exhibit C-107](#), pp. 97-104.

²⁴¹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10) (emphasis added).

²⁴² [Reply](#), para. 2.164 (quoting Expert Report of Professor Dale Whittington, dated 18 October 2021, para. 5.30).

²⁴³ [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 6.52.

²⁴⁴ *See* paras. 126-131 *supra*.

162. In seeking to suggest that Ethiopia “[a]dmitted [i]ts [m]istake but [f]ailed to [f]ix [i]t,” the Claimant submits “the evidence is that Akgun intended to supply a solution for [the water] 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.”²⁴⁵ In support of this assertion the Claimant cites (i) a seven-page “Report on Organized Industrial Zone Waste Water Purification Plant” dated January 2014;²⁴⁶ (ii) the thirty-page ITU Addendum to the GOTA EIA dated October 2014;²⁴⁷ and (iii) the second witness statement of Mr. Yusuf Akgun.²⁴⁸

163. The Claimant adds for good measure that “Yusuf Akgun had publicly committed to implement environmentally friendly water treatment measures since the early stages of the Project’s conception” and cites a few brief pages of the project feasibility study as well as this statement from 2010:²⁴⁹

“The project will be environmentally friendly. For example, we have plans to collect the drainage water in one place using [a] filtering system, which will make the water safe for drinking. It can also be used to water plants and trees.”²⁵⁰

164. In point of fact, the evidence is that Akgun proved not willing or not able to undertake the necessary expense to ensure the required level of treatment.

165. As Akgun wrote openly to the Minister of Industry in respect of waste treatment a few months after the rejection of its ITU Addendum, in February 2015, “[c]lose precentages [sic] to %100 in terms of efficiency can be [] provided by very advanced *but expensive*

²⁴⁵ Reply, para. 2.167.

²⁴⁶ See Report on Organized Industrial Zone Waste Water Purification Plant/Ethiopia Technical Approach File from Akgun Construction to Ministry of Industry, dated January 2014, [Exhibit C-023](#).

²⁴⁷ See Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, [Exhibit C-078](#).

²⁴⁸ See [Second Witness Statement of Yusuf Akgun](#), dated 17 October 2021, para. 2.3 (stating that Akgun “was willing to implement any [] reasonable and practicable suggestions”).

²⁴⁹ Reply, para. 2.167.

²⁵⁰ Reply, note 297 (quoting T.Tsige, “We will have a better hospital from the ones abroad,” *The Reporter*, dated 19 June 2010, [Exhibit C-132](#)).

*techniques,” but, “[o]n the other hand, sustainability of such issues is not possible,” for “[i]f the cost cannot be compensated, it is possible that enterprise will burst up.”*²⁵¹

166. Mr. Sisay Gemechu Edo testifies that

“[a]s a past and present CEO of industrial parks enterprises in Ethiopia, with a vast experience both at the federal and Oromia state levels, I now conclude that Akgun didn’t want to engage an experienced international consulting company to produce an acceptable EIA because it knew very well that construction of a water treatment plant for this mega-project covering an area of up to one thousand hectares or more would have a heavy cost. I came to know about this from the zero-liquid-discharge water treatment plant that we built a few years ago in Hawassa Industrial Park.”²⁵²

167. In its Reply memorial, the Claimant has declined to respond to this evidence.

168. The Claimant next refers, yet again, to the conclusions that would supposedly have been reached in the course of inter-agency consultations in early 2014 and writes that the Ministry of Industry “concealed from Akgun” a direction from the Prime Minister’s office that the project should be relocated to an alternative site.²⁵³

169. As now seen, this narrative is factually false.²⁵⁴

170. The Claimant next reaches, yet again, for its implicit suggestion that, in any event, Ethiopia should have simply let the project proceed in the interest of its own economic development,²⁵⁵ stating that “[w]hether Respondent genuinely sought to ‘protect the watershed from pollution’ is highly questionable” where Professor Whittington’s “detailed

²⁵¹ Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 9 (emphasis added).

²⁵² [Witness Statement of Mr. Sisay Gemechu Edo](#), dated 12 March 2021, para. 19.

²⁵³ [Reply](#), para. 2.168.

²⁵⁴ See paras. 126-131 *supra*.

²⁵⁵ See, e.g., Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, [Exhibit C-068](#) (bearing subject line “**PURPOSE OF THE ETHIO TURK INDUSTRY ZONE PROJECT**”), wherein Akgun wrote of “approximately \$ 10 billion of exports per annum” as well as “employment opportunities to 1 million people” which “makes us understand the importance of the project more clearly” before giving any mention whatsoever to the enclosed revised GOTA EIA.

analysis of the land use patterns within the Legedadi watershed” indicates that “it has been subject to increasing urban expansion and heavy agricultural use.”²⁵⁶

171. Ethiopia’s response to the insidious suggestion has been set out above and need not be here repeated.²⁵⁷

172. Akgun submits that “at the time it received the [Ministry of Industry]’s 24 July 2014 suspension letter, Akgun took the [Ministry of Industry] 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,” and “[t]hus, it spent additional time and money futilely attempting to address the water treatment concerns.”²⁵⁸

173. The reality is that the Ministry of Industry’s letter of 24 July 2014 faithfully conveyed the instruction that “no construction shall take place *before the EIA is presented and approved*.”²⁵⁹ Akgun was not mistaken in its belief; rather, its further efforts were futile for failure on their merits.

174. Akgun submits that these further “efforts” were demonstrated in its “follow-up communications,” wherein it would have done the following four things:

- “Provided additional details to the [Ministry of Industry] concerning its wastewater treatment plans, with particular emphasis on the constituents that the [Ministry of Industry] identified as pollutants of concern in its suspension letter”²⁶⁰

The August 2014 letter that Akgun here references has been earlier examined.²⁶¹ It comprises a total of five pages wherein Akgun (i) confesses the failure of the GOTA

²⁵⁶ Reply, para. 2.169.

²⁵⁷ See paras. 150-151 *supra*.

²⁵⁸ Reply, para. 2.170.

²⁵⁹ Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, **Exhibit C-016** (emphasis added).

²⁶⁰ Reply, para. 2.171.1.

²⁶¹ See para. 133 *supra*.

EIA;²⁶² and (ii) confirms its contempt for the EIA process, writing to the Ministry of Industry that “[t]he Environmental Report is only a procedure” that “doesn’t prevent the work.”²⁶³

- “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”²⁶⁴

Here, Akgun’s conduct and submissions further betray its apparent belief throughout the entire episode that the process of environmental review was somehow a mere formality or bureaucratic nuisance, that it was somehow optional for Akgun. Akgun’s reference to the hosting of investors at this stage, after its proffered EIAs had twice been rejected, was tone-deaf and oblivious. It is the same sentiment that is seen in Akgun’s insulting February 2015 letter, wherein Akgun wrote that “[i]t should be considered, *how Akgun Group can face with [] investors if the review result of EIA report is negative.*”²⁶⁵

- “Sought additional information from various authorities concerning rainfall and other issues to supplement the GOTA EIA”²⁶⁶

As has been seen, Ethiopia responded to these requests genuinely and without delay.²⁶⁷

- “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 [Ministry of Industry] and the President’s offices”²⁶⁸

²⁶² Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, [Exhibit C-025](#) (acknowledging that “the time spent for having the Environmental Report made in Ethiopia was spent for nothing” and that “[w]e are sorry about that”).

²⁶³ Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, [Exhibit C-025](#).

²⁶⁴ [Reply](#), para. 2.171.2.

²⁶⁵ Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 8 (emphasis added).

²⁶⁶ [Reply](#), para. 2.171.3.

²⁶⁷ See, e.g., Letter from AAWASA to Akgun Construction, dated 1 September 2014, [Exhibit C-136](#). The letter is reproduced in full at para. 135 *supra*.

²⁶⁸ [Reply](#), para. 2.171.4.

Ethiopia meticulously examined the brief “supplement” to which Akgun here refers and rejected it for its gross insufficiency.²⁶⁹

175. Mr. Ahmed Abteu, then Minister of Industry, confirms this finding in the following terms:

“After Akgun submitted the addendum document from Istanbul Technical University, everybody within the Ethiopian Government, at both the federal level as well as Oromia State, and myself included, became convinced that Akgun lacked the seriousness to be trusted with Addis Ababa’s water supply system. To put it mildly, the lack of any genuine semblance of effort to convince us that it would ensure reliable mitigation of environmental harm was startling.”²⁷⁰

176. Akgun submits that “[a]t 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.”²⁷¹

177. This statement is true, for indeed, Ethiopia had reached no such decision.

178. Akgun submits that Ethiopia carried on nothing less than a “*ruse*” by “supplying written comments to Akgun’s EIA and supplement thereto”²⁷² and that “[t]hus, 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.”²⁷³

179. With respect, Akgun’s suggestion that “[Ethiopia’s] reply to Akgun’s water treatment proposal failed to consider that proposal on its merits” is not understood.

²⁶⁹ See [Statement of Defense](#), paras. 74-77 and Sec. III.E (“**Rather Than Respond to the Merits of Ethiopia’s Concerns, Akgun Dispatches a Dismissive and Disparaging Letter**”), Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#), and the November 2014 MOEF Review Comments, [Exhibit C-082](#).

²⁷⁰ [Witness Statement of Mr. Ahmed Abteu](#), dated 12 March 2021, para. 35.

²⁷¹ [Reply](#), para. 2.172.

²⁷² [Reply](#), para. 2.173 (emphasis added).

²⁷³ [Reply](#), para. 2.174.

180. In its Statement of Defense, Ethiopia has extensively set forth the findings of a meticulous review undertaken by its Ministry of Environment and Forest (which, at fifteen pages in length, reaches fully half the magnitude of the ITU Addendum itself).²⁷⁴ Those findings include the indication of insufficiencies reaching back to the earlier GOTA EIA, which insufficiencies remained uncured and unresolved.²⁷⁵
181. The MOEF nonetheless concluded, in November 2014, that “[w]e would support the implementation of the project under the condition that the company will confirm us to give due considerations of all the above comments.”²⁷⁶
182. Akgun now diffidently suggests that “[i]f 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,” here relying upon the second witness statement of Mr. Yusuf Akgun.²⁷⁷ This statement is, once again, belied by Yusuf Akgun himself:

by implementation of a suitable treatment plant. However, each treatment plants can dispose effluents with a specific ratio and it can not be expected to have %100 purification. Close percentages to %100 in terms of efficiency can be also provided by very advanced but expensive techniques. On the other hand, sustainability of such issues is not possible. If the cost can not be compensated, it is possible that enterprise will burst up.

Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, [Exhibit C-087](#), p. 9

183. Akgun then invokes, yet again, the various documents emerging from the inter-agency consultation phase within the EIA process in persistent pursuit of its false narrative of

²⁷⁴ See [Statement of Defense](#), Sec. III.E (“Rather Than Respond to the Merits of Ethiopia’s Concerns, Akgun Dispatches a Dismissive and Disparaging Letter”); see also Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#), and the November 2014 MOEF Review Comments, [Exhibit C-082](#).

²⁷⁵ See Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, [Exhibit C-029](#).

²⁷⁶ November 2014 MOEF Review Comments, [Exhibit C-082](#), p. 15 (emphasis added).

²⁷⁷ [Reply](#), para. 2.175 (citing Second Witness Statement of Yusuf Akgun, dated 17 October 2021, para. 2.3) (stating that Akgun “was willing to implement any [] reasonable and practicable suggestions”).

deception and deceit,²⁷⁸ presenting various snapshot phrases as if they were decisional and placing particular reliance upon its preferred quotations from the Ministry of Industry's memorandum of 3 April 2014.²⁷⁹

184. As has been set out several times, that memorandum bears, on its first page, the following note of executive finding:

“Should the environmental assessment demand a change of site, it may only be granted in the event that it is impossible to undertake a measure that can withstand the impacts. *The comments do not signify this*; and it should be referred to the Federal Ministry of Environment and Forestry Development, for proper resolution to this end.”²⁸⁰

185. As seen once again, upon review of the October 2014 ITU Addendum to the GOTA EIA, the MOEF found that, despite the persisting deficiencies of Akgun's third-round submission, “[w]e would support the implementation of the project under the condition that the company will confirm us to give due considerations” to its comments.²⁸¹

186. Following Akgun's failure to do so, its principals were received by the then Special Advisor to the Prime Minister in December 2014, who thereafter wrote to the Ministry of Industry to relate their telling of this meeting in which Ethiopia had conveyed its inclination to seek an alternate site:

“H.E. Dr. Arekebe Oqubay also expressed that *[Ethiopia] can allocate a land for free* in Hawasa or Dire Dawa cities to Akgün GROUP and *provide tax exemption for 15 years*.”²⁸²

²⁷⁸ See Reply, para. 2.175.

²⁷⁹ Reply, para. 2.178 (citing Letter from Ministry of Environment and Forest to Ministry of Industry, dated 14 April 2014, [Exhibit C-106](#), Letter from Addis Ababa Water and Sewerage Authority to Ministry of Water, Irrigation and Energy et al., dated 16 May 2014, [Exhibit C-128](#), and Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#)).

²⁸⁰ Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector, dated 3 April 2014, [Exhibit C-105](#), p. 1 (emphasis added).

²⁸¹ November 2014 MOEF Review Comments, [Exhibit C-082](#), p. 15.

²⁸² Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, [Exhibit C-017](#) (emphasis added). In an earlier draft of this letter, Akgun had written that “[i]t is obvious that the cities and dam areas will be

187. Akgun further acknowledges that Ethiopia facilitated a visit for its principals to inspect proposed alternative sites in mid-2015,²⁸³ and that it 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).”²⁸⁴

188. In seeking to suggest that Ethiopia proffered hopeless lands, the Claimant submits that “Yusuf Akgun reiterated these requirements to Ethiopian officials while visiting one of the proposed alternative sites in August 2015,”²⁸⁵ there relying upon (i) one video taken at one of the proffered sites;²⁸⁶ and (ii) Yusuf Akgun’s accompanying sarcastic comment: “*Let me allocate you land like this one, and you come and construct a factory.*”²⁸⁷

189. First, the Claimant’s suggestion that the sites visited in August 2015 were “each at a great distance from Addis Ababa”²⁸⁸ is belied by the simple fact that, as Mr. Yusuf Akgun confirms, *he visited all three sites within a single day.*²⁸⁹

190. Second, the Claimant omits any mention of a second video, taken at a second site on that same single day.²⁹⁰ Still images captured from this video reveal the following flat, open expanse, underneath a clutch of wind turbines:

affected in some way by the industrial facilities that will be established near them.” Draft Letter from Akgun Construction to Ministry of Industry, dated 17 December 2014, [Exhibit R-55](#). This sentence was omitted from the letter’s final version.

²⁸³ [Reply](#), para. 2.188.

²⁸⁴ [Reply](#), para. 2.189.

²⁸⁵ [Reply](#), para. 2.190.

²⁸⁶ Video taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit C-140](#).

²⁸⁷ Transcription of the video taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit C-141](#).

²⁸⁸ [Reply](#), para. 2.194 (citing First Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.25).

²⁸⁹ See [First Witness Statement of Yusuf Akgun](#), dated 19 November 2020, para. 5.25 (“I remember visiting three different properties in one day”).

²⁹⁰ Video AKGUN-146 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-56](#).









Still Images from the Video AKGUN-146
taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-57](#)

191. The accompanying audio has captured Mr. Yunus Akgun's contemporaneous utterance that "[c]omparing to other two alternatives *this is good*,"²⁹¹ and features a confirmation of the site's suitability by Mr. Yusuf Akgun himself, who concludes that with a certain addition, "*this could do*."²⁹²

192. As heard in another video taken upon this site,²⁹³ in response to the Akgun principals' queries regarding railway and highway infrastructure, it was explained to them that "[t]he highway is already here" and that "there is also railway after 2-3 years."²⁹⁴ As may be seen in a simple visual comparison, the referenced existing highway is of a capacity equal to that of the Addis Ababa-Debre Berhan highway which reaches Sendafa:

²⁹¹ Transcription of the Video AKGUN-146 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-58](#) (emphasis added).

²⁹² Transcription of the Video AKGUN-146 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-58](#) (emphasis added).

²⁹³ Video AKGUN-148 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-59](#).

²⁹⁴ Transcription of the Video AKGUN-148 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-60](#).



Photograph of the Sendafa Site, dated February 2021, [Exhibit R-61](#)



Still Image from the Video AKGUN-146
taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-57](#)

193. A fourth video shows another site of similarly flat expanse:²⁹⁵

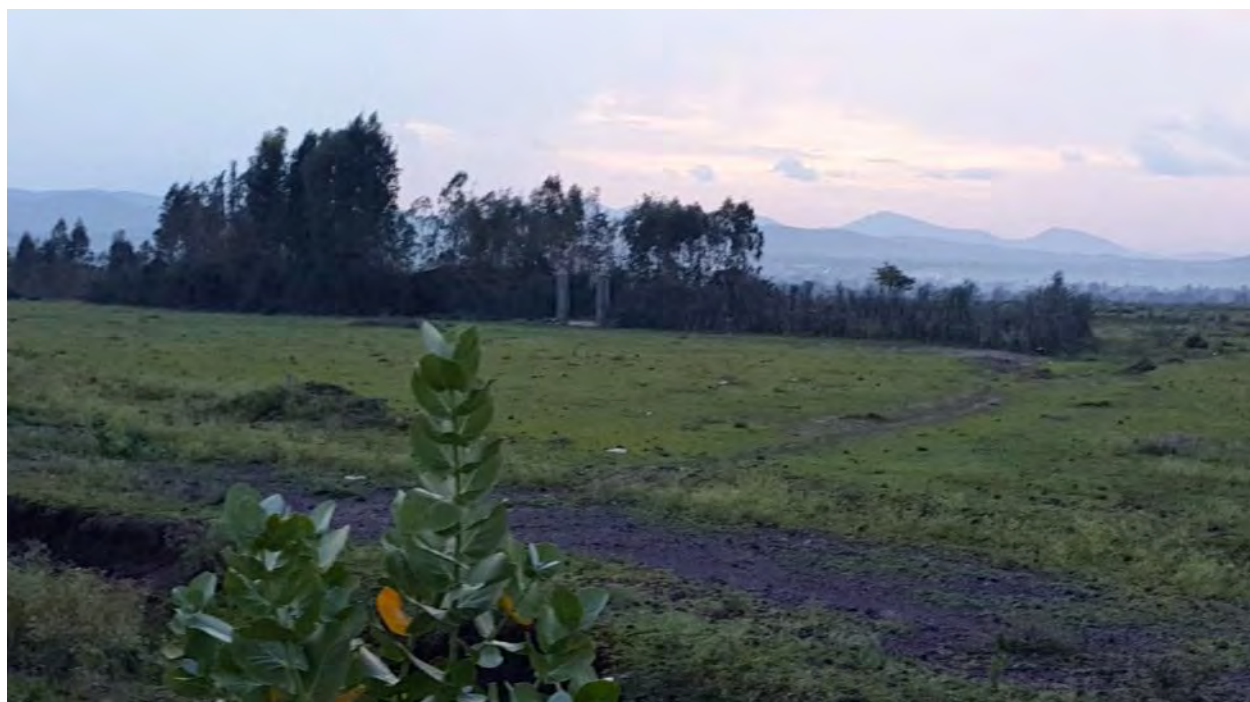


Still Image from the Video AKGUN-147
taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-63](#)

194. Finally, as seen in yet another video, the Akguns also visited on that same single day a site immediately adjacent to an access point onto the world-class Addis Ababa-Adama Expressway:²⁹⁶

²⁹⁵ Video AKGUN-147 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-62](#).

²⁹⁶ Video AKGUN-149 taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-64](#).





Still Images from the Video AKGUN-149
taken on 21 August 2015 during a site visit in Ethiopia, [Exhibit R-65](#)

195. Ethiopia was, at all times, ready and willing to see the developer demonstrate its ability and intention to achieve environmental safety at the Sendafa site, in accordance with its laws. This truth is evident in Ethiopia's commentary upon each of the three successive studies that Akgun proffered and in each and every one of Ethiopia's letters to Akgun in the matter. Unfortunately, the Claimant proved itself unwilling or unable, over a period extending to two years, to furnish even a minimally respectable impact assessment in respect of the designated land.
196. Rather than terminate the agreement and bid Akgun farewell, Ethiopia came to believe that a way forward for the desirable project might lie in allocation of an alternative site. Ethiopia thus offered the prospect of free land and generous tax exemptions in the vicinities of Mojo, Adama (also known as Nazret), Hawassa (also known as Awasa), or Dire Dawa. Adama is located some ninety kilometers from Addis Ababa and a mere thirty kilometers from the dry port that was opened at Mojo in 2009. Mojo is the focal point of all transport and logistics in Ethiopia. Dire Dawa is equidistant between Addis Ababa and the port of Djibouti, through which the overwhelming part of Ethiopia's imports and exports must pass.



197. Akgun was not genuinely interested in this conversation and ultimately elected to unceremoniously exit several years later, at a time which coincides with the decline of its OYAP enterprise in Ethiopia.

198. In his first witness statement, Mr. Yunus Akgun suggestively wrote that “[a] few weeks after [he] left [Ethiopia in August 2017], [the Akguns] learned that the Oyap factory in Ethiopia was seized by Ethiopia’s Commercial Bank.”²⁹⁷ Documents obtained in disclosure plainly show that OYAP took a significant high-interest loan (approximately US\$ 2.5 million at 9.5% per annum) in 2012 “by pledging [its] machineries as a collateral.”²⁹⁸ OYAP thereafter

²⁹⁷ [First Witness Statement of Yunus Akgun](#), dated 19 November 2020, para. 8.7. Yunus Akgun has acknowledged that Akgun Construction was heavily intertwined and commingled with the Oyap enterprise in Ethiopia. *See id.*, paras. 9.2-9.3.

²⁹⁸ Independent Auditors’ Report to the Owner, OYAP Ethio Industry and Trading Private Limited Company, dated 18 November 2016, [Exhibit R-66](#), p. 7.

suffered losses in 2015 and 2016, leading to apparent inability to service the loan and evident default.²⁹⁹

199. Akgun sought financing for the industrial zone project but failed to obtain it. Thus, in August 2014, Yusuf Akgun wrote in a draft letter to the then Special Advisor to the Prime Minister that “[f]unding was sought from financial institutions for the zone” but that “[t]he efforts were inconclusive,”³⁰⁰ this despite Akgun’s obligation to fund the entirety of the project.³⁰¹

200. Meanwhile, financial statements gained in the document disclosure phase indicate that Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., a supposed titan of industry, was not all that it seemed.³⁰²

201. In the end, the unfortunate demise of ETIZ was caused not by any unlawful act on the part of Ethiopia but rather by Akgun’s condescending beliefs about Ethiopia’s environmental expectations, its own lower environmental expectations, and ultimately its own economic analysis of the continued feasibility of the project in view of the cost of environmental care.

III. JURISDICTION

202. Akgun has brought no claim beyond the four corners of the 2012 ETIZ Agreement and the governing laws that instrument expressly incorporates.³⁰³

²⁹⁹ See generally Independent Auditors’ Report to the Owner, OYAP Ethio Industry and Trading Private Limited Company, dated 18 November 2016, [Exhibit R-66](#) and Revised Financial Statements for the Year ended June 30, 2015 and for the Six-Month Period ended December 31, 2015, OYAP Ethio Industry and Trading Private Limited Company, [Exhibit R-67](#).

³⁰⁰ Draft Letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014, [Exhibit R-68](#) (emphasis added).

³⁰¹ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 12(1) (“**FINANCING OF THE PROJECT**”); see also paras. 37-38 and note 61 *supra*.

³⁰² See generally 2015 Financial Statements of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., [Exhibit R-69](#), 2016 Financial Statements of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., [Exhibit R-70](#), and 2017 Financial Statements of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., [Exhibit R-71](#).

³⁰³ The Claimant does not dispute this but rather acknowledges and confirms it. See [Reply](#), para. 4.14.

203. The Claimant now seeks to advance claims that have been placed squarely outside of this Tribunal's remit by virtue of the clear, comprehensive, and exclusive jurisdiction clause of the Agreement. No amount of creative pleading can escape the broad scope of that dispute settlement mechanism nor alter the essential basis of the Claimant's claims, nor can it bring the Claimant to satisfy the burden it bears in setting out a case for the existence (much less the breach) of any obligation owing to it under the Treaty in any event.
204. Akgun holds no "assets" in Ethiopia such as might qualify for the protections of the Treaty, nor did Akgun undertake any meaningful performance toward the development of an industrial zone such as might satisfy necessary elements of contribution, duration and risk. To the extent that the Claimant points to unmaterialized prospective assets that may have emanated from any leasehold rights, these fundamentally fall short of engaging the Treaty's protections.
205. Lastly, the Claimant is not entitled to exploit the most-favored nation provision of the Treaty to import the umbrella clause of the Denmark-Ethiopia BIT, for the MFN clause of the Treaty requires the Claimant to establish treatment that is actually discriminatory as contrasted to that of an actual investor in a "similar situation," which the Claimant has not done nor even sought to do.
206. Regardless of whether the Claimant is permitted to incorporate an umbrella clause by virtue of the MFN provision, an umbrella clause does not and cannot transform the Claimant's contractual claims into Treaty claims. The umbrella clause of the Denmark-Ethiopia BIT therefore does nothing to remedy the fact that the Claimant's claims remain contractual in their essence and are in turn excluded by virtue of the dispute resolution provision of the Agreement.
207. These points are elaborated in the sections below.

a. This Tribunal Lacks Jurisdiction Where the 2012 ETIZ Agreement Includes a Mandatory and Exclusive Selection of Forum Encompassing All of the Claimant’s Claims, to Which Selection the Claimant Freely Assented

208. Article 21 of the 2012 ETIZ Agreement has the effect of barring all of the Claimant’s present claims.³⁰⁴

209. The Claimant recognizes (as it must) the extensive forum selection provision within the 2012 ETIZ Agreement but submits that it does not “[p]resent an [o]bstacle” to the Tribunal’s jurisdiction.³⁰⁵ The Claimant is wrong. All parties have openly anticipated remedy in their autonomously chosen arbitration forum, the exclusive selection upon which all parties agreed at the time of original contracting.

210. Contrary to the Claimant’s urging, the 2012 ETIZ Agreement’s elaborate dispute settlement mechanism is not invitational but is rather *the* dispute settlement provision for “[a]ny *disputes or differences*” as may occur “*in connection with*” the Agreement, and this under all of the “*Ethiopian laws, the [Treaty] and accepted principles of the international law.*”³⁰⁶

211. The Claimant has submitted as follows in its Reply memorial, in reliance upon Article 13 of the 2012 ETIZ Agreement:

“In the case at hand, the law applicable *to the 2012 ETIZ Agreement* is ‘[t]he relevant Ethiopian laws, *and* the [Treaty].’ 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.”³⁰⁷

212. While this submission is essentially correct as a statement of the applicable law, the Claimant elides the result that inescapably follows where one views Article 13 in conjunction with

³⁰⁴ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21 (“SETTLEMENT OF DISPUTES”).

³⁰⁵ [Reply](#), Sec. 3.C.

³⁰⁶ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(1), (5) (emphasis added).

³⁰⁷ Reply, para. 4.14 (quoting 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 13) (“GOVERNING LAW”) (emphasis added).

Article 21 of the 2012 ETIZ Agreement. The inevitable conclusion is that both classes of claims (i.e. both the municipal and the international) have been mandatorily and exclusively submitted to the contractually agreed forum.³⁰⁸

213. It is of course true that Ethiopia is not itself a party to the Agreement.³⁰⁹ This is no matter. Where a body of law that is expressly incorporated into a State contract regulates the behavior of the State, the parties to that contract intended and did agree that the State be bound thereto; where the provisions for governing law and dispute settlement expressly encompass obligations which, by their nature, fall upon (and thus can only be breached by) the State itself, such confirms the intention that Ethiopia be bound (and the acceptance by the Claimant that Ethiopia be so bound). In the words of one tribunal, the relevant contractual clauses “*engage the Government of [Ethiopia], and contemplate claims against it.*”³¹⁰

214. Thus, if Akgun wishes to bring any claim on the basis of “[a]ny disputes or differences” arising “*in connection with*” the Agreement under any of the “*Ethiopian laws, the [Treaty] [or] accepted principles of the international law,*” try as it might, it cannot escape the elaborate and exclusive forum selection of Article 21 that it freely negotiated and accepted.³¹¹

215. In view of this broad scope of Article 21, and further having regard to its entire meaning, it cannot genuinely be contended that the contractually agreed dispute settlement provision is merely optional. *By crafting its scope widely, all parties intended precisely to avoid the*

³⁰⁸ To reach the higher plane of international law requires, however, the setting out of a claim which has its essential basis in a misuse of sovereign power, something the Claimant has not done and cannot do. *See* Sec. III.B *infra*.

³⁰⁹ *See* 2012 ETIZ Agreement, [Exhibit C-009](#) (whose parties are a federal organ (the “Ministry of Industry of the Federal Democratic Republic of Ethiopia”), a regional state (the “Oromiya Regional State”), and a private entity (“Akgun Insaat Makine Sanayi Dis Ticaret Sirketi”)).

³¹⁰ *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, 95 I.L.R. 183, [CLA-121](#), p. 205 (emphasis added). Precisely as in *Biloune*, there are instances in which the GOE itself undertook express obligations by the contract. *See, e.g.*, 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(2) (“[t]he GOE undertakes that there shall not be any expropriation except in conformity with the relevant laws; in connection with the Land use right, Parcels, plants, enterprises and/or factories to be established over the Land”) (emphasis added). This provision is notable in that, where contrasted to the text of the Treaty (which requires an “investment” as therein defined; *see* Treaty, [CLA-001](#), Art. I(2)), the two instruments offer differently defined objects of a possible expropriation claim. Both claims are mandatorily submitted to the contractual dispute settlement mechanism of the 2012 ETIZ Agreement’s Article 21. *See* 2012 ETIZ Agreement, [Exhibit C-009](#), Arts. 13 and 21(5).

³¹¹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(1), (5) (emphasis added).

numerous questions of parallel legal orders and accompanying jurisdictional interstices that the Claimant has, by callously disregarding its contractual commitment, now caused to be litigated before this Tribunal.

216. The intent of the parties may readily be seen in further examining the plain text of Article 21 of the 2012 ETIZ Agreement. Article 21 first contemplates efforts to resolve a dispute amicably by resort to consultations and negotiations. The final sentence of Article 21(1) also contemplates the possibility of mediation during the first three months of a dispute being notified: “[the] Parties may also appoint one or more mediators [...] within three months period.”³¹² Where six months have passed, at that juncture, the parties have the option of referring their dispute to arbitration.³¹³ Article 21 is clear in that disputes that arise between the parties will be “***finally settled*** by an arbitration committee” constituted thereunder.³¹⁴
217. Contrary to the Claimant’s assertion, the use of the permissive “may” cannot be taken to mean that a claimant can choose to circumvent the contractually agreed dispute resolution provision entirely in the event that a dispute arises.³¹⁵ The intention of the parties was that resort to arbitration at all would be optional, not that the forum chosen by the parties and expressly identified as applicable could be disregarded.
218. Finally, Ethiopia acknowledges some tribunals have found that the failure to abide by a dispute settlement provision in an underlying contract is a matter of admissibility.³¹⁶ If the Tribunal were to consider that the 2012 ETIZ Agreement, with its explicit provision for arbitration under all of the “Ethiopian laws, the [Treaty] and accepted principles of the international law,”³¹⁷ does not operate to bar its exercise of jurisdiction over the Claimant’s

³¹² 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(1).

³¹³ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(2).

³¹⁴ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(3) (emphasis added).

³¹⁵ See [Statement of Reply](#), paras. 3.72 *et. seq.*

³¹⁶ See *Société Générale de Surveillance SA v The Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, [CLA-096](#), para. 155; *Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, Award of 25 October 2012, [CLA-105](#), para. 252; and *Bureau Veritas, Inspection, Valuation, Assessment and Control v The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction of 29 May 2009, [CLA-062](#), para. 148.

³¹⁷ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(5).

claims, Ethiopia respectfully requests that Akgun's claims be ruled inadmissible and, as such, be equally rejected in their entirety.

b. This Tribunal Lacks Jurisdiction Where the Claimant's Claims are Merely Contract Claims Masquerading as Treaty Claims

219. Even if the Tribunal were not to consider that the agreed dispute settlement mechanism extends over the Claimant's claims for breach of treaty standards by virtue of Articles 13 and 21 of the 2012 ETIZ Agreement, the result is nonetheless the same, for the Claimant's present claims are ultimately and essentially contractual in nature.³¹⁸

220. In short, the Claimant has not invoked any true instance of *puissance publique* nor even seriously sought to do so. That is because, outlandish allegations aside, the Claimant could not succeed in crafting a credible characterization of the acts of Ethiopia as such. While a claimant is the master of its claim, no amount of colorful pleading may alter the claim's very essence. This Tribunal is asked to adjudicate a series of contract claims under the cover of treaty principles while in reality there are merely municipal rights and obligations in dispute.

221. The Claimant does not establish a *prima facie* cause of action under the Treaty. The facts alleged by the Claimant are not "susceptible of constituting a treaty breach" if taken to be true.³¹⁹ In other words, the *essential basis* of Akgun's claims is in the 2012 ETIZ Agreement alone, and "[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."³²⁰

³¹⁸ For the reasons why Akgun's attempt to bring its contractual claims via an imported umbrella clause equally fails, see Sec. III.D *infra*.

³¹⁹ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 91.

³²⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, [CLA-088](#), para. 149.

222. The Claimant advances claims that are properly characterized as allegations of contractual breach; they all arise out of the 2012 ETIZ Agreement and are contractual in their essence. Resolving them therefore requires an interpretation and application of the Agreement under the contractually chosen law. According to Judge Crawford, exclusive jurisdiction clauses represent a clear intention to “renounce” the right to arbitrate contractual claims in the treaty forum:

“Whatever answer may be given to the question whether an investor can by contract in advance renounce the right to arbitrate treaty claims, there cannot be any doubt that it can renounce the right to arbitrate contract claims in a treaty forum. An exclusive jurisdiction clause in a contract *is surely intended to do just that*.”³²¹

223. Because the relevant obligations are contractual in nature, the interpretation of the contents of these obligations remains subject to the law applicable to the Agreement, the fundamental objective being to enforce the agreement of the parties as embodied in the terms of the contract, in accordance with the principle of *pacta sunt servanda*. Indeed, in the Claimant’s own telling, “Ethiopian law shall apply to ascertaining contractual obligations and breaches as between the parties to the contract.”³²² Thus, in the case of *Abaclat v. Argentina*, the tribunal observed that

“[i]t is in principle admitted that with respect to a BIT claim an arbitral tribunal has *no jurisdiction where the claim at stake is a pure contract claim*. This is because *a BIT is not meant to correct or replace contractual remedies*, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims... Pure contract claims must be brought before the competent organ, *which derives its jurisdiction from the contract*...”³²³

224. In *Garanti Koza* the tribunal also highlighted this critical distinction in its analysis of the nature of the claims:

³²¹ J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351, **CLA-104**, p. 14 (emphasis added).

³²² Reply, para. 4.14 (citing 2012 ETIZ Agreement, **Exhibit C-009**, Art. 13) (“**GOVERNING LAW**”).

³²³ *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, **CLA-093**, para. 316 (emphasis added).

“[I]f [...] Claimant’s claims *amounted merely to claims for breach of contract*, the Tribunal would agree with the Respondent that *such claims would be beyond the jurisdiction of an ICSID tribunal and also that they would be subject to the forum-selection clause in the Contract*.”³²⁴

225. The Claimant proffers a “fundamental basis of the claim” test to determine whether alleged breaches stem from obligations owed by Ethiopia under the Treaty or else are mere contractual claims.³²⁵ Under the Claimant’s own test, where one puts aside the Claimant’s wild allegations of sovereign abuse which are without a shred of evidence whatsoever, one is left with merely municipal rights and obligations to be decided under the contract and the applicable Ethiopian law. The Claimant has not presented claims that are capable of being characterized as independent breaches by Ethiopia of any of its treaty obligations; the “fundamental basis” of the Claimant’s claims is inescapably contractual in nature.

226. In *Muhammet v. Turkmenistan*, the tribunal dismissed the Claimant’s claims relating to “contract performance issues,” emphasizing that “it is insufficient to rely on Claimants’ subjective labelling of their claims as treaty claims” and that “[t]he true nature of a claim and whether it is a treaty claim must be objectively determined.”³²⁶ It is also accepted that tribunals “should not accept jurisdiction where a dispute is really a *contractual dispute disguised as a treaty claim*.”³²⁷ In *Duke Energy v. Ecuador* the tribunal was confronted with a similar question, and applied the same reasoning to arrive at the same result:

“In the present case, most of the Claimants’ allegations under Article II(3)(a) deals with the non-compliance of the Respondent’s contractual obligations. At least in the context of provisions other than the umbrella clause, *it is now a well-established principle that in and of itself the violation of a contract does not amount to the violation of a treaty*. This is only natural since treaty and contract breaches are different things, responding to different tests, subject to different rules.

³²⁴ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#), para. 244 (emphasis added).

³²⁵ See [Reply](#), paras. 3.64-3.66.

³²⁶ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 705 (emphasis added).

³²⁷ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 701 (emphasis added).

[...]

Similarly, when the *Impregilo* tribunal reviewed a claim in respect of unforeseen geological conditions, it stressed that the claim ***did not raise issues beyond the application of a contract.***³²⁸

227. The same line of reasoning guided the tribunal’s analysis in *Saluka v. Czech Republic*. In *Saluka*, the agreement under which certain obligations had been disputed contained an exclusive forum selection clause at its Article 21:

“Given the facts of this arbitration, the Share Purchase Agreement, including its Article 21, ***constitutes a special agreement*** relating to Saluka’s investment. It follows that the Tribunal ***is required by the terms of the Treaty to take into account the mandatory arbitration provision in Article 21 of that Agreement.***”³²⁹

228. In *Société Générale de Surveillance SA v. The Republic of Philippines*, the tribunal accepted that the claimant’s purely contractual claims to payment would need to be resolved in accordance with the mechanism and under the law agreed by the parties to the contract:

“[T]he Tribunal ***should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved***, and have done so exclusively. ***SGS should not be able to approbate and reprobate in respect of the same contract***: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.”³³⁰

229. Where Akgun has brought claims on the “fundamental basis” of rights and obligations existing under the 2012 ETIZ Agreement, the entirety of the contractual obligations, including the forum selection, must be upheld. The express selection of forum must be regarded and respected as any other contractual obligation.³³¹

³²⁸ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, **CLA-102**, paras. 343-344 (emphasis added).

³²⁹ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, **CLA-022**, para. 56 (emphasis added). *See also id.*, para. 54 (noting that the language of Article 21 is “in mandatory terms: the disputes and differences in question ‘shall be finally settled by arbitration’ in accordance with the UNCITRAL Rules”).

³³⁰ *Société Générale de Surveillance SA v The Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, **CLA-096**, para. 155 (emphasis added).

³³¹ *See Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, **CLA-102**, paras. 342-345 and *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. The Republic of Paraguay*, ICSID

c. This Tribunal Lacks Jurisdiction Where the Claimant Does Not Hold and Never Held Any “Investment” Within the Meaning of Article I(2) of the Treaty

230. In any event, Akgun does not hold any asset in Ethiopia and thus does not have any qualifying “investment” under the Treaty. In this section Ethiopia will demonstrate that (i) the 2012 ETIZ Agreement is not an asset within the meaning of Article I(2)(b) of the Treaty (and, in any event, any rights that Akgun may have held under a leasehold agreement were contingent upon Akgun providing an acceptable EIA, which it failed ever to do); (ii) any equipment or machinery mobilized to the ETIZ site by Akgun cannot constitute an investment under Article I(2)(c) of the Treaty; and (iii) Akgun neither contributed nor held any “goodwill” or “know-how” in Ethiopia that may qualify as an investment under Article I(2)(d) of the Treaty.

i. Akgun Never Held Any Investment Under the Plain Language of Article I(2) of the Treaty

231. The Claimant’s suggestion that it held “assets” in Ethiopia within the meaning of the Treaty is hollow, unsupported, and does not withstand scrutiny. None of the “assets” it claims are independently or collectively capable of qualifying for the Treaty’s protections.

232. Akgun defines its “investment” to “include” the following:

“[R]ights under the 2012 ETIZ Agreement, leases, sub-leases, and other contractual rights having financial value related to the project”;

“[E]quipment, machinery, and other movable property necessary for completion of the Project”;

“[T]he 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)”;

Case No. ARB/07/9, Decision on Objections to Jurisdiction of 29 May 2009, [CLA-062](#), para. 148. *See also Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, Award of 25 October 2012, [CLA-105](#), para. 252.

“[T]he Project as a whole.”³³²

233. An investment’s existence is materially fact specific.³³³ As seen, the Treaty in this case includes within its definition of “investment” “movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights as defined in conformity with the laws and regulations of the Party in whose territory the property is situated.”³³⁴ Leasehold rights notably do not qualify as a property interest.

1. Akgun Never Held Rights “[R]elated to an [I]nvestment” Under Article I(2)(b) of the Treaty

234. The language of the Treaty expressly limits the scope of any claims in respect of contractual rights to “claims to money or any other rights having financial value *related to an investment*.”³³⁵ The Claimant’s rights under the 2012 ETIZ Agreement do not constitute rights “related to an investment” within the meaning of the Treaty. Under the plain language of Article I(2)(b), in order to fall within its scope, claims must relate to an *already existing investment* that has materialized.³³⁶ The Treaty does not contemplate rights or claims in connection with investments that have not materialized; to be “*entitled to engage in investments*” is not the same as *having made an investment*.³³⁷

235. The Claimant relies on decisions that have turned on treaty provisions with markedly different constructions than those of the provision in question here to say that it has a qualifying investment under the Treaty. The relevant treaty provisions in those cases are broader in scope and do not feature the language limiting protected rights to those “related to an investment.”³³⁸

³³² Reply, para. 3.5. See also *id.* paras. 3.8 *et. seq.*

³³³ See *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award of 13 March 2009, [CLA-091](#), para. 265.

³³⁴ Treaty, [CLA-001](#), Art. I(2)(c).

³³⁵ Treaty, [CLA-001](#), Art. I(2)(b) (emphasis added).

³³⁶ See [Statement of Defense](#), para. 167.

³³⁷ *Nordzucker AG v Poland*, UNCITRAL, Partial Award on Jurisdiction of 10 December 2008, [CLA-004](#), para. 172 (emphasis added).

³³⁸ See, e.g., *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction of 31 May 2017, [CLA-009](#); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of*

236. In *Salini v. Morocco*, the Italy-Morocco BIT defined investments to include “rights to **any contractual benefit having an economic value**” and “**any right of an economic nature** conferred by law **or by contract**.”³³⁹ In *Jan de Nul*, Article III(1)(c) of the BIT covered “[d]ebts and rights to **any performance having economic value**.”³⁴⁰ In *Beijing Urban Construction v. Yemen*, the relevant definition of investment under Article 1(1)(c) of the China-Yemen BIT extended to “creditor’s rights and **claims to performance having an economic value**.”³⁴¹ This was also the case in the Germany-Poland BIT before the tribunal in *Nordzucker v. Poland*.³⁴²

237. As established in Ethiopia’s Statement of Defense, the definition of “investment” under the Treaty in this case is **an asset-based definition**.³⁴³ Contributions allegedly made by investors are not qualified as investments “unless they have **actually produced the assets** of which the investor claims to have been deprived.”³⁴⁴ A mere promise to perform has no ascribable economic value or output, and therefore does not qualify as an “asset” under the Treaty.

238. The *KT Asia v. Kazakhstan* tribunal highlighted that the fundamental feature of “assets” within the meaning of a treaty is that they (i) “are the result of the act of investing”; and (ii) “presuppose an investment in the sense of a commitment of resources.”³⁴⁵ The tribunal thus arrived at the essential principle that “[w]ithout such a commitment of resources, the asset

Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, [CLA-010](#); and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, [CLA-011](#).

³³⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, [CLA-011](#), para. 37 (emphasis added).

³⁴⁰ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, [CLA-010](#), para. 28 (emphasis added).

³⁴¹ *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction of 31 May 2017, [CLA-009](#), paras. 15 *et. seq.* (emphasis added).

³⁴² *Nordzucker AG v Poland*, UNCITRAL, Partial Award on Jurisdiction of 10 December 2008, [CLA-004](#).

³⁴³ See Statement of Defense, para. 162.

³⁴⁴ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 167. See also *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, [CLA-093](#), para. 349.

³⁴⁵ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 166.

belonging to the claimant *cannot constitute an investment*.”³⁴⁶ The tribunal in that case concluded that the claimant had not made any contribution with respect to its alleged investment and had failed to demonstrate the existence of an investment.³⁴⁷

239. Under the express terms of the 2012 ETIZ Agreement, the project is defined as “the development, construction and operation of the [industrial zone] on the Land by the Developer in accordance with the Agreement and the Business Plan.”³⁴⁸ By the time Akgun departed Ethiopia, the ETIZ project had not yet begun; i.e. no “development, construction [or] operation” to speak of had taken place. The Claimant’s characterization of the ETIZ Agreement as an asset falling within the definition of the Treaty fails. Akgun had at best a right to build.³⁴⁹ That right to build “could only begin to accrue economic value to the extent [Akgun] *actually commits assets* through building or related economic activities.”³⁵⁰

240. The facts show that any activities undertaken by Akgun were in anticipation of performing its obligations under the Agreement. As shown by Ethiopia in its Statement of Defense and further elucidated above, any actual performance by Akgun was stalled by its own inability to produce an EIA.³⁵¹ Any contributions allegedly made by Akgun did not generate any asset that it now points to as a qualifying investment under the Treaty.³⁵² Rather, the items pointed to by the Claimant to suggest that it may hold any rights related to an existing “investment” in Ethiopia consist of mere promises to perform and modest preparations for performance, without the realization of any “asset” ever at all.

³⁴⁶ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 166 (emphasis added). See also *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award of 29 June 2018, [CLA-086](#), paras. 113-114.

³⁴⁷ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 206 (emphasis added). See also *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award of 29 June 2018, [CLA-086](#), paras. 113-114.

³⁴⁸ 2012 ETIZ Agreement, [Exhibit C-009](#), Definitions.

³⁴⁹ See [Statement of Defense](#), paras. 162 *et. seq.*

³⁵⁰ [Statement of Defense](#), para. 165 (emphasis added).

³⁵¹ See [Statement of Defense](#), Sec. III.C and Secs. II.D, II.E, and II.F *supra*.

³⁵² *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 167.

241. The Claimant alleges that it “made a number of substantial contributions in cash, in kind, and in future commitments” by way of the following activities:

- “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.”³⁵³

242. These activities pointed to by the Claimant were pursued in performance of pre-development contractual obligations expressly undertaken by Akgun in the ETIZ Agreement. Any rights or benefits that may have theoretically resulted from Akgun’s eventual performance of the ETIZ Agreement had simply not materialized before Akgun packed its bags. At that point, save for some ancillary works to prepare the site for implementation, Akgun had not yet begun development work. The agreement to develop ETIZ contained obligations and conditions that the parties agreed to fulfill before any benefit to either side could be realized. The language of the Treaty defining an investment as “every kind of asset” does not encompass rights before they have ripened into assets.

243. Notwithstanding the lack of any progress or performance on the ETIZ project, the Claimant bemoans its inability to capitalize on “the right to operate the ETIZ for 80 years.”³⁵⁴ As pointed out by the Claimant itself, this right was contractually contingent upon completion of the ETIZ project. As also confirmed by the Claimant, the project “*was not near completion.*”³⁵⁵ Insofar as the ETIZ project may have ripened into an asset once materialized, this simply never occurred.

244. To summarize, in order to qualify for protection, any “rights having financial value” must be “related to an investment” which investment may only be an “asset.”³⁵⁶ A leasehold obtained for the purpose of future development is not an “asset” within the definition of the Treaty.

³⁵³ Reply, para. 3.56.

³⁵⁴ Reply, para. 3.49.

³⁵⁵ Reply, para. 3.53 (emphasis added).

³⁵⁶ Treaty, **CLA-001**, Art. I(2)(b).

Thus, there is no “asset” to which “rights having financial value” may “relate[.]” Further than this, any rights under the leasehold agreement were contingent upon Akgun furnishing an acceptable EIA, which it failed ever to do.³⁵⁷

245. The suggestion that Akgun held any rights “related to an investment” under Article I(2)(b) of the Treaty is to be rejected as baseless.

2. Akgun Never Held Any Protected Investment Under Article I(2)(c) of the Treaty

246. The Claimant suggests that it held an investment within the meaning of Article (I)(2)(c) of the Treaty on the basis that it brought or arranged for the deployment of machinery and equipment for ETIZ project activities.³⁵⁸

247. First, to the extent that the Claimant’s claims rest on its own contractual obligation to source equipment that had not yet been executed, they must be disregarded, for a promise to provide the required tools to execute contractual performance is not an investment.

248. Second, as for any machinery or equipment deployed to the site, Akgun has not claimed that it has been deprived of these nor that it has been unable to repatriate or sell said machinery or equipment upon its departure. This truth negates any argument put forth by the Claimant that such machinery constitutes an asset or an “investment” within the meaning contemplated under the Treaty. Indeed, the Claimant’s hesitating suggestion of an “investment” under this prong of the Treaty’s definition is vacant, hollow, and empty where the Claimant has attached no claim for injury or loss.³⁵⁹ That is because there is none.

249. The suggestion that the Claimant holds “property” within the meaning of Article I(2)(c) of the Treaty is to be rejected.

³⁵⁷ See [Statement of Defense](#), Sec. III.C and Secs. II.E and II.F *supra*.

³⁵⁸ See [Reply](#), para. 3.13.

³⁵⁹ See paras. 375-376 *infra*.

3. Akgun Never Held Any Protected Investment Under Article I(2)(d) of the Treaty

250. Akgun claims that its “experience and expertise in developing industrial cities constitutes ‘know-how,’ an investment protected under BIT Art. I(2)(d).”³⁶⁰ The express purpose of Article I(2)(d) is to protect “industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights.”³⁶¹ The Claimant has not adduced any evidence in support of its suggestion that it actually contributed “know-how” within the meaning of Article I(2)(d); the mere possession of (pre-existing) “know-how,” without more, does not constitute an “asset” within the meaning contemplated under the Treaty.

251. The Claimant nonetheless attempts to stretch Article I(2)(d) beyond any reasonable limit to suggest that the mere possession of developer experience or know-how somehow constitutes an investment under the Treaty.³⁶² This is implausible by any treaty standard; Akgun had to contribute know-how or expertise *into Ethiopia* in order for such to qualify as an “investment” under the Treaty. In fact, any “know-how” held by Akgun never materialized because the industrial zone was never realized.

252. Indeed, the 2012 ETIZ Agreement contemplates that Akgun would have the right to “register its intellectual and industrial rights arising during the realization of the Project.”³⁶³ If Akgun holds intellectual property that it registered in Ethiopia, presumably that evidence would be before this Tribunal.

253. The Claimant’s case is thus distinct from those cases where significant goodwill and know-how have been contributed in the course of an investment. In *AIYY v. Czech Republic*, the claimant provided “cutting-edge assistive technologies and holistic solutions for the visually

³⁶⁰ See Reply, para. 3.12.

³⁶¹ Treaty, CLA-001, Article I(2)(d).

³⁶² Reply, paras. 3.12 *et. seq.*

³⁶³ 2012 ETIZ Agreement, Exhibit C-009, Art. 10(18).

impaired,” as well as materials and training handbooks that were “among the best.”³⁶⁴ In *White v. India*,

“White hired and paid approximately *one hundred local contractors to provide technical construction services on the project. It trained Coal India's work force both in Australia and India* (45 in Australia, 100 on site in India). It maintained a technical staff of 34 expatriate and local employees at the Piparwar site; a full time administrative staff of four at its office in Calcutta and a full-time administrative staff of three at its office in Ranchi, as well as an office in Piparwar with full-time administrative staff of five. It *transferred its ‘Mobile In-Pit Crushing and Conveying’ technology, the use of which it pioneered in open-cut coal mines in Australia and it transferred its own coal-washery technology.*”³⁶⁵

254. Unlike the clear contribution of know-how by the claimants in these cases, Akgun has not pointed to any intellectual property that it currently holds, brought, or ever held in Ethiopia such as may qualify as an investment within the meaning of Article I(2)(d), and the suggestion that the Claimant holds “property” under this provision of the Treaty is to be rejected.³⁶⁶

ii. The Claimant Has Failed to Meet the *Salini* Criteria of Contribution, Risk, and Duration

255. The Claimant relies on cases applying the *Salini* criteria in seeking to establish that it held an “investment” in Ethiopia, but in the same breath rejects the applicability of the *Salini* factors. In any case, the arbitral jurisprudence cited by the Claimant indicates that whether to apply the *Salini* factors is in the Tribunal’s discretion.³⁶⁷ Ethiopia, for its part, submits

³⁶⁴ *ALLIY LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award, 29 June 2018, [CLA-086](#), paras. 145 *et. seq.*

³⁶⁵ *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, [CLA-085](#), para. 7.4.14 (emphasis added).

³⁶⁶ Further, as with Sec. I(2)(c) of the Treaty, *see* note 359 *supra*, the Claimant’s hesitating suggestion of an “investment” under this prong of the definition is vacant where the Claimant has attached no claim for injury or loss. *See* paras. 375-376 *infra*. That is because there is none.

³⁶⁷ *See KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para.165 (quoting *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280) (“[t]he term ‘investment’ has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT... The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning (*irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings*) *entailing a contribution that extends over a certain period of time and that involves some risk*”) (emphasis added).

that the *Salini* factors provide a well-established basis for assessing whether an investment has been made. As reflected in Ethiopia’s Statement of Defense, the *Salini* test gives broad and ambiguous definitions of investment “proper grounding in fact.”³⁶⁸

256. It may be that the Claimant’s resistance to applying the *Salini* test stems from the fact that its situation is readily distinguished from the authorities it relies upon when viewed under the *Salini* lens. This is because in the majority of those cases the relevant entities had made significant progress on the projects in question and a palpable contribution was left behind.³⁶⁹ The cases cited by the Claimant to support its contention that it satisfies the *Salini* criteria are therefore distinct; Akgun cannot equate or even compare its performance to that of the claimants in the cases on which it relies. In the sections below, the Respondent demonstrates that the cases relied upon by the Claimant do not further its position that it holds or ever held an “investment.”

1. Contribution and Risk

257. In order to assess whether the investor holds a qualifying investment susceptible of *ratione materiae* jurisdiction, the relevant inquiry is whether the claimant in question made a “contribution.”³⁷⁰ Where there is no contribution, this necessarily entails that there is also no risk.³⁷¹ The activities conducted by Akgun on the ETIZ project did not go beyond mere preparatory activities in anticipation of the commencement of implementation. The Claimant cannot find any support for its position that a project that had yet to enter its implementation phase qualifies as an investment.

³⁶⁸ [Statement of Defense](#), para. 180.

³⁶⁹ See *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award of 30 November 2011, [CLA-085](#); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, [CLA-011](#); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, [CLA-088](#); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, [CLA-010](#); and *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#).

³⁷⁰ See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, [CLA-011](#).

³⁷¹ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 219.

258. In *Beijing Urban Construction v. Yemen*, because the claimant had substantially performed by completing half of a two-phase airport megaproject, the tribunal found that this was an investment falling under Article 1(1)(c) of the relevant BIT: “[I]t is obvious that ***the construction of an international air terminal worth in excess of a hundred million dollars contributes to the host State’s economic development.***”³⁷²
259. In *Garanti Koza v. Turkmenistan*, the claimant was required under its agreement to construct twenty-eight bridges within a period of seven and a half months.³⁷³ That tribunal’s analysis of the claimant’s progress was central to its finding that there was a qualifying investment: “[I]t is clear from the record [...] that Garanti Koza ***engaged in the actual building of highway bridges*** in the territory of one of the Contracting Parties to the BIT”³⁷⁴ and “***actually built a number of bridges.***”³⁷⁵ Garanti Koza completed fifteen of twenty-eight bridges, and performed “at least a portion of the obligations it undertook to perform under a contract having a financial value – USD 100 million in gross value.”³⁷⁶ Of further relevance was the fact that Garanti Koza “***left behind a number of bridges that are being used by the Respondent today.***”³⁷⁷
260. In *White v. India*, the claimant provided US\$ 45 million by way of guarantees and was “***vulnerable to the risk of draw down on these guarantees,***”³⁷⁸ while in *Salini v. Morocco*, the Italian companies

³⁷² *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction of 31 May 2017, [CLA-009](#), para. 137 (emphasis added).

³⁷³ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#), para. 61.

³⁷⁴ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#), para. 234 (emphasis added).

³⁷⁵ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#), para. 232 (emphasis added).

³⁷⁶ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#), para. 234.

³⁷⁷ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of 19 December 2016, [CLA-012](#), para. 234 (emphasis added).

³⁷⁸ *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award of 30 November 2011, [CLA-085](#), para. 7.4.16 (emphasis added). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*,

“used their know-how [...] provided the necessary equipment and qualified personnel for the accomplishment of the works [...] set up the production tool on the building site [...] obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and [...] agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then, at the end of the tender process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. ***The Italian companies, therefore, made contributions in money, in kind, and in industry.***”³⁷⁹

261. Akgun does not benefit from the findings of the tribunals in the aforementioned cases, which findings were predicated on significant factors that are simply not present here. In those cases: (i) actual performance under the contracts in question by the claimants was underway and marked progress had been made; (ii) there had been a significant and sustained dedication of resources; (iii) the claimants had issued high-value bonds to guarantee their performance of the agreements, which rendered them vulnerable to the risk of drawdowns on those guarantees; and (iv) there were palpable contributions left behind in the host State.

2. Duration

262. While it is necessary that Akgun demonstrate a certain duration of time associated with its alleged investment, this is not on its own sufficient to establish jurisdiction pursuant to the *Salini* test.³⁸⁰ Were duration to be taken in isolation of the other two key factors (contribution and risk), this would entitle claimants to claim treaty protection on the basis that, regardless of whether they performed or contributed in any meaningful way, they were simply present in the territory for the requisite duration. The duration element of the *Salini* test is rather designed to bar those claims where any contribution or risk is limited in time. In other words,

ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, [CLA-088](#), para. 135 (noting that Bayindir was susceptible to “the danger of an unlawful call on those guarantees”).

³⁷⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, [CLA-011](#), para. 53 (emphasis added).

³⁸⁰ See *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 208.

there must be some degree of contribution and risk that is in turn *sustained* over a period of time.³⁸¹

263. In *Jan de Nul*, it was undisputed that the claimant had proceeded to perform and execute its dredging obligations throughout and within the “contractual period of the works.”³⁸² In addition, in *Toto v. Lebanon*, a key factor guiding the tribunal’s analysis was that the actual execution of the works by the claimant took place over an extended period of time.³⁸³ Where there has been no performance or execution of any significant work, the mere passage of time (without more) does not establish that there has been an investment.

264. It is therefore inconsequential that Akgun remained a few years in Ethiopia after signing the 2012 ETIZ Agreement. To qualify for protection under the Treaty the Claimant must also satisfy this Tribunal that during the time in question it dedicated significant resources in actual performance of the Agreement and assumed a degree of risk. For the reasons articulated above, it did not.

d. This Tribunal Lacks Jurisdiction Over the Claimant’s Imported Umbrella Clause Claims

265. Akgun is not entitled to import the umbrella clause from the Denmark-Ethiopia BIT. The parties to the Turkey-Ethiopia Treaty did not agree nor did they contemplate that simple undertakings, commitments or contractual obligations may come within the Treaty’s protections.

266. Further, the Claimant has not shown any discriminatory treatment by Ethiopia as contrasted to that of any investor in a “similar situation,” as is required for the Claimant to benefit from substantive protections of other treaties using the MFN vehicle at Article III(2) of the Treaty.

³⁸¹ See, e.g., *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, [RLA-46](#), para. 207.

³⁸² *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, [CLA-010](#), para. 94.

³⁸³ See [Statement of Defense](#), para. 171.

267. Lastly, even if the Claimant were permitted to reach the umbrella clause of the Denmark-Ethiopia BIT, the umbrella clause, without more, does not and cannot transform the Claimant's contractual claims into treaty claims. Such an expansive interpretation of the umbrella clause would have the effect of elevating all municipal-level obligations, governed by their own applicable laws and dispute settlement procedures, into international law commitments, a most vexatious imposition serving no legitimate objective.

i. The Parties to the Treaty Elected Not to Include an Umbrella Clause

268. When the Treaty was executed between Ethiopia and Turkey in 2000, neither Ethiopia nor Turkey agreed to include an umbrella clause in the Treaty. The Claimant asserts that “[i]t is nonsensical for Respondent to suggest that the Turkey Ethiopia BIT reflects a choice to exclude protections that were not yet in place.”³⁸⁴ In fact, Ethiopia agreed to umbrella clauses in investment treaties with other States before the Treaty with Turkey,³⁸⁵ and has agreed to umbrella clauses in other treaties entered into thereafter.

269. Had the parties intended to include an umbrella clause in the present Treaty, they would have and could have done so. Instead, as noted in Ethiopia's Statement of Defense, Turkey and Ethiopia have expressly chosen to protect only “rights having financial value *related to an investment*” while excluding any umbrella clause.³⁸⁶ As further noted, the two treaties are characterized by irreconcilable definitional mismatch in respect of what constitutes an “investment.”³⁸⁷ Reading further substantive obligations into the Treaty would cut against its object and purpose and would serve to override the intention of the parties in negotiating

³⁸⁴ Reply, para. 3.99.

³⁸⁵ See, e.g., Agreement Between the Swiss Confederation and the Federal Democratic Republic of Ethiopia on the Promotion and the Reciprocal Protection of Investments (1998), [RLA-48](#), Art. 10(2) (“Each contracting party shall observe any particular obligation it has assumed with regard to an investment in its territory by investors of the other Contracting Party”). Notably, the definition of “investment” within the Switzerland-Ethiopia BIT includes “claims to money or to any performance having an economic value,” *id.*, Art. 1(2)(c), as does the Denmark-Ethiopia BIT. See Denmark-Ethiopia BIT (2001), [CLA-002](#), Art. 2(3); see also Statement of Defense, paras. 233-237.

³⁸⁶ Treaty, [CLA-001](#), Art. I(2)(b) (emphasis added).

³⁸⁷ See [Statement of Defense](#), paras. 181-183 and 233-237. In addition, even if the umbrella clause *were* imported, there is insurmountable mismatch of the parties, i.e., the characteristic obligations that Akgun seeks to invoke were not undertaken by Ethiopia. See [Statement of Defense](#), paras. 229-232.

and agreeing its terms. The Claimant may not invoke a protection and impose an obligation that was excluded by the parties to the Treaty.

ii. The Claimant May Not Avail the Treaty’s MFN Clause to Import Substantive Protections from the Denmark-Ethiopia BIT Where It Has Not Shown Actual Discrimination in Favor of Others in “[S]imilar [S]ituations”

270. The Claimant contends that “[t]he importation of the Umbrella Clause protection through the Treaty’s MFN Clause is consistent with the object and purpose of the Treaty.”³⁸⁸ The language of the MFN clause at Article (III)(2) reads as follows:

“Once the investment is accepted, each Party shall accord to this investment, treatment no less favourable than that accorded *in similar situations* to investments of its investors or to investments of investors of any third country, whichever is the most favourable.”³⁸⁹

271. Ethiopia and Turkey chose to include an MFN clause in the Treaty that is expressly limited to treatment accorded to investors “in similar situations.” Accordingly, based on the plain language of the Treaty, to demonstrate that there has been a breach of the MFN clause by the Respondent, the Claimant must show *de facto* discrimination relative to a national or foreign investor in similar circumstances. In other words, the Claimant must prove that: (i) more favorable treatment was accorded to investments of nationals or investors from countries other than Turkey; and (ii) such investments were in a “similar situation” to the Claimant’s alleged investment in Ethiopia.

272. Tribunals interpreting this limitation have refused to extend the scope of the MFN clause to import substantive protections. In particular, tribunals interpreting MFN provisions with the “similar situations” limiter have refused to extend jurisdiction under an MFN clause to offer protections not included in the primary treaty where the claimant failed to demonstrate *de facto* discrimination.

³⁸⁸ Reply, paras. 3.94 *et. seq.*

³⁸⁹ Treaty, [CLA-001](#), Article III(2) (emphasis added).

273. Thus, in *Ickale v. Turkmenistan*, the tribunal interpreted the same MFN language at Article II(2) of the Turkey-Turkmenistan BIT as follows:

“The terms ‘treatment accorded in similar situations’ therefore suggest that the MFN treatment obligation requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less favorable than that accorded to investments of the investors of any third State. It follows that, given the *limitation of the scope of application of the MFN clause to ‘similar situations,’ it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State.* The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, *but such differences between applicable legal standards cannot be said to amount to ‘treatment accorded in similar situations,’ without effectively denying any meaning to the terms ‘similar situations.’* Investors cannot be said to be in a ‘similar situation’ merely because they have invested in a particular State; indeed, if the terms ‘in similar situations’ were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause ‘treatment no less favourable than that accorded in similar situations [...] to investments of investors of any third country’ and ‘treatment no less favourable than that accorded [...] to investments of investors of any third country.’ *Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or effet utile, which requires that each term of a treaty provision should be given a meaning and effect.*”³⁹⁰

274. The tribunal in that case concluded that the claimant was not entitled to invoke substantive protections under other treaties using the MFN clause on the basis that the contracting parties had expressly used the language “in similar situations” in Article II(2) of their BIT and therefore

“must be considered to have agreed to restrict the scope of the MFN clause so as to cover discriminatory treatment between investments of investors of one of the State parties and those of investors of third States, *insofar as such investments may be*

³⁹⁰ *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, [RLA-49](#), para. 329 (emphasis added).

said to be in a factually similar situation [...] The Claimant is therefore **only entitled to invoke those investment protection standards specifically included in the BIT.**³⁹¹

275. Most recently, in *Muhammet v. Turkmenistan*, the claimant was once again attempting to rely on the same MFN language in the Turkey-Turkmenistan BIT to import, among other protections, the substantive protections of the umbrella clause in the UK-Turkmenistan BIT.³⁹² In that case the tribunal echoed the interpretation of the *Ickale* tribunal and reasoned that “the MFN clause in the present case applies **only where there is de facto discrimination**. In other words, there needs to be **two actual investors in a similar situation who are being treated differently, i.e. one less favourably than the other.**”³⁹³

276. Interpreting the Turkey-Turkmenistan MFN provision in light of Article 31 of the Vienna Convention on the Law of Treaties, the *Muhammet* tribunal reasoned that

“[...] the benefit of the MFN **is not automatic**. This type of MFN clause extends protection to Investors **when it is established that they are placed in similar situations** and the activities in the host State are similar to those Investors from a third State.”³⁹⁴

277. The tribunal concluded that the MFN clause expressly “applies to de facto discrimination **where two actual investors in a similar situation are treated differently.**”³⁹⁵ The claimant had not made any such showing and was therefore barred from using the MFN clause to import the umbrella clause (or any other substantive protections the claimant had attempted to import from the UK-Turkmenistan BIT):

³⁹¹ *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, [RLA-49](#), para. 332 (emphasis added).

³⁹² *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#).

³⁹³ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 780 (emphasis added).

³⁹⁴ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 780 (emphasis added).

³⁹⁵ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 781 (emphasis added).

“The substantive protections in each treaty apply to the investors that fall within that treaty’s scope of application. Just because some standards in a third-party treaty appear to be more favourable (in the sense of introducing additional protections) than those in a basic treaty, does not mean that the treatment accorded is ‘less favourable’. This may be simply a difference between two legal standards in two distinct legal instruments. Such difference cannot be considered as ‘treatment accorded in similar situations’ *because it would render the meaning of the words ‘similar situation’ meaningless.*”³⁹⁶

278. As with the MFN clause before the *Muhammet* tribunal, the MFN clause in the present Treaty limits MFN protection to similar situations: it “does not refer to ‘all matters’ [...] Rather, *it clearly states that its scope of application is restricted to where the investors are in a similar situation.*”³⁹⁷

279. The Claimant asserts that the reasoning of the tribunal in *EDF v. Argentina* should apply here because the “Argentina-France BIT is no broader than the MFN clause in [the] Turkey-Ethiopia BIT.”³⁹⁸ That is incorrect. That treaty does not contain the same limiting language present in the Treaty here. Moreover, the fact that the MFN clause in question was broadly drafted and unrestricted was a fundamental and defining element for the tribunal’s decision in *Arif v. Moldova*.³⁹⁹ The *EDF* and *Arif* cases cited by the Claimant are therefore not helpful to it.

280. The reasoning of the *Ickale* and *Muhammet* tribunals is sound, and the test to be applied where the MFN clause is expressly limited to “similar situations” is whether the Claimant has made out a showing of actually discriminatory treatment entitling it to trigger Article III(2) of the Treaty. In order to benefit from the MFN clause, Akgun must demonstrate that Ethiopia granted treatment more favorable to a local or third-State investor in a situation

³⁹⁶ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 788 (emphasis added).

³⁹⁷ *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No ARB/12/6, Award of 4 May 2021, [RLA-47](#), para. 790 (emphasis added).

³⁹⁸ Statement of Claim, para. 3.20

³⁹⁹ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, [CLA-019](#), para 396.

“similar” to that of its contemplated industrial zone megaproject. It has not done so and cannot do so.

281. Ethiopia thus submits that there has been no showing of actually discriminatory treatment such as would raise the Claimant over the threshold required to import a new substantive protection under the text of the present MFN clause. Accordingly, the Claimant may not utilize Article III(2) of the Treaty to reach the umbrella clause of the Denmark-Ethiopia BIT, and this Tribunal lacks jurisdiction over Akgun’s umbrella clause claims.

iii. Even If the Tribunal Were to Avail the Imported Umbrella Clause to the Claimant, Such Does Not Elevate the Claimant’s Claims to the International Plane

282. Even if the Tribunal were to allow the Claimant to import the umbrella clause from the Denmark-Ethiopia BIT into the Treaty, an umbrella clause does not “elevate” any municipal obligation into a treaty obligation.⁴⁰⁰ The *El Paso v. Argentina* tribunal thus rejected the expansive approach taken by the tribunals in *Eureko v. Poland* and *Noble Ventures Inc. v. Romania* in this respect because such would have the impermissible effect of “internationalizing” all municipal law commitments:

“Again, the problem met by such reasoning, according to this Tribunal, is that, by necessary implication, all municipal law commitments must necessarily be ‘internationalised’, as the so-called umbrella clause does not differentiate among the obligations; it refers to *any obligation* and not specifically to contractual obligations, *the consequence being that the division between the national legal order and the international legal order is completely blurred.*”⁴⁰¹

⁴⁰⁰ See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006, [RLA-50](#), para. 85 and *Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of 27 July 2006, [RLA-51](#), para. 113

⁴⁰¹ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006, [RLA-50](#), para 106 (emphasis added). See also the Denmark-Ethiopia BIT, [CLA-003](#), Art. 2(3) (requiring observance of “any commitment”). Cf. *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 200, [CLA-061](#) and *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award of 19 August 2005, [CLA-004](#).

283. This approach was also adopted by the tribunal in *Pan American v. Argentina* when interpreting the umbrella clause of the US-Argentina BIT:

“[I]n this Tribunal’s view, following important precedents decided by previous Tribunals, ***an umbrella clause cannot transform any contract claims into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims.*** These far-reaching consequences of a broad interpretation of the so-called umbrella clauses, quite destructive of the distinction between the national legal orders and the international legal order, have been well understood and clearly explained by the first Tribunal which dealt with the issue of the so-called ‘umbrella clause’ in the *SGS v. Pakistan* case [...] and which insisted on the theoretical problems faced. ***It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law ‘with regard to investments.’***”⁴⁰²

284. Accordingly, the Respondent respectfully submits that Akgun’s claims offer no basis for this Tribunal to assert jurisdiction, whether under the Treaty’s own terms or by virtue of the umbrella clause in the Denmark-Ethiopia BIT.

e. Conclusion

285. For all of these reasons, the Tribunal lacks jurisdiction in this case. As such, Ethiopia respectfully requests the Tribunal to dismiss all of Akgun’s claims for lack of jurisdiction in their entirety.

286. If, however, the Tribunal should decide to exercise jurisdiction over any of Akgun’s substantive claims, Ethiopia submits that in its overall assessment of the merits of this case, the admission of counterclaims, and award of costs, the Tribunal take note of Akgun’s unnecessary and disingenuous jurisdictional maneuver of disregarding the most obvious and

⁴⁰² *Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of 27 July 2006, [RLA-51](#), para. 110 (emphasis added).

appropriate contract-based dispute settlement mechanism to which it has freely, directly, and expressly assented.⁴⁰³

IV. APPLICABLE LAW

287. Although there is now a considerable amount of convergence in the parties' submissions on the applicable law, a few of the Claimant's characterizations warrant the Respondent's further clarification.

288. The Claimant prefers the application of Ethiopian law as a matter of fact rather than as a matter of law without disputing that in either case the Tribunal must ascertain its contents to determine whether certain events met Ethiopian law requirements. Ethiopia submits that the Claimant's characterization of Ethiopian law applicable as a matter of fact rather than a rule of decision would not lead to a different result under the treaty standards.

289. More specifically, the question is whether GOE conduct that is consistent with Ethiopian law is immune from treaty reproach? The Claimant suggests that "the legality of Ethiopia's acts under Ethiopian law does not determine their lawfulness under international law."⁴⁰⁴ Although this is generally stating the obvious, it is entirely irrelevant in this case because Akgun submits not a single claim challenging the nature, content or application of Ethiopian law on treaty grounds. Rather, the claims purport to impeach the formality of one administrative directive to suggest that Ethiopia applied laws it didn't adopt in accordance with its own procedures. Akgun's exact challenge in this regard is not clear.

290. Applying Akgun's own preferred treaty standard, Akgun bears the burden of showing that Ethiopia's application of Ethiopian law as referenced in the 2012 ETIZ Agreement was arbitrary and disproportionate under the facts of this case.

⁴⁰³ See Sec. III.A *supra*.

⁴⁰⁴ [Reply](#), para. 4.7.

291. In that sense, Ethiopia does not disagree with the Claimant’s conclusion that “the law applicable to the 2012 ETIZ Agreement is ‘[t]he relevant Ethiopian laws, and the [Treaty]’”; “[t]hus, Ethiopian law shall apply to ascertaining contractual obligations and breaches as between the parties to the contract,” and “[t]he Treaty and relevant rules of international law [] will govern whether the contractual breaches can trigger an international responsibility of Ethiopia.”⁴⁰⁵
292. The only difference that the parties seem to have is what this means to the umbrella clause claims. The Claimant seeks to elevate a contract claim to the level of treaty violation. Whether there is a breach of contract is determined on the basis of application of domestic law. The first step in the analysis is thus the application of fact to domestic law. The second step is the application of the outcome of the first to the applicable treaty standard. The legal fiction that the domestic law is considered a fact rather than a law thus serves no useful purpose.
293. In any case, Ethiopia submits that the characterization of Ethiopian law as fact or law is of no consequence in this case because the nature and content of the law itself is not challenged.⁴⁰⁶
294. Overall, as far as the contents of the applicable treaty standards are concerned, Ethiopia maintains its position as provided in detail in its Statement of Defense.⁴⁰⁷
295. Ethiopia maintains in particular that FET sets “*a floor, an absolute bottom, below which conduct is not accepted by the international community*,” and that in terms of procedure a breach of FET would mean “*blatant unfairness, [or] a complete lack of due process*,” or

⁴⁰⁵ Reply, para. 4.14 (quoting 2012 ETIZ Agreement, **Exhibit C-009**, Art. 13).

⁴⁰⁶ For the sake of completeness, the Claimant does challenge the very existence of an environmental directive because it says it was not signed. See Reply, Sec. 2.C(ii)a; see also A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, **RLA-2**. This dispute aside, the directive was needed to list industries that require an EIA. The development of Africa’s largest industrial park is not one such as could have been exempted under any conceivable directive whether formally enacted or not, and as such Akgun’s formality argument is desperate.

⁴⁰⁷ See Statement of Defense, paras. 195-225.

“some act far beyond the measure’s mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective.”⁴⁰⁸

296. Furthermore,

“not every process failing or imperfection ... will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state’s acts or procedural omissions are, on the facts and in the context before the adjudicator, ***manifestly unfair or unreasonable*** (such as would shock, or at least surprise a sense of judicial propriety) ... that the standard can be said to have been infringed.”⁴⁰⁹

297. Expropriation at a minimum requires “***a compulsory transfer of property rights***,”⁴¹⁰ or simply a “***taking***” of property by a governmental authority.⁴¹¹ To prevail in a takings claim, therefore, the Claimant must at a minimum prove that (i) it owned property; and (ii) that property was forcibly taken by the State.

298. The best articulation of the most accepted and acceptable interpretation of indirect expropriation as it relates to environmental regulation is contained in Canada’s most recent model treaty. It reads:

“A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation.”⁴¹²

⁴⁰⁸ *Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, [RLA-4](#), paras. 616, 626 (emphasis added).

⁴⁰⁹ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, [RLA-19](#), para. 9.3.40 (emphasis added).

⁴¹⁰ *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, 15 Iran-U.S. C.T.R. 189, Partial Award of 14 July 1987, [RLA-10](#), para. 191 (emphasis added).

⁴¹¹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, [RLA-11](#), para. 280 (emphasis added).

⁴¹² 2021 Model Foreign Investment Protection Agreement, Government of Canada, [RLA-52](#), Art. 9(3) (emphasis added).

299. This is by no means an announcement of a new rule. It is a reasonable and common-sense interpretation of the meaning of expropriation. This is Ethiopia's understanding of what it agreed to when it signed the Treaty.
300. Finally, Ethiopia submits that the Tribunal's task is limited to determining what the parties have meant by the words fair and equitable treatment, expropriation or most-favored nation in this particular Treaty. In doing so, the choices of the rules of interpretation are not unlimited. Although it may consider the parties' submissions of sporadic and often conflicting arbitral jurisprudence as persuasive authority, it must decide this case on the basis of the particular Treaty and the Vienna Convention on the Law of Treaties. In that regard, the Tribunal must particularly be careful with most recent, expansive and inappropriate interpretations that have caused enormous backlash against investor-State dispute settlement around the world, including in Ethiopia and Turkey. Indeed, it is important to note that the concept of "legitimate expectations" was only invented three years after the signing of the Treaty.⁴¹³
301. That said, as will be elaborated in the next section step by step, the facts of this particular case do not force a resolution of the outer limits of the important principles such as FET, as there could only be one possible outcome based on the Claimant's own preferred interpretation of rational basis, arbitrariness and proportionality. As the Tribunal would have noted by now, no level of stretch could make these treaty principles turn routine *bona fide* local environmental administrative decisions into an internationally wrongful act.

V. CLAIMS ON THE MERITS

a. The Claimant Has Failed to Prove that Ethiopia Breached the Obligation to Accord Fair and Equitable Treatment

⁴¹³ The first case that is known to have interpreted FET to consider "legitimate expectations" is *Tecnicas Medioambientales Tecmed S.A. v. United States of Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, [CLA-006](#). In the words of Judge Crawford, "the doctrine of legitimate expectations should not be used as a substitute for the actual arrangements agreed between the parties, or as a supervening and overriding source of the applicable law." J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351, [CLA-104](#), p. 374.

302. The Claimant bears the burden of proving that the Respondent violated the FET provision of the Treaty. This provision states in its entirety:

“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.”⁴¹⁴

303. In this provision, Ethiopia and Turkey agreed to accord each other’s investors “fair and equitable treatment” and “full protection.” Because Akgun does not invoke the “full protection” prong, the focus here is on the FET prong.

304. The Claimant admits that to prevail in an FET claim, it must prove that the government’s actions are “unreasonable and discriminatory measures on Turkish investors.”⁴¹⁵ It highlights what it considers to be the core of the FET principle in the following terms:

“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. 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.’”⁴¹⁶

305. It also adds “[d]enial of justice” and “deficient review of administrative actions” as core components of the FET principle.⁴¹⁷ Although Akgun attempts to lower the standard with the hopes of matching its meager facts, it cannot credibly lower the standard enough to make this Tribunal find a violation of FET for legitimate regulatory requests for environmental studies.

⁴¹⁴ Treaty, **CLA-001**, Art. II(2).

⁴¹⁵ Reply, para. 5.4.

⁴¹⁶ Reply, para. 5.8 (quoting *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award of 13 December 2017, **CLA-053**, para. 336).

⁴¹⁷ Reply, para. 5.7 (quoting *Flemingo DutyFree Shop Private Ltd. v. Republic of Poland*, UNCITRAL, Award of 12 August 2016, **CLA-078**, paras. 534-535).

306. The application of Akgun's preferred standard of legitimate expectations, protection against arbitrary, unreasonable and disproportionate conduct and denial of justice to Akgun's facts would only lead to the rejection of all claims.

i. Akgun Mischaracterizes Ethiopia's Granting of Land as a Granting of Immunity from Environmental Care

307. Akgun repeats its reference to the same facts relating to the genesis of the project, such as "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."⁴¹⁸ The Ethiopian officials took all of these measures to facilitate a legitimate and proper investment whereas here Akgun attempts to turn these facts into a violation of FET. The core of Akgun's FET claim is contained in the following paragraph:

"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. 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. *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.* 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.* 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."⁴¹⁹

⁴¹⁸ Reply, para. 5.40.

⁴¹⁹ Reply, para. 5.50 (emphasis added).

308. The questions that need to be asked here are: (i) whether, under the facts of this case, Akgun subjectively and genuinely believed that Ethiopia had already determined the environmental suitability of the land and that Akgun had nothing to worry about; and, even then, (ii) whether, under the facts of this case, Akgun's assumptions were legitimate?

309. Ethiopia submits that Akgun did not subjectively believe that it had no environmental responsibilities not only because it signed the 2012 ETIZ Agreement containing many provisions referencing environmental matters but also merely because of the scale, composition and location of the project, as an experienced developer would see. If, despite all of that, Akgun believed that it did not have environmental obligations, its expectations would not be legitimate or reasonable.

ii. Any Expectation that Akgun Could Develop the Largest Industrial Park in Africa Next to Addis Ababa's Water Supply Without an EIA is Not Legitimate or Reasonable

310. As extensively offered in Ethiopia's Statement of Defense, a combination of the express 2012 ETIZ Agreement provisions and the provisions of the Ethiopian law that they incorporate by reference leave no room for doubt that Akgun knew and should have known that it was granted land for development according to the country's environmental laws.

311. **First**, the 2012 ETIZ Agreement expressly provides that "[Akgun] shall respect this Agreement *and all other conditions stated in the relevant laws of Ethiopia*."⁴²⁰

312. **Second**, the Agreement also expressly requires that "[Akgun] shall protect the environment from pollution by using appropriate methods and technologies," and that "[i]n this regard [Akgun] 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*."⁴²¹

⁴²⁰ 2012 ETIZ Agreement, **C-009**, Art. 8(12) (emphasis added).

⁴²¹ 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10) (emphasis added).

313. **Third**, the Agreement further provides for continued monitoring of compliance of land use conditions under the law by both federal and state authorities, stating in particular that “[Akgun] shall allow experts of the Ministry and the Oromiya Regional State, who shall be sent for continuous assessment and follow up [of] the proper use of the land leased and its conformity with this agreement, to have access to the [industrial zone].”⁴²²

314. **Fourth**, the Ethiopian Environmental Impact Assessment Proclamation No. 299 of 2002 establishes this general rule in its Article 3(1):

*“Without authorization from the [Environmental Protection] Authority or from the relevant regional environmental agency, no person shall commence implementation of any project that requires environmental impact assessment as determined in a directive issued pursuant to Article 5 of this Proclamation.”*⁴²³

315. **Fifth**, the Environmental Protection Authority’s Directive No. 1/2008 includes at Item No. 21, by way of stating the obvious, “*Establishment of Industrial Zone*.”⁴²⁴

316. **Sixth**, the Authority’s earlier-issued Environmental Impact Assessment Procedural Guideline Series 1 of 2003 sets forth the specific regulatory processes for the conduct of an environmental impact assessment.⁴²⁵ It defines “Environmental Assessment” as “[t]he Methodology of identifying and evaluating *in advance*, any impact positive or negative, which results from the implementation of a proposed action.”⁴²⁶ It also defines “Environmental Impact Assessment Report” to be “[a] report containing sufficient information to enable the Environmental Agency to determine whether and under what

⁴²² 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(11).

⁴²³ Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 3(1) (emphasis added).

⁴²⁴ A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, [RLA-2](#) (emphasis added).

⁴²⁵ Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, [RLA-3](#).

⁴²⁶ Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, [RLA-3](#) (defining “Environmental Assessment”) (emphasis added).

*conditions a proposed action should proceed.*⁴²⁷ The Guidelines further provide that “all feasible options to a project, policies, programs or its components like site, processes, products, raw materials etc. including the ‘no go’ option should be considered.”⁴²⁸ The same Guidelines define “**Alternatives**” as “[a] possible course of action that might be adopted in lieu of the proposal or activity or in terms of site, design, input, process, including the ‘no action’ alternative.”⁴²⁹

317. **Finally**, and most importantly, under the regulatory framework, the Authority has the discretion to “*refuse implementation* of the project *if it is convinced* that the negative impact cannot be satisfactori[l]y avoided.”⁴³⁰

318. Because the provisions of the Agreement and Ethiopian environmental law leave no room for doubt that Akgun had the responsibility to conduct and present an acceptable EIA and follow all environmental rules to sustainably develop the project, Akgun tries to challenge their applicability using expert reports to claim that government allocation of land amounts to the issuance of an unqualified environmental immunity. Akgun states:

“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.

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

⁴²⁷ Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, [RLA-3](#) (defining “Environmental Impact Assessment Report”) (emphasis added).

⁴²⁸ Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, [RLA-3](#), Sec. 4.2.2 (“Guiding Principles of [Environmental Assessment]”).

⁴²⁹ Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, [RLA-3](#) (defining “Alternatives”).

⁴³⁰ Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, [RLA-1](#), Art. 9(2)(c) (emphasis added).

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.’

Thus, Akgun’s expectation that Ethiopia would provide a site that was environmentally suitable and commercially viable for implementing ETIZ was reasonable and legitimate.”⁴³¹

319. Both Professors Tekle and Whittington speak in generality when they opine about who must conduct what study and when. When they apply Akgun’s facts, their conclusions are hesitant. Professor Tekle says an EIA must be performed before a project is implemented. In his own words: “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.”⁴³²

320. Professor Tekle’s authority for this proposition is the preamble to the EIA proclamation which says that EIAs are intended to “predict and manage the environmental effects which a proposed development activity ... entails.”⁴³³ What Professor Tekle cannot extrapolate is that Ethiopia’s request came unreasonably too late. The request goes back to the very signing of the Agreement itself and admittedly a reminder followed as Akgun sought to mobilize following a partial handover of land. This was a multi-billion-dollar and decades-long project. A request at the commencement of a piloting phase comprising a mere one hundred hectares of land cannot be regarded as having come too late.

321. Because the delayed request argument does not convince Akgun itself, its main argument relies on a presumption, i.e., the allocation of land gave Akgun the impression that an EIA had already been done by the government. Such assumption is not only factually untrue as Akgun knew that there was no EIA but also unreasonable under the circumstances.

⁴³¹ Reply, paras. 5.52-5.54 (quoting Expert Report of Professor Mekete Bekele Tekle, dated 18 October 2021, para. 2.30 and Expert Report of Professor Dale Whittington, dated 18 October 2021, para. 6.61).

⁴³² Expert Report of Professor Mekete Bekele Tekle, dated 18 October 2021, para. 2.30.

⁴³³ Expert Report of Professor Mekete Bekele Tekle, dated 18 October 2021, note 108 (quoting Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Preamble).

322. Regardless of the facts, however, Professor Tekle concludes the following as a matter of law:

“[I]f 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 investor.”⁴³⁴

323. This statement is incredible not only because it fails to cite any recognizable authority but also because it is absolutely illogical.

324. Professor Whittington does not clearly say that the site selection is *ipso facto* evidence of environmental approval but offers a somewhat hesitant and nuanced conclusion:

“From my perspective, it is unreasonable to 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.”⁴³⁵

325. By this statement, he seems to suggest that if Ethiopia chooses development over clean water, the developer bears no responsibility. But it is clear that his academic integrity does not permit him to then directly conclude in this case that Akgun was right in thinking, if it did, that it had no EIA obligations.

326. Akgun’s reliance on these hesitant and unsupported quasi-legal premises to conclude that its “expectation” that it would not be required to conduct an EIA for its multi-billion-dollar project is reasonable must be rejected because (i) on the facts of this case, Akgun did indeed know that it had the responsibility to conduct an EIA where it signed the 2012 ETIZ Agreement; (ii) Akgun knew that no EIA had been done because it was shown three different locations and chose one where it was evident from the circumstances that Akgun and the government entities involved were jointly exploring options; and (iii) at a minimum, as a

⁴³⁴ [Expert Report of Professor Mekete Bekele Tekle](#), dated 18 October 2021, para. 2.32.

⁴³⁵ [Expert Report of Professor Dale Whittington](#), dated 18 October 2021, para. 6.5.

developer, Akgun should have known from all the above that it could not be developing an industrial park of this scale without an EIA in a sensitive area.

327. As such, Akgun did not genuinely expect that it was granted environmental immunity along with the land, but if it did believe so, its belief would be supremely unreasonable and as such illegitimate.

iii. Ethiopia Exercised Legitimate and Proportionate Regulatory Measures Under Due Process of Law

328. The uncontested facts show that the Ethiopian authorities offered Akgun three possible sites for potential industrial development. Akgun selected one of the three and eventually took handover of some seven percent of the anticipated land in what was supposed to be a collaborative, long-term, phased, multi-billion-dollar industrial development undertaking.⁴³⁶

329. When the Agreement was signed, the parties clearly understood that the area was environmentally sensitive, that the developer would undertake the necessary environmental studies, and that the relevant governmental agencies would thereupon issue the necessary permits.

330. Throughout this process, it was clear to all involved including Akgun that studies may reveal environmental issues requiring attention, and that is exactly what happened. Akgun accepted the demand for an EIA. Those studies it did produce showed the need for more care. The studies were examined by the relevant and concerned government agencies and were found lacking in all respects. Akgun was then asked to conduct a more serious study and show how it would mitigate the grave contamination concerns. Akgun failed ever to deliver. It was, however, offered two options: modify the mix of industries it anticipated or relocate. It

⁴³⁶ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 5 (“**TOTAL AREA OF THE LEASED LAND**”) (establishing a mechanism for phased handover of land whereby further handover becomes fully discretionary in any event following the first 660 hectares).

initially accepted the idea of relocation and visited three alternative sites. It now states that it did not like any one of them. It then decided, some two years later, to exit Ethiopia.

331. Ethiopia's conduct was reasonable, proportionate and consistent with its own laws and as such consistent with the FET principle. It granted land. It signed a proper contractual agreement containing environmental provisions. It asked for an EIA. It conducted a series of inter-agency consultations to identify shortcomings with the EIA where the proposed development was located in a sensitive area. Akgun was given the opportunity to participate in the consultations and indeed it did participate. It was also given written comments. Akgun did not appreciate the scrutiny.
332. After the consultations, it became clear that Akgun was not the type of developer that could address the grave environmental concerns in such a sensitive area. Thus, Akgun was offered to relocate with compensation. Akgun was offered three alternative locations within driving range of the capital city and others further afield. It chose not to accept any one of them without explanation except to say that they were too far from Addis Ababa.⁴³⁷
333. Ethiopia's treatment of Akgun was eminently fair and equitable. Akgun has thus failed to sustain its burden of proof that Ethiopia violated any iteration of the FET principle contained in the Treaty.
334. Lastly, Ethiopia maintains that Akgun's non-impairment claim is a mere restatement of its FET claim (and, hesitatingly, its expropriation claim) and that the claim is not genuinely asserted or advanced but is rather put forth over a mere three paragraphs in its Statement of Claim.⁴³⁸ This claim must equally be rejected for all those reasons stated hereinabove.

⁴³⁷ See, e.g., [First Witness Statement of Yunus Akgun](#), dated 19 November 2020, para. 7.15 (stating that "Akgun [] declined the proposed land options, as they were located too far from Addis Ababa").

⁴³⁸ See [Statement of Claim](#), paras. 5.67-5.69.

b. The Claimant Has Failed to Prove that Ethiopia Expropriated Any Investment

335. In its Statement of Claim, the Claimant failed to plead a claim for expropriation.

336. Rather, the Claimant submitted only that “[a] state is liable for expropriation regardless of whether the deprivation results from a single act or failure to act or by the cumulative effect of a series of actions [or] inactions – i.e., a so-called creeping expropriation,” in reliance upon the following definition supplied by an UNCTAD publication:

“Creeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment.”⁴³⁹

337. The Claimant then simply stated, in conclusory manner and without more, that an expropriation of its “investment” was effected “*through a series of measures culminating in the final suspension of ETIZ in mid-2014*,” that “[t]aken together, *these acts* constitute an indirect *and/or* creeping expropriation of the Claimants’ investment,” and that “[a]s a result of *these measures*, Claimant was deprived of the control, economic use and enjoyment of its investment.”⁴⁴⁰

338. The Claimant did not bother to set out what was this “series of measures,” or what were “these acts.” In other words, Akgun did not bother to set out any “incremental encroachment[s]” on its contractual rights, let alone the eventual destruction of whatever value the 2012 ETIZ Agreement might have had at that time, as it was required to do.

⁴³⁹ [Statement of Claim](#), para. 5.10 (quoting UNCTAD Series on Issues in International Investment Agreements, II, Expropriation, United Nations Publication, 2012, **CLA-031**, p. 11).

⁴⁴⁰ [Statement of Claim](#), para. 5.13 (emphasis added).

339. In its Statement of Defense, Ethiopia established that (i) Akgun did not own any investment that could be expropriated or deprived;⁴⁴¹ (ii) Ethiopia's requests for a proper EIA were mandated under the 2012 ETIZ Agreement and the applicable laws;⁴⁴² and (iii) Akgun rejected the option to relocate and voluntarily abandoned its project.⁴⁴³ There was no "investment" and, for reasons attributable to the Claimant alone, certainly no "investment" that held any economic value to the Claimant; there was thus no value to be destroyed.

340. Ethiopia thereafter submitted that Akgun's expropriation claim falls for its failure to show and prove: (i) the total or near total destruction of an investment; (ii) a series of illegitimate or arbitrary regulatory or other State measures; (iii) that the EIA requirement was unlawfully imposed; (iv) that the rejection of the EIA was pretextually rendered; and, overall, for total failure to even identify much less prove (v) any plausible and illegitimate expropriatory intent, motive or purpose.⁴⁴⁴

341. As observed, the standard of expropriation that the Claimant has chosen to invoke ("indirect and/or creeping expropriation")⁴⁴⁵ requires the Claimant, by its own reckoning, to set out "incremental encroachment"⁴⁴⁶ by a "series of measures"⁴⁴⁷ that "eventually destroys (or nearly destroys) the value of his or her investment."⁴⁴⁸ The Claimant, having declined to set out such "series of measures" in its Statement of Claim (as it was required to do), now seeks to cure this defect by setting out in its Reply memorial (for the first time) eight "measures" as would supposedly effect such eventual destruction.⁴⁴⁹

⁴⁴¹ [Statement of Defense](#), Sec. VI.A.i. As seen, the Treaty includes within its definition of "investment" the following: "movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights as defined in conformity with the laws and regulations of the Party in whose territory the property is situated." Treaty, **CLA-001**, Art. I(2)(c). Leasehold rights do not qualify as a property interest.

⁴⁴² [Statement of Defense](#), Sec. VI.A.ii.

⁴⁴³ [Statement of Defense](#), Sec. VI.A.iii.

⁴⁴⁴ [Statement of Defense](#), para. 288.

⁴⁴⁵ [Statement of Claim](#), para. 5.13.

⁴⁴⁶ [Statement of Claim](#), para. 5.10 (quoting UNCTAD Series on Issues in International Investment Agreements, II, Expropriation, United Nations Publication, 2012, **CLA-031**, p. 11).

⁴⁴⁷ [Statement of Claim](#), para. 5.13.

⁴⁴⁸ [Statement of Claim](#), para. 5.10 (quoting UNCTAD Series on Issues in International Investment Agreements, II, Expropriation, United Nations Publication, 2012, **CLA-031**, p. 11).

⁴⁴⁹ See [Reply](#), para. 5.147.

342. The enumeration carries Akgun no further than did its earlier silence.

343. As an initial matter, Ethiopia does not accept that an expropriation may be effected by inaction, for expropriation, being the gravest of the international delicts in the realm of investment protection, may not be accomplished by mere neglect. “Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.”⁴⁵⁰ McLachlan, Shore, and Weiniger have thus observed that while some tribunals “do not find a distinction between actions or inactions to be relevant,” “[t]his lack of attention to State purpose is troubling,” and the “teleologically driven” test is “to be preferred,” for

“the *Olguín* test is more closely connected to the historical origins of expropriation claims; it recognises the proposition that investment treaties do not give foreign investors a guarantee of investment success; and it further recognises that for most tribunals an assessment of indirect expropriation in any of its forms has not somehow been disconnected from a requirement of State conduct of some sort.”⁴⁵¹

344. Akgun sets out the eight “measures” which, in its most recent telling, “amounted in the aggregate to an expropriation of [its] investments” as follows:

- “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”;
- “Implying that it would not demand an EIA for ETIZ [...]”;
- “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”;
- “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”;

⁴⁵⁰ *Mr. Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award of 26 July 2001, *ICSID Review – Foreign Investment Law Journal*, [RLA-53](#), para. 84.

⁴⁵¹ CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2d ed. 2017), [RLA-54](#), para. 8.72.

- “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”;
- “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”;
- “Failing to propose suitable alternative lands for ETIZ after admitting that it made a mistake with the initial land selection or allocation”; and
- “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.”⁴⁵²

345. Akgun’s desperation in seeking to belatedly conceive any semblance of a “series of measures” in satisfaction of its own standard is evident, for these eight “measures” consist essentially in false factual allegations which, even if true, are not by their nature capable of comprising an expropriation event.

346. Put simply, the only “measure” which, *even if true*, could “encroach[.]” any “ownership right” that Akgun might have had is a wrongful suspension of works, in tandem with a failure to offer suitable alternative lands.⁴⁵³ Having earlier failed to set out a “series of measures” (as its own test requires), Akgun now casts about to embellish the only true “measure” it invokes by leaning upon a contrived chain of empty allegations. When one strips aside the tired narrative of deceit, there is nothing more.

347. The Claimant, in choosing to plead the notion of “indirect and/or creeping expropriation,”⁴⁵⁴ recognized and confirmed that the suspension of works alone is not sufficient to constitute a taking. The Claimant thereby assumed the burden to demonstrate further “measures” to this end. *Akgun concurrently failed in its Statement of Claim to set out any single measure aside from the same suspension.* The Claimant has thus belatedly sought to concoct a series

⁴⁵² Reply, para. 5.147.

⁴⁵³ As noted, a suspension of works is the single measure that Akgun set forth in its Statement of Claim. See [Statement of Claim](#), para. 5.13.

⁴⁵⁴ [Statement of Claim](#), para. 5.13.

of “measures” that it might hitch onto the so-called suspension letter in order to reach out for the threshold of expropriation but has, in so doing, failed to add anything of weight whatsoever to the original measure itself (the insufficiency of which is already admitted).

348. As has been extensively set out and need not be here repeated, Ethiopia did not “[o]rder[] Akgun to suspend works in the name of a purported EIA ‘requirement’ that did not in fact exist.”⁴⁵⁵ Rather, the developer’s obligation of rigorous environmental review is firmly grounded in both law and contract.⁴⁵⁶ It is an obligation that Akgun failed ever to meet.⁴⁵⁷

349. Further, Akgun now acknowledges and confirms (as it must) that an offering of suitable alternative lands would serve to independently defeat its claim,⁴⁵⁸ but chooses to factually dispute the suitability of such lands as were, in the event, offered to it.⁴⁵⁹ Yet, *Akgun has declined to introduce evidence such as might prove the non-suitability of the offered lands*. Instead, Akgun rests upon (i) a single video of one single such site;⁴⁶⁰ (ii) the self-serving testimony of its own principals;⁴⁶¹ and nothing more.

350. The dearth of evidence is unsurprising, for the lands offered were eminently suitable.⁴⁶² To demonstrate this truth, Ethiopia, for its part, has introduced four additional videos, taken by Akgun itself but earlier withheld from this Tribunal, the audio of which features favorable contemporaneous commentary by none other than Messrs. Yusuf and Yunus Akgun.⁴⁶³

⁴⁵⁵ Reply, para. 5.147.6.

⁴⁵⁶ See Secs. II.B and II.C *supra*.

⁴⁵⁷ See Secs. II.E and II.F *supra*.

⁴⁵⁸ See, e.g., Reply, para. 5.128 (now describing Ethiopia’s “expropriatory measures” as “culminating in its July 2014 suspension letter *and* its failure to offer suitable alternative land”) (emphasis added). Akgun has here admitted that an offering of suitable alternative sites forestalls a destruction of any “investment” and thus bars a finding of expropriation.

⁴⁵⁹ The standard that Akgun appears to endorse is one of adequate suitability. See Reply, para. 2.1.7 (stating that “Respondent... committed to... an *adequately suitable* replacement site”) (emphasis added).

⁴⁶⁰ See Reply, para. 2.190 (citing Video taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit C-140** and Transcription of the video taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit C-141**).

⁴⁶¹ See, e.g., **First Witness Statement of Yunus Akgun**, dated 19 November 2020, para. 7.15 (stating that “Akgun [] declined the proposed land options, as they were located too far from Addis Ababa”).

⁴⁶² See paras. 190-194 *supra*.

⁴⁶³ See para. 191 *supra*.

Ethiopia has also offered visual aid in the form of a map indicating the various geographical localities.⁴⁶⁴

351. The reality is that following Akgun's failure to discharge its obligations of environmental study, Ethiopia offered numerous suitable sites, in proximity to Addis Ababa and otherwise. Ethiopia enhanced these proposals of alternative lands with generous offers of compensation in the form of rent abatement and tax exemption.⁴⁶⁵ But Akgun refused it all, for reasons known only to itself.

352. The Claimant's favored arbitral case in seeking to sustain its claim of creeping expropriation is none other than *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*.⁴⁶⁶ In the Claimant's words, "[t]he facts of [its] 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."⁴⁶⁷ This submission is stunning for its audacity. The Claimant acknowledges that the *Biloune* tribunal "concluded that the **totality of the circumstances** effected an indirect expropriation, because together they caused an 'irreparable cessation of work on the project,'"⁴⁶⁸ and elsewhere quotes that tribunal as finding that "[w]hat is clear is that the conjunction of the **[measures]** had the effect of causing the irreparable cessation of work on the project."⁴⁶⁹

353. A full quotation of this passage would have read as follows:

⁴⁶⁴ See p. 87 *supra*.

⁴⁶⁵ See, e.g., Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, [Exhibit C-017](#) ("H.E. Dr. Arekebe Oqubay also expressed that [Ethiopia] can allocate a land for free in Hawasa or Dire Dawa cities to Akgun GROUP and provide tax exemption for 15 years").

⁴⁶⁶ See [Reply](#), paras. 5.160 *et seq* (citing *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, 95 I.L.R. 183, **CLA-121**).

⁴⁶⁷ [Reply](#), para. 5.161.

⁴⁶⁸ [Reply](#), para. 5.160 (quoting *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, 95 I.L.R. 183, **CLA-121**, p. 209) (emphasis added).

⁴⁶⁹ [Reply](#), note 909 (quoting *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, 95 I.L.R. 183, **CLA-121**, p. 209) (emphasis added).

This Tribunal must determine whether the above facts constitute, as the Claimants charge, a constructive expropriation of MDCL's assets and Mr Biloune's interest in MDCL. The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role

Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana,
95 I.L.R. 183, CLA-121, p. 209

354. The tribunal wasn't finished:

the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events.

Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana,
95 I.L.R. 183, CLA-121, p. 209

355. The award finally reads in dispositive part:

The Tribunal therefore holds that the Government of Ghana, by its actions and omissions culminating with Mr Biloune's deportation, constructively expropriated MDCL's assets, and Mr Biloune's interest therein, not later than December 24, 1987. The Claimants are therefore entitled to compensation.

Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana,
95 I.L.R. 183, CLA-121, p. 210

356. In other words, in the Claimant’s favored case, the “stop work order” *was but the very first* in a “series of measures” (or “incremental encroachment[s]”) ultimately “culminating” in expulsion (“deportation... without possibility of re-entry”). Akgun, for its part, relies upon culmination by stoppage of works; Akgun relies upon a suspension of works as being not the first in its now-offered “series of measures” but rather the very culmination of its own expropriation.⁴⁷⁰

357. Separately, the Claimant does not dispute that the State’s intent, motive, or purpose may be relevant considerations in the expropriation inquiry,⁴⁷¹ and openly acknowledges that “[s]ome 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,” but that “[t]o avail itself of the police powers doctrine” a State “must show that its regulatory or administrative measures were *non-discriminatory*.”⁴⁷² The Claimant then quotes McLachlan, Shore and Weinger: “The discriminatory character of the taking has long been an influential factor in determining expropriation.”⁴⁷³

358. Akgun next proffers perhaps its boldest allegation of all: “Respondent *belatedly invoked the EIA requirement as part of its discriminatory machinations* to halt the ETIZ project in favor

⁴⁷⁰ See [Statement of Claim](#), para. 5.13 (stating that an expropriation was effected “through a series of measures culminating in the final suspension of ETIZ in mid-2014”); see also [Reply](#), para. 5.128 (now describing Ethiopia’s “expropriatory measures” as “culminating in its July 2014 suspension letter and its failure to offer suitable alternative land”).

⁴⁷¹ See, e.g., [Reply](#), para. 5.175 (stating only that “‘intent’ is less important than ‘effect’”).

⁴⁷² [Reply](#), para. 5.179 (emphasis in original) (citing *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, [CLA-048](#), para. 255) (“[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare”).

⁴⁷³ [Reply](#), para. 5.179 (quoting CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), [CLA-123](#), para. 8.145) (citing American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, § 712 comment g) (“a state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if is not discriminatory ... and is not designed to cause the alien to abandon the property to the state or sell it at a distress price”). See also 2021 Model Foreign Investment Protection Agreement, Government of Canada, [RLA-52](#), Art. 9(3) (“[a] non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation”) and paras. 297-299 *supra*.

of the Condominium Project it preferred.”⁴⁷⁴ Akgun ventures further still, submitting to this Tribunal that Ethiopia’s “continued insistence on an EIA for ETIZ” was “*intended and did in fact target ETIZ and cause its demise*.”⁴⁷⁵

359. These fantastical statements reside in the realm of idle gossip alone and are leveled without a shred of evidentiary support. As Ethiopia’s witnesses have confirmed, its EIA process is established in law and was initiated and conducted for the sole purpose of safeguarding the public health and welfare in proximity to key sources of water for the burgeoning population of its capital city,⁴⁷⁶ precisely an instance of “bona fide regulations falling within its police powers.”⁴⁷⁷ It has been amply shown that the so-called suspension letter merely (i) highlights the environmental concerns that multiple agencies had raised; (ii) describes the nature of the relevant environmental issues; (iii) indicates the illegality of the commencement of construction works prior to the approval of an EIA; (iv) requests the submission of an adequate EIA; and (v) suspends construction until such a time as the EIA would have been presented.⁴⁷⁸ The steps that the Ministry of Industry has taken, as documented in the letter, show legitimate steps to ensure regulatory compliance consistent with the contractual and legal obligations that the Claimant assumed under the Agreement that it signed.

360. Ultimately, a total destruction of value is a necessary but not a sufficient condition to a finding of expropriation,⁴⁷⁹ for where expropriation is, in its classical definition and as a generally recognized principle of international law, *a taking of property*, there is only an expropriation where the measure is so *extreme and punitive* as to destroy all value of an investment.⁴⁸⁰ Ethiopia has shown that the “measures” relied upon by the Claimant are not

⁴⁷⁴ Reply, para. 5.180 (emphasis added).

⁴⁷⁵ Reply, para. 5.184 (emphasis added).

⁴⁷⁶ See generally Witness Statement of Mr. Ahmed Abteu, dated 12 March 2021 and [Witness Statement of Mr. Sisay Gemechu Edo](#), dated 12 March 2021.

⁴⁷⁷ Reply, para. 5.179.

⁴⁷⁸ See Letter from Ministry of Industry to Akgun, dated 24 July 2014, [Exhibit C-016](#).

⁴⁷⁹ See, e.g., CAMPBELL McLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), [RLA-54](#), para. 8.88 (“the ‘sole effect doctrine’ (ie that the effect on the investor is the only relevant criterion) remains a highly controversial approach to indirect expropriation”).

⁴⁸⁰ As seen in the words of the *Burlington Resources v. Republic of Ecuador* tribunal, “[i]t must be shown that the investment’s continuing capacity to generate a return has been virtually extinguished.” *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, [RLA-12](#), para. 399.

capable of comprising such an event.⁴⁸¹ This truth is inescapably affirmed where no conduct of Ethiopia has effected a destruction of whatever value any “investment” of Akgun might have had as a matter of fact.

361. For Akgun’s expropriation claim to succeed requires that Ethiopia’s conduct reduced the value of the “investment” to zero at the time of the so-called suspension letter in July 2014.⁴⁸² This self-evidently did not happen. It cannot be contested that Akgun failed to dedicate a rigorous level of attention to the exercise of environmental review, as was legitimately expected and required. Following Akgun’s failure to meet its obligations under law and contract, Ethiopia offered Akgun *two alternative options*: first, the possibility to alter the mix of industries it had intended or, second, to acquire various alternative lands with generous rent abatement and tax forgiveness,⁴⁸³ all of which Akgun declined and elected instead to seek treaty recourse.

362. In order for this Tribunal to find that there has been an expropriatory deprivation, it would necessarily have to find that Akgun held a singular discretion in its unreasonable refusals. Not even Akgun itself puts forth such a suggestion. Yet this is the assertion that is necessary to sustain the expropriation claim. The value that any “investment” might have had to the Claimant was destroyed by the Claimant itself.

⁴⁸¹ See paras. 344-347 *supra*.

⁴⁸² See, e.g., [Expert Report of Laura Hardin of Alvarez & Marsal](#), dated 19 November 2020, para. 61 (wherein the expert witness states her selection of 1 July 2014 as “a [valuation] date just preceding the date I have been instructed that Claimant’s Investment was effectively destroyed”).

⁴⁸³ See, e.g., [Second Witness Statement of Yusuf Akgun](#), dated 17 October 2021, paras. 5.2-5.3. In the same manner that the Claimant appears to mistakenly believe it held an entitlement to the originally contemplated land, *see* note 63 *supra*, the Claimant appears to believe it held a right to develop any industries it might wish. See, e.g., [Reply](#), para. 5.163 (“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 [the] 2010 ETIZ Agreement and 2012 ETIZ Agreement”) (emphasis in original). This belief is equally mistaken. The Claimant held no entitlement to any particular mix of industries; indeed the governing contractual instrument that the Claimant here references offers only sparse aspirational language. See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(13) (stating that Akgun shall “take in to account” the industrial development strategy of Ethiopia) and Art. 8(14) (stating that Akgun shall “provide priorities” for certain industries enumerated).

363. For all of these reasons, Akgun’s expropriation claim falls for its failure to show and prove: (i) the existence of an investment of economic value, (ii) the total or near total destruction of such investment; (iii) a series of illegitimate or arbitrary regulatory or other State measures; (iv) that the EIA requirement was unlawfully imposed; (v) that the rejection of the EIA was pretextually rendered; and, overall, for total failure to even identify much less prove (vi) any plausible and illegitimate expropriatory intent, motive or purpose.

c. The Claimant Has Failed to Prove that Ethiopia Violated Any Umbrella Clause Obligation

364. Akgun claims that Ethiopia breached umbrella clause obligations.⁴⁸⁴ The claim must be roundly rejected on numerous jurisdictional grounds as stated in Section III.D above.

365. As for the merits, in its Statement of Claim, Akgun put forth only so-called umbrella clause claims as were founded in provisions the Claimant selected within the 2012 ETIZ Agreement.⁴⁸⁵ Akgun listed six contractual commitments and simply said that all of them were breached without more.⁴⁸⁶ Ethiopia responded to each one as follows:

- i. “The Ministry undertakes to facilitate possible supports of all governmental organs of various levels, during the construction, development and operation of the [industrial zone].”⁴⁸⁷

This is true and the record would show that the Ministry has provided extensive assistance and facilitation to the proponents of the ETIZ project.

⁴⁸⁴ See [Statement of Claim](#), Sec. 5.E and [Reply](#), Sec. 5.D.

⁴⁸⁵ See [Statement of Claim](#), paras. 5.78-5.80.

⁴⁸⁶ See [Statement of Claim](#), para. 5.80.

⁴⁸⁷ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(1).

- ii. “The GOE undertakes that there shall not be any expropriation except in conformity with the relevant laws; in connection with the Land use right, Parcels, plants, enterprises and/or factories to be established over the Land.”⁴⁸⁸

Ethiopia never expropriated anything. This has been elaborated in Section V.B immediately above.

- iii. “For the purpose of ensuring the realization of the Project in full, the GoE hereby undertakes to provide adequate energy power including energy lines up to red line of the Project at its own expenses and that the [industrial zone] will not suffer undue power interruption.”⁴⁸⁹

The ETIZ project unfortunately never reached this point due to Akgun’s failure to meet threshold contractual conditions; this promise would otherwise have been honored without difficulty.

- iv. “The GOE undertakes to bring telecommunication up to the red line of the project at its own expenses.”⁴⁹⁰

The ETIZ project unfortunately never reached this point due to Akgun’s failure to meet threshold contractual conditions; this promise would otherwise have been honored without difficulty.

- v. “In the case where the Project is suspended or stopped or the Land is returned to the Ministry due to third persons, legal entities or civil society organizations and similar external factors without any default which is attributable to the Developer, any and all

⁴⁸⁸ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(2). *See also* note 310 *supra*.

⁴⁸⁹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(8).

⁴⁹⁰ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(9).

direct and indirect losses of the Developer shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the [Treaty].”⁴⁹¹

This is an important provision because it not only anticipates that the project could be suspended due to third parties including civil society organizations (including because of environmental concerns) but it also sets forth the proper legal recourse to remediate any suspensions that may cause harm to the investor. The parties to this Agreement were, however, very careful to prescribe that such remedy is available only if the land is returned to the Ministry through no fault of Akgun. If such is due to the developer’s fault, as it is here, there is no obligation arising out of this particular provision (although this is understandably not a waiver of all remedies by the developer). In any case, since the suspension occurred due to Akgun’s own fault, this provision is of no help to the Claimant.

- vi. “If the investment made within the scope of the Project is stopped or suspended by a court order or administrative decision without any default which is attributable to the Developer, any and all direct and indirect losses of the Developer shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the [Treaty].”⁴⁹²

Similar to the fifth point, this provision also foresees legal remedy for harm that might befall the investor through no fault of its own. Since the evidence shows that the project was suspended because of Akgun’s failure to present an acceptable EIA, this provision similarly cannot be a source of liability for Ethiopia. On the contrary, the formulation of this provision, just like the one immediately preceding it, shows that the contracting parties anticipated remedy under the provisions of Ethiopian law and the Treaty. These provisions also make clear that the parties anticipated the use of courts and administrative tribunals in the course of implementation of the project and added remedies for the event that such institutions might fail to offer

⁴⁹¹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(10).

⁴⁹² 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 11(11).

adequate remedy. This is not in any way extraordinary. The Claimant does not claim and cannot show that it even attempted to use any domestic administrative or judicial processes that these provisions openly anticipate.

366. The Claimant has now sought to conceive additional bases of its so-called umbrella clause claim in a bid to muster anything that might bear some hallmark of actionability, including extra-contractual bases.⁴⁹³ The effort is equally futile. Ethiopia confines itself to a brief response on the merits of these new items in the interest of completeness.

367. Akgun submits that Ethiopia “[b]reached [i]ts [o]bligation to [a]llocate the [l]and [s]uitable for the ETIZ [p]roject”⁴⁹⁴ and “[b]reached [i]ts [o]bligation to [p]rovide Akgun with the 80-[y]ear [r]ight of [u]se of the ETIZ [s]ite for the [p]urpose of ETIZ [d]evelopment.”⁴⁹⁵

368. Thus, Akgun’s breach of contract claim would now be for the very act of allocation of the land where environmental studies later raised doubts as to its suitability for the intended purpose. Akgun would have this Tribunal believe that Ethiopia bore the exclusive responsibility for environmental studies and that Akgun assumed it got the land free of any environmental obligations.⁴⁹⁶ It is simply impossible that Akgun believed this at the time. If it did, it was not justified, not only because it signed an agreement containing numerous express provisions concerning the developer’s environmental obligations but also because of the high sensitivity of the initial location, which sensitivity was expressly stated in the same agreement.⁴⁹⁷ Beyond the contractual provisions, Akgun cannot credibly assert that it thought it could embark on the largest industrial development project in Africa next to the water supply basin of one of the largest cities in Africa without demonstrating environmental

⁴⁹³ See [Statement of Claim](#), Sec. 5.D.(ii) (“Ethiopia Violated Other Specific Commitments It Entered into With Respect to Akgun’s Investment”).

⁴⁹⁴ [Statement of Claim](#), Sec. 5.D.(i).a.

⁴⁹⁵ [Statement of Claim](#), Sec. 5.D.(i).b.

⁴⁹⁶ See [Reply](#), para. 5.198 (“Since the [Ministry of Industry] 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.”).

⁴⁹⁷ See 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10).

compliance. Indeed, it is saying that the very act of Ethiopia's request for an acceptable EIA was in breach of contract. The claim is quite simply frivolous.

369. The Claimant next submits that Ethiopia “[b]reached [i]ts [o]bligation to [f]acilitate [i]mplementation of the [p]roject,”⁴⁹⁸ “[b]reached [i]ts [o]bligation [n]ot to [e]xpropriate,”⁴⁹⁹ and “[b]reached [i]ts [o]bligation to [p]ay [d]irect and [i]ndirect losses.”⁵⁰⁰ Each of these has been addressed and none is requiring of further response.⁵⁰¹

370. Finally, Akgun submits that “Ethiopia provided a specific commitment to relocate ETIZ”⁵⁰² and follows with a repetition of the erroneous assertion that “Ethiopia decided to relocate ETIZ by mid-2014 at the latest.”⁵⁰³ As has been established by meticulous examination of the record, the factual conclusion that the Claimant here seeks to draw is simply in error.⁵⁰⁴ As has been extensively set out, Ethiopia reached a decision to relocate ETIZ to a less sensitive site only after Akgun failed *for a third time* to present a minimally respectable EIA, and thereby failed to demonstrate even an elementary commitment to environmental stewardship.⁵⁰⁵

371. The Claimant submits that the Respondent thereafter “provided the specific written commitment to Akgun to relocate ETIZ to an alternative site” in June 2015 but “to date Respondent has not complied with its commitment” and “[t]herefore, Respondent is in breach of its commitment to relocate ETIZ.”⁵⁰⁶

372. In point of fact, the weight of the evidence abundantly demonstrates that, following Akgun's failure for a third time to present a minimally respectable EIA, *Ethiopia offered eminently*

⁴⁹⁸ [Statement of Claim](#), Sec. 5.D.(i).c.

⁴⁹⁹ [Statement of Claim](#), Sec. 5.D.(i).d.

⁵⁰⁰ [Statement of Claim](#), Sec. 5.D.(i).e.

⁵⁰¹ See para. 365 *supra*.

⁵⁰² [Reply](#), para. 5.217.

⁵⁰³ [Reply](#), para. 5.217 (citing Letter from Prime Minister to Ministry of Industry, dated 22 July 2014, **Exhibit C-131**).

⁵⁰⁴ See paras. 126-131 *supra*.

⁵⁰⁵ See [Statement of Defense](#), Secs. III.C, III.E, and III.F and Secs. II.F and II.G *supra*.

⁵⁰⁶ [Reply](#), para. 5.218 (citing Letter from Ministry of Industry to Akgun Construction, dated 17 June 2015, **Exhibit C-031**).

*suitable alternative lands, in proximity to Addis Ababa and otherwise, accompanied by generous proposals for rent abatement and tax forgiveness, all of which Akgun elected to decline.*⁵⁰⁷ The statement that Ethiopia “has not complied with its commitment” to relocate the ETIZ project borders on the malicious for the degree of its falsity.

373. For all of the above reasons, Akgun’s umbrella clause claims must be rejected in their entirety.

VI. DAMAGES

a. Introduction

374. The numerous fatal defects pervading the Claimant’s damages claims that Ethiopia has earlier identified remain uncured in its Reply memorial.⁵⁰⁸ Ethiopia now offers the following opening observations on the quantum of damages Akgun has claimed.

375. Akgun fails to apply its damages analysis across its own various “investments.” As best as Ethiopia can discern, the Claimant has declined to attach any claim for loss or injury to two out of the four “investments” it has earlier proffered for purposes of pursuing arbitral jurisdiction under the Treaty.⁵⁰⁹ In the Claimant’s own words, its “investments” are “(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.”⁵¹⁰ Notwithstanding this submission, the Claimant has advanced no claim for injury or loss in respect of “know-how required to develop an industrial city” or “the materials and equipment needed to build ETIZ.” Those proffered “investments” are vacant where the Claimant has declined to attach any plea for remedy.

⁵⁰⁷ See paras. 190-194 *supra*.

⁵⁰⁸ See [Statement of Defense](#), Sec. VII.

⁵⁰⁹ See [Reply](#), para. 3.8.

⁵¹⁰ [Reply](#), para. 3.8.

376. Ethiopia is left to surmise that the only objects of the Claimant’s damages claims are the two remaining “investments” (namely “rights under the 2012 ETIZ Agreement” and “the Project as a whole”), between which two the Claimant apparently does not attribute any difference. Instead, the Claimant has simply put forth three alternative measures of damages, each of which corresponds to a total loss of “the rights” or “the Project,” and thus each of which corresponds to an expropriation event.⁵¹¹ In other words, the Claimant has undertaken the task of establishing a taking by Ethiopia. On the facts of this case, Akgun falls so far short of this threshold so as to merely mock the principle itself. This truth is fatal to all the Claimant’s claims.

377. Moreover, even if all of the treaty breaches claimed were to be cumulatively proven, Akgun has failed to show a causal relationship between any such violation and the claimed injury or damage, for Akgun has failed to show that any “harm” it may have incurred has been caused by any wrongful conduct on the part of Ethiopia.

378. That is because there is none.

b. Akgun Has Again Declined to Defend the Quality of its Environmental Studies, The Sufficiency of Which is a Precondition to the Realization of Any Value

379. The Claimant first submits that “[p]ervading 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.’”⁵¹² The Claimant adds, for good measure, that “[a]s to the latter, Respondent’s contention is not only conclusory but unsubstantiated.”⁵¹³

⁵¹¹ See [Statement of Claim](#), dated 20 November 2020, Secs. 6.C-6.E and Reply, Secs. 6.A(ii)-(iv).

⁵¹² [Reply](#), para. 6.2.

⁵¹³ [Reply](#), para. 6.3.

380. The Claimant appears not to appreciate the burden that it bears in establishing the elements of a successful damages claim. It is precisely the identification of *which wrongful act* has caused *which specific injury* that is the very essence and function of the damages inquiry.⁵¹⁴ It is an inquiry that the Claimant has now failed for a second time to confront.⁵¹⁵

381. The Claimant submits (incorrectly) that Ethiopia’s arguments on damages “turn entirely on its characterization of the EIA as a ‘precondition’” where the “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’ and insists instead that ‘*the Agreement holds precisely zero value* unless and until this regulatory requirement [the EIA] is cleared.’”⁵¹⁶

382. While this truth presents one fatal defect to the Claimant’s damages claims, it falls very far from being the only one.

383. The Claimant next falls back upon its false factual narrative and devolves it even further, declining again to defend the quality of its proffered environmental studies and instead grasping toward the gratuitous submission that the project failed because Ethiopia’s ministries “*concealed from Akgun*” a decision to relocate the project, “*deceived Akgun*”

⁵¹⁴ As earlier noted, see [Statement of Defense](#), para. 344 and note 391, the position in international law is admirably articulated in the final award in the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*:

“*It is therefore insufficient* to assert that simply because there has been a ‘taking’, or unfair or inequitable conduct, there must necessarily have been an ‘injury’ caused such as to ground a claim for compensation. Whether or not *each wrongful act* by the Republic ‘*caused injury*’ such as to ground a claim for compensation must be analysed in terms of *each specific ‘injury’* for which [the claimant] has in fact claimed damages.”

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award of 24 July 2008, [RLA-34](#), paras. 804-805 (citing ILC ARTICLES ON STATE RESPONSIBILITY, [CLA-042](#), Art. 31(2)) (emphasis added).

⁵¹⁵ As further examined below in Sec. VI.C immediately below, the conclusion to be reached is that the Claimant has pled a case for damages on the basis of total investment loss corresponding to an expropriation event. The Claimant has foregone the opportunity to seek such sort of damages as might arise from a breach of any of the lesser treaty standards; the Claimant has not sought to demonstrate what injury might flow from Ethiopia’s conduct should it fail to establish an eviction, as it inevitably does.

⁵¹⁶ [Reply](#), para. 6.6 (emphasis in original).

into thinking that it could go forward on the Sendafa site, and “*fooled Akgun*” with “*empty promises*” to provide alternative land.⁵¹⁷

384. As now seen, Akgun’s grievous allegations do not reconcile with reality.⁵¹⁸ The simple truth is that Akgun repeatedly and resoundingly demonstrated its unwillingness or inability to meet the requisite requirements of environmental stewardship over a period extending toward two years and thereafter declined the offer of suitable alternative lands, without which any “rights” in “the Project” are bereft of any value.

c. Akgun Has Failed to Establish the Elements of a Damages Claim

385. The Claimant has alleged four breaches of the Treaty: (i) the denial of fair and equitable treatment; (ii) impairment through unreasonable or discriminatory measures; (iii) indirect expropriation; and (iv) breach of an imported umbrella clause.⁵¹⁹ Compensation is due when conduct constituting a violation of a treaty standard invoked causes a quantifiable loss.⁵²⁰

386. In its Statement of Defense, Ethiopia observed that the Claimant had asserted a blanket entitlement to receive full investment value without bothering to set out the requisite linkage as between this injury it chose to allege (loss of full investment value) and any of the four enumerated treaty breaches it chose to plead.⁵²¹ Instead, the Claimant simply set out three alternative measures of damages (each a method of measuring total investment loss) without more.⁵²² In so doing, the Claimant failed to plead a case for damages.

387. To claim damages for a total investment loss, Akgun must prove that unlawful conduct by Ethiopia extinguished all value of the “investment,” for where a claimant seeks (as Akgun has) full investment value, it bears the burden to prove that full investment value has been

⁵¹⁷ Reply, para. 6.8 (emphasis added).

⁵¹⁸ See paras. 126-131 and 190-194 *supra*.

⁵¹⁹ See Reply, Sec. 5.

⁵²⁰ The self-evident causation requirement is recognized in the ILC Articles on State Responsibility and their accompanying commentary. See ILC ARTICLES ON STATE RESPONSIBILITY, CLA-042, Art. 31.

⁵²¹ See Statement of Defense, paras. 342-344.

⁵²² See Statement of Claim, Secs. 6.C-6.E and Reply, Secs. 6.A(ii)-(iv).

nullified. In order to attain such class of damages as it seeks, Akgun must establish unlawful conduct by Ethiopia that is extreme so as to effectively destroy the “investment.”⁵²³

388. Where the Treaty offers protection against expropriation (including a guarantee against indirect expropriation, as invoked by Akgun in this case),⁵²⁴ the question of Akgun’s entitlement (or not) to full investment value turns upon it. To reach a different finding would be to impermissibly lower the venerable standard under the guise of a different name. Where Akgun has uniquely sought full investment value for total investment loss, it is meaningless for Akgun to claim breach of any of the other treaty standards invoked (which claims are, by their nature, not capable of giving rise to such class of compensation on their own). Akgun has again declined to demonstrate how it might enjoy entitlement to full investment value absent a taking by Ethiopia. That is because it cannot.

389. Having now studied the Claimant’s Reply submission, it may only be concluded that the Claimant has indeed entrenched itself in expropriation and chosen to confine itself to a claim for expropriation damages alone. Either Ethiopia’s actions were so extreme as to destroy the “investment” or they were not. Seeing this truth, Akgun has consciously elected the all-or-nothing approach. Because Ethiopia’s actions plainly do not rise to the confiscatory threshold, the entitlement fails. With it fail Akgun’s claims.

390. Furthermore, even under the faulty premise of a taking, each of the Claimant’s three proffered measures of damages is riven with fatal defects.

d. The Measures of Valuation that Akgun Proffers are Riven with Fatal Defects

391. As a threshold matter, Akgun utilizes the rule of reparation as articulated in the *Case Concerning the Factory at Chorzów* as the governing rule as to measure of damages in

⁵²³ See, e.g., [Expert Report of Laura Hardin of Alvarez & Marsal](#), dated 19 November 2020, para. 61 (wherein the claimant’s expert witness confirms that her valuation corresponds to the expropriation standard where she states her selection of “a [valuation] date just preceding the date [she has] been instructed that Claimant’s Investment was effectively destroyed”).

⁵²⁴ See [Reply](#), Sec. 5.C.

international law.⁵²⁵ Akgun sets out that rule but then proceeds to improperly apply it. The rule is as follows:

“[R]eparation must, as far as possible, wipe out all the consequences of the *illegal act* and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁵²⁶

392. In the present case, the lawfulness of any act by Ethiopia is determined by reference to the Treaty. Thus, the rule is full reparation for injury that is caused by any measure found to constitute breach of a treaty standard invoked.

393. The Claimant chooses to disavow these requirements of the reparation rule and seeks instead to leap unnoticed from full reparation directly to full investment value. In so doing, Akgun bypasses the burden that it bears. Full reparation under international law is emphatically measured not by default reference to full investment value but rather as those damages that are actually and proximately caused by (and thus required to fully remedy) those measures constituting a treaty breach that is found.⁵²⁷

i. Lost Profits

394. The Claimant first states its injury to be US\$ 381,477,179 in lost profits calculated on the basis of a discounted cash flow methodology.⁵²⁸ The Claimant’s expert witness Laura Hardin purports to apply the standard of “full compensation” upon simply being informed that the “[i]nvestment” is “effectively destroyed.”⁵²⁹ As Ethiopia has demonstrated, the proffered

⁵²⁵ See [Reply](#), para. 6.11.

⁵²⁶ *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Judgment No. 13 (Merits) of 13 September 1928, P.C.I.J. Series A, No. 17 (1928), [CLA-063](#), p. 47 (emphasis added).

⁵²⁷ See ILC ARTICLES ON STATE RESPONSIBILITY, [CLA-042](#), Art. 31, cmt. 9 (stating that Article 31 “addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury,” that “[i]t is only ‘[i]njury ... caused by the internationally wrongful act of a State’ for which full reparation must be made,” and that “[t]his phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act rather than any and all consequences flowing from an internationally wrongful act”).

⁵²⁸ See [Statement of Claim](#), dated 20 November 2020, p. 93, Table 5.

⁵²⁹ [Expert Report of Laura Hardin of Alvarez & Marsal](#), dated 19 November 2020, para. 61.

report is *void ab initio* for resting on faulty legal instructions and must be summarily dismissed on grounds of frivolity and lack of common sense alone.⁵³⁰

395. The Claimant now submits that it has “established that it is entitled to the full suite of lost profits damages calculated by its valuation expert.”⁵³¹ Ethiopia first wishes to note that Akgun’s seemingly vigorous pursuit of its “forward-looking damages model”⁵³² does not sit entirely well with the plain meaning of the *Chorzów Factory* rule which, with its purpose to “**wipe out** all the consequences of the **illegal act** and **reestablish** the situation which would, in all probability, **have existed**,” is decidedly backward-looking in its orientation.⁵³³ The “investment” proffered by the Claimant does not remotely approach any possibility of measurement by lost profits in any event.

396. In attempting its impossible lift, the Claimant submits that “various noteworthy aspects” of the industrial zone project “create an objective likelihood that it would have generated significant quantifiable profits.”⁵³⁴ In fact, a cursory examination of these “aspects” serves to expose the Claimant’s manifest evidentiary shortfall:

- “Akgun had already built from scratch a similar, highly successful industrial zone in Istanbul. There can be no question that Akgun had the necessary know-how to succeed on a world class scale.”⁵³⁵

⁵³⁰ See [Statement of Defense](#), Sec. VII.B.

⁵³¹ [Reply](#), para. 6.17.

⁵³² [Reply](#), para. 6.21.

⁵³³ *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Judgment No. 13 (Merits) of 13 September 1928, P.C.I.J. Series A, No. 17 (1928), [CLA-063](#), p. 47 (emphasis added). The commentary to the ILC Articles on State Responsibility offers the following:

“[L]ost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where **an anticipated income stream** has attained **sufficient attributes** to be considered **a legally protected interest** of sufficient certainty to be compensable.”

ILC ARTICLES ON STATE RESPONSIBILITY, [CLA-042](#), Art. 36, cmt. 27 (emphasis added).

⁵³⁴ [Reply](#), para. 6.18.

⁵³⁵ [Reply](#), para. 6.18.1.

This statement is simply false. It is not true that “Akgun had [] built from scratch a similar, highly successful industrial zone in Istanbul.” Rather, it seems that Yusuf Akgun would have participated in the development of the Ikitelli industrial zone in a role the precise scope of which has never been fully delineated in this proceeding.⁵³⁶

- “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.”⁵³⁷

This statement is meaningless toward the end for which it is offered: an observation that “the economics of [industrial] zones are established and well-understood” in general is not transferable to the unique situation and distinctive conditions of any given project in particular, and as such does not offer any insight toward a particular project’s prospects of success.

- “Ethiopia cannot credibly challenge market demand for ETIZ since Ethiopia itself made the creation of such zones a cornerstone of its economic policy. 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.”⁵³⁸

This statement suffers the same defect as the previous one, namely that “market demand” for industrial space in general does not serve as a reliable indicator or predictor as to the result of any project in particular. As for the “committed” and “interested” industrialists, Akgun has evidenced nothing more than exchanges in the context of advertising and promotion.⁵³⁹ As seen in Akgun’s inability to carry even the supposedly low cost of the “self-funding” model under the 2012 ETIZ Agreement, it is apparent that none of these industrialists paid in any funds.

⁵³⁶ See, e.g., [First Witness Statement of Yusuf Akgun](#), dated 19 November 2020, Sec. 2.

⁵³⁷ [Reply](#), para. 6.18.2.

⁵³⁸ [Reply](#), para. 6.18.3.

⁵³⁹ See [Reply](#), note 1023.

- “Akgun had obtained the requisite investment licenses and permits.”⁵⁴⁰

This statement is patently false, for Akgun failed ever to secure requisite environmental clearance, which is a precondition to pursuit of the project.

- “Akgun’s plan of finance did not require third-party investment [or] loans.”⁵⁴¹

This statement is curious for though it may or may not be true that Akgun’s “plan” did not “require” “third-party investment [or] loans,” in the event, Akgun did seek third-party financing but failed to obtain it. In August 2014, Yusuf Akgun wrote that “[f]unding was sought from financial institutions for the zone” but that “[t]he efforts were inconclusive.”⁵⁴² Thus, despite its contractual obligation to fund the entirety of the project on its own,⁵⁴³ *Akgun was not able to carry even those supposedly minimal start-up costs as were necessary to achieve project initiation.* In short, Akgun failed to obtain project financing under the 2010 ETIZ Agreement and failed to do so for a second and final time under the 2012 ETIZ Agreement.

- “The fact that many industrialists had committed to build factories in ETIZ substantiated Akgun’s projected revenues.”⁵⁴⁴

As noted, these “commit[ments]” were not backed by investment on the part of any industrialist and were indeed nothing more than exchanges in the context of marketing communication.

⁵⁴⁰ Reply, para. 6.18.4.

⁵⁴¹ Reply, para. 6.18.5. Notably, Akgun here relies upon its expert witness as “confirming [that] the high probability of [its] success on ETIZ is supported by the ETIZ development model, namely a ‘cost-plus’ model that was to be ‘demand driv[en] and essentially self-funding.’” Reply, note 1025 (citing Expert Report of Laura Hardin of Alvarez & Marsal, dated 19 November 2020, Sec. 5.1.C).

⁵⁴² Draft Letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014, [Exhibit R-68](#) (emphasis added).

⁵⁴³ The 2012 ETIZ Agreement equally provides that “[t]he Developer shall seek, *on its own*, opportunities to get financing from natural persons, legal entities, private equity or venture capital funds, international banks, financial institutions or any other sources with interest to invest in and/or finance the Project in accordance to the rules and regulations of Ethiopia,” 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 12(1) (“**FINANCING OF THE PROJECT**”) (emphasis added), while omitting any obligation to finance on the part of Ethiopia.

⁵⁴⁴ Reply, para. 6.18.6.

- “Akgun’s pricing for the construction of the factories and the ongoing lease payments were in line with the experience at other similar projects.”⁵⁴⁵

Akgun here simply offers, “[b]y way of comparison” with supposedly “similar projects,” “rates” that were supposedly “achieve[d]” in Turkey.⁵⁴⁶ More fundamentally, however, and as seen, it is precisely the “construction of the factories” in Ethiopia that Akgun was financially unable to achieve.

- “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.”⁵⁴⁷

Considerations of costs are never reached in the event where, as here, the obstacle lies in Akgun’s inability ever to meet precisely those costs as were necessary to achieve project initiation (and thus its inability ever to generate any revenue).

- “Akgun had commissioned and circulated feasibility studies for the project that Ethiopian officials had enthusiastically endorsed.”⁵⁴⁸

Finally, Akgun (and its expert witness) here rely (once again) upon nothing more than Akgun’s own promotional materials, all of which are premised upon Akgun’s funding of the project, whereas Akgun has twice proven itself unable to deliver.

397. Acknowledging the factual weakness of the predicates it has proffered as forming the basis of its lost profits claim, the Claimant meekly suggests that “where the respondent’s misconduct occasions [] uncertainty” the burden of proof “should be relaxed or perhaps even

⁵⁴⁵ Reply, para. 6.18.7.

⁵⁴⁶ See Reply, note 1027.

⁵⁴⁷ Reply, para. 6.18.8.

⁵⁴⁸ Reply, para. 6.18.9.

reversed.”⁵⁴⁹ The two authorities that the Claimant here invokes are not kind to the Claimant;⁵⁵⁰ its proposed burden-shifting scheme is to be roundly rejected.

398. The Claimant next acknowledges Ethiopia’s submission that “lost profits may only ever be awarded in the case of an enterprise or going concern with a proven record of profitability” but submits that “that is not so—not in the least.”⁵⁵¹ Instead, the Claimant urges, “[t]ribunals 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.”⁵⁵² A brief consideration of the case law the Claimant offers in support of this notion reveals that, even in the Claimant’s urging, such “other indicia” are far out of reach for Akgun.

399. The first observation one may make is that the Claimant’s favored case law necessarily revolves around the expropriation standard.⁵⁵³ Indeed, within each one of the six arbitral awards upon which the Claimant relies in its lost profits argumentation, the tribunal rendered a finding of an expropriation-level event.⁵⁵⁴ Secondly, the Claimant’s recitation of these six

⁵⁴⁹ Reply, para. 6.20.

⁵⁵⁰ See Reply, note 1031. In the case of *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963), which award the Claimant does not supply (but rather references by quotation featuring in another award), the arbitrator exercised his powers *ex aequo et bono*. See *Gemplus S.A. et. al v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award of 16 June 2010, [CLA-032](#), para. 13-85. In *Gemplus*, the tribunal reached its thinly reasoned result by reference primarily to *Sapphire*, and in any event did so upon a firmer foundation of profit potentiality than Akgun is able to offer on the facts of its case. In other words, even under the rule that the Claimant urges, Akgun has not first met (and cannot meet) its own evidentiary burden so as to reach the point of reversal.

⁵⁵¹ Reply, para. 6.21 (quoting Statement of Defense, para. 374).

⁵⁵² Reply, para. 6.21.

⁵⁵³ The Claimant concedes the point where it freely submits that the method is employed “in expropriation cases.” Reply, para. 6.23.

⁵⁵⁴ The six cases are *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, [CLA-036](#); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, [CLA-016](#); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, [CLA-124](#); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, [CLA-030](#); *Tecnicas Medioambientales Tecmed S.A. v. United States of Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, [CLA-006](#); and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, [CLA-005](#). In the *Gold Reserve* case, the tribunal declined to find a technical expropriation where it considered the State not to have acted in *iure imperii* in terminating the relevant concession contracts. It did find this termination to have unlawfully extinguished all value of the investment before proceeding to award damages on that basis. See *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, [CLA-030](#), paras. 663-668.

cases is so superficial and devoid of analytical comparison to its own present facts that it can amount only to an empty plea. The Claimant has, once again, casually disregarded the burden that it bears.

400. The first case invoked is *Crystallex International Corp. v. Bolivarian Republic of Venezuela*.⁵⁵⁵ The Claimant favorably quotes that tribunal's finding that "once the *fact* of future profitability is established and is not essentially of [a] speculative nature, the amount of such profits need not be proven with the same degree of certainty."⁵⁵⁶ In view of the fatal financing and other challenges that Akgun faced, the "*fact*" of its venture's profitability is far from "established" in this case.

401. The Claimant next rightly acknowledges that, in *Crystallex*, the tribunal reasoned the sufficient certainty of a profitmaking activity "due to the nature of the investment at stake" and "the development stage of the project,"⁵⁵⁷ including the fact that the size of the resource deposits had been established.⁵⁵⁸ As the Claimant further notes, "[t]he tribunal *specifically relied upon* (1) *the importance of the mine at issue* ... and (2) *the stability of the market for gold*."⁵⁵⁹ This attribute of world prices known in global markets is a privilege uniquely enjoyed by minerals and other commodities, not by industrial development.

402. The Claimant next invokes the case of *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* wherein, in Akgun's telling, the tribunal "*considered* the claimant's DCF valuation in determining reparations due ... under the fair market value standard" following an expropriation event.⁵⁶⁰

⁵⁵⁵ *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, [CLA-036](#).

⁵⁵⁶ [Reply](#), para. 6.22 (quoting *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, [CLA-036](#), para. 875) (emphasis in original).

⁵⁵⁷ [Reply](#), para. 6.22 (quoting *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, [CLA-036](#), paras. 875, 877).

⁵⁵⁸ *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, [CLA-036](#), para. 880.

⁵⁵⁹ [Reply](#), para. 6.22 (citing *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, [CLA-036](#), paras. 878-880) (emphasis added).

⁵⁶⁰ [Reply](#), para. 6.25 (citing *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, [CLA-016](#), paras. 810, 813-814) (emphasis added).

403. In the case of *Ioannis Kardassopoulos and Ron Fuchs. v. Republic of Georgia*, the Claimant relates that the tribunal “**combined** an income-based model using the DCF method with a market approach” in the event of an expropriation of the claimant’s oil and gas concession.⁵⁶¹ Here, it is evident that the tribunal took comfort in the greater certainty offered by comparable market transactions over identical property rights, namely rights of extraction of fungible commodities priced in world markets, over which a concessionaire enjoys precisely calculated contractual revenues.⁵⁶² In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, the Claimant turns to yet another case of extractive concession, whose distinctive economic attributes are simply absent from a project of greenfield industrial development.⁵⁶³

404. The Claimant next chooses to highlight the *World Bank Guidelines on the Treatment of Foreign Direct Investment*,⁵⁶⁴ which, as Ethiopia has shown, offer the following:

“[P]articular caution should be observed in applying [the DCF] method as experience shows that investors tend to greatly exaggerate their claims of compensation for lost future profits. Compensation under this method is not appropriate for speculative or indeterminate damage, or for alleged profits which cannot legitimately accrue under the laws and regulations of the host country.”⁵⁶⁵

405. The most the Claimant can muster is to submit that, “[a]t most,” the *Guidelines* “do not foreclose” its proposed method,⁵⁶⁶ whereas the *Guidelines* themselves openly propose

⁵⁶¹ [Reply](#), para. 6.26 (citing *Ioannis Kardassopoulos and Ron Fuchs. v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, [CLA-124](#), paras. 539, 544, 553, 562-563, 595-603) (emphasis added).

⁵⁶² See *Ioannis Kardassopoulos and Ron Fuchs. v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, [CLA-124](#), para. 598 (stating that “[i]t is not common in investment treaty arbitrations that a Tribunal has available to it three arm’s-length, contemporaneous transactions (or potential transactions) to assist in valuing an investment, much less three that converge in a narrow range of value”).

⁵⁶³ See [Reply](#), para. 6.27 (citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, [CLA-030](#)).

⁵⁶⁴ See [Reply](#), para. 6.28.

⁵⁶⁵ *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, World Bank Group (1992), 31 ILM 1366, [RLA-35](#), para. 42 (citation omitted).

⁵⁶⁶ [Reply](#), para. 6.28.

compensation on this basis only “*for a going concern with a proven record of profitability.*”⁵⁶⁷

406. The Claimant elects the same formulation in addressing the case of *Técnicas Medioambientales Tecmed S.A. v. United States of Mexico*, submitting that this tribunal “did not foreclose the [DCF] method either,” but rather that it disregarded the method given the “difficulties in obtaining objective data” in this expropriation case.⁵⁶⁸ It is precisely such “objective data” that Akgun is incapable to supply.⁵⁶⁹

407. The Claimant’s attempt to seek support in the *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* award borders on the fanciful.⁵⁷⁰ The Claimant simply quotes two passages from that decision in the abstract, without so much as feigning any mention to the facts (much less analogizing them to its own). First, Akgun suggests that a claimant “might” attain lost profits “by presenting sufficient evidence of its expertise and proven record of profitability ... in similar circumstances,”⁵⁷¹ apparently suggesting (without saying) that Yusuf Akgun’s participation in an industrial zone in Istanbul bears sufficient similarity to total execution of a greenfield megaproject in Ethiopia. The Claimant then timidly suggests that under the *Vivendi* award lost profits “were not theoretically foreclosed” in reliance upon the following passage:

“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

⁵⁶⁷ *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, World Bank Group (1992), 31 ILM 1366, [RLA-35](#), Art. IV(6)(i) (emphasis added).

⁵⁶⁸ [Reply](#), para. 6.29 (quoting *Técnicas Medioambientales Tecmed S.A. v. United States of Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, [CLA-006](#), para. 186).

⁵⁶⁹ The Claimant favorably cites a passage of this award in which the tribunal found that compensation “must amount to an integral compensation for the damage suffered, *including lost profits.*” [Reply](#), note 1051 (quoting *Técnicas Medioambientales Tecmed S.A. v. United States of Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, [CLA-006](#), para. 195) (emphasis in the Claimant’s quotation). What the Claimant neglects to mention is that the tribunal reached this finding having been convinced of the certainty that there was, in fact, a modest measure of lost profits where the relevant enterprise had operated for a period of two years in an environment of rising revenues.

⁵⁷⁰ See [Reply](#), paras. 6.30-6.31 (citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, [CLA-005](#)).

⁵⁷¹ [Reply](#), para. 6.30 (quoting *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, [CLA-005](#), para. 8.3.4).

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.”⁵⁷²

408. The Claimant omits the final sentence of this paragraph, in which the *Vivendi* tribunal declined to make such a finding: “***This approach was not taken here.***”⁵⁷³

409. The *Vivendi* tribunal reached this result notwithstanding the fact that the claimants there had assumed ownership over an existing water services infrastructure with an existing customer base; in short, an existing and operational utility concession. The *Vivendi* rule upon which Akgun here relies condemns Akgun’s own claims with equal dispatch.

410. The Claimant’s patent failure to meet the standard it sets out is on display one final time in its suggestion that a generalized “risk premium,” as chosen by its expert from amongst various indicators offered in international marketplaces, is adequate to account for the innumerable project-specific risks, which risks foreclose any certainty of having ever earned any revenue at all.⁵⁷⁴ This is all the more so where Akgun failed for a second time to finance the project, as it was obliged to do. The Claimant’s proffering of blue-sky estimates under cover of a “risk premium” as somehow sufficient to satisfy the requisite level of legal certainty for an award of damages fails.⁵⁷⁵

411. The Claimant has submitted that “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***” in former times but suggests “that is no longer

⁵⁷² Reply, para. 6.31 (quoting *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, [CLA-005](#), para. 8.3.10).

⁵⁷³ *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, [CLA-005](#), para. 8.3.10 (emphasis added). The tribunal further stated that “[i]n these circumstances, we conclude that Claimants’ evidence of the value of the concession – in the sum of US\$300,532,000 – based on its lost profits analysis cannot be relied upon and need not be further analysed.” *Id.*, para. 8.3.11.

⁵⁷⁴ See Reply, paras. 6.37-6.38.

⁵⁷⁵ Ethiopia here recalls once more the commentary to the ILC Articles on State Responsibility: “In cases where lost future profits have been awarded, it has been where ***an anticipated income stream*** has attained ***sufficient attributes*** to be considered ***a legally protected interest*** of sufficient certainty to be compensable.” ILC ARTICLES ON STATE RESPONSIBILITY, [CLA-042](#), Art. 36, cmt. 27 (emphasis added).

the case” where, in the Claimant’s telling, the “trend” leads “away from such a dogmatic rule.”⁵⁷⁶ The Claimant refers to “financial scientists”⁵⁷⁷ and suggests that “[t]he calculation of damages under international law follows the science of the valuation of private investments in modern finance,”⁵⁷⁸ and further that “[m]any tools and techniques have been established in the finance industry to estimate the value of nascent businesses” from which international law “borrows.”⁵⁷⁹

412. Ethiopia, for its part, submits that the “dogmatic rule” has not been displaced, and this for good reason. The theories now urged by the Claimant, quite aside from being unhelpful to Akgun on its facts, fall far outside the *Chorzów Factory* rule for reparation under international law. Ethiopia did not assent to such sort of experimentation in acceding to the Treaty.

ii. Loss of Opportunity

413. Akgun next suggests that the Tribunal “could” turn to “lost opportunity” in the event that it finds “the evidence regarding the DCF value” not to be “sufficiently supported.”⁵⁸⁰

414. Quite aside from the fact that this basis of damages suffers the same incurable defect for Akgun by virtue of its inherent assumption of the existence of a harm, Ethiopia maintains that the “loss of opportunity” or “loss of a 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’” and that it is, as such, not a rule that may be employed by a tribunal bound to international law.⁵⁸¹

⁵⁷⁶ Reply, para. 6.24 (emphasis added).

⁵⁷⁷ Reply, para. 6.32.

⁵⁷⁸ Reply, para. 6.34.

⁵⁷⁹ Reply, para. 6.35.

⁵⁸⁰ Reply, para. 6.42.

⁵⁸¹ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits of 30 March 2010, [RLA-36](#), para. 382. The tribunal considered the state of the law to be so evident that it did not invoke any authority (other than to quote, without attribution, the Statute of the International Court of Justice).

415. The Claimant’s invocation of the immediately following sentence within the *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador* award is unavailing.⁵⁸²

The full sentence reads as follows:

“*At most* 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 it is difficult to quantify,’ (sic) as noted in the commentary to the UNIDROIT Principles cited by [Ecuador].”⁵⁸³

416. For the reasons set out, Akgun does not remotely approach the threshold of any such “exceptional situation.”⁵⁸⁴ Put succinctly, the numerous commercial and other risks that Akgun faced, including in its own inability to finance even the modest start-up phase of the project, foreclose any finding of certainty in respect of the existence of future revenues (much less future profits), and thus foreclose any finding of certainty of the relevant harm.⁵⁸⁵

417. Lastly, Akgun seeks again to evoke an exorbitant and discredited burden-shifting scheme.⁵⁸⁶ The Claimant’s lean upon such a plea within yet another experimental theory not forming a part of the applicable international law is courageous. It is to be equally rejected.

iii. Out of Pocket Damages

⁵⁸² See [Reply](#), para. 6.46.

⁵⁸³ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits of 30 March 2010, [RLA-36](#), para. 382 (emphasis added). The *Chevron* tribunal here quoted the 1994 edition of the UNIDROIT Principles of International Commercial Contracts. The current 2016 version relied upon by the Claimant similarly refers to a situation of “harm *the existence of which cannot be disputed* but which it is difficult to quantify.” UNIDROIT Principles of International Commercial Contracts with Official Commentary (2016), [CLA-077](#), Art. 7.4.3, cmt. 2 (emphasis added).

⁵⁸⁴ See para. 396 *supra*.

⁵⁸⁵ The same is seen in the Claimant’s misplaced reliance upon the award in the case of *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, wherein the Claimant quotes the following passage: “[T]he fact that damages cannot be assessed with certainty is no reason not to award damages *when a loss has been incurred*.” [Reply](#), para. 6.48 (quoting *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, para. 215) (emphasis added). The formulation thus requires the certainty of a harm.

⁵⁸⁶ See [Reply](#), paras. 6.49-6.50 and para. 397 *supra*.

418. First of all, Akgun’s claim for out of pocket damages should be dismissed as a classic case of *de minimis non curat lex*, especially as a treaty claim that does not establish that such amounts to “investment” within the meaning of the Treaty. In any case, the following response is given for the sake of completeness.
419. Urging, in the final alternative, that the alleged loss of its “investment” might be measured by “[o]ut-of-[p]ocket [d]amages,”⁵⁸⁷ the Claimant contests Ethiopia’s submission that Akgun’s pursuit of preparatory works at the Sendafa site consisted in unauthorized acts.⁵⁸⁸
420. To the extent that Akgun commenced any works prior to taking receipt of the requisite environmental clearances as set out in both Ethiopian law and the 2012 ETIZ Agreement that Akgun signed, Akgun did so at its own risk in seeking to preempt a legitimate environmental assessment.⁵⁸⁹
421. In addition to the governing laws and the Agreement, Ethiopia expressly requested the Claimant to prepare and present the requisite EIA report immediately upon issuance of its investment permit, for it is common ground between the parties that partial handover of the land occurred in March 2013; the investment permit was issued in April 2013; and the Ministry of Industry’s request came in May 2013. The Claimant, however, continued its pursuit of preparatory works even after receiving the Prime Minister’s express order of suspension, conveyed via the Ministry of Industry, in July 2014.⁵⁹⁰
422. Against this submission, the Claimant offers that provisions within the 2012 ETIZ Agreement “required Akgun to begin development within specified time frames and to

⁵⁸⁷ [Statement of Claim](#), para. 6.81.

⁵⁸⁸ [See Reply](#), Sec. 6.A(iv).

⁵⁸⁹ [See](#), in this respect, [Witness Statement of Mr. Ahmed Abtew](#), dated 12 March 2021, para. 15 (“[t]his act was not only contrary to the letter and spirit of the Agreement and applicable laws but was indeed intended to create new facts on the ground in an effort to make a possible relocation decision difficult”).

⁵⁹⁰ [See, e.g.](#), Letter from Akgun Construction to Ethiopian Electric Utility, dated 27 August 2014, [Exhibit C-022](#) (stating that “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] supply of electric power because it is near to be operational”).

complete development on specified timelines.”⁵⁹¹ But as Ethiopia has shown, the referenced provisions were simply tolled in the event of Akgun’s delay in attaining regulatory approvals. During the more than eighteen months which passed from the time of partial handover in March 2013 to Akgun’s final failed attempt to produce an adequate impact assessment in October 2014, Ethiopia never took steps to terminate the Agreement or enter the land.⁵⁹² Rather, Ethiopia never terminated the Agreement at all, and the land remains idle to this day.

423. The Claimant’s own disturbance of the land in defiance of the requisite environmental requirements being the essence of its assessment of damages, its claim for compensation for out of pocket expenditures lacks causal relationship with an illegal State conduct and is meaningless as such.

e. No Injury to Akgun Was Caused by Any Conduct of Ethiopia In Any Event

424. Akgun bears the burden to prove, with precision, an identifiable injury caused by unlawful conduct of Ethiopia. Akgun has neither proven such an injury nor even seriously sought to do so. Even if there were a breach of any treaty obligation owed, no injury has been caused by such breach as a matter of fact.

425. *It is Akgun that chose to quit the project and exit Ethiopia.* For Akgun’s compensation claim to succeed thus requires that Ethiopia’s *illegal conduct* reduced the value of the “investment” to zero at the time of the so-called suspension letter in July 2014.⁵⁹³

426. This self-evidently did not happen. Following its failure to meet legal and contractual obligations, Akgun was offered accommodations including numerous alternative lands as

⁵⁹¹ Reply, para. 6.61.

⁵⁹² In putting forth its suggestion that Ethiopia “imposed on Akgun the onus to [commence works] under threat of forfeiture,” Reply, para. 6.62, Akgun evidences only a pair of letters dating from September 2012. See, e.g., Reply, para. 5.46 (citing Letter from Investment Office of Oromia to Bereh Woreda Administration Office, dated 18 September 2012, Exhibit C-051). Those letters (occurring as they do six months prior to the time of partial site handover) mark an obvious administrative error on the part of the Oromia regional authorities, for there was, at that time, nothing to forfeit.

⁵⁹³ See Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, Exhibit C-016.

well as generous rent abatement and tax forgiveness, all of which it declined.⁵⁹⁴ Akgun's theory of the case would require that it held a singular discretion in its unreasonable refusal. Not even Akgun itself puts forth such a suggestion, yet this is the assertion that is necessary to sustain the damages claim. Rather, the "loss" of the "investment" was caused by Akgun's own decision, years after the fact, to exit Ethiopia, and thereby to relinquish it.

427. The record is by now abundantly clear that Akgun's departure was a result of its failure to meet environmental conditions and a business decision. In addition to being disappointed by Ethiopia's desire to enforce the contractual and legal commitments on the environment, Akgun faced a variety of adverse events unrelated to the EIA request and chose to exit Ethiopia after it failed, for a second time, to fund the project, as it was required to do.⁵⁹⁵ The financial condition of the sister OYAP enterprise deteriorated dramatically, leading ultimately to seizure of its assets by a creditor.⁵⁹⁶ Meanwhile, financial statements gained in document disclosure seem to confirm that Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. was not all that it seemed.⁵⁹⁷

428. In sum, Akgun's decision to depart has multiple causes but none attributable to Ethiopia's wrongful conduct. This fact is independently sufficient to cause Akgun's compensation claims to fail for lack of causation of the injury alleged.

429. Ethiopia hoped that Akgun would create value because of the expertise it represented itself to have. Following Akgun's abandonment, the site remains idle to this day. Whatever expenditure Akgun might have made did not create value for Ethiopia. Ethiopia has not

⁵⁹⁴ See Sec. II.G *supra*.

⁵⁹⁵ In the telling of Yusuf Akgun himself, Akgun sought financing from financial institutions in 2014, but the result was "inconclusive." Draft Letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014, [Exhibit R-68](#).

⁵⁹⁶ See Independent Auditors' Report to the Owner, OYAP Ethio Industry and Trading Private Limited Company, dated 18 November 2016, [Exhibit R-66](#) and Revised Financial Statements for the Year ended June 30, 2015 and for the Six-Month Period ended December 31, 2015, OYAP Ethio Industry and Trading Private Limited Company, [Exhibit R-67](#); see also [First Witness Statement of Yunus Akgun](#), dated 19 November 2020, para. 8.7 and paras. 197-198 *supra*.

⁵⁹⁷ See generally 2015 Financial Statements of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., [Exhibit R-69](#); 2016 Financial Statements of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., [Exhibit R-70](#); and 2017 Financial Statements of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., [Exhibit R-71](#).

gained anything from Akgun. Ethiopia has not been benefited in any way. Instead, it has suffered significant loss, as has been set out in its counterclaims.

VII. COUNTERCLAIMS

a. Introduction

430. Should the Tribunal assert jurisdiction over and proceed to adjudicate the Claimant's claims, the Respondent's counterclaims must be decided contiguously with the Claimant's principal claims. First, to entertain the Claimant's claims but decline to hear the Respondent's counterclaims would yield a skewed assessment of the true nature and extent of the rights and obligations agreed by the parties and would have the further effect of sanctioning the Claimant's abusive procedural maneuvering and disregard for its contractual selection of forum. Second, the contractually agreed mechanism plainly allows counterclaims, as does Article VII(1) of the Treaty, where such counterclaims are "in connection with [the] investment."

431. The Respondent further demonstrates below that the Claimant's arguments in defense of its failure to perform its substantive obligations do not withstand scrutiny. Ethiopia thus counterclaims for damages arising out of Akgun's unmitigated failure to perform the 2012 ETIZ Agreement, and specifically Akgun's breach of (i) the obligation to develop an industrial zone; and (ii) the obligation to finance the ETIZ project, all without justification.

b. Jurisdiction

432. The Respondent's counterclaims must be decided alongside any of the Claimant's principal claims for two fundamental reasons. First, the 2012 ETIZ Agreement plainly permits and does not bar counterclaims by a respondent party, while Article VII of the Treaty is also sufficiently capacious to encompass the present counterclaims. Second, well-established principles of fairness, equity, and procedural economy support accepting jurisdiction over

the Respondent's directly related counterclaims, which are central to any determination of the Claimant's claims.

i. If the Tribunal Asserts Jurisdiction Over the Claimant's Claims, It Must Equally Exercise Jurisdiction Over Ethiopia's Counterclaims

433. Ethiopia regards it as beyond reproach that any respondent holds the right to bring counterclaims under the mandatory and exclusive selection of forum within Article 21 of the 2012 ETIZ Agreement, and this under all of the "Ethiopian laws, the [Treaty] and accepted principles of the international law."⁵⁹⁸ If this honorable Tribunal were to usurp the role of the adjudicatory body that all parties have earlier envisaged and agreed, Ethiopia submits that it must exercise a jurisdiction that is coextensive with that which was conferred upon said body, lest a denial of justice occur.
434. If the Tribunal were to consider that a basis of jurisdiction lies in the Treaty, its Article VII(1) applies generally to "[d]isputes between one of the Parties and an investor of the other Party, in connection with his investment."⁵⁹⁹ The ordinary meaning of Article VII(1) is therefore that "disputes [...] in connection with [...] investment" may include claims that the respondent host State may have in connection with the same "investment."⁶⁰⁰ Article VII(I) makes no distinction as between "one of the Parties and an investor of the other Party" with respect to any "[d]isputes."⁶⁰¹
435. While the investor is entitled under the Treaty to choose the forum for the resolution of disputes that may arise, the Treaty does not foreclose the host State from raising counterclaims that are directly related to the principal claims. As noted in Ethiopia's Statement of Defense, "it simply does not follow from the investor-claimant's privilege of

⁵⁹⁸ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 21(1), (5).

⁵⁹⁹ Treaty, [CLA-001](#), Art. VII(1) (emphasis added).

⁶⁰⁰ See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, [RLA-55](#), para. 1183.

⁶⁰¹ Treaty, [CLA-001](#), Art. VII(1). See also *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, [RLA-55](#), paras. 1183-1187.

initiation by first notifying a *dispute* that it thereafter holds a monopoly on *claims*,” for where, as here, Akgun elects to exercise that privilege, Akgun has opened the gate to all that may follow.⁶⁰² By abusively seeking to supplant the contractually agreed forum, the Claimant has invited the present counterclaims.

436. Tribunals confronted with provisions akin to the one in question, i.e. where “[n]o distinction is made in respect of the party entitled with the rights that are at the basis of the dispute,” have found that these rights “can be rights of the investor *as they can be rights of the host State*.”⁶⁰³ In *Urbaser v. Argentina*, the tribunal asserted *prima facie* jurisdiction over Argentina’s counterclaim on the basis that the dispute settlement provision in question could not reasonably be read as excluding counterclaims by the host State from its scope. The tribunal reasoned that while “[i]t is certain and undisputed that the BIT’s main and manifestly prevailing focus is on [...] inducing and protecting foreign investments,” there was nothing in the treaty’s language “stating that the host State would not have any right under the BIT.”⁶⁰⁴

437. The language in the Treaty in this case is broader than that of the Romania-Greece BIT that was before the tribunal in *Spyridon Roussalis v. Romania* or the Canada-Venezuela BIT in *Rusoro v. Venezuela*, two key cases upon which the Claimant chooses to rely.⁶⁰⁵

438. In *Roussalis*, the BIT provision regarding disputes between the parties was restricted to “[d]isputes 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

⁶⁰² [Statement of Defense](#), para. 397 (emphasis in original).

⁶⁰³ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, [RLA-55](#), para. 1187 (emphasis added).

⁶⁰⁴ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, [RLA-55](#), para. 1183.

⁶⁰⁵ See [Reply](#), paras. 7.18-7.28.

of the former.”⁶⁰⁶ The majority in the *Roussalis* case rested their finding on the language “concerning an obligation of the latter under this Agreement.”⁶⁰⁷

439. In the *Rusoro v. Venezuela* case, Venezuela counterclaimed against Rusoro on the basis that it had damaged natural resources in Venezuela by employing improper mining practices.⁶⁰⁸ The language of the Canada-Venezuela BIT was almost identical to that in the Romania-Greece BIT that governed in *Roussalis*; Article XII(1) of the BIT provision as between Canada and Venezuela expressly limited disputes as follows:

“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.”⁶⁰⁹

440. The tribunal in that case interpreted Article XII(1) as *expressis verbis* barring the Respondent’s counterclaim because it is narrowly concerned with disputes relating to measures taken by the host State in alleged breach of the Treaty, rather than in relation to an “investment” more generally.⁶¹⁰ That language is distinct from Article VII(1) of the Treaty here which, once again, broadly applies to “[d]isputes between one of the Parties and an investor of the other Party, in connection with his investment.”⁶¹¹

441. The Claimant relies heavily on the tribunal’s decision in *Saluka v. Czech Republic*.⁶¹² In *Saluka*, the tribunal asserted *prima facie* jurisdiction over the counterclaim by the Czech

⁶⁰⁶ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, [CLA-127](#), paras. 874-875 (emphasis added).

⁶⁰⁷ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, [CLA-127](#), paras. 874-875. For an excerpt of the dissenting opinion, see para. 462 *infra*.

⁶⁰⁸ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, [CLA-129](#), paras. 598 *et. seq.*

⁶⁰⁹ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, [CLA-129](#), para. 598 (emphasis added).

⁶¹⁰ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, [CLA-129](#), paras. 598 *et. seq.*

⁶¹¹ Treaty, [CLA-001](#), Art. VII(1).

⁶¹² See [Reply](#), paras. 7.14-7.18.

Republic within the framework of the Netherlands-Czech Republic BIT.⁶¹³ Based on its reading of the language at Article 8 of that treaty, which broadly referred to “[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter,” the *Saluka* tribunal accepted that, in principle, the BIT allowed jurisdiction over the Czech Republic’s counterclaims:

“The Tribunal agrees that, in principle, the jurisdiction conferred upon it by Article 8, particularly when read with Article 19.3, 19.4 and 21.3 of the UNCITRAL Rules, **is in principle wide enough to encompass counterclaims**. The language of Article 8, in referring to ‘**All disputes**,’ is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal’s jurisdiction, to be ‘between one Contracting Party and an investor of the other Contracting Party’ **carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims**.”⁶¹⁴

442. Although the *Saluka* tribunal considered that the treaty was broad enough to encompass counterclaims by the host State, it ultimately found the counterclaims not to have a sufficient connection with the principal claim.⁶¹⁵ Such lack of a link between the counterclaim and principal claims was also at issue in *Gavazzi v. Romania*, another case on which the Claimant relies, where the tribunal ultimately concluded that the counterclaim represented an “entirely independent claim based upon Romanian law and unrelated to the Claimants’ claim.”⁶¹⁶

443. Unlike the Czech Republic’s counterclaim in *Saluka* and Romania’s counterclaim in *Gavazzi*, Ethiopia’s counterclaims are directly connected to the Claimant’s principal claims

⁶¹³ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, [CLA-022](#).

⁶¹⁴ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, [CLA-022](#), para. 39 (emphasis added).

⁶¹⁵ See *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, [CLA-022](#), paras. 61-79. The tribunal also dismissed certain heads of counterclaims as being subject to a mandatory arbitration provision in the relevant share purchase agreement. See para. 227 *supra*.

⁶¹⁶ *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award of 18 April 2017, [CLA-074](#), para. 154.

and arise out of obligations undertaken by Akgun “in connection with” its purported “investment.”⁶¹⁷

ii. Well-Established Principles of Fairness, Equity, and Procedural Economy Favor the Adjudication of Ethiopia’s Counterclaims

444. If the Claimant is allowed to (i) escape the forum selection clause of the 2012 ETIZ Agreement (which objectively encompasses all of its claims); (ii) import an umbrella clause from the Denmark-Ethiopia BIT; and (iii) attribute various obligations under the 2012 ETIZ Agreement to the Respondent for purposes of availing said umbrella clause, it would be inequitable and unjust for this Tribunal to endorse the Claimant’s grotesque maneuver but then decline to hear directly related counterclaims.

445. The Claimant’s bold assertion that the Respondent is not a party to the Agreement and should therefore be barred from presenting claims is disingenuous in light of the fact that it is the Claimant that has engineered the conditions for this argument, for the nominal mismatch of the parties has been procured precisely by the Claimant’s abusive procedural conduct. *Indeed, the jurisdictional quagmire created by the Claimant’s attempt to force-fit its various claims into the dispute settlement mechanism under the Treaty (as well as the accompanying danger of duplication of proceedings and splitting of claims) is precisely what the parties intended and did agree to foreclose by incorporating the comprehensive governing law and forum selection provisions featuring at Articles 13 and 21 of the 2012 ETIZ Agreement.*⁶¹⁸

446. The Respondent’s counterclaims arise out of the exact same subject matter as the principal claims and implicate the same factual context and legal issues; they are directly relevant to the question of whether the Claimant may be entitled to the damages it seeks, or indeed any damages at all. Accordingly, it is in keeping with well-established principles of fairness, equity, and procedural economy in international arbitration to decide the Respondent’s

⁶¹⁷ Treaty, [CLA-001](#), Art. VII(1).

⁶¹⁸ See Sec. III.A *supra* and 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 13 (“**GOVERNING LAW**”) and Art. 21 (“**SETTLEMENT OF DISPUTES**”).

counterclaims alongside the Claimant's principal claims. It would be antithetical to those principles to allow Akgun to derogate from the contractually agreed forum for the resolution of disputes under the 2012 ETIZ Agreement, disguise its claims as treaty claims, and then bar Ethiopia from raising directly related counterclaims that are undoubtedly actionable in the autonomously chosen forum.

447. Thus, if the Tribunal were to (i) allow the Claimant to evade the applicability of the forum selection clause to which it expressly assented; and (ii) simultaneously decline to hear the Respondent's counterclaims, Ethiopia would be unjustly deprived of adequate recourse for its own inextricably interconnected claims. An honorable Tribunal simply cannot countenance such shameless sort of abuse.

1. The Respondent's Counterclaims are Directly Relevant and Related to the Claimant's Claims

448. The essential basis of the Claimant's claims is in the 2012 ETIZ Agreement and the alleged breach by the Respondent of obligations relating to it. The Respondent's counterclaims on the basis of the Claimant's own failures to perform that same Agreement are therefore directly relevant and related to the Tribunal's determination of wherein responsibility for the failure of the 2012 ETIZ Agreement, and thus any corresponding damages, may lie.

449. The Claimant's claims cannot justifiably be split from Ethiopia counterclaiming that it was, in fact, Akgun that failed to perform. Akgun alleges that it was not required to submit an EIA and that it was not in breach of any obligation to that effect. On the other hand, the Respondent maintains that the Claimant was required to prepare and submit an adequate EIA as a matter of both law and contract. There can be no doubt in this case that the questions of the Respondent's right to request an EIA from Akgun and the damages claimed by the Respondent for Akgun's failure to deliver the ETIZ project are directly and inextricably related to Akgun's claims.

450. The jurisprudence surrounding counterclaims by host States clearly shows that tribunals are inclined to assert jurisdiction over a counterclaim where it is directly related to the principal claims, or where they both arise out of the same contractual instrument.⁶¹⁹ The principal claims brought by the Claimant in relation to the ETIZ Agreement are unquestionably linked to the Respondent's counterclaims, as they both arise under the same transaction and have the same legal and factual context. Accordingly, the Respondent's counterclaims clearly meet any legal requirement of a "direct" or "close" connection with the Claimant's primary claims.

451. This general principle was highlighted by the tribunal in *Saluka v. Czech Republic*:

"Article 19.3 of the UNCITRAL Rules, Articles 25(1) and 46 of the ICSID Convention and Article II(1) of the Iran-US Claims Settlement Declaration, all reflect essentially the same requirement: the counterclaim must arise out of the '**same contract**' (UNCITRAL Rules, Article 19.3), or must arise 'directly out of an investment' and 'directly out of the subject- matter of the dispute' (ICSID, Articles 25(1) and 46), or must arise 'out of the same contract, transaction or occurrence that constitutes the subject matter of [the primary] claims' (Article II(1) of the Claims Settlement Declaration). The Tribunal is satisfied that those provisions, as interpreted and applied by the decisions which have been referred to, **reflect a general legal principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim.**"⁶²⁰

452. Referring to the tribunal's decision in *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon* and, amongst others, the findings of the tribunal in *American Bell International, Inc. v. The Government of the Islamic Republic of Iran, et al*, the *Saluka* tribunal further highlighted that

⁶¹⁹ See *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, [CLA-022](#); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, [RLA-55](#); *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, [RLA-56](#); *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Award of 21 October 1983, 2 ICSID Rep. 9 (1994), [RLA-57](#); and *Antoine Goetz and others v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award of 21 June 2012, [RLA-58](#).

⁶²⁰ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, [CLA-022](#), para. 96 (emphasis added).

“[t]he interdependence and essential unity of the instruments on which the original claim and counterclaim were based in those cases, resulting in the tribunals holding that they had jurisdiction over the counterclaims, may be contrasted with other cases in which tribunals have found that *there was no sufficient connexion between the claims and the counterclaims to justify it having jurisdiction over the latter.*”⁶²¹

453. In *Klöckner v. Cameroon*, a German investor initiated ICSID proceedings for breach of a factory construction and operation contract it had entered into with Cameroon.⁶²² Cameroon counterclaimed under the same contract. The *Klöckner* tribunal asserted jurisdiction over Cameroon’s counterclaim, highlighting that where the subject-matter of the counterclaim is intimately connected with the subject-matter of the original claim, they are “indivisible” and “interdependent.”⁶²³ The tribunal further reasoned that “the reciprocal obligations had a **common origin, identical sources, and an operational unity,**” that “[t]hey were assumed for the accomplishment of a single goal, and are thus interdependent.”⁶²⁴

454. The same reasoning guided the tribunal in *Urbaser v. Argentina*:

“The Tribunal observes that *the factual link between the two claims is manifest.* Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. *This would be sufficient to adopt jurisdiction over the Counterclaim as well [...]*”⁶²⁵

455. Similarly, in *David Aven & Others v. Costa Rica*, the tribunal echoed the *Urbaser* reasoning and accepted that it would in principle have jurisdiction over Costa Rica’s counterclaims

⁶²¹ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, [CLA-022](#), para. 70 (emphasis added).

⁶²² *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Award of 21 October 1983, 2 ICSID Rep. 9 (1994), [RLA-57](#).

⁶²³ See *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, [CLA-022](#), para. 65 (quoting *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Award of 21 October 1983, 2 ICSID Rep. 9 (1994), [RLA-57](#)).

⁶²⁴ See *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, [CLA-022](#), para. 67 (quoting *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Award of 21 October 1983, 2 ICSID Rep. 9 (1994), [RLA-57](#)) (emphasis added).

⁶²⁵ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, [RLA-55](#), para. 1151 (emphasis added).

because they arose out of the same subject-matter as the original dispute.⁶²⁶ The tribunal disagreed with the claimant's position that the relevant DR-CAFTA provision should be interpreted as barring counterclaims by the host State, and went on to emphasize that "it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law."⁶²⁷

456. In *Goetz v. Burundi*, the tribunal asserted jurisdiction over Burundi's counterclaim on the basis that the principal claim and counterclaim were directly and intimately linked.⁶²⁸ The tribunal found jurisdiction over Burundi's counterclaim even though it related in part to violations of domestic law:

"[...] there can be no doubt [of a close connection between the principal claim and counterclaim]. The main dispute relating to ABC concerned the lawfulness of the suspension of the free enterprise zone certificate and the resulting closure of the bank as a result of breaches of its obligations. *The counterclaim relates to prejudice said to have been suffered by Burundi because of those same breaches. It therefore relates directly to the subject matter of the dispute, and it follows that it is admissible.*"⁶²⁹

457. In the words of the late Judge James Crawford:

"Despite the inherently asymmetrical character of a BIT, BIT tribunals should be able to hear *closely connected investment counterclaims arising under the investment contract. Otherwise the maxim pacta sunt servanda operates in only one direction.*"⁶³⁰

⁶²⁶ *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, [RLA-56](#), paras. 692-694.

⁶²⁷ *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, [RLA-56](#), para. 696.

⁶²⁸ *Antoine Goetz and others v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award of 21 June 2012, [RLA-58](#), para. 285.

⁶²⁹ *Antoine Goetz and others v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award of 21 June 2012, [RLA-58](#), para. 285 (emphasis added) (counsel translation) ("En l'espèce, cependant, aucun doute n'est permis. Le différend principal relatif à ABC concernait la licéité de la suspension du certificat d'entreprise de zone franche et la fermeture consécutive de la banque à la suite de manquements à ses obligations. La demande reconventionnelle concerne le préjudice allégué par le Burundi du fait de ces mêmes manquements. Elle est donc en rapport direct avec l'objet du différend et est par suite recevable").

⁶³⁰ J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351, [CLA-104](#), p. 366 (emphasis added).

458. As also emphasized by the *SGS Société Générale de Surveillance S.A v. Islamic Republic of Pakistan* tribunal, “[i]t would be inequitable if, by reason of the invocation of ICSID jurisdiction, the foreign investor *could on the one hand elevate its side of the dispute to international adjudication* and, on the other, *preclude the [host State] from pursuing its own claim for damages*.”⁶³¹

459. Ethiopia submits that its counterclaims are directly relevant and related to the determination of the Claimant’s principal claims and are thus to be decided contiguously therewith.

2. The Respondent’s Counterclaims Should Be Decided in the Same Forum as the Claimant’s Claims for Reasons of Procedural Economy and Efficiency

460. In addition, the fundamental factual and legal similarities between the Claimant’s claims and the Respondent’s counterclaims demand that they be decided contemporaneously for reasons of procedural economy and efficiency. In *Urbaser v. Argentina*, the tribunal reasoned that, because of the significant factual linkages between the original claim and counterclaim, refusing to confer jurisdiction over the counterclaim would invite unwelcome inconsistency:

“It would be wholly inconsistent to rule on Claimants’ claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. *Reasonable administration of justice cannot tolerate such a potential inconsistent outcome*.”⁶³²

461. The *Aven v. Costa Rica* tribunal accepted Costa Rica’s submission that deciding both the principal claims and the counterclaims in the same forum would serve efficiency purposes, reasoning that “the admission of counterclaims has several practical advantages on

⁶³¹ *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 of 16 October 2002, *ICSID Review – Foreign Investment Law Journal*, **RLA-59**, p. 302 (emphasis added).

⁶³² *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, **RLA-55**, para. 1151 (emphasis added).

procedural economy and efficiency, for the benefit of both the host State and the foreign investor.”⁶³³

462. Finally, in the case of *Spyridon Roussalis v. Romania*, Professor Michael Reisman cautioned in his separate declaration that BITs not be interpreted to foreclose counterclaims by the host State, even in the face of the restrictive treaty language that the tribunal there faced:⁶³⁴

“It is important to bear in mind that such counterclaim jurisdiction is not only a concession to the State Party: Article 46 [of the ICSID Convention] works to the benefit of both respondent state and investor. In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by the claimant – perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) *Aside from duplication and inefficiency, the sorts of transaction costs which counterclaim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.*”⁶³⁵

463. Should the Tribunal assert jurisdiction over the Claimant’s claims but refuse to hear the Respondent’s counterclaims, the only recourse left to Ethiopia would be in the form of duplicate proceedings inevitably turning on the same facts, issues, and overall subject matter presently before this Tribunal. Such an undesirable outcome would be dangerously at odds with the goals of economy and efficiency in international arbitration.

c. Applicable Law

464. The parties agree that the law applicable to Ethiopia’s counterclaims is the Ethiopian Law of Obligations, and in particular those provisions set out in Ethiopia’s Statement of Defense.⁶³⁶

⁶³³ *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, [RLA-56](#), para. 741.

⁶³⁴ See para. 438 *supra*.

⁶³⁵ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, dated 28 November 2011, [RLA-60](#) (emphasis added).

⁶³⁶ See [Statement of Defense](#), paras. 407-412; see also [Reply](#), para. 4.14 (“Ethiopian law shall apply to ascertaining contractual obligations and breaches as between the parties to the contract”) and para. 7.70 (“Akgun agrees with Ethiopia that the principal applicable law is the Ethiopian Law of Obligations”).

This applicable law provides the legal basis for the Tribunal’s determination of the Respondent’s counterclaims.

465. The universal principle of good faith and fair dealing in contractual relations is enshrined at Article 1733 of the Civil Code, which provides that “[c]ontracts shall be interpreted in accordance with good faith and with regard to the loyalty and confidence which should exist between the parties according to business practice.”⁶³⁷ Article 1733 of the Civil Code further provides that “[w]here the provisions of a contract are clear, the court may not depart from them and determine by way of interpretation the intention of the parties.”⁶³⁸ Where a provision is unambiguous, a court may not depart from it by attempting to interpret or augment its clear terms.

d. Substantive Claims

466. The Claimant seeks to paint the fictitious picture that Ethiopia unlawfully obstructed its ability to perform the ETIZ project. The reality is that the very failures the Claimant complains of were entirely attributable to its *own* inability to perform.

467. In consequence of (i) Akgun’s failure, whether by negligence or intent, to appreciate and comply with its environmental obligations at the outset of the project; (ii) Akgun’s failure to comply with its obligation to finance the ETIZ project; and (iii) Akgun’s failure to genuinely consider (and ultimate unreasonable refusal of) alternative sites in Ethiopia, Akgun failed to perform nothing less than *all* of its obligations under the 2012 ETIZ Agreement.

468. The Respondent identifies and references those specific facts as demonstrate each of Akgun’s breaches of the Agreement in the sections below.

i. Akgun Breached its Obligation to Develop an Industrial Zone

⁶³⁷ Ethiopian Civil Code, [RLA-38](#), Art. 1733.

⁶³⁸ Ethiopian Civil Code, [RLA-38](#), Art. 1733(ii).

469. Akgun was expressly obliged to comply with Ethiopian laws and regulations in all respects under the 2012 ETIZ Agreement, and to bring its “highest level of know-how, experience, technical, financial resource and technological equipment to the Federal Democratic Republic of Ethiopia.”⁶³⁹ As highlighted by the Respondent in its Statement of Defense, “the entire Agreement was predicated upon [this] promise.”⁶⁴⁰ The incentives and privileges given to Akgun under the Agreement were granted with the expectation that the ETIZ project would be developed. Unfortunately, it was not to be.
470. The ETIZ project stalled because of Akgun’s failure to discharge its environmental obligations.⁶⁴¹ Under the contract, Akgun expressly undertook to “protect the environment from pollution by using appropriate methods and technologies [and] take maximum care to safeguard the Legedadi and Dire Dams underground water basins from pollution and carryout the necessary environmental studies required in this regard.”⁶⁴²
471. Thus, the Agreement is unambiguous regarding Akgun’s obligation to “carryout the necessary environmental studies” to “protect the environment.”⁶⁴³ Under Article 8(10) of the Agreement, Akgun represented that it would (i) protect the environment; (ii) conduct all studies necessary to protect the environment; and (iii) deploy the appropriate methods and technologies to ensure that no environmental harm incurs in the course of the ETIZ project.⁶⁴⁴
472. Despite Akgun’s continuous failure to present a sufficient EIA report, the Ministry of Industry repeatedly assured Akgun that it would support implementation of the project provided that the various deficiencies in the environmental assessment presented were addressed by Akgun in full.⁶⁴⁵ By late 2014, some eighteen months after the Ministry

⁶³⁹ 2012 ETIZ Agreement, [Exhibit C-009](#), Preamble.

⁶⁴⁰ [Statement of Defense](#), para. 420.

⁶⁴¹ *See* Sec. II.F *supra*.

⁶⁴² 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10).

⁶⁴³ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10).

⁶⁴⁴ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(10).

⁶⁴⁵ *See* Sec. II.E *supra*.

expressly reminded Akgun of its environmental study obligation in May 2013, none of the various “consultants” retained by Akgun had conducted the requisite level of environmental analysis to assure the Ministry and Oromia State that the surrounding environment would be safeguarded from negative impacts of the project.⁶⁴⁶ It was clear to the Ministry at that juncture that Akgun was unable (or unwilling) to adequately address the outstanding questions as to its stewardship at the contemplated site. In the words of Mr. Ahmed Abteu, “[t]o put it mildly, the lack of any genuine semblance of effort to convince us that it would ensure reliable mitigation of environmental harm was startling.”⁶⁴⁷ To resolve the impasse, the Ministry elected to proceed by identifying an alternative location for the industrial zone.

473. As the sole party responsible for execution of the project, it was *for Akgun* to demonstrate that its project would be responsible from the environmental perspective. It was also reasonable and foreseeable that Akgun would not be granted full authorization until such time as an acceptable assessment of the environmental impact posed by the ETIZ project was provided.

474. The unfortunate reality is that Akgun was indifferent to the project’s environmental impact and preferred to blindly proceed. Akgun was determined to use only the land originally identified for its own surreptitious reasons.⁶⁴⁸ As highlighted by Mr. Sisay Gemechu Edo:

“I now conclude that Akgun didn’t want to engage an experienced international consulting company to produce an acceptable EIA because *it knew very well that construction of a water treatment plant for this mega-project covering an area of up to one thousand hectares or more would have a heavy cost*. I came to know about this from the zero-liquid-discharge water treatment plant that we built a few years ago in Hawassa Industrial Park.”⁶⁴⁹

475. There is no dispute that the contemplated industrial zone failed ever to be developed. Following its failure to discharge the obligation of environmental study and its unreasonable

⁶⁴⁶ See Sec. II.E *supra*.

⁶⁴⁷ Witness Statement of Mr. Ahmed Abteu, dated 12 March 2021, para. 35.

⁶⁴⁸ See, e.g., Witness Statement of Mr. Ahmed Abteu, dated 12 March 2021, para. 34.

⁶⁴⁹ Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021, para. 19 (emphasis added).

and unjustified refusal of suitable alternative lands, Akgun's failure to execute the project is attributable to Akgun alone.

ii. Akgun Breached its Obligation to Finance the Project

476. Akgun was ultimately unable to finance even the simple start-up costs of the project, let alone to finance the entirety of the project for a period of eighty years.

477. Akgun expressly undertook the obligation to obtain financing for the ETIZ project and failed to do so under the 2010 ETIZ Agreement.⁶⁵⁰ At that point, Akgun "requested to fulfil the project in smaller sizes and phase by phase to be able to get the finance and to abolish all time limitations and penalties in the Agreement."⁶⁵¹

478. The parties therefore proceeded to execute the 2012 ETIZ Agreement. Article 12 of the 2012 ETIZ Agreement provides that "[t]he Developer *shall* seek, on its own, opportunities to get financing from natural persons, legal entities, private equity or venture capital funds, international banks, financial institutions or any other sources with interest to invest in and/or finance the Project in accordance to the rules and regulations of Ethiopia" while omitting any obligation to finance on the part of Ethiopia.⁶⁵²

479. The record shows that the Claimant sought to obtain financing for the project pursuant to the revised arrangement, but that it once again failed in its quest to do so. By August 2014, i.e., two years after the revised ETIZ Agreement entered into force, Akgun remained unable to obtain financing for its project, for Mr. Yusuf Akgun wrote in a draft letter at this time that though "[f]unding was sought from financial institutions for the zone," such efforts had proven "inconclusive."⁶⁵³

⁶⁵⁰ Statement of Defense, para. 424.

⁶⁵¹ Letter from Akgun to the Ministry of Industry, dated 19 December 2011, Exhibit C-046.

⁶⁵² 2012 ETIZ Agreement, Exhibit C-009, Art. 12(1) ("**FINANCING OF THE PROJECT**") (emphasis added).

⁶⁵³ Draft Letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014, Exhibit R-68.

480. Akgun was ultimately unable to inject sufficient capital into the project to progress its obligations in any meaningful way. Even under the less burdensome 2012 ETIZ Agreement, Akgun proved itself unable to perform for a second time. In the end, Akgun failed to perform its obligation to develop the industrial zone because it failed to perform its obligation to finance the ETIZ project.

iii. Akgun Failed to Perform Without Justification

481. Akgun's failure to fulfill its obligations under the 2012 ETIZ Agreement and unmitigated abandonment of the ETIZ project have no justifiable basis in fact or law.⁶⁵⁴

482. Beyond identifying land with suitable parameters for the project based upon the guidance provided by Akgun, the Ministry deferred to Akgun to apply its know-how and expertise. The deal was consummated on this fundamental premise; Akgun put itself out as financially capable, technically competent, and professionally skilled, which gave Ethiopia the assurance that the industrial zone project would come to fruition under the auspices of Akgun.

483. Under the 2012 ETIZ Agreement, Akgun was required to do the following:

- i. Comply with Ethiopian laws and regulations.⁶⁵⁵
- ii. Avail its team, equipment, and resources in sufficient quantities and in good time to enable it to perform its obligations under the Agreement and in accordance with Ethiopian law.⁶⁵⁶
- iii. Bring its highest level of know-how in the development of the industrial zone.⁶⁵⁷
- iv. Construct all types of infrastructure and superstructure on the site.⁶⁵⁸

⁶⁵⁴ See [Statement of Defense](#), paras. 426 *et. seq.*

⁶⁵⁵ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(12).

⁶⁵⁶ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 10(19).

⁶⁵⁷ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 10(1).

⁶⁵⁸ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 8(5).

- v. Realize the architectural, static, mechanical, electrical, installation, landscaping and furnishing works needed on the site.⁶⁵⁹
- vi. Finance the ETIZ project including by relying on third party investors and institutions as necessary.⁶⁶⁰

484. Ethiopian officials also relied on Akgun's representations as to the contributions it would make in the context of the ETIZ project. Akgun promised and represented to its Ethiopian counterparts that it would.⁶⁶¹

- i. Create one million direct and indirect employment opportunities.
- ii. Establish diverse industries that would serve various sectors of the economy.
- iii. Attract billions of dollars of capital by way of investments in ETIZ.

485. The Claimant failed to comply with its contractual undertakings and did not fulfill any of its promises. This result was a consequence of (i) the Claimant's inability to deliver an acceptable EIA despite numerous opportunities to do so and its refusal thereafter to accept any alternative site; and (ii) the Claimant's inability to finance the ETIZ project. This was not a consequence of any wrongful act on the part of Ethiopia as the Claimant now seeks to portray. The Claimant misconstrues the contractual provision on *force majeure* entirely; the Claimant's performance would have had to be impeded by unexpected forces beyond its control for the provision to enter into effect.⁶⁶² Akgun cannot plausibly argue that the Ministry's decision to pause any works on the ETIZ project was a *force majeure* event within the meaning of the applicable law.⁶⁶³

⁶⁵⁹ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 10(4).

⁶⁶⁰ 2012 ETIZ Agreement, [Exhibit C-009](#), Art. 12(1).

⁶⁶¹ See [Statement of Defense](#), paras. 434-436 and [Witness Statement of Mr. Sisay Gemechu Edo](#), dated 12 March 2021, para. 4. See also, generally, Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, [Exhibit C-068](#); Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, [Exhibit C-069](#); and Ethio- Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, [Exhibit C-078](#).

⁶⁶² See [Statement of Defense](#), paras. 430 *et. seq.*

⁶⁶³ [Reply](#), para. 7.97.

486. The Claimant argues that it “began to develop” but that “Ethiopia made the project implementation impossible by suspending ETIZ.”⁶⁶⁴ First, the Claimant was not entitled to begin developing ETIZ before presenting a proper report identifying environmental impacts and demonstrating mitigation measures. Second, Akgun was given multiple opportunities to present an acceptable EIA; it was only two years after the conclusion of the revised 2012 ETIZ Agreement that the Ministry ordered Akgun to pause any works so that the parties might seek to resolve the impasse.
487. As elaborated by the Respondent in its Statement of Defense, *force majeure* is necessarily limited to situations involving an “unforeseeable act,” “an official prohibition,” “a natural catastrophe,” war or the like.⁶⁶⁵ None of those events took place here. The Claimant had full control over the circumstances. The circumstances in which the Claimant found itself were of its own creation. Akgun may not now rebrand its own non-performance as a “*force majeure*” event.
488. The various project stakeholders invested considerable time and effort to facilitate Akgun’s development of the ETIZ project and deferred to Akgun to deploy its expertise in accordance with its express contractual obligations. The Ministry’s continued willingness to engage Akgun on the ETIZ project is clear from the factual record.⁶⁶⁶ The sad reality, however, is that Akgun had no desire to engage in any genuine or meaningful way with the Ministry and declined suitable alternative sites.⁶⁶⁷ Rather than work with the Ministry to identify a path forward, Akgun abandoned the ETIZ project altogether.
489. The only conclusion that can be drawn from Akgun’s evading of any meaningful discussions and vacating of the country is that it fundamentally lacked the requisite financial ability, technical competence, and professional skill to execute a development project of the magnitude contemplated under the 2012 ETIZ Agreement in Ethiopia.

⁶⁶⁴ Reply, para. 7.96.

⁶⁶⁵ See Statement of Defense, paras. 429-431 (quoting Ethiopian Civil Code, **RLA-38**, Arts. 1792-1793).

⁶⁶⁶ See Sec. II.E *supra*.

⁶⁶⁷ See Sec. II.G *supra*.

490. In conclusion, Akgun failed to perform its obligations without legal justification, which has actually and proximately caused injury to Ethiopia.

e. Damages

491. Ethiopia counterclaims for damages arising out of Akgun's failure to perform its contractual obligations in good time and in good faith. Akgun's unjustified failure to deliver on its obligations under the 2012 ETIZ Agreement entitles the Respondent to resulting damages.⁶⁶⁸

492. The Claimant takes issue with the Respondent's claim for damages because, in the Claimant's account, the Respondent "prevented ETIZ from coming to fruition."⁶⁶⁹ As extensively pleaded and evidenced by Ethiopia, it is Akgun that failed to perform its obligations under the Agreement, and it is the Claimant that is therefore to be barred from claiming its own self-inflicted damages.

493. Ethiopia claims only those damages as have actually occurred. While this does not compensate Ethiopia for the full range of revenues and benefits that Akgun promised to bring through the ETIZ project, it is a fair measure of the damage Akgun has actually caused to Ethiopia by idling the anticipated land for almost a decade and is in accordance with the requirements of legal certainty.⁶⁷⁰

494. The basis of Ethiopia's damages calculation is clear: Afro Oil agreed to lease undeveloped land from Akgun in the contemplated ETIZ, as is, at US\$ 1 per square meter per year.⁶⁷¹ This is the value that Afro Oil was willing to pay for the land alone.⁶⁷² To reflect appreciation in the rental value of the land, this amount was to increase by five percent every three

⁶⁶⁸ See [Statement of Defense](#), paras. 433 *et. seq.*

⁶⁶⁹ [Reply](#), paras. 2.111 and 7.103.

⁶⁷⁰ See [Statement of Defense](#), para. 437.

⁶⁷¹ See [Statement of Defense](#), paras. 439-440.

⁶⁷² See [Reply](#), paras. 2.111 *et. seq.*

years.⁶⁷³ Akgun's own agreement with Afro Oil memorialized this calculation, and Ethiopia has here adopted this modest measure. By the Claimant's own admission, the periodic sublease payments by Afro Oil were not substantial because Afro Oil was to independently construct its own factories on its allotted plot of land.⁶⁷⁴ The payments to be made by Afro Oil therefore reflect *only* the rental value of the land.

495. The Claimant asserts that "Ethiopia decided against proceeding with an industrial zone development on that land" and that therefore "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 damage."⁶⁷⁵ Whether or not the industrial zone development proceeded is irrelevant because, as the Claimant itself acknowledges, Afro Oil agreed to pay this price for a right to rent and build on the land only.⁶⁷⁶ Ethiopia thus relies on a valuation freely and actually reached as between Akgun and Afro Oil, which accurately and reliably reflects the rental value of the land in the market at the relevant time.

496. Ethiopia further claims interest at the statutory rate of nine percent per annum.⁶⁷⁷

497. The Respondent's damages are accordingly quantified as follows:

⁶⁷³ See Sublease Agreement between Akgun and Afro-Oil Manufacturing PLC, dated 23 October 2013, [Exhibit C-015](#), Art. 5.2.

⁶⁷⁴ See [Reply](#), para. 7.103 and Sublease Agreement between Akgun and Afro-Oil Manufacturing PLC, dated 23 October 2013, [Exhibit C-015](#).

⁶⁷⁵ [Reply](#), para. 7.102.

⁶⁷⁶ See [Reply](#), para. 2.111 and [Statement of Defense](#), para. 441; see also Sublease Agreement between Akgun and Afro-Oil Manufacturing PLC, dated 23 October 2013, [Exhibit C-015](#).

⁶⁷⁷ See Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Art. 2479, [RLA-39](#).

	<u>Year</u>	<u>Base Amount</u>	<u>Interest</u>	<u>Total</u>
1	2013-2014	US\$ 1,000,000	X 1.09 ⁹	US\$ 2,171,893.28
2	2014-2015	US\$ 1,000,000	X 1.09 ⁸	US\$ 1,992,562.64
3	2015-2016	US\$ 1,000,000	X 1.09 ⁷	US\$ 1,828,039.12
4	2016-2017	US\$ 1,050,000	X 1.09 ⁶	US\$ 1,760,955.12
5	2017-2018	US\$ 1,050,000	X 1.09 ⁵	US\$ 1,615,555.15
6	2018-2019	US\$ 1,050,000	X 1.09 ⁴	US\$ 1,482,160.69
7	2019-2020	US\$ 1,102,500	X 1.09 ³	US\$ 1,427,769.47
8	2020-2021	US\$ 1,102,500	X 1.09 ²	US\$ 1,309,880.25
9	2021-2022	US\$ 1,102,500	X 1.09	US\$ 1,201,725.00
	<u>Total</u>			<u>US\$ 14,790,540.72</u>

498. Ethiopia thus claims actual damages in the provisional amount of **US\$ 14,790,540.72**, subject to upward revision as of the date of the final award and execution.

VIII. COSTS

499. As earlier noted, Article 42(1) of the UNCITRAL Rules supplies the controlling rule on costs. It provides as follows in full:

“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”⁶⁷⁸

500. As demonstrated in Ethiopia’s Statement of Defense, Objections to Jurisdiction, and Counterclaims and in this Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims, and as will be further seen in the course of later submissions, Akgun’s claims are to be dismissed in their entirety. Ethiopia submits that there is no basis to depart from the presumption of this rule and requests the full award of costs in its favor.

⁶⁷⁸ 2010 UNCITRAL Arbitration Rules, Art. 42(1).

IX. REQUEST FOR RELIEF

501. For each and all of the above stated reasons:

- i. Ethiopia respectfully requests the Tribunal to find that it lacks jurisdiction over all claims asserted by the Claimant and dismiss the Claimant's claims in their entirety.
- ii. If the Tribunal finds that it has jurisdiction over and admits any of the Claimant's claims, including any portion or portions thereof, Ethiopia respectfully requests the Tribunal to dismiss all such claims on their merits.
- iii. Ethiopia further requests the Tribunal, in respect of its counterclaims, to:
 - Find and declare that the Claimant has violated obligations owed to the Respondent; and
 - Award to the Respondent compensation in the amount of US\$ 14,790,540.72 for its resulting losses.
- iv. Ethiopia respectfully requests the Tribunal to order that the Claimant shall bear the full costs of these proceedings, including all costs of representation and including interests, and to order such further relief as the Tribunal may deem appropriate and just.
- v. Ethiopia reserves its right to modify or amend this Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims in further submissions.

Respectfully submitted,



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