

UNCITRAL ARBITRATION
PERMANENT COURT OF ARBITRATION

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

v.

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
Respondent

**Claimant's Statement of Rejoinder on Jurisdictional
Objections and Counterclaims**

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1. INTRODUCTION

1.1. Pursuant to Procedural Order No. 1 dated 4 December 2020, as amended by the Tribunal's Communication No. 32 dated 30 September 2021, Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. respectfully submits this Rejoinder in response to the Jurisdictional Objections and Counterclaims asserted in the Federal Democratic Republic of Ethiopia's Statement of Rejoinder dated 21 January 2022.

1.2. Akgun's Rejoinder comprises six main sections:

1.2.1. Section 1 is this Introduction.

1.2.2. Section 2 sets forth the facts germane to addressing Ethiopia's¹ jurisdictional objections and counterclaims. Respondent attempts to narrow the relevant facts to a slim timeframe following the 2012 ETIZ Agreement's conclusion in order to support its straw man argument that Akgun's claims are purely contractual and therefore beyond this Tribunal's jurisdiction under the Treaty. Akgun in truth undertook broad and extensive investment activities over the course of nearly 7 years in Ethiopia. Such activities, described in detail herein and in prior pleadings, underscore that Akgun made an investment as defined in the Treaty and that Akgun's claims are Treaty claims and not simply contract claims. Respondent further attempts to leverage its straw man contractual argument into a set of contractual counterclaims against Akgun. Although Respondent fails to articulate its counterclaims with the requisite specificity, Akgun nonetheless shows that Respondent's counterclaims, even taken broadly, are unsupported because the facts show that Akgun was ready, willing, and able to fulfill, and had spent a great deal of time fulfilling its contractual commitments to Ethiopia. Indeed, Akgun exceeded those commitments in attempting to appease Respondent's extra-contractual demands. ETIZ failed to come to fruition because Respondent destroyed Akgun's investment by suspending ETIZ and failing to supply an adequate alternative site to Akgun.

¹ Terms and abbreviations defined in the Claimant's Notice of Arbitration, Statement of Claim, and Statement of Reply carry the same meaning in this Rejoinder unless otherwise indicated.

- 1.2.3. Section 3 demonstrates why Respondent's jurisdictional objections must be denied. First, the plain text of the 2012 ETIZ Agreement's dispute resolution clause does not support Respondent's inventive reading of that clause in arguing that it deprives this Tribunal of jurisdiction. There is no evidence that Akgun intended to give up its rights under the Treaty. Indeed, the 2012 ETIZ Agreement's language tends to reinforce Akgun's recourse to the Treaty rather than abnegate it. Second, Akgun again addresses Respondent's hopeful yet specious assertion that Akgun's claims are contract claims instead of Treaty claims. This argument ignores the fundamental Treaty-based causes of action that underlie Akgun's case. Third, Akgun demonstrates that its assets qualify as protected investments under the Treaty, regardless of the varied analytical approaches to the term "investment" that may be adopted here. Finally, Akgun shows that the Tribunal may also take jurisdiction over Akgun's umbrella clause claim. The Treaty's MFN clause, properly understood, allows Akgun to appeal to umbrella clause protection that Ethiopia has offered to other foreign investors through its other BITs.
- 1.2.4. Section 4 addresses Respondent's counterclaims. Akgun first shows that the Tribunal lacks jurisdiction over such counterclaims because the Treaty limits standing to initiate claims to investors; the state possesses no reciprocal right. Thus, Respondent's claim fails for lack of jurisdiction *ratione personae*. Respondent's appeals to factual connexity, procedural efficiency, and fairness in support of jurisdiction over its counterclaims cannot succeed; without a textual basis in the Treaty for jurisdiction, the Tribunal would exceed its mandate and jeopardize its ultimate award if it entertained Respondent's counterclaims. Even if the Tribunal were to assume jurisdiction, Akgun also shows that Respondent's counterclaims fail on the merits. Respondent cannot establish that Akgun failed to fulfill any of its contractual obligations for any reason besides Respondent's own ill conduct towards Akgun. Finally, Akgun addresses Respondent's damages claim, showing that it is fundamentally unsound since Respondent already received compensation from Akgun for the land regarding which it now seeks damages. Moreover, the amount of damages is inflated beyond any

reasonable measure to which Respondent would be entitled, even if Akgun had not already compensated it for that very land.

1.2.5. Section 5 reiterates Akgun's prayer for relief.

1.2.6. Section 6 contains Akgun's reservation of rights.

2. FACTS

- 2.1. Claimant reiterates and incorporates herein the facts and associated evidence supplied in connection with its Statement of Claim dated 20 November 2020 and its Statement of Reply dated 22 October 2021. The evidence Claimant supplied in support of its pleadings included the Witness Statements of Mr. Yusuf Akgun, Mr. Yunus Akgun, and Mr. Ufuk Akgun. In addition, Claimant supplied the Expert Opinions of Prof. Mekete Bekele Tekle, Prof. Dale Whittington, and the quantum report of Alvarez & Marsal ("A&M"), the latter two of which Respondent elected not to rebut with any responsive expert opinion.
- 2.2. The facts Claimant has supplied demonstrate its entitlement to relief. In summary, the relevant facts span approximately from 2008 through 2015. They begin with Ethiopian officials' first visit to Ikitelli to solicit Akgun to recreate a similar development in Ethiopia; involve Akgun's numerous subsequent visits to Ethiopia to plan, design, and present its detailed vision for ETIZ on the site Ethiopia selected and allocated; include the negotiation and later re-negotiation of the ETIZ Agreement to change the financing and pacing of ETIZ's construction; continue through the land leasing, investment permitting and licensure, and site handover; further continue through Akgun's site-clearing and land preparation efforts; and ultimately lead to the ill-fated and diabolical EIA process that revealed Ethiopia's failure to properly plan for its limited water resources or coordinate its development goals, resulting in its suspension of ETIZ, admission of error in siting ETIZ within the Legedadi watershed, promise to provide Akgun an adequate alternative site, and final failure to do so.
- 2.3. Beyond its florid rhetoric and a-contextual review of the contemporaneous evidence in its Rejoinder, Respondent does little to dispel these facts, as Claimant intends fully to demonstrate at the hearing. Claimant's current

pleading, however, is limited to addressing the facts that relate to: i) Respondent's objection to this Tribunal's jurisdiction over Akgun's claims for Ethiopia's violations of the protections it agreed to afford Turkish investors in the Turkey-Ethiopia BIT; and ii) Respondent's attempt to bring contractual Counterclaims against Akgun within this proceeding. Many of the facts that defeat Respondent's jurisdictional objection and counterclaims have already been set forth in Claimant's prior pleadings. For the sake of economy, Claimant will not fully restate the entire relevant factual history here but will instead recount the most salient facts that relate to Respondent's jurisdictional and counterclaim arguments.

- 2.4. Below in Section 2.A, Claimant reviews certain facts relating to Respondent's objection to jurisdiction. There, Akgun recounts the resources that it dedicated to developing ETIZ over the course of several years. These resources included Akgun's time, sweat equity, and know-how. They also included Akgun's genuine expenditures to design, plan, and market ETIZ internationally and domestically; its expenditures within Ethiopia for licenses, permits, the land for ETIZ, EIA reports, and labor to begin site work; and its purchase and importation of equipment, machinery, and raw materials to construct ETIZ. All these facts, which Respondent either trivializes or ignores, taken individually and along with the ETIZ project as a whole, go towards establishing the fact of Akgun's investment in Ethiopia, per the terms of the Treaty. That investment confers jurisdiction on this Tribunal under the Treaty, thereby defeating Respondent's jurisdictional objection, as further discussed in Section 3.
- 2.5. Below in Section 2.B, Claimant reviews certain facts relating to Respondent's counterclaims. There, Akgun focuses primarily on facts relating to Respondent's assertion that Akgun was either unwilling or unable to develop ETIZ and therefore violated its contractual obligations under the 2012 ETIZ Agreement. Respondent wildly distorts the facts concerning both Akgun's environmental obligations and its plan to finance ETIZ. The facts show that Ethiopia's assertions about the breadth of Akgun's supposed environmental obligations are implausible, at best. The facts further show that Akgun had in place a long-term plan to finance ETIZ's development and was both capable of and had already begun to finance ETIZ's start-up costs. Akgun also shows that Respondent's claims concerning its "offer" to Akgun of alternative sites for

ETIZ is shot through with error. To be clear, Respondent never formally offered any alternative site to Akgun or presented Akgun with an alternative site proposal, despite Akgun's specific requests to Respondent for such a proposal. Thus, even if the Tribunal were to entertain jurisdiction over Ethiopia's counterclaims, which it resolutely should not, those claims would be futile, as further discussed in Section 4.

A. Akgun's Development of ETIZ

(i) Akgun's Development Efforts from 2008-2012

- 2.6. The origins of ETIZ are by now familiar territory, having emerged from an October 2008 visit of a delegation of Ethiopian officials to the Ikitelli industrial city on the outskirts of Istanbul, whereupon the delegation immediately sought to have Akgun sign a Memorandum of Understanding that memorialized the Ethiopians' desire to have Akgun create a similar industrial city near Addis Ababa.² In January 2009, once Respondent showed Akgun the region where it intended for the industrial city to be located, as Respondent had committed to do in the MoU, the starting gun sounded for Akgun.³ It began immediately to invest its resources to develop ETIZ.⁴
- 2.7. As a first step towards concretizing its investment, in February 2009, Akgun sought and obtained its trade registration certificate for its Ethiopian branch, which reflected initial trade capital of 5.5 million Ethiopian Birr.⁵ At the same time, Akgun further sought and obtained its investment permit for ETIZ, which reflected investment capital of 30 million Ethiopian Birr.⁶ In March 2009, Akgun also filed its taxpayer registration certificate with Respondent⁷ and by May 2009 it had obtained its investment license.⁸ The investment license further

² Claimant's Statement of Reply and Defense to Respondent's Jurisdictional Objections and Counterclaims dated 22 October 2021 ("[Statement of Reply](#)"), ¶¶ 2.3-2.5.

³ *Id.*, ¶¶ 2.6-2.12.

⁴ *Id.*

⁵ [C-038](#), Principal Trade Registration Certificate issued by Ethiopian Investment Agency dated 19 February 2009.

⁶ [C-039](#), Investment Permit issued by Ethiopian Investment Agency dated 19 February 2009.

⁷ [C-040](#), Taxpayer Registration Certificate issued by FDRE Ministry of Revenue Federal Inland Revenue Authority dated 4 March 2009.

⁸ [C-041](#), Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009.

expanded the scope of Akgun's "capital out-lay" to 65 million Ethiopian Birr "for establishing [a] **REAL ESTATE DEVELOPMENT** project in Addis Ababa and Oromia region."⁹ Notably, the letter from the Investment Agency approving Akgun's license was copied to the Ministry of Trade and Industry; the Ministry of Health; the Ministry of Labour and Social Affairs; the Environmental Protection Authority; the Addis Ababa City Administration Investment Authority; and the Oromia Investment Commission.¹⁰ It explicitly called on those entities copied to the correspondence to "provide the necessary support and follow up for the realization of the project" in accordance with the "rules, regulations and directives that are enforced in the Country."¹¹ There is no evidence that any of these entities, including the EPA in charge of enforcing the country's environmental laws, informed Akgun that they believed Akgun would need to commission and supply an EIA for ETIZ to be in accord with the "rules, regulations and directives that are enforced in the Country."

- 2.8. Akgun also spent significant time and money on the design and planning for ETIZ in order to present its pre-feasibility and final feasibility studies for ETIZ to Respondent.¹² For instance, Akgun hired an architect, Mr. Sadettin Ozdonmez, to whom it paid nearly USD 700,000 for his work in designing ETIZ.¹³ It also hired Casta Consultancy to develop the preliminary and detailed feasibility studies that it presented to Respondent, and Akgun paid Casta over USD 800,000 for its work.¹⁴ Akgun made a highly publicized formal presentation regarding ETIZ to the Ethiopian Council of Ministers in August 2009, where it also flew in its consultant and architect to join in the presentation and answer the ministers' questions.¹⁵ This required a serious investment of time, money, and effort, all of which occurred because Ethiopia specifically sought out Akgun and requested its know-how and expertise in

⁹ *Id.* (emphasis in original).

¹⁰ *Id.*

¹¹ *Id.*

¹² [Statement of Reply](#), ¶¶ 2.15-2.27.

¹³ [AM-Appendix 5.5](#); [AM-297](#) (re-submitted).

¹⁴ [AM-Appendix 5.5](#); [AM-151](#); [AM-211](#).

¹⁵ [Statement of Reply](#), ¶¶ 2.17-2.20.

developing and operating an industrial city based on the Ikitelli industrial zone, which Ethiopia's Minister of Finance regarded as "a perfect model for attracting investors."¹⁶

- 2.9. Akgun faithfully, and at its expense, fulfilled the obligations of the 2008 MOU, leading ultimately to the 2010 ETIZ Agreement. Indeed, the 2010 ETIZ Agreement reflected Akgun's efforts and the basis for ETIZ, as it specifically recognizes that Akgun

...has know-how and experience at the highest level regarding the establishment of an organized industrial zone, construction of infrastructure and superstructure, operation of organized industrial zones and finding [i]nvestors to invest in organized industrial zones.¹⁷

- 2.10. As discussed in prior pleadings, pursuant to the 2010 ETIZ Agreement, Respondent was to contribute 30% of the infrastructure costs for ETIZ and the remaining financing was envisioned to comprise the entire 1460 ha of initial land development.¹⁸ Ultimately, neither Respondent nor Akgun was able to fund ETIZ as initially envisioned, and so the parties agreed to revise the contract, which yielded the 2012 ETIZ Agreement.¹⁹

- 2.11. The 2012 ETIZ Agreement likewise stipulated to Akgun's "know-how and experience at the highest level" for industrial zone projects.²⁰ It further stipulated to the economic contribution of the project to Ethiopia, emphasizing

... the importance of the development of the Industrial Zones to attract foreign direct investments and support the

¹⁶ **C-044**, Akgun personal guest book showing numerous messages of support from high level government officials starting from the first meeting held in 2008 through 2014, p. 3 (handwritten note of Sufian Ahmed dated 7 October 2009).

¹⁷ **C-008**, Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia and Akgun Construction for the Lease of Land and Development of an Industrial Zone dated 11 June 2010 ("The 2010 ETIZ Agreement"), Preamble.

¹⁸ **Statement of Reply**, ¶¶ 2.28-2.32; **C-008**, The 2010 ETIZ Agreement, Arts. 5(1), 10(5), 10(9), 11(7), 11(18).

¹⁹ **Statement of Reply**, ¶¶ 2.33-2.40.

²⁰ **C-009**, Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia, Oromia Regional State and Akgun Construction for the Lease of Land and the Development of an Industrial Zone dated 8 June 2012 ("The 2012 ETIZ Agreement"), Preamble.

industrialization of the Federal Democratic Republic of Ethiopia.²¹

- 2.12. The 2012 ETIZ Agreement specified that ETIZ would be governed by a land lease lasting for a term of 80 years.²²

(ii) Akgun's Development Efforts from 2012-2015

- 2.13. After signing the 2012 ETIZ Agreement, Akgun accelerated its investment of resources to develop the Project over the ensuing years.²³ Because the 2012 ETIZ Agreement required Akgun to pay compensation to Respondent for the existing farmers for their relocation and property, this was one of Akgun's first acts after signing the 2012 ETIZ Agreement.²⁴ Accordingly, on or around 31 July 2012, Akgun paid 14,717,476 million Ethiopian Birr, or approximately USD 820,944, to fulfill this obligation.²⁵

- 2.14. Shortly after providing this compensation, Akgun received a letter from the Oromia Investment Office urging it to:

... commence the work of the project[] within a period of six months for otherwise we are mandated to terminate the agreement without any precondition and snatch the land and thereby transfer it to other investors.²⁶

- 2.15. As explained in the Statement of Reply, this letter flatly contradicts Respondent's assertion that Akgun was expected and obligated to perform an EIA before commencing work on the project.²⁷ Respondent has no response to this letter except to wave it away in the footnotes as having been sent in "administrative error."²⁸ This explanation, however, fails. Numerous

²¹ *Id.*

²² *Id.*, Art. 6.

²³ [Statement of Reply](#), ¶¶ 2.33-2.40.

²⁴ [C-009](#), The 2012 ETIZ Agreement, Art. 8(1); [C-010](#), Receipt issued by Cooperative Bank of Oromia dated 31 July 2012.

²⁵ [C-010](#), Receipt issued by Cooperative Bank of Oromia dated 31 July 2012; [AM-Appendix 5.5](#).

²⁶ [C-051](#), Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012.

²⁷ [Statement of Reply](#), ¶¶ 2.39-2.40, 2.89, 3.28.

²⁸ Respondent's Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims dated 21 January 2022 ("[Statement of Rejoinder](#)"), fn. 128 & 592.

governmental entities were copied on the correspondence, including the Oromia Rural Land and Environmental Protection office and the Bereh Woreda Rural Land and Environmental Protection Office, either of which should have flagged the supposed “error” and interceded to first request an EIA, if Respondent’s version of events were true.²⁹ And even if Respondent were correct that this letter represented merely an “administrative error,” then this would further demonstrate the confusing and intractable bureaucratic morass that mired ETIZ and ultimately led to its failure, amounting to an admission that Respondent violated its Treaty obligation of fair and equitable treatment.³⁰

- 2.16. Heeding the Ethiopian authorities’ threat that they intended to “snatch the land” from Akgun if work were not commenced, Akgun sought its 80-year land lease certificate for ETIZ’s first 100 ha plot, which Akgun received from the Oromia Bureau of Rural Land and Environmental Protection by January 2013.³¹ That letter from the environmental bureau “strongly urge[d]” Akgun “to undertake the work of your project as per the prescribed rules and regulations.”³² As with prior correspondence and licensure documenting the ETIZ project, the correspondence enclosing the lease certificate was copied to multiple other authorities, including the Oromia Investment Commission, the Oromia Special Zone Land Use and Environmental Protection Office, and the Bereh Woreda Land Use and Environmental Protection Office,³³ none of whom objected to the issuance of the land lease certificate or the instruction to Akgun to “undertake the work” on ETIZ for any reason at all, much less on the basis that an EIA was lacking from Akgun.
- 2.17. Accordingly, Akgun developed and submitted to the Mol its initial work plan for developing ETIZ – a document which evidences Akgun’s “know-how and

²⁹ [C-051](#), Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012.

³⁰ See [Statement of Reply](#), ¶¶ 5.1-5.109.

³¹ [C-012](#), Land Lease Certificate issued by Oromia Bureau of Rural Land and Environmental Protection dated 2 January 2013 (“Land Lease Certificate”).

³² *Id.*

³³ *Id.*

experience” that the parties stipulated to in the 2010 and 2012 ETIZ Agreements.³⁴

- 2.18. Akgun also sought to renew its investment licensure. The Mol wrote a letter on Akgun’s behalf to the Ethiopian Investment Agency, dated 18 March 2013, in which it unequivocally stated that “the **investment has been approved** by the government” and acknowledged that “some preparatory works have been carried out.”³⁵ Nothing in this letter suggested that the investment was conditioned on an EIA; rather, the investment had already been “approved,” by Respondent’s own admission. Moreover, the Industry Zone Development & Environmental Safeguards Directorate was copied on the correspondence,³⁶ but no one from that environmental agency or any other agency interceded with the Ethiopian Investment Agency to instruct it to withhold the permit pending submission of an EIA by Akgun. Instead, the Ethiopian Investment Agency issued the permit to Akgun on 9 April 2013, reflecting Akgun’s dedicated investment capital in the amount of 400 million Ethiopian Birr, or approximately USD 20 million, at the time.³⁷
- 2.19. Its investment having been “approved” and its investment permit issued, Akgun began to mobilize to the site and over the ensuing months it hired laborers and purchased and/or rented machinery, equipment, and raw materials for site work. Ethiopia elects to ignore this evidence, which Mr. Yunus Akgun summarized in his First Witness Statement:

Akgun rented machinery and equipment such as excavators, loaders, graders, rollers and trucks locally to commence site mobilization and initial works. We paid over USD 100,000 in total for such rent. Akgun cleared the site and conducted survey works. It also excavated, leveled and filled in 3 kilometers of dirt roads and implemented parceling works.³⁸

³⁴ [C-053](#), Letter from Akgun Construction to Ministry of Industry dated 12 March 2013.

³⁵ [C-055](#), Letter from Ministry of Industry to Ethiopian Investment Agency dated 18 March 2013 (emphasis added).

³⁶ *Id.*

³⁷ [C-056](#), Investment Permit issued by Ethiopian Investment Agency for Akgun Construction dated 9 April 2013.

³⁸ Witness Statement of Yunus Akgun dated 19 November 2020 (“[Yunus Akgun 1st Statement](#)”), ¶ 5.3.

- 2.20. Mr. Akgun's statement is supported by contemporaneous evidence, including invoices for the equipment rentals, along with periodic reports reciting the clearing and grading work Akgun performed to prepare the site for construction.³⁹
- 2.21. Mr. Akgun also described the large-scale pieces of machinery and equipment that Akgun purchased and imported to Ethiopia for ETIZ, which included a mobile concrete plant, concrete mixers, and a crane, all of which cost Akgun a total of EUR 2,027,000 (USD 1,504,415).⁴⁰
- 2.22. Ethiopia ignores the various Ethiopian labor costs that Mr. Yunus Akgun identified in his First Witness Statement, which for administrative staff included "office managers, a secretary, accountants, and a marketing team, as well as drivers and office cleaning staff"⁴¹ and which for site construction included:
- ... local subcontractors and daily local employees from Sendafa town to help us with construction. We worked with two subcontractors, Mr. Samuel and Mr. Deme, for this project. We also had from 10 to 30 daily workers on site at a time depending on the volume of work.⁴²
- 2.23. Ethiopia also ignores the resources that Akgun dedicated to marketing ETIZ and enticing investors to come to Ethiopia. This included not only the resources Akgun dedicated to its international investment offices and the efforts it undertook in Istanbul to attract Turkish investors, but it also included the resources it devoted to bringing interested investors to Ethiopia for site visits.⁴³ Akgun also spent money on advertisement within Ethiopia; indeed,

³⁹ [YUN-07](#), Proforma Invoice dated 23 April 2013; [YUN-08](#), Loader rental payments; [YUN-09](#), Machine rent payment; [C-057](#), Akgun's work report dated 6 August 2013; [C-058](#), Akgun's work report dated 5 September 2013.

⁴⁰ [Yunus Akgun 1st Statement](#), ¶ 5.6; [YUN-10](#), Commercial invoice dated 15 November 2013; [YUN-11](#), Proforma invoice dated 20 November 2013; [YUN-12](#), Photos of some purchased machinery and equipment.

⁴¹ [Yunus Akgun 1st Statement](#), ¶ 4.6; [YUN-02](#), Addis Ababa office rent agreement dated 26 September 2011.

⁴² [Yunus Akgun 1st Statement](#), ¶ 5.5.

⁴³ *Id.*, ¶¶ 5.7-5.11.

Akgun wrote to the Mol in April 2014 seeking permission to erect new billboards promoting ETIZ, and the Mol promptly facilitated Akgun's request.⁴⁴

- 2.24. Claimant's expert, A&M, reviewed the resources that Akgun dedicated to developing ETIZ, itemizing each cost as it related to machinery, equipment, materials, labor, advertising, administrative costs, transportation costs, and other invoices.⁴⁵ A&M concluded that these documented and supportable expenditures amounted to no less than USD 4,955,131, excluding pre-award interest.⁴⁶
- 2.25. Respondent offers no direct rebuttal to this assessment. It instead prefers to trivialize the resources that Akgun dedicated to advancing ETIZ and the progress it achieved as mere "modest preparations."⁴⁷ Respondent inserts in its pleadings a photograph of open land at the proposed ETIZ site,⁴⁸ as if to imply that this serves as proof of no investment (and therefore no jurisdiction under the Treaty) and further proof in support of its counterclaims against Akgun for failure to perform the Project. This strategy backfires. That the photograph shows open, clear land is in fact evidence of the very work that Akgun performed to clear and grade the land before Ethiopia suspended the Project.⁴⁹ Ethiopia also cites to photographs of the initial structures that Akgun built as a derisive depiction of Akgun's efforts.⁵⁰ Respondent's derisive tone is ill-considered; these photographs show that Akgun began its work in good faith and further show the peremptory fashion in which Ethiopia put a stop to that work.⁵¹ The lack of further progress resulted from Respondent's unfair, inequitable, and expropriatory conduct towards Akgun, not any failing of

⁴⁴ [C-075](#), Letter from Akgun Construction to Ministry of Industry dated 10 April 2014; [C-076](#), Letter from Ministry of Industry to Addis Ababa City Government Mayor's Office dated 11 April 2014.

⁴⁵ [AM-Appendix 5](#).

⁴⁶ Expert Report of Laura Hardin dated 19 November 2020 ("[A&M Report](#)"), ¶¶ 153-154; [AM-Appendix 5](#).

⁴⁷ [Statement of Rejoinder](#), ¶ 240.

⁴⁸ *Id.*, ¶ 54; [R-7](#), Photographs of the Sendafa Site, dated February 2021; Respondent's Statement of Defense, Objections to Jurisdiction, and Counterclaims dated 12 March 2021 ("[Statement of Defense](#)"), ¶ 377.

⁴⁹ See Witness Statement of Yusuf Akgun dated 19 November 2020 ("[Yusuf Akgun 1st Statement](#)"), ¶ 4.24; [Yunus Akgun 1st Statement](#), ¶¶ 5.3, 5.6.

⁵⁰ [Statement of Rejoinder](#), ¶ 54 (citing [R-7](#), Photographs of the Sendafa Site, dated February 2021).

⁵¹ See [Yusuf Akgun 1st Statement](#), ¶ 4.24; [Yunus Akgun 1st Statement](#), ¶ 5.5.

Akgun.⁵² As further discussed herein, Ethiopia should not be permitted to ignore the plainly established facts and leverage the consequences of its own poor conduct to assert that Akgun made no investment under the Treaty, much less use it as a basis for asserting counterclaims against Akgun.

B. Akgun's Obligations Under the 2012 ETIZ Agreement

(i) Respondent Misrepresents Akgun's Environmental Obligations

- 2.26. Respondent predicates its Counterclaims in part on the notion that Akgun violated its environmental obligations contained in 2012 ETIZ Agreement Art. 8(10).⁵³ Akgun has cited that Article in its prior pleadings⁵⁴ and reproduces it once again here:

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.⁵⁵

- 2.27. Respondent argues that Claimant's use of the shorthand phrase, "necessary studies," in its Statement of Reply to refer to the obligation in Art. 8(10) is an attempt to elide the duties therein or fool the Tribunal.⁵⁶ The assertion is absurd on its face; Claimant reproduced the Article in full and cited its own expert's opinion also reproducing the Article in full.⁵⁷ Claimant used the shorthand phrase "necessary studies" for no reason besides ease of reading. Moreover, Claimant's own discussion of the "studies" focuses intently on the scope of the **environmental** examination such studies entailed, affirmatively disproving Respondent's suggestion that Claimant's phraseology represents

⁵² See generally [Statement of Reply](#), Section 5.

⁵³ [Statement of Rejoinder](#), ¶¶ 469-475.

⁵⁴ [Statement of Reply](#), ¶ 2.98; Claimant's Statement of Claim dated 20 November 2021 ("[Statement of Claim](#)"), ¶ 2.50.

⁵⁵ [C-009](#), The 2012 ETIZ Agreement, Art. 8(10).

⁵⁶ [Statement of Rejoinder](#), ¶¶ 50, 91-92.

⁵⁷ [Statement of Reply](#), ¶¶ 2.97-2.98. Claimant notes that in quoting this provision in its [Statement of Claim](#), ¶ 2.50, it mistakenly excluded the word "environmental." This was merely a scrivener error and of course the full text was contained in Claimant's exhibits.

an attempt to evade its obligations.⁵⁸ Claimant's analysis in no way attempted to carve out the "environmental" aspect from the Art. 8(10) obligation and Respondent's invidious interpretation of the phrase "necessary studies" exalts form without examining the substance of Claimant's arguments.

- 2.28. Setting aside Respondent's picayune and artificial argument, Respondent fails to genuinely contend with Claimant's explanation that Art. 8(10) refers to studies of a scope that are much more limited than the EIA that Respondent contends Akgun was responsible for providing. As Claimant explained in its Reply, the "necessary environmental studies" identified in Art. 8(10) refers to the determination of appropriate pollution control measures "to safeguard the Legedadi and Dire Dams underground water basin from pollution."⁵⁹ Claimant's expert on Ethiopian environmental law reviewed the 2012 ETIZ Agreement and sensibly concluded that Art. 8(10) must be read in context with the Article in the 2010 ETIZ Agreement that it replaced, Art. 8(9), which focuses on such pollution control measures and likewise makes no mention of an EIA.⁶⁰
- 2.29. Even setting aside Claimant's expert's opinion, the plain text of the provision shows that the Art. 8(10) obligations simply cannot comprise the scope that Respondent suggests. First, Art. 8(10) refers to Akgun's obligation to "protect the environment from pollution by using appropriate methods and technologies."⁶¹ This language squarely focuses on process (*i.e.*, "methods and technologies"), not policy. Second, it reiterates that Akgun must "take maximum care to safeguard ... from pollution."⁶² Again, safeguarding from pollution has to do with process, not policy. Finally, the specified source to be safeguarded is the "Legedadi and Dire Dams underground water basin."⁶³ This underground water basin is only one component of the entire environment surrounding the Legedadi watershed in which ETIZ was to be situated. The Legedadi watershed region also included surface waters, soil,

⁵⁸ [Statement of Reply](#), ¶¶ 2.97-2.103.

⁵⁹ *Id.*; [C-009](#), The 2012 ETIZ Agreement, Art. 8(10).

⁶⁰ Expert Report of Prof. Mekete Bekele Tekle dated 18 October 2021 ("[Tekle Report](#)"), ¶¶ 2.44, 2.47.

⁶¹ [C-009](#), The 2012 ETIZ Agreement, Art. 8(10).

⁶² *Id.*

⁶³ *Id.*

flora, fauna, and all the other tangible elements that comprise the natural environment. The provision explicitly limits the obligation of “necessary environmental studies” to a specific resource within the environment (the “underground water basin”); it says nothing about other resources, nor does it mention air pollution, soil contamination, social impacts, population issues, project alternatives, energy requirements, transregional impacts, or any of the other myriad issues that Ethiopia’s own proffered expert contends are the appropriate subject matter of the EIA Akgun supposedly should have performed pursuant to Art. 8(10).⁶⁴ It stretches the language of Art. 8(10) well beyond its breaking point to draw from it an obligation that Akgun perform a broad scale EIA of the type Respondent argues was required. On this basis alone, Respondent’s argument that Art. 8(10) required an EIA must be rejected.

- 2.30. Finally, it defies belief for Respondent to continue to suggest that Akgun should have nevertheless known that it was responsible for providing an EIA before commencing with ETIZ. Claimant reviewed the history of the project in detail in its Statement of Reply and highlighted additional key points in that document’s Section 2.A, beginning with Ethiopia’s designation of the Legedadi watershed as the site for the project, continuing through numerous public presentations to various Ethiopian officials describing the project’s location and its scope, and proceeding through the licensure and permitting process and the commencement of site work.⁶⁵ At virtually every step during this process, environmental authorities were either present, copied on the relevant correspondence, or issued the correspondence.⁶⁶ At no point did an environmental official intercede to tell Akgun that it must conduct a comprehensive environmental, social, and technical study of ETIZ’s effects on the Legedadi watershed region and identify potential alternative uses for the region besides ETIZ, as Respondent now argues was required. The EIA request first came in mid-2013 from the Mol, an oral request that did not require Akgun to stop work, and even then, the full scope of what Ethiopia envisioned from the EIA was not apparent and was not revealed to Akgun until

⁶⁴ Expert Report of Prof. Susan Murcott dated 7 March 2021 (“[Murcott Report](#)”), ¶¶ 60-64, Tables 4-5.

⁶⁵ [Statement of Reply](#), ¶¶ 2.6-2.42.

⁶⁶ See *id.*; *supra* Section 2.A.

much later.⁶⁷ Ethiopia, however, suggests that Akgun should have known from the very beginning that ETIZ could not proceed an inch until it supplied such a study.⁶⁸

- 2.31. Ethiopia's position is simply illogical. In the absence of an explicit agreement to the contrary, it cannot be the role of a private investor to assume the mantle of making natural resource policy decisions for a host state, especially if the decision involves site selection for a large development project that will affect a limited and precious water resource. As Claimant's expert, Prof. Whittington, explained:

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.⁶⁹

He continues:

The allocation of a limited natural resource, such as water, is clearly a decision for the Government of Ethiopia, not Akgun or its environmental consultant.⁷⁰

Addressing the Murcott Opinion, he further explains:

In fact, 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 across "multiple projects and programs," or to presume to understand and interpret "Ethiopia's vision for its development" or how it should "achieve a sustainability of lifestyles."⁷¹

- 2.32. Respondent has offered no rebuttal to Prof. Whittington's analysis and critique of the Murcott Opinion on this point. Nor has Respondent offered any

⁶⁷ See [Statement of Reply](#), ¶¶ 2.89-2.125.

⁶⁸ See [Statement of Rejoinder](#), ¶¶ 100, 106.

⁶⁹ [Expert Report of Prof. Dale Whittington dated 18 October 2021](#), ¶ 6.5.

⁷⁰ *Id.*, ¶ 6.20.

⁷¹ *Id.*, ¶ 6.61 (quoting [Murcott Report](#), ¶¶ 17, 27, 57).

explanation for how the requirement to conduct “necessary environmental studies” on safeguarding the Legedadi underground water basin could reasonably be interpreted to demand an EIA of the type Respondent now describes; rather, Respondent merely assumes it to be so.

- 2.33. Thus, Respondent’s arguments concerning Akgun’s supposed EIA obligations simply do not stand up to scrutiny, and any defense or claim founded on that illusory obligation is equally diaphanous.

(ii) Akgun Had a Financing Plan in Place for ETIZ

- 2.34. Respondent also engages in a fantastical interpretation of correspondence and draft correspondence to argue that Akgun was unable to fulfill its obligation to finance ETIZ. The facts and the very correspondence Respondent cites are to the contrary. Moreover, there is no evidence that Akgun was unable to meet its financial obligations after signing the 2012 ETIZ Agreement.
- 2.35. In sum, under the 2010 ETIZ Agreement, Akgun and Ethiopia were to be partners in the financing of the ETIZ Project, with Ethiopia committing to provide 30% of the infrastructure costs for the full 1460 ha of the Project’s initial phase and Akgun to seek financing for the remainder.⁷² Respondent suggests that this financing arrangement fell through because of Akgun,⁷³ but it is evident from the contemporaneous correspondence that neither party was able to finance the project as initially envisioned under the 2010 ETIZ Agreement.⁷⁴ The December 2011 letter that Respondent only selectively and creatively cites on this issue is clear that, “[t]he difficulties in finding finance for the project [was] due to events [that] occurred with Arab Spring in the region.”⁷⁵ The letter further recounts that “the Government of the Federal Democratic Republic of Ethiopia does not want to exercise its 30% contribution.”⁷⁶ It further confirms that the Prime Minister requested that rather than build ETIZ all at once, Akgun “fulfill the project in smaller sizes and phase

⁷² [Statement of Reply](#), ¶¶ 2.28-2.40; [C-008](#), The 2010 ETIZ Agreement, Arts. 5(1), 7(2), 9(1), 11(7).

⁷³ [Statement of Rejoinder](#), ¶ 477.

⁷⁴ [C-046](#), Letter from Akgun Construction to Ministry of Industry dated 19 December 2011.

⁷⁵ *Id.*

⁷⁶ *Id.*

by phase to be able to get the finance” and that accordingly Akgun would “handle 100% of the project with our own resources.”⁷⁷ There is nothing in the record to contradict what this contemporaneous letter states.

2.36. The terms of the 2012 ETIZ Agreement reflect the contents of the letter, as it eliminated the financing partnership with Ethiopia and instead set forth the terms for phased handover of the land for step-wise development of ETIZ.⁷⁸ As provided in the 2012 ETIZ Agreement, “[t]he first 660 (Six Hundred Sixty) hectares of Land shall be handed over to then Developer in five consecutive phases consisting of 100 hectares for four phases and 260 hectares for the last phase.”⁷⁹ It also provided for expansions of an additional 800 ha and 2,000 ha beyond the first 660 ha, depending upon occupancy rates and the timeframe in which those rates were achieved.⁸⁰ Apart from its obligation to pay compensation for each tract of land, Akgun owed no financing duties under the 2012 ETIZ Agreement.⁸¹

2.37. Respondent cites to Art. 12(1) of the 2012 ETIZ Agreement but misinterprets the scope and meaning of that provision to argue that Akgun had a financing obligation that it failed to fulfill. In full, that provision states:

The 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.⁸²

2.38. Under Respondent’s view, that provision required Akgun to obtain outside financing, which it putatively failed to do in violation of the 2012 ETIZ Agreement.⁸³ That is wrong for multiple reasons. First, Arts. 8 and 10 contain Akgun’s obligations under the 2012 ETIZ Agreement and the financing

⁷⁷ *Id.*

⁷⁸ [C-009](#), The 2012 ETIZ Agreement, Arts. 5, 9.

⁷⁹ *Id.*, Art. 5(2).

⁸⁰ *Id.*, Arts. 5(4)-5(9).

⁸¹ *Id.*, Art. 8(1).

⁸² *Id.*, Art. 12(1).

⁸³ [Statement of Rejoinder](#), ¶¶ 478-480.

provision is set forth separately in Art. 12. Thus, it is not among Akgun's contractual obligations to its counterparties and cannot be invoked in a claim for breach. Second, because the financing provision is set forth separately from Akgun's obligations in Arts. 8 and 10, it is sensibly read as a statement of Akgun's intent to explore various financing options to advance ETIZ's development in whatever fashion it may choose rather than requiring that it do so under penalty of contractual breach. Third, the provision states that Akgun "shall **seek**, on its own, opportunities to get financing."⁸⁴ It does not state that Akgun shall **obtain** financing, as Respondent would have it read. Fourth, the provision must be read in context with other provisions of the 2012 ETIZ Agreement, such as the preamble, which defines "industrialists" and "investors" interchangeably as "individuals or legal entities, which establish and/or run businesses in the IZ"⁸⁵ for whom, under Arts. 10(3)-10(5) and 10(8)-10(9), Akgun possessed the sole authority to contract for the construction of their factories.⁸⁶ These provisions reflect the manner by which Akgun intended to finance ETIZ – *i.e.*, the cost-plus model that Akgun's expert A&M described in its report as a common and accepted project finance methodology.⁸⁷ Thus, these "investors" and "industrialists" were, per the language of Art. 12(1), among the "natural persons" and "legal entities" that possessed "interest to invest in and/or finance the Project." As Akgun has previously demonstrated, it had obtained commitments of interest from numerous investors, such that even if Respondent were correct to interpret Art. 12(1) as requiring Akgun to obtain financing for ETIZ, it had demonstrably done so by lining up ETIZ investors.⁸⁸

- 2.39. The 2012 ETIZ Agreement is also notable for what it lacks in comparison to the 2010 ETIZ Agreement. Specifically, under 2010 ETIZ Agreement Art. 7(2), among the Ministry of Industry's rights was that:

⁸⁴ [C-009](#), The 2012 ETIZ Agreement, Art. 12(1) (emphasis added).

⁸⁵ *Id.*, Preamble.

⁸⁶ *Id.*

⁸⁷ [A&M Report](#), ¶ 103. ("Claimant's business model for the ETIZ was, for the most part, what's referred to as a "cost-plus model", which is common in the construction industry. Under a cost-plus model, the constructor provides its services and the materials necessary for construction or ongoing operations of the site to its customers at cost plus a markup, which is often referred to as a 'constructor's profit'.")

⁸⁸ [Statement of Claim](#), ¶¶ 6.43-6.44; [Statement of Reply](#), ¶ 2.41.6; [A&M Report](#), ¶¶ 99-102; [Yunus Akgun 1st Statement](#), ¶¶ 5.7-5.11; [Yusuf Akgun 1st Statement](#), ¶ 4.28.

The Land shall only be handed over to the Developer when it is ascertained that the Developer has secured finance and other resources required for the development of the OIZ ...⁸⁹

2.40. Art. 9(1) of the 2010 ETIZ Agreement further provides:

The Developer shall search finance for the Project after the signing date of this Agreement. **In this context, this Agreement shall be terminated automatically if the Developer could not ensure the finance within 2 (two) years maximum after the signing date of this Agreement.**⁹⁰

2.41. Although both agreements contain the identical “financing” provision discussed above that Respondent mistakenly relies on,⁹¹ both the Art. 7(2) right to require financing for development of ETIZ and Art. 9(1) termination provision for the failure to obtain financing are contained only in the 2010 ETIZ Agreement; the parties elected not to include them in the 2012 ETIZ Agreement. That these provisions requiring financing were not replicated in the 2012 ETIZ Agreement follows logically from the cost-plus model Akgun was to employ, further showing that Respondent’s interpretation of 2012 ETIZ Agreement Art. 12(1) to require Akgun to obtain outside financing is incorrect.

2.42. In a final, flailing attempt to denigrate Akgun, Respondent cites to a passage from an August 2014 *draft* letter as proof that Akgun had failed to finance the project.⁹² This interpretation is infirm from the outset because, as described above, Respondent’s interpretation of Art. 12(1) as requiring Akgun to obtain outside financing is incorrect. But Respondent’s interpretation of the letter as evidencing lack of financing is wrong anyway. Respondent insists that the following passage is proof of “failure to finance”:

Funding was sought from financial institutions for the zone.
The efforts were inconclusive.⁹³

⁸⁹ **C-008**, The 2010 ETIZ Agreement, Art. 7(2).

⁹⁰ *Id.*, Art. 9(1) (emphasis added).

⁹¹ *Id.*, Art. 13(1); **C-009**, The 2012 ETIZ Agreement, Art. 12(1).

⁹² **Statement of Rejoinder**, ¶ 479.

⁹³ **R-68**, Draft letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014.

But Respondent fails to account for the passages that immediately precede and follow these two sentences. Preceding these sentences is Akgun's review of ETIZ's history, beginning with Ethiopia's visit to Ikitelli through the 2010 ETIZ Agreement and its financing provisions, along with the amendments to those provisions.⁹⁴ The "efforts" that Respondent cites, therefore, clearly relate to the funding sought to finance the entire 1460 ha Project under the 2010 ETIZ Agreement. It is undisputed that the 2012 ETIZ Agreement altered that financing arrangement for both Akgun and the Government of Ethiopia, shifting to a self-funding, cost-plus model with Akgun covering the initial start-up costs. The sentence that immediately follows Respondent's cited passage underscores this reality, as it states, "As Akgun Insaat, we have reached the current position with our own resources."⁹⁵ Akgun's further comments in the draft confirm its intention to move forward with the self-funding financing model, as it states:

... we concluded the preliminary negotiations with 15 investor-industrialists that will start investing to incorporate their companies in Ethiopia after meeting with you first. As of 10.08.2014, we will bring them to Ethiopia to meet you ...⁹⁶

- 2.43. Respondent's insistence that Akgun had failed to and could not finance the project is completely nonsensical alongside the references to Akgun's use of its "own resources" up to that point (resources totaling at least USD 5 million as discussed above in Section 2.A) and the set of committed investor-industrialists for whom Akgun would build factories at a profit.⁹⁷
- 2.44. In a similar vein, Respondent also asserts that Akgun could not and/or was unwilling to finance the construction of a water treatment plant for ETIZ.⁹⁸ Respondent's evidence on this point is the self-serving assumption of its fact witness that Akgun regarded such a plant as too costly to implement and its selective interpretation of Akgun's concerns regarding Respondent's request

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ [Statement of Claim](#), ¶¶ 6.43-6.44; [Statement of Reply](#), ¶ 2.41.6; [A&M Report](#), ¶¶ 99-102; [Yunus Akgun 1st Statement](#), ¶¶ 5.7-5.11; [Yusuf Akgun 1st Statement](#), ¶ 4.28.

⁹⁸ [Statement of Rejoinder](#), ¶¶ 162-166, 474-475.

for a 100% guarantee that ETIZ would not result in pollution.⁹⁹ Akgun's cited remarks demonstrate the uncontroversial proposition that guaranteeing a 100% pollution-free industrial city is simply unrealistic and that attempts to do so would be so costly as to make it impossible to attract investors, to whom such costs would be passed. That Respondent leans so heavily on this passage from Akgun's correspondence is surprising since its own authorities recognized a year earlier during a meeting that "[t]here is no filtration technology guaranteeing one hundred percent treatment of such effluent, and there is a likelihood for sudden accidents or equipment malfunctions to cause pollution on the dam"¹⁰⁰ and further noted that "even if at least the potential chemical pollution on the dam is just 1%, the Addis Ababa people will be at risk, which will have catastrophic result."¹⁰¹ Accordingly, multiple authorities concluded at that time that "the project site should be relocated."¹⁰² The meeting notes conclude with the observation that:

[T]he meeting of the day was adjourned at 1:30 PM upon agreement with the recommendations that the intended site of the Industry Zone should be changed, and that the relocation site should also be subject to careful study.¹⁰³

- 2.45. Thus, even Respondent agreed that ETIZ should be relocated because it was unwilling to accept any risk of pollution, regardless of the degree of sophistication of the water treatment plant that Akgun might install. It is further elementary that no conceivable treatment plant could resolve Respondent's conclusion that there were insufficient water resources to cover the needs of

⁹⁹ [Statement of Rejoinder](#), ¶¶ 165-166.

¹⁰⁰ **C-105**, Memorandum from Industry Zone Development and Environmental Care Directorate to State Minister of Investment and Industry Zone Development Sector dated 3 April 2014 together with attached Assessment and Discussion report conducted with stakeholders regarding the Environmental Impact Assessment (Second Draft Report) on Ethio-Turkish Industry Zone ("Memorandum dated 3 April 2014"), p. 5. In its [Statement of Rejoinder](#), Respondent makes much of the handwritten notes on the first page of this document, suggesting that the notes imply that the contents of the document are inconclusive. The very text of the document belies this assertion, as does the subsequent correspondence from Respondent's environmental and municipal authorities that Claimant cites. See [Statement of Reply](#), ¶¶ 2.127-2.137.

¹⁰¹ **C-105**, Memorandum dated 3 April 2014, p. 10.

¹⁰² *Id.*, p. 11; see *id.*, p. 8 ("Reallocation of the site to other site should be done"); p. 9 ("Relocation is the better solution. The Legedadi Dam and treatment plant and Ethio-Turkish Industrial Zone could not co-exist."), p. 10 ("... let a replacement site be offered for the other projects").

¹⁰³ *Id.*, p. 6.

ETIZ and Respondent's Condominium Project.¹⁰⁴ In sum, Respondent's current arguments concerning the costs of the treatment plant are simply a diversion from its site selection error.

- 2.46. In any event, Respondent is wrong on the facts. Claimant's quantum expert has already demonstrated that Akgun's cost-plus model for ETIZ would be perfectly capable of financing the construction of the water treatment plant and increasing its scope to meet the needs of ETIZ as it would grow.¹⁰⁵ Respondent offers neither analysis nor rebuttal to this assessment.
- 2.47. In sum, all of Respondent's arguments concerning Akgun's supposed inability to finance ETIZ are baseless.

(iii) Ethiopia Failed to Supply an Alternative Site

- 2.48. Finally, to the extent it comprises part of Respondent's counterclaims, Akgun is compelled to respond to Ethiopia's contention that it supplied Akgun with perfectly suitable alternative sites for ETIZ that Akgun heedlessly rejected.¹⁰⁶ In truth, Ethiopia never offered an alternative site to Akgun, much less a suitable one.
- 2.49. As recounted in its Statement of Reply, Akgun informed Ethiopia from the very beginning of its relationship of the characteristics that it found necessary to the development of a successful large scale industrial zone.¹⁰⁷ Akgun reiterated those factors to Respondent in 2015, still believing that Respondent genuinely intended to provide a suitable alternative site.¹⁰⁸ Those factors included proximity to transportation hubs; proximity to Addis Ababa, a population center that would provide for labor and keep costs lower; and feasible land characteristics that would not make construction onerous.¹⁰⁹

¹⁰⁴ See [Statement of Reply](#), ¶¶ 2.139-2.186.

¹⁰⁵ [A&M Report](#), ¶¶ 128-129.

¹⁰⁶ [Statement of Rejoinder](#), ¶ 467. Claimant notes that although Respondent asserts that Akgun's supposed "failure" to consider the alternative sites that Ethiopia offered is part of its Counterclaim, it fails to expand any further on this assertion in its Rejoinder.

¹⁰⁷ [Statement of Reply](#), ¶ 2.6.

¹⁰⁸ *Id.*, ¶¶ 2.189-2.194.

¹⁰⁹ [Statement of Reply](#), ¶ 2.189.

Respondent now concedes that it deferred to Akgun's "know-how and expertise"¹¹⁰ in providing the parameters for a successfully situated site.

2.50. But despite conceding its deferral to Akgun's "know-how and expertise" on these parameters, Respondent nonetheless argues that the sites that it showed Akgun in August 2015 were suitable alternatives and that Akgun did not take up the offer because it simply did not want to perform the Project.¹¹¹ There is no evidence to support this assumption and the evidence that Respondent musters to argue that the alternative sites were suitable is self-defeating. As an initial matter, Respondent is vague as to the location of the sites it references in its Rejoinder and fails to set forth the specific land characteristics that relate to the sites or the land area available at those sites. Moreover, Respondent appears to assume, without attempting to prove, that the separate site-visit videos it references were taken at different locations. Indeed, it adduces no evidence of its own and relies instead on Claimant's records and exhibits. In any event, as to one of the sites, Respondent does not even attempt to argue that it was suitable but merely criticizes one of Mr. Yusuf Akgun's "sarcastic" comments about the site,¹¹² seeming to forget that by that point Mr. Akgun was understandably irritated after having been run through a bureaucratic rat maze for years. His patience having been tested in a Job-like fashion, Mr. Akgun may be excused for having uttered a caustic comment by this point. As to another nearby site, Respondent suggests it was suitable due to its flat land but in the same breath recognizes that it completely lacked the necessary transportation links at that time.¹¹³ As to a supposed third site, which Ethiopia contends was suitable since it was adjacent to a highway access point,¹¹⁴ the evidence is that this site was too far from Addis Ababa, which was a problem common to the alternative sites.

2.51. As Mr. Yusuf Akgun explained in his first Witness Statement, locating the industrial city at too great a distance from Addis Ababa,

¹¹⁰ [Statement of Rejoinder](#), ¶ 482.

¹¹¹ *Id.*, ¶¶ 195-196.

¹¹² *Id.*, ¶ 188.

¹¹³ *Id.*, ¶¶ 190-192.

¹¹⁴ *Id.*, ¶ 194.

... makes it harder to find both blue-collar and white-collar workers, increases transportation costs, and discourages investors because they would like to live close to a developed city, otherwise they have security concerns. I also remember that one of the alternatives was located on a hill, but the development of an industrial zone requires flat land, and it would not be financially or technically feasible to flatten a steep hill.¹¹⁵

- 2.52. As depicted below, the Sendafa site was 30.4 km from the Addis Ababa Bole International Airport which Akgun regarded as a primary transportation hub, another few kilometers to the city center, and closer still to the quickly burgeoning northeast developments of Addis Ababa – the very developments that would ultimately cause Respondent to conclude it erred in selecting the Legedadi watershed for ETIZ.

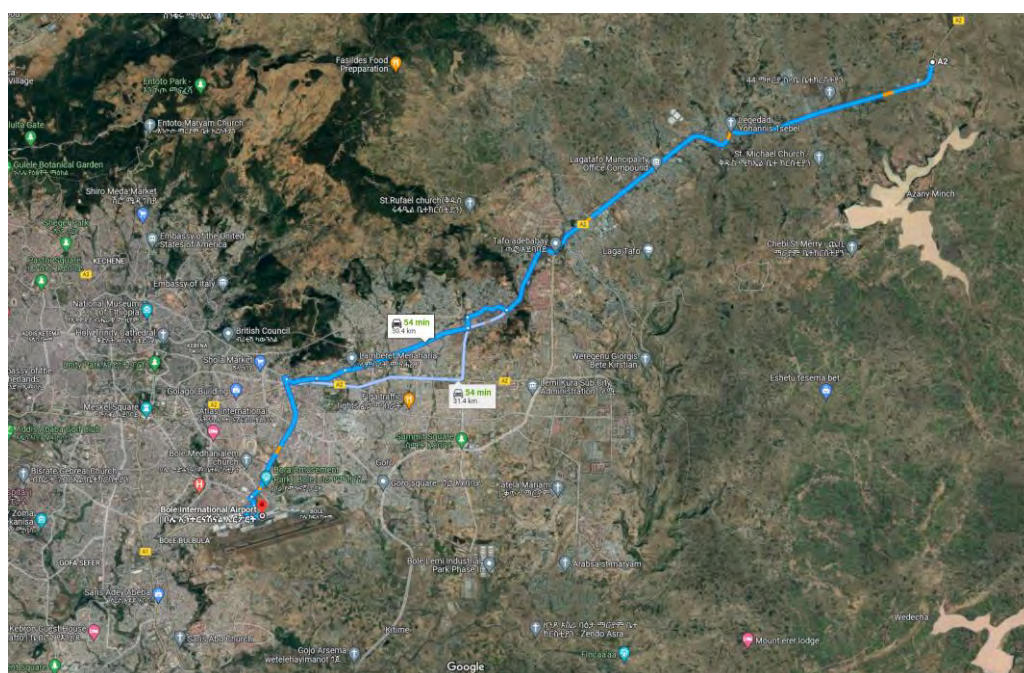


Figure 1. Distance from ETIZ Site to Bole Airport (30.4 km) (Source: Google Maps)

- 2.53. Respondent asserts that it provided four alternative sites (Adama, Mojo, Dire Dawa, and Hawassa)¹¹⁶ that were equally well-situated but this is simply

¹¹⁵ Yusuf Akgun 1st Statement, ¶ 5.25.

¹¹⁶ Statement of Rejoinder, ¶ 196.

untrue as the distance alone from the main population center would have made labor difficult to attract, transportation too costly, and the site unappealing to investors from a security perspective. For instance, as Respondent itself admits and the below maps show, the Adama site was “located some ninety kilometers from Addis Ababa,” the Mojo site was located only a few kilometers closer, the Dire Dawa site, which Respondent attempts to tout as appealing, was in an extremely remote location, some 500 km from Addis Ababa and another nearly 400 km to the port of Djibouti, and the Hawassa site was similarly remote, located nearly 300 km south of Addis Ababa.

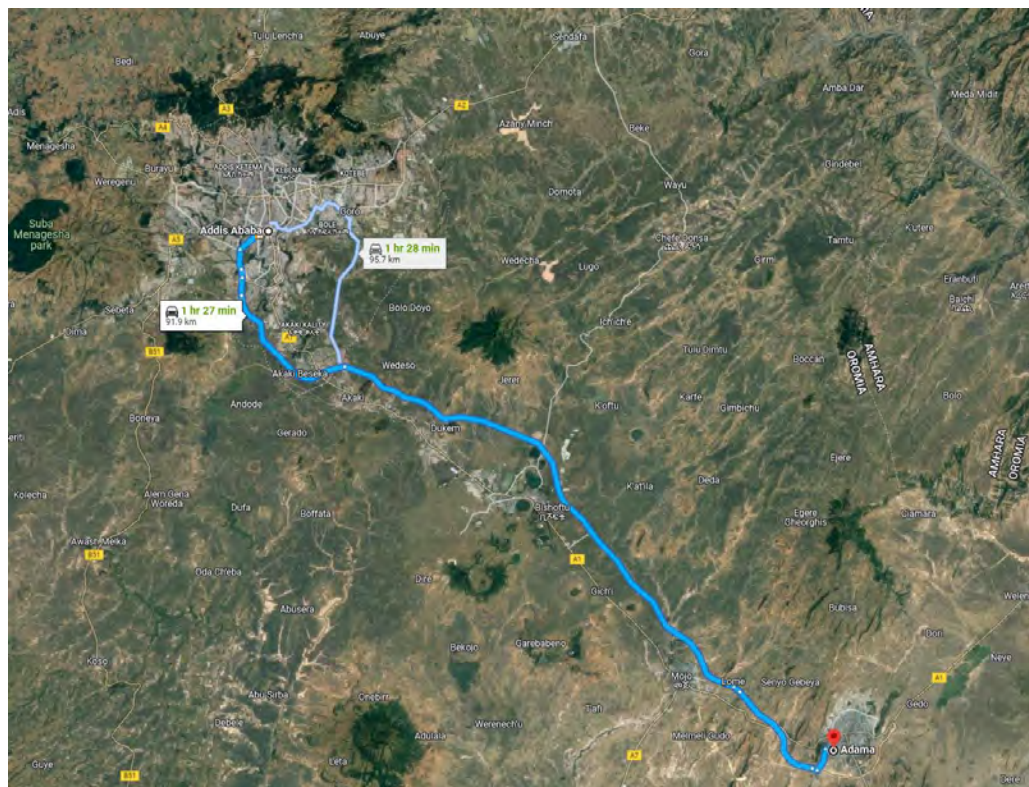


Figure 2. Distance from Addis Ababa to Adama (91.9 km) (Source: Google Maps)

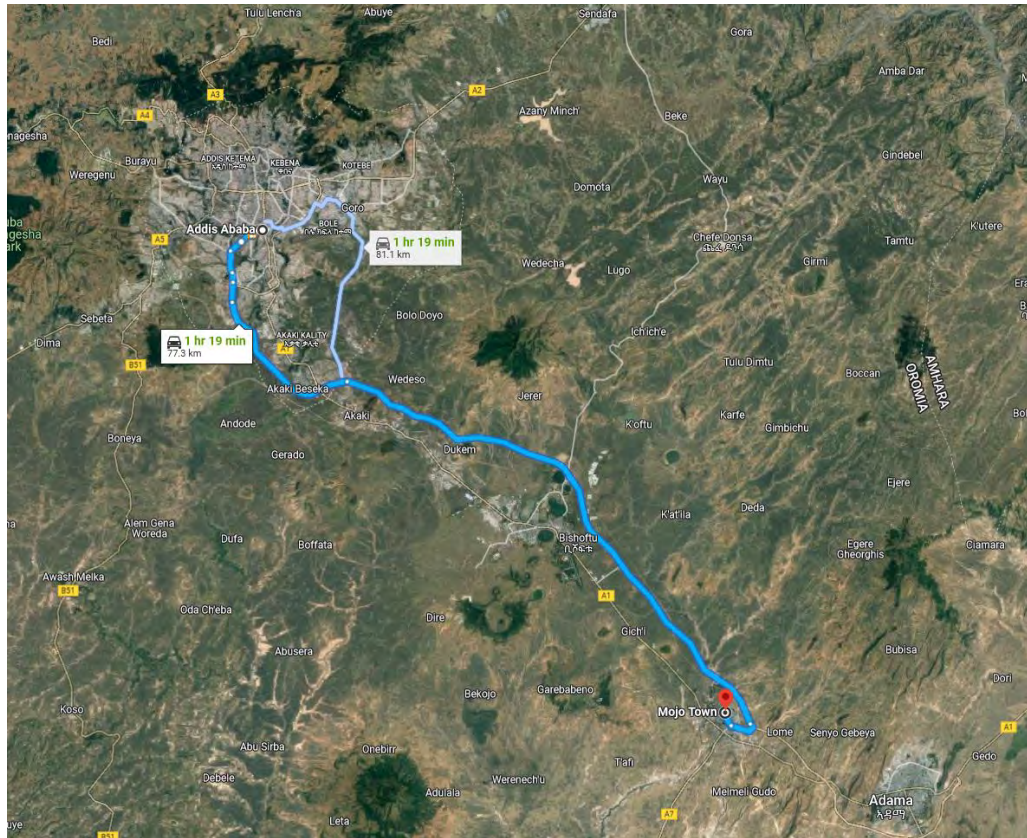


Figure 3. Distance from Addis Ababa to Mojo (77.3 km) (Source: Google Maps)



Figure 4. Distance from Addis Ababa to Dire Dawa (513 km) (Source: Google Maps)



Figure 5. Distance from Dire Dawa to Port of Djibouti (325 km) (Source: Google Maps)



Figure 6. Distance from Addis Ababa to Hawassa (279 km) (Source: Google Maps)

2.54. Thus, the sites were not suitable. But even if they were, Ethiopia never formally offered any of these sites to Akgun or put forward any proposal to Akgun for how it could move forward on an alternative site.¹¹⁷ Nor did Akgun simply sit idly wishing, hoping, and praying that it would receive such an offer or proposal; it twice wrote to Respondent after the site visit to explain its intention to proceed, pending an offer from Respondent.

2.55. Akgun first wrote to Respondent with a letter dated 7 September 2015, in which it recounted a 20 August 2015 meeting the parties conducted after the site visits, stating:

At this meeting, which was held together with Ministry of Industry and Presidency of Oromia State, You have mentioned that the Ministry of Industry and the Oromia State would suggest some solutions to the dispute, about which You are already put on notice by our letter (a) dated 27.03.2015 and letter (b) dated 16.07.2015. Without prejudice to our rights and privileges, we are looking forward to receiving your suggestions and proposals.¹¹⁸

2.56. Akgun received no response to this letter and it followed up with another letter dated 2 November 2015. This letter recounted the recent history between the parties, starting with Respondent's determination that it would not allow the project to proceed at the Sendafa site it had originally allocated to Akgun and confirming that two of the proposed alternative sites were unsuitable due to their distance from Addis Ababa:

The fate of the Ethio-Turkish International Industrial zone is known to all of us. We understand that it will not be possible for us to establish an industrial zone on the land in Sandafa. Indeed, the construction was stopped by the letter of Ministry of Industry dated 17.07.2014.

Following the stoppage of construction by the Ministry, the former Vice Prime Minister His Excellency Arekebe Oqubay once more made certain of the fact that it would not be possible to establish an industrial zone on the current land in Sandafa, at the meeting organized by His

¹¹⁷ Yusuf Akgun 1st Statement, ¶ 5.25.

¹¹⁸ C-149, Letter from Akgun Construction to Ministry of Industry and President of the Oromia Regional State dated 7 September 2015.

Excellency on 11.12.2014 at the Office of Prime Minister. He told us that all the expenses incurred by us related to the current land would be paid back to us and he offered us two new lands in Havasa and Dire Dawa. However it was understood that both lands were not suitable for establishing an industrial zone due to the distance.¹¹⁹

- 2.57. Akgun again recalled the meeting after the August 2015 site visit and its expectation of receiving an offer to evaluate how to proceed with ETIZ:

Upon receiving the invitation of His Excellency Tadesse HAILE on 13.08.2015, in order to discuss the fate of the project, we attend[ed] a meeting organized at the Ministry of Industry on 20.08.2015, to which Vice President of Oromia State Deribu JAMAL participated. We have not received a reasonable offer on or after the meeting. Therefore we sent a new letter to the Ministry of Industry and the Office of President of Oromia State on 07.09.2015 and told them that we were expecting a new offer. However we have not received any response yet.¹²⁰

- 2.58. Akgun again reiterated its request that Respondent present an offer for a suitable alternative site:

As we have mentioned before, we are suffering from financial and moral damages day by day. Therefore, without prejudice to our rights, we are expecting your offer for a new land, not further away than 30 km to Addis Ababa City and adjacent to a railroad and a highway, and for the reimbursement of the expenses we have incurred on the current land. We are kindly waiting for your decision.¹²¹

- 2.59. Ethiopia, however, never responded to Akgun's request for a formal proposal or offer, despite an in-person meeting a short time later in which Ethiopia again promised that it would locate a suitable alternative site to offer to Akgun for ETIZ and yet failed to follow through.¹²² Thus, Respondent's claim that it offered Akgun suitable alternative sites is utterly hollow.

¹¹⁹ [C-088](#), Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu *et al.* dated 2 November 2015.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² [Yusuf Akgun 1st Statement](#), ¶ 5.26.

- 2.60. In sum, the facts do not support Respondent's defenses regarding the Tribunal's lack of jurisdiction over Akgun's claims, nor can they support Ethiopia's counterclaims.

3. JURISDICTION

- 3.1. This Tribunal has jurisdiction over Akgun's claims: the dispute arises from Akgun's "investments" as defined by the BIT; Akgun has explicitly articulated its claims as causes of action under the treaty; Akgun did not agree in the 2012 ETIZ Agreement to divest the Tribunal of jurisdiction over those claims; and Akgun's claims arising out of ETIZ find protection under the umbrella clause that the Treaty's MFN clause incorporates as an additional substantive guarantee to investors.¹²³
- 3.2. Respondent bears the burden of proving that this Tribunal lacks jurisdiction over the claims before it;¹²⁴ Respondent has failed to meet that burden.
- 3.2.1. First, Respondent is wrong that the 2012 ETIZ Agreement's dispute resolution provision applies to claims arising under the BIT and deprives this Tribunal of jurisdiction over those claims.¹²⁵ The 2012 ETIZ Agreement's dispute resolution provision does not apply to treaty claims and it does not explicitly waive Akgun's right to assert claims under the Treaty. In any event, the dispute resolution provision is permissive rather than mandatory such that, even if it were operative as to Treaty claims, it does not bar jurisdiction here.
- 3.2.2. Second, Respondent repeats its bald assertion that Akgun's claims are contract claims. But the facts of the case and the relevant legal authorities belie this assertion. In its Statement of Reply, Akgun detailed the aspects of its claims that render them treaty claims. Respondent offers no evidence in its Rejoinder to dispute those arguments or to otherwise establish that the Tribunal is bound to treat Akgun's claims as contract, rather than treaty, claims.

¹²³ See [Statement of Reply](#), Section 3.

¹²⁴ UNCITRAL Arbitration Rules (2013), Art. 27(1) ("Each party shall have the burden of providing the facts relied on to support its claim or defence.").

¹²⁵ [Statement of Rejoinder](#), ¶¶ 202-203; 208-218.

- 3.2.3. Third, Respondent's argument that Akgun's investments are not "assets" within the meaning of the BIT is refuted by the facts of this case, and its contention that Akgun's claims fail to satisfy the *Salini* factors (which are in any event inapplicable to this non-ICSID arbitration) are contrary to the findings of tribunals applying the *Salini* test.
- 3.2.4. Fourth, Respondent is wrong to state that Akgun may not assert a claim for umbrella clause protection under the Treaty. The MFN provision in the Turkey-Ethiopia BIT guarantees Akgun the same substantive rights that Ethiopia offers to other foreign investors. Those rights include umbrella clause protection, and such protection allows Akgun to assert a claim for Ethiopia's violation of its specific commitments before this Tribunal.

A. The Dispute Resolution Provision in the 2012 ETIZ Agreement Does Not Deprive This Tribunal of Jurisdiction

- 3.3. In its Rejoinder, Respondent repeats its argument that the 2012 ETIZ Agreement's dispute resolution provision is exclusive and bars this Tribunal from hearing Akgun's claims. Respondent, however, has now revised its argument slightly to suggest that the 2012 ETIZ Agreement's dispute resolution provision applies not only to claims arising under the 2012 ETIZ Agreement, but also to claims arising under the BIT. Yet Respondent continues to ignore that the provision it cites is permissive and non-exclusive, even if one were to assume *arguendo* its applicability here.¹²⁶
- 3.4. Because the 2012 ETIZ Agreement's dispute resolution provision does not apply to claims arising under the BIT, such as Akgun's claims here, and because the dispute resolution provision is neither mandatory nor exclusive, the 2012 ETIZ Agreement does not deprive the Tribunal of jurisdiction over Akgun's claims.

(i) The 2012 ETIZ Agreement's Dispute Resolution Provision Does Not Apply to Akgun's Treaty Claims

- 3.5. Art. 21 of the 2012 ETIZ Agreement, entitled "Settlement of Disputes" provides: "Any disputes or differences between the Ministry and the Developer

¹²⁶ [Statement of Rejoinder](#), ¶¶ 208-218.

in connection with this Agreement shall as far as possible be settled amicably,” failing which “the dispute **may** be submitted to [ICSID].”¹²⁷

- 3.6. By its plain language, the 2012 ETIZ Agreement’s dispute resolution provision, including any forum selection clause, is limited to *contractual* disputes arising under the Agreement. Indeed, in its Statement of Defense, Respondent argued that the 2012 ETIZ Agreement’s dispute resolution provision applies because Akgun’s claims are “patently [] contract claim[s] that belong under the exclusive dispute settlement provision to which the Parties expressly agreed.”¹²⁸ Thus, Respondent initially conceded that Art. 21 relates only to contractual disputes and not to Treaty disputes.
- 3.7. Akgun rebutted this argument in its Statement of Reply, demonstrating that Akgun’s claims are not contract claims, but are treaty claims arising under the BIT. Accordingly, the 2012 ETIZ Agreement’s dispute resolution provision — which Respondent conceded applies only to contract claims—does not apply and does not bar this Tribunal’s jurisdiction over Akgun’s claims.¹²⁹
- 3.8. Rather than respond to this argument or defend its initial position in its Rejoinder, Respondent instead attempts to broaden the scope of the 2012 ETIZ Agreement’s dispute resolution provision, suggesting that it applies not only to contractual claims, but also to claims arising “in connection with” the BIT (*i.e.*, treaty claims):
- if Akgun wishes to bring any claim on the basis of “[a]ny disputes or differences” arising “**in connection with**” the Agreement under . . . **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.¹³⁰
- 3.9. But that is not what the 2012 ETIZ Agreement provides. Art. 21(5), from which Respondent selectively quotes in its Rejoinder, does not broaden the scope of the Agreement’s dispute resolution provision to include claims arising

¹²⁷ [C-009](#), The 2012 ETIZ Agreement, Arts. 21(1)-21(2) (emphasis added).

¹²⁸ [Statement of Defense](#), ¶ 187.

¹²⁹ [Statement of Reply](#), ¶¶ 3.72-3.73.

¹³⁰ [Statement of Rejoinder](#), ¶ 214 (emphasis in original).

“under” or “in connection with” the BIT; it simply provides that once an arbitration of contractual claims has been conducted, the terms of the BIT form part of the law applicable to such a dispute. Specifically, the 2012 ETIZ Agreement provides:

The applicable law for the arbitration [of “[a]ny disputes or differences . . . in connection with this Agreement”] shall be Ethiopian laws, the BIT and accepted principles of international law.¹³¹

- 3.10. Nothing in the 2012 ETIZ Agreement specifies that the dispute settlement provisions govern all claims arising under the BIT, and Respondent cannot unilaterally rewrite the terms of that provision to include *treaty* claims. Respondent’s attempt is especially daring since there is no explicit text in the 2012 ETIZ Agreement subjecting treaty claims, which are governed by a BIT that Ethiopia and Turkey negotiated and signed, to the terms of that 2012 ETIZ Agreement that was signed by separate parties. Respondent’s attempt is both contrary to the plain language of the Agreement and contrary to the general rule that a dispute resolution provision in a contract cannot extend to treaty claims under international law. On this the legal authorities are clear:

[A]n exclusive jurisdiction clause in relation to disputes concerning possible *contractual* breaches [...] may not divest an international tribunal of its jurisdiction under an international treaty in relation to possible *treaty* breaches. Differently put, [the] Tribunal has a duty to carry out its remit under the BIT, namely to decide upon treaty claims under international law, irrespective of a domestic law jurisdictional clause relating to the resolution of different types of disputes.¹³²

- 3.11. Moreover, as Claimant explained in its Statement of Reply, but that Respondent does not address, where treaty provisions are incorporated by

¹³¹ [C-009](#), The 2012 ETIZ Agreement, Arts. 21(5), 21(1).

¹³² [CLA-036](#), *Crystallex International. Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (“*Crystallex v. Venezuela*”), ¶ 480; see also [CLA-023](#), *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, 3 July 2002 (“*Vivendi*, Decision on Annulment”), ¶ 103 (“A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”).

reference into a contract related to or at issue in a dispute, the arbitration provisions of the *treaty* apply.¹³³

- 3.12. That is, the very argument that Respondent asserts in its Rejoinder calls for the result opposite to that which Respondent seeks—by referencing the BIT in Art. 21, the 2012 ETIZ Agreement incorporates the BIT’s arbitration provisions by reference. Rather than making the contract’s dispute settlement provisions the master of any BIT claims that may touch on the 2012 ETIZ Agreement, as Respondent argues, Art. 21’s reference to the BIT in fact recognizes that the terms of the BIT are the master of any such dispute. Thus the Art. 21 reference to the BIT permits disputes involving the 2012 ETIZ Agreement to be submitted to arbitration under the UNCITRAL rules and before this Tribunal, per the BIT’s terms.
- 3.13. Accordingly, even if Respondent were correct that the 2012 ETIZ Agreement’s dispute settlement provision extends beyond mere contract claims to also encompass treaty claims, the 2012 ETIZ Agreement permits that those claims be brought before this Tribunal, and certainly contains no text that explicitly bars resolution of those claims here.
- 3.14. In support of the novel argument that a contract’s dispute resolution provision extends to treaty claims, Respondent cites only *Biloune and Marine Drive Complex Ltd. v. Ghana*.¹³⁴ Relying on *Biloune*, Respondent argues that the BIT was expressly incorporated into the 2012 ETIZ Agreement and that therefore, “the parties to that contract intended and did agree that the State be bound thereto” such that the Agreement “expressly encompass[es] obligations which, by their nature, fall upon (and thus can only be breached by) the State itself.”¹³⁵

¹³³ [CLA-095](#), *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 (“*COSB v. Slovak Republic*”), ¶ 55 (“The Tribunal concludes, therefore, that by referring to the BIT, the parties intended to incorporate Article 8 of the BIT by reference into the Consolidation Agreement, in order to provide for international arbitration as their chosen dispute-settlement method.”).

¹³⁴ [Statement of Rejoinder](#), ¶ 213 (citing [CLA-121](#), *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and The Government of Ghana*, 95 I.L.R 183 (“*Biloune v. Ghana*”), p. 205).

¹³⁵ *Id.*

3.15. But the *Biloune* tribunal did not conclude that a contract's dispute settlement provision extends to treaty claims, as Respondent suggests. That question was not before it. The *Biloune* tribunal was called to answer whether a sovereign consented to arbitration in a *contract* (not a treaty) to which an agency of the sovereign, but not the sovereign itself, was a party.¹³⁶ The *Biloune* tribunal determined yes:

[B]ecause the Agreement with GIC, an agency of the Government of Ghana, clearly binds the Government; indeed, the Agreement speaks explicitly of disputes between the investor "and the Government", and the expropriation clause expressly prohibits expropriation "by the Government."¹³⁷

3.16. In no way did the *Biloune* tribunal determine that the contract's dispute settlement provision extended to treaty claims. Indeed, the *Biloune* dispute was not even heard under an investment treaty—it strictly concerned claims arising in contract and resolved those claims in accordance with the contract's dispute settlement provision. Akgun's claims are not contract claims. They are treaty claims.¹³⁸ And while *Biloune* may assist the Tribunal in determining whether Respondent expropriated Akgun's investments because, like the BIT, the contract at issue in *Biloune* "prohibited expropriation 'by the Government,'" the *Biloune* opinion has no relevance to this Tribunal's jurisdiction over Akgun's claims.¹³⁹

3.17. Respondent can point to no tribunal finding that a contractual dispute settlement clause extends to govern the forum for claims arising under an investment treaty. Instead, as Claimant noted in its Statement of Reply, tribunals have repeatedly concluded that "forum selection clauses [in contracts] may not affect treaty claims."¹⁴⁰ Respondent is wrong to argue that

¹³⁶ [CLA-121](#), *Biloune v. Ghana*, pp. 204-205.

¹³⁷ *Id.*

¹³⁸ See [Statement of Reply](#), Section 3.B.

¹³⁹ See, e.g., [RLA-55](#), *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 ("*Urbaser v. Argentina*"), ¶ 1154, n. 427.

¹⁴⁰ See [Statement of Reply](#), ¶ 3.72 (quoting [CLA-093](#), *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 ("*Abaclat and others v. Argentina*"), ¶ 498).

the 2012 ETIZ Agreement should be the first of its kind in that regard since the plain text does not merit such a reading.

- 3.18. Absent any express language whereby parties to a contract explicitly agree to adjudicate *treaty* claims in accordance with the terms of the contract, it cannot be presumed that the parties intended to waive the right to adjudicate the treaty claims in accordance with the terms of the treaty. A contrary result would strip investors of their expected and time-honored protections set forth by treaty, and replace sovereign negotiations for investment protection with subjective judgments about contractual parties' implicit intent. Indeed, "the right to access a particular dispute resolution forum offered in a treaty 'should not be lightly assumed to have been waived,'" and tribunals routinely require "direct and convincing evidence that a party intended to do so, for example through an express waiver rather than one merely by inference or implication."¹⁴¹ Respondent has offered no such evidence, and Respondent's unilateral rewriting of the 2012 ETIZ Agreement's dispute resolution provision to encompass treaty claims should be rejected.
- 3.19. Because the 2012 ETIZ Agreement's dispute resolution provision does not extend to treaty claims (and because Akgun's claims are treaty claims, for reasons in its Statement of Reply and for reasons reiterated herein), the Agreement's dispute resolution provision does not apply to the claims at issue in this dispute and, as such, does not mandate that those claims be brought in any different forum.

(ii) The 2012 ETIZ Agreement's Dispute Resolution Provision Is Not Mandatory or Exclusive

- 3.20. In rehashing the arguments above, Respondent continues to ignore that the 2012 ETIZ Agreement's dispute resolution provision is neither exclusive (*i.e.*, it does not explicitly preclude all other means of dispute settlement) nor mandatory (*i.e.*, it does not require that dispute settlement occur in accordance with the 2012 ETIZ Agreement's terms), such that even if it were in any way applicable to Akgun's claims (it is not), Akgun would still have the option to bring its claims before this Tribunal. This ignorance seems willful, as

¹⁴¹ [CLA-134](#), *Nissan Motor Co., LTD. (Japan) v. The Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 271 (internal citations omitted).

Respondent freely admits in its Rejoinder that Art. 21 of the 2012 ETIZ Agreement grants the parties “the **option** of referring their dispute to arbitration” constituted thereunder.¹⁴²

- 3.21. In any event, by maintaining that Akgun’s treaty claims must be arbitrated before an ICSID tribunal in accordance with the 2012 ETIZ Agreement’s dispute settlement provision, Respondent asks the Tribunal to look to the plain language of the 2012 ETIZ Agreement, largely ignoring that the Agreement’s plain language provides that the dispute settlement provision is *not* mandatory and is, instead, entirely “option[al].”¹⁴³ Specifically, the Agreement provides that if disputes or differences arising thereunder cannot be amicably resolved, “the dispute **may** be submitted” to ICSID arbitration.¹⁴⁴ As Akgun detailed in its Statement of Reply, a forum selection clause is mandatory only when made expressly so, with many international tribunals finding a dispute resolution clause is mandatory only when it employs the word “**shall**.”¹⁴⁵ No such language can be found in the forum selection provision set forth in the 2012 ETIZ Agreement, and Respondent offers no reason why this Tribunal should depart from the well-settled principle that, absent such language, the 2012 ETIZ Agreement’s dispute resolution provision is not mandatory.
- 3.22. Instead, Respondent reasons that it is only whether “the parties . . . resort to arbitration at all” that is optional under the 2012 ETIZ Agreement, not the selection of forum in which to pursue that arbitration.¹⁴⁶ Specifically, Respondent argues that the Agreement’s provision that, should the option of

¹⁴² [Statement of Rejoinder](#), ¶ 216 (emphasis added).

¹⁴³ *Id.*

¹⁴⁴ **C-009**, The 2012 ETIZ Agreement, Art. 21(2) (emphasis added).

¹⁴⁵ See [Statement of Reply](#), ¶ 3.81; **CLA-022**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction, 7 May 2004 (“*Saluka v. Czech Republic*, Decision on Jurisdiction”), ¶ 54 (“Article 21 is in mandatory terms: the disputes and differences in question ‘**shall** be finally settled by arbitration’ in accordance with the UNCITRAL Rules.”) (emphasis added); see also **CLA-096**, *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of The Tribunal on Objections to Jurisdiction, 29 January 2004 (“*SGS v. Philippines*”), ¶ 115 (finding that the use of the word “shall” renders a provision mandatory); **CLA-094**, *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998, ¶ 31 (finding that a contractual forum selection clause was not exclusive and did not displace the arbitral tribunal’s jurisdiction where the clause was not made expressly exclusive).

¹⁴⁶ [Statement of Rejoinder](#), ¶ 217 (emphasis in original).

arbitration thereunder be pursued, the dispute will be “**finally settled** by an arbitration committee” constituted under the 2012 ETIZ Agreement.¹⁴⁷

- 3.23. Respondent’s analysis is infirm from the outset because it is predicated on the idea that the 2012 ETIZ Agreement’s dispute settlement provisions extend beyond contract claims under that Agreement to also control treaty claims. As discussed above, this is wrong.¹⁴⁸ Setting aside the false foundation on which Respondent’s arguments rest, it is nonetheless clear that the provisions it cites only underscore the optional nature of the 2012 ETIZ Agreement’s forum selection provision. The 2012 ETIZ Agreement provides that a party has the “**option**,” in Respondent’s words, to pursue arbitration before a panel constituted under the 2012 ETIZ Agreement; there is no provision excluding the possibility of pursuing resolution elsewhere. Nothing in Art. 21 of the Agreement makes the terms of its dispute resolution provision mandatory or exclusive of other means of dispute resolution.
- 3.24. In any event, the 2012 ETIZ Agreement incorporates the terms of the BIT by reference, including the arbitration provision therein, providing that “[t]he relevant Ethiopian laws, and the BIT shall govern this Agreement.”¹⁴⁹ As Akgun argued in its Statement of Reply, but that Respondent, again, failed to address, when treaty provisions are incorporated by reference into a contract, the *treaty’s* dispute resolution provision applies.¹⁵⁰ Because the terms of the BIT are incorporated by reference into the 2012 ETIZ Agreement, this Tribunal, constituted under the terms of the BIT, is *ipso facto* also an “arbitration committee” constituted under the 2012 ETIZ Agreement. Stated differently, by incorporating the BIT’s terms, including its arbitration provision, into the 2012 ETIZ Agreement, the parties agreed that disputes involving the 2012 ETIZ Agreement may be submitted to arbitration under the UNCITRAL rules and before this Tribunal. Thus, even if the 2012 ETIZ Agreement’s

¹⁴⁷ *Id.*, ¶ 216 (emphasis in original).

¹⁴⁸ It is further worthwhile noting that the full text of the provision Respondent cites states, “The Agreement will be finally settled by an arbitration committee” It is not too bold to suppose that there are words missing from this provision, as it is not “the Agreement” that will be settled but rather disputes under the Agreement. Properly read, the direct reference to the Agreement as the subject of the disputes further demonstrates that the provision is aimed at contractual disputes and not treaty disputes.

¹⁴⁹ **C-009**, The 2012 ETIZ Agreement, Art. 13.

¹⁵⁰ See [Statement of Reply](#), ¶¶ 3.78-3.80 (citing **CLA-095**, *COSB v. Slovak Republic*, ¶ 55).

dispute resolution provision were mandatory, because the Agreement incorporates the terms of the BIT by reference, the BIT's arbitration provision prevails, and allows Claimant to bring its claims before this Tribunal.

- 3.25. In sum, even if the 2012 ETIZ Agreement's dispute resolution provision *did* apply (though it does not), because the provision incorporates the BIT's arbitration provision by reference, such that the Agreement allows for arbitration before this Tribunal, and because the provision is neither mandatory nor exclusive, the Agreement does not deprive the Tribunal of jurisdiction over Akgun's claims.

(iii) The 2012 ETIZ Agreement's Dispute Resolution Provision Does Not Render Akgun's Claims Inadmissible

- 3.26. Respondent argues for the first time in its Rejoinder that "some tribunals have found that the failure to abide by a dispute settlement provision in an underlying contract is a matter of admissibility" and Akgun's claims should be ruled inadmissible here.
- 3.27. At the threshold, this untimely argument fails, because Akgun *did* abide by the 2012 ETIZ Agreement's dispute settlement provision. The Agreement does not prohibit Akgun from bringing its treaty claims (or any claim, for that matter) before this Tribunal for reasons stated above.
- 3.28. The decisions cited by Respondent in its Rejoinder are inapposite because those cases involved either pure contract claims without BIT breaches or involved umbrella clause claims that were controlled by an explicitly exclusive forum selection clause.
- 3.28.1. In *SGS v. Philippines*, the tribunal determined that certain of the claimant's claims were purely contractual—that is "[n]o question of a breach of the BIT independent of a breach of contract claim [was] raised"—and the tribunal determined the claims inadmissible on that basis.¹⁵¹ In relying on *SGS v. Philippines*, Respondent again stubbornly recasts Akgun's claims as contract claims. But as set forth in Akgun's Statement of Reply and herein, each of Akgun's claims involve breaches of the BIT, not just the 2012 ETIZ

¹⁵¹ See [CLA-096](#), *SGS v. Philippines*, ¶ 159.

Agreement. Akgun's claims are not contract claims. They are treaty claims, and the *SGS v. Philippines* tribunal's decision is irrelevant to their admissibility.

- 3.28.2. In *Bosh International Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine* and *BIVAC v. Paraguay*, the tribunals determined that the claimant's claim for respondent's failure to comply with contractual undertakings, which it sought to assert by way of the BIT's umbrella clause, must first be asserted in accordance with the contract's *exclusive* dispute resolution provisions.¹⁵² Specifically, in *Bosh*, the contract provided:

All disputes between the Parties in connection to which no agreement has been reached **shall** be settled in accordance to the Ukrainian legislation.¹⁵³

- 3.28.3. And, in *BIVAC*:

Any conflict, controversy or claim which arises from or is produced in relation to this Contract, non compliance, resolution or invalidity **shall** be submitted to the Tribunals of the City of Asuncion pursuant to Paraguayan Law.¹⁵⁴

- 3.29. Unlike the forum selection clauses in *Bosh* and *BIVAC*, the 2012 ETIZ Agreement's dispute resolution provision is not mandatory or exclusive, and *Bosh* and *BIVAC* are not dispositive here.
- 3.30. Respondent's argument that Akgun's claims are inadmissible, even if this Tribunal holds jurisdiction over those claims, is without merit, and the Tribunal should dispose of it accordingly.

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

- 3.31. As it did in its Statement of Defense, Respondent insists that Akgun's claims are contract claims, again stubbornly recasting them as "essentially

¹⁵² See [CLA-105](#), *Bosh International, Inc. and B&P, Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 ("*Bosh v. Ukraine*"), ¶ 252; [CLA-062](#), *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 ("*BIVAC v. Paraguay*"), ¶ 159.

¹⁵³ [CLA-105](#), *Bosh v. Ukraine*, ¶ 255 (emphasis added).

¹⁵⁴ [CLA-062](#), *BIVAC v. Paraguay*, ¶ 144 (emphasis added).

contractual in nature” because, Respondent asserts, “they all arise out of the 2012 ETIZ Agreement,”¹⁵⁵ entirely ignoring in the process the factual matrix extending from 2008-2012 that forms an important part of Akgun’s treaty claims.

3.32. Though Respondent repeats this assertion throughout its Rejoinder, it never explains why “the Claimant has not presented claims that are capable of being characterized as independent breaches by Ethiopia of any of its treaty obligations”—*i.e.*, why Akgun’s claims are not treaty claims.¹⁵⁶ Argument by mere edict is no argument at all.

3.33. Akgun, for its part, explained in great detail the many ways in which its claims are treaty claims, rather than contract. In short, Akgun has established, *prima facie*, that the fundamental basis for each of Akgun’s claims is the BIT:

3.33.1. Akgun alleged, *inter alia*, that by recruiting Akgun to develop ETIZ, repeatedly promising Akgun its unwavering support for the Project, selecting the Sendafa site, accepting Akgun’s payment for lease of the site, allocating and then withdrawing the site from Akgun, and failing—despite its repeated promises—to provide an adequate alternative site, Respondent violated Art. II(2) of the BIT, requiring that investments “at all times be accorded fair and equitable treatment” and prohibiting Respondent from taking unreasonable or discriminatory actions with respect to “the management, maintenance, use, enjoyment, extension, or disposal of such investments.”¹⁵⁷

3.33.2. Akgun alleged, *inter alia*, that by failing to state or imply that an EIA would be required as a condition precedent to development of ETIZ, and taking numerous steps to indicate the contrary, only to then impose such a requirement (grounded neither in the terms of the MoU, the 2010 ETIZ Agreement, the 2012 ETIZ Agreement, or Ethiopian law) five years after development of the Project commenced and demanding that construction of ETIZ be halted without ever recompensating Akgun—again, despite its repeated

¹⁵⁵ [Statement of Rejoinder](#), ¶¶ 219, 222.

¹⁵⁶ *Id.*, ¶ 225.

¹⁵⁷ See [Statement of Reply](#), ¶ 3.68, Section 5.A-B.

promises—Respondent violated Art. VI of the BIT, which protects against “direct[] or indirect[]” “expropriat[ion]” of investments.¹⁵⁸

- 3.33.3. And Akgun alleged that Respondent breached certain commitments under the 2012 ETIZ Agreement as well as other specific commitments, in violation of the umbrella clause imported into the BIT through its MFN clause.¹⁵⁹
- 3.34. These allegations demonstrate that Akgun has, in fact, “invoked . . . true instance[s] of *puissance publique*,” and Respondent is wrong to suggest otherwise.¹⁶⁰ At root of each of these claims, as Akgun has pleaded them, is Respondent’s breach of standards of conduct set forth by the BIT. Because “the conduct alleged by Claimant[], if established, *could* have breached the BIT,” the Tribunal may exercise jurisdiction over Akgun’s claims, and Akgun has established, *prima facie*, that the fundamental basis (or, “essential basis”) for each of its claims is the BIT.¹⁶¹
- 3.35. Still, Respondent insists that, because the factual matrix underlying Akgun’s claims includes the 2012 ETIZ Agreement, they are exclusively contractual claims. But as the *Vivendi* ad-hoc committee recognized long ago, and as many other international tribunals have recognized since, treaty claims and contract claims can coexist and “a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT’s standards and questions of contracts.”¹⁶² Stated differently, Respondent cannot exploit the fact that Akgun’s treaty claims involve the 2012 ETIZ Agreement as a basis for allowing the contract to swallow whole the treaty claims and place them beyond this Tribunal’s jurisdiction.
- 3.36. Again, the tribunal decisions on which Respondent relies in its Rejoinder are inapposite to the arguments it asserts.

¹⁵⁸ *Id.*, ¶ 3.69, Section 5.C.

¹⁵⁹ *Id.*, ¶ 3.70, Section 5.D.

¹⁶⁰ See [Statement of Rejoinder](#), ¶ 220. See also [Statement of Reply](#), ¶¶ 3.122-3.133 (demonstrating that the process through which ETIZ was implemented was replete with state action).

¹⁶¹ [CLA-023](#), *Vivendi*, Decision on Annulment, ¶ 112.

¹⁶² *Id.*, ¶ 60; [CLA-036](#), *Crystallex v. Venezuela*, ¶ 475.

- 3.36.1. In *KT Asia Investment Group B.V. v. Kazakhstan*, the tribunal declined jurisdiction not because the claims before it were contract claims, rather than treaty claims, but because it determined that the claimant had not made an investment under Art. 25(1) of the ICSID Convention and within the meaning of the treaty at issue.¹⁶³ Specifically, the *KT Asia* tribunal determined the claimant had made no contribution sufficient to constitute a protected investment because the claimant was nothing more than a shell company that had purchased shares in a Kazakh bank for a nominal price (*i.e.*, one-eighth of the market value for the shares) from an interested affiliate seeking to conceal his identity and dodge adverse tax consequences for the shares in certain jurisdictions.¹⁶⁴ That is not the case here. As detailed in its Statement of Reply, and further outlined below, Akgun was an entity that made significant contributions to develop the ETIZ and in furtherance of its other investments in Ethiopia.¹⁶⁵ Those investments are eligible for protection under the plain meaning of the BIT and relevant principles of international law.¹⁶⁶
- 3.36.2. In *Bayindir v. Pakistan*, *Abaclat v. Argentina*, and *Garanti Koza v. Turkmenistan*, the tribunals determined that each *did* have jurisdiction over the claimant's claims, even though the claims arose from or related to a particular contract, with the *Bayindir* tribunal noting that "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty."¹⁶⁷ Thus, even if the facts giving rise to Akgun's treaty claims involve the 2012 ETIZ Agreement, the Tribunal has jurisdiction over those claims.
- 3.36.3. In *Muhammet v. Turkmenistan*, the tribunal determined that the bulk of the claimants' claims were treaty claims, even though the claims

¹⁶³ [RLA-46](#), *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013 ("*KT v. Kazakhstan*"), ¶ 222.

¹⁶⁴ *Id.*, ¶¶ 19, 90, 178-183, 200, 204-206.

¹⁶⁵ See [Statement of Reply](#), ¶¶ 3.54-3.57.

¹⁶⁶ *Id.*, Section 3.A.

¹⁶⁷ [CLA-088](#), *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 ("*Bayindir v. Pakistan*, Decision on Jurisdiction"), ¶ 167; [CLA-093](#), *Abaclat and others v. Argentina*, ¶ 326; [CLA-012](#), *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, dated 19 December 2016, ¶¶ 244-247.

arose from a “complex matrix of contracts.”¹⁶⁸ The *Muhammet* tribunal concluded that it did not have jurisdiction over the claimants’ purely contractual claims (*i.e.*, those “which relate to contract performance issues, such as for non- or late payments, prolongation costs, extensions of time”)¹⁶⁹ because those claims did not arise from the “exercise of sovereign authority” in violation of “international obligations binding on the State party to a BIT.”¹⁷⁰ Though many tribunals have concluded that the foregoing test is overly restrictive and therefore shall not apply,¹⁷¹ Akgun’s claims satisfy it. As set forth in its Statement of Reply and herein, Akgun’s claims—including its umbrella clause claims—are replete with State action.¹⁷² Thus, even under the test set out by the *Muhammet* tribunal, this Tribunal has jurisdiction over Akgun’s claims.

- 3.36.4. Indeed the “contract performance issues” excluded from jurisdiction by the *Muhammet* tribunal (“non- or late payments, prolongation costs, extensions of time”) are the very sort of claims that the tribunal in *Duke Energy v. Ecuador*, also cited by Respondent, determined constitute breaches of a treaty’s umbrella clause. Those claims, like Akgun’s umbrella clause claims here, are treaty claims.¹⁷³
- 3.36.5. Respondent’s reliance on *Saluka v. Czech Republic*, *SGS v. Philippines*, *BIVAC v. Paraguay*, *Bosh International v. Ukraine* and the excerpted commentary by Judge Crawford is inapposite—each concerns mandatory and/or exclusive dispute resolution provisions in contracts relating to the claimant’s claims.¹⁷⁴ For the reasons

¹⁶⁸ [RLA-47](#), *Muhammet Cap & Sehil Insaat Industri ve Ticaret LTD. STI. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award of 4 May 2021 (“*Muhammet Cap & Sehil v. Turkmenistan*”), ¶¶ 703, 708.

¹⁶⁹ See [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*, ¶ 709.

¹⁷⁰ *Id.*, ¶ 705.

¹⁷¹ [Statement of Reply](#), ¶¶ 3.103-3.113.

¹⁷² See *id.*, ¶¶ 3.114-3.133; 5.189-5.218.

¹⁷³ [CLA-102](#), *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 325 (finding that respondent’s “late establishment of the Payment Trusts, their poor implementation, the irregular imposition of fines and the non-payment of interest for late payment arising under the 96 Liquidation Agreement . . . breached its obligations under the umbrella clause” of the treaty).

¹⁷⁴ See [Statement of Rejoinder](#), ¶ 222 (citing [CLA-104](#), J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351 (“Crawford”)); ¶ 227 (citing [CLA-022](#), *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶¶ 54, 56); ¶ 228 (citing [CLA-096](#), *SGS v. Philippines*, ¶ 155); ¶ 229, fn. 331 (citing [CLA-062](#), *BIVAC v. Paraguay*, ¶ 148 and [CLA-105](#), *Bosh v. Ukraine*, ¶ 252).

stated above, the 2012 ETIZ Agreement's dispute resolution provision is neither mandatory nor exclusive, and these authorities do not apply.

- 3.37. Indeed, rather than seriously contend with Claimant's arguments as to why the claims before this Tribunal are treaty claims, Respondent seems to argue that, because Art. 21 of the 2012 ETIZ Agreement contains a dispute resolution provision, any claims involving the Agreement are necessarily contractual.¹⁷⁵ Respondent begs the question—the 2012 ETIZ Agreement's forum selection clause is applicable only if the claims at dispute here are contractual. They are not.

C. Akgun's Investments Are Protected by the BIT

- 3.38. Respondent again asserts that Akgun's investments are not protected by the BIT because they are not "assets" as defined therein and further do not satisfy the *Salini* factors. Again, Respondent is wrong on both counts.

(i) Akgun's Investments Are Protected by the Plain Language of the BIT

a. Akgun's Assets Are Stand-Alone Investments as Defined by the BIT

- 3.39. Akgun had committed significant resources, which materialized into a number of assets, by the time Respondent's conduct prevented Akgun from realizing profitable returns on its investments.
- 3.39.1. Akgun had established an Ethiopian branch; it had paid for the ETIZ leasehold; it had brought investors to Ethiopia; it had conducted a number of feasibility studies and EIAs; it committed the know-how to develop the Project successfully, as well as the equipment, materials and labor to construct the Project; and it committed to managing and operating ETIZ for 80 years once completed.¹⁷⁶
- 3.39.2. These commitments materialized into real assets, including equipment, machinery, and other movable property necessary for

¹⁷⁵ [Statement of Rejoinder](#), ¶¶ 227-228 (citing [CLA-022](#), *Saluka v. Czech Republic*, Decision on Jurisdiction and [CLA-096](#), *SGS v. Philippines*).

¹⁷⁶ See [Statement of Reply](#), ¶ 3.56.

the Project; the know-how to develop the Project; and the Project as a whole.¹⁷⁷

3.40. Respondent ignores Akgun's significant commitments and the assets that materialized therefrom, arguing instead that "[b]y 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."¹⁷⁸ Respondent wishes not "to speak of" this evidence because it flatly contradicts Respondent's argument. By the time Akgun departed Ethiopia in 2015, more than seven years had passed since development of the Project had commenced, by which point:

3.40.1. Akgun and the Oromia Regional State had entered into the MoU.¹⁷⁹

3.40.2. Respondent appointed a committee of experts to identify the location at which the ETIZ would be developed and selected a site in Oromia state.¹⁸⁰

3.40.3. Akgun established an Ethiopian branch through which it would conduct business related to the project.¹⁸¹

3.40.4. Akgun employed professional consultants and architects to assist in developing the plans for ETIZ and multiple feasibility studies for the Project, each of which was well-received by the Ethiopian government.¹⁸²

3.40.5. Akgun submitted a final version of the feasibility study to Respondent.¹⁸³

3.40.6. Akgun applied for, and Respondent issued, the required permits and licenses for construction and development of ETIZ.¹⁸⁴

¹⁷⁷ See *id.*, ¶ 3.5.

¹⁷⁸ [Statement of Rejoinder](#), ¶ 239.

¹⁷⁹ [Statement of Reply](#), ¶ 3.21.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

- 3.40.7. Akgun and Respondent entered into the 2010 Agreement to develop ETIZ at the site Respondent identified.¹⁸⁵
- 3.40.8. Two years later, Akgun and Ethiopia entered into the 2012 Agreement, which modified the 2010 Agreement, including to relieve Respondent of its financing obligations for the Project.¹⁸⁶
- 3.40.9. The 2012 ETIZ Agreement included a lease for land at the site that Respondent selected. Akgun paid hundreds of thousands of dollars to Ethiopia for the leasehold and Ethiopia handed over the first 100ha of the land to Akgun, payment that, in part, served to compensate the farmers who were relocated from the land on which ETIZ was to be located.¹⁸⁷
- 3.40.10. Throughout this time, Akgun devoted time and resources to marketing ETIZ, and actively solicited investors in accordance with the deadlines the 2012 ETIZ Agreement set. Akgun succeeded in soliciting more than 100 interested investors and secured a significant number of preliminary commitments.¹⁸⁸
- 3.40.11. Akgun also devoted time, money, and other resources to soliciting industrialists to establish factories in ETIZ.¹⁸⁹
- 3.40.12. Akgun had purchased, leased, and/or imported machinery, equipment, and other movable property to the ETIZ site for construction of ETIZ.¹⁹⁰
- 3.40.13. Akgun hired and paid laborers and other personnel to perform work on the Project in Ethiopia.¹⁹¹
- 3.40.14. Akgun began construction of ETIZ at Respondent's encouragement, including clearing the site and building infrastructure and other facilities for the industrial city. Respondent had full knowledge of Akgun's construction work.¹⁹²

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

- 3.41. Nevertheless, Respondent argues that Akgun held no “claims to money or any other rights having financial value related to an investment” because Akgun’s rights under the 2012 ETIZ Agreement do not “relate to an already existing investment that has materialized.”¹⁹³ The latter phrase is Respondent’s gloss on the BIT to suit its arguments but has no foundation in the BIT itself, much less the facts. Likewise, Respondent distinguishes Akgun’s rights as merely “entit[ling]” Akgun “to engage in investments,” a distinction that Respondent suggests is dispositive, though offering no decision by any tribunal in support.¹⁹⁴
- 3.42. Setting aside whether such inventive distinctions are at all relevant, Akgun’s rights do relate to an existing investment that has materialized—even as Respondent defines the concept. Respondent argues that in order for an investment to have “materialized,” the investor must have made contributions that “actually produced the assets of which the investor claims to have been deprived” and that “without such a commitment of resources,” no investment can be claimed.¹⁹⁵
- 3.43. As Akgun demonstrated with the foregoing list of activities and contributions that Akgun undertook before Respondent suspended ETIZ, Akgun has satisfied the very test Respondent sets forth.
- 3.44. Still, Respondent demands more, arguing that these “activities” were only “undertaken by Akgun [] in anticipation of performing its obligations under the [2012 ETIZ] Agreement.”¹⁹⁶ Respondent slices the salami far too thinly in severing Akgun’s activities from the investment itself; indeed, they are of a piece and those activities were not anticipatory of the obligations but rather fulfilled them. Respondent also argues that “any actual performance by Akgun was stalled by its own inability to produce an EIA.”¹⁹⁷ This, too, is contrary to fact, as Akgun detailed in its Statement of Reply and above in Section 2. Akgun had no obligation to perform an EIA of the scope that Respondent

¹⁹³ [Statement of Rejoinder](#), ¶ 234.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*, ¶¶ 237-238 (citations omitted).

¹⁹⁶ *Id.*, ¶ 240.

¹⁹⁷ *Id.*

insists was required under the 2010 or 2012 ETIZ Agreements or under any provision of Ethiopian law, as Akgun’s expert, Prof. Tekle explained in support of Akgun’s Statement of Reply.¹⁹⁸

- 3.45. Respondent is simply wrong that the commitment or assets, contributions of resources and other investment activity by Akgun were nothing more than “pre-development contractual obligations,” such that Akgun’s assets, including its rights relating to the 2012 ETIZ Agreement, are beyond the scope of “investments” protected by the BIT.¹⁹⁹ Indeed, Tribunals have routinely recognized that similar investments, at similar postures, are protected under investment treaties, including those deciding cases cited by Respondent itself.
- 3.46. For example, in *Ickale v. Turkmenistan*, the tribunal determined that the claimant, who had opened a branch office in the host country, who had engaged in construction projects in the host country (pursuant to contracts that typically lasted only between two and three years), and who had imported machinery and equipment into the host country, and who had “committed significant assets of its own, in the form of money” had made “investments” within the meaning of the applicable treaty and in satisfaction of the *Salini* factors—all the while noting that “whether an investment has been made . . . does not turn on the precise value of the [c]ontracts or the amount of the Claimant’s expenditures, but rather on whether the Claimant made a capital contribution to the venture in question.”²⁰⁰
- 3.47. Akgun’s investments are no different—Akgun opened a branch office; Akgun engaged in a large-scale construction project that lasted for nearly a decade before Respondent’s breaches of the BIT thwarted its completion; and Akgun imported and further committed equipment, machinery, and other resources to develop the Project. Importantly, the *Ickale* tribunal determined that the claimant had made “investments” under the ICSID Convention and within the

¹⁹⁸ See [Statement of Reply](#), ¶¶ 3.23-3.35; [Tekle Report](#), ¶¶ 2.10, 2.12, 2.20, 2.47-2.48.

¹⁹⁹ [Statement of Rejoinder](#), ¶ 242.

²⁰⁰ [RLA-49](#), *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016 (“*Ickale v. Turkmenistan*”), ¶¶ 292-293; see also [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*, ¶¶ 671-676, 681-682; [RLA-50](#), *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006 (“*El Paso v. Argentina*”), ¶¶ 93, 100.

meaning of the treaty in dispute, despite the fact that the claimant's construction contracts had not been completed.²⁰¹ Accordingly, Respondent's argument that Akgun's investments are beyond protection of the BIT because the Project "was not near completion" holds no water.²⁰² The foregoing demonstrates Akgun's stand-alone investments under the BIT, which are properly before this Tribunal.

b. Akgun's Machinery and Equipment Are Stand-Alone Investments Under the BIT

- 3.48. As to the machinery and equipment that Akgun devoted to development of ETIZ, Respondent argues that because 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," those assets do not constitute "investments" within the meaning of the BIT.²⁰³
- 3.49. Respondent misconstrues the definition of "investment" under the BIT. In relevant part, the BIT defines investment as, simply, "movable and immovable property," which the equipment and machinery employed by Akgun to develop the ETIZ plainly are. Akgun cannot rewrite the BIT's definition of "investment" to include "deprivation" or "repatriation." While deprivation may go to Respondent's liability and quantum of damages (*i.e.*, for Akgun's claims for expropriation), it has no bearing on the meaning of "investment" under the BIT or on the Tribunal's jurisdiction over Akgun's claims.²⁰⁴
- 3.50. In any event, Respondent mischaracterizes Akgun's claims with respect to equipment and machinery. Akgun *does* allege that it was deprived of the

²⁰¹ [RLA-49](#), *Ickale v. Turkmenistan*, ¶¶ 116, 292-293.

²⁰² [Statement of Rejoinder](#), ¶ 243.

²⁰³ *Id.*, ¶ 248.

²⁰⁴ See [CLA-001](#), Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, signed 16 November 2000, entered into force 3 October 2005 ("Turkey-Ethiopia BIT"), Art. I(2) (defining "investment" with no requirement of "deprivation" or "repatriation" to the investor); see also [CLA-092](#), *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 ("*SGS v. Paraguay*"), ¶ 93 (finding it "appropriate to defer to the State parties' articulation in the instrument of consent (e.g. the BIT) of what constitutes an investment"); [CLA-093](#), *Abaclat and others v. Argentina*, ¶¶ 364-367.

assets it invested in the Project, including machinery and equipment.²⁰⁵ For example, Claimant's expert, A&M, reviewed the resources that Akgun dedicated to developing ETIZ, itemizing each cost as it related to machinery, equipment, materials, labor, advertising, administrative costs, transportation costs, and other invoices and concluded such expenditures amounted to no less than USD 4,955,131, excluding pre-award interest.²⁰⁶ Respondent's suggesting that Akgun never committed resources to the Project is flatly contradicted by this evidence.²⁰⁷ Thus, even under Respondent's interpretation of the BIT, Akgun's equipment and machinery fall within the meaning of "investment" thereunder.

c. Akgun's Know-How Is a Stand-Alone Investment Under the BIT

- 3.51. Respondent next argues that Akgun's investments of "know-how" are not protected by the BIT but does so by narrowing the definition of "investment" therein to include only "intellectual property . . . registered in Ethiopia."²⁰⁸ But the BIT's definition of "investment" is broader, and expressly includes "know-how." Respondent's assertion that "'know-how' without more, does not constitute an 'asset' within the meaning contemplated under the Treaty" is both contradicted by the BIT's plain language and unsupported by decisions of tribunals in other proceedings, including, again, those on which Respondent relies. For example, in *Muhammet v. Turkmenistan*, the tribunal determined that the claimants' "manpower, expertise and commitment" constituted a stand-alone category of investments under the ICSID convention and within the meaning of the treaty governing the dispute.²⁰⁹ In relevant part, the definition of "investment" in the Turkey-Turkmenistan BIT (under which the *Muhammet* dispute arose) is nearly identical to the definition of "investment" made applicable by the BIT here.²¹⁰ Under that definition, the *Muhammet*

²⁰⁵ See, e.g., [Statement of Reply](#), ¶¶ 5.122, 5.137, 5.138, 7.90.

²⁰⁶ [A&M Report](#), ¶¶ 153-154; [AM-Appendix 5](#).

²⁰⁷ See, e.g., [Statement of Rejoinder](#), ¶¶ 237-239.

²⁰⁸ *Id.*, ¶ 252.

²⁰⁹ [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*, ¶¶ 674, 682.

²¹⁰ Compare *id.*, ¶ 422 (noting that "Article I(2) [of the Turkey-Turkmenistan BIT] reads as follows: The term 'investment', in conformity with the hosting Party's Laws and Regulations, shall include every kind of asset in particular, but not exclusively: . . . copyrights, industrial and intellectual property rights such as patents, licenses,

tribunal did not limit the scope of eligible investments to “intellectual property.” Instead, the *Muhammet* tribunal concluded that “manpower” and “expertise” constitute investments entitled to treaty protection, as defined by the Turkey-Turkmenistan BIT.²¹¹ That definition tracks the language of the Turkey-Ethiopia BIT almost exactly, and this Tribunal should similarly conclude that Akgun’s manpower, expertise, and know-how constitute investments protected by the BIT applicable here.

- 3.52. Indeed, as Akgun noted in its Statement of Reply, the value of Akgun’s know-how was repeatedly memorialized in both the 2010 and 2012 ETIZ Agreements, wherein the parties acknowledged that Akgun “has know-how and experience at the highest level regarding the establishment of an industrial zone, construction of infrastructure and superstructure, operation of industrial zones and finding Investors to invest in industrial zones” and will “bring its highest level of know-how, experience, financial, technical and technological resources to the Federal Democratic Republic of Ethiopia for the purpose of establishing an industrial zone within the scope of the project.”²¹²
- 3.53. Respondent argues that is not enough, citing *A11Y v. Czech Republic*, for the proposition that the know-how must be “cutting edge” and “among the best,” and citing *White Industries v. India* to suggest that the quantity of know how contributed must encompass dozens of personnel and include proprietary technology.²¹³ But nowhere does the BIT impose any such threshold requirements of quantum or quality. Instead, as other tribunals have reasoned, including the *Ickale* tribunal on which Respondents rely, “whether an investment has been made . . . does not turn on the precise value of the

industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights”) with [CLA-001](#), Turkey-Ethiopia BIT, Art. I(2)(d) (defining “investment” to include “industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights”).

²¹¹ See [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*, ¶ 680.

²¹² [C-009](#), The 2012 ETIZ Agreement, Preamble. See also [C-008](#), The 2010 ETIZ Agreement, Preamble.

²¹³ [Statement of Rejoinder](#), ¶ 253 (citing [CLA-086](#), *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award, 29 June 2018, ¶ 145 *et seq.* and [CLA-085](#), *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 (“*White Industries v. India*”), ¶ 7.4.14).

[contribution], but rather on whether the Claimant made a [] contribution to the venture in question.”²¹⁴

- 3.54. In sum, Respondent’s unilateral narrowing of the BIT’s definition of “investment” to include only “intellectual property” is inappropriate and its assertion that Akgun devoted zero “know-how” in Ethiopia, is unfounded and this Tribunal should reject it.

(ii) Akgun’s Investments Satisfy the *Salini* Factors

- 3.55. Though the *Salini* test does not bind this Tribunal, and non-ICSID tribunals have routinely rejected strict adherence to the *Salini* factors,²¹⁵ Respondent insists both that (1) Akgun’s investments fail to satisfy the *Salini* test; and (2) as a result, this Tribunal has no jurisdiction over the dispute before it. Again, Respondent is wrong. Akgun satisfied the *Salini* test, and this Tribunal’s jurisdiction extends to each of its claims.

a. Contribution and Risk

- 3.56. Respondent first argues that “[t]he activities conducted by Akgun on the ETIZ project did not go beyond mere preparatory activities in anticipation of the commencement of implementation.”²¹⁶ This is wrong, as a matter of fact, for reasons stated in Akgun’s Statement of Reply and above.
- 3.57. First, Akgun made significant contributions to the Project. Akgun established an Ethiopian branch; it paid for the ETIZ leasehold; it brought investors to Ethiopia; it conducted numerous feasibility studies and EIAs; it provided the know-how to develop a successful ETIZ; it provided and further committed to provide equipment, materials and labor to construct the ETIZ; and it committed to managing and operating ETIZ for 80 years thereafter. These are the very kinds of contribution that the *Salini* tribunal found that an “investment” requires.²¹⁷ These contributions and their significance are evidenced—at least in part—by Akgun’s investment license, which sets forth Akgun’s “capital out-

²¹⁴ [RLA-49](#), *Ickale v. Turkmenistan*, ¶ 292.

²¹⁵ See [Statement of Reply](#), ¶¶ 3.39-3.44.

²¹⁶ [Statement of Rejoinder](#), ¶ 257.

²¹⁷ See [CLA-011](#), *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001 (“*Salini v. Morocco*”), ¶ 53.

lay” to 65 million Ethiopian Birr “for establishing [a] **REAL ESTATE DEVELOPMENT** project in Addis Ababa and Oromia region,” and corroborated by Claimant’s quantum expert report, wherein Claimant’s expert, A&M, calculates that Akgun contributed approximately USD 5 million in expenditures to develop the Project and in furtherance of its investments in Ethiopia.²¹⁸

3.58. Second, Akgun took on significant risk in making these contributions and in committing the resources to develop ETIZ, including that Akgun would be unsuccessful in recruiting investors for the Project; that Akgun would be unable to identify sublessors with manufacturers for ETIZ; that the costs of labor and materials required to construct and develop the Project may increase; or that Akgun’s property or personnel may suffer casualties during construction of ETIZ.²¹⁹ The *Salini* tribunal found these to be the hallmark risks that characterize an “investment.”²²⁰

3.59. The decisions relied upon by Respondent are not dispositive here.

3.59.1. Respondent first argues that *Beijing Urban Construction Group Co., Ltd. v. Yemen*, provides that a claimant must have substantially completed the construction project, and the project must be worth “in excess of a hundred million dollars” in order for the project to satisfy the contribution and risk prongs of the *Salini* test.²²¹ But the *Beijing Urban Construction* tribunal did not limit the meaning of “investment” so narrowly, reasoning instead that “[a] construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk.”²²²

3.59.2. Whether the construction project at center in the *Beijing Urban Construction* dispute was substantially completed was not dispositive—it was only the prospect that the project could extend over a long period of time that is important, as confirmed by many of

²¹⁸ [C-041](#), Letter from Ethiopian Investment Agency to Akgun Construction dated 18 May 2009 (emphasis in original); [A&M Report](#), ¶¶ 153-154; [AM-Appendix 5](#).

²¹⁹ See [Statement of Reply](#), ¶ 3.52.

²²⁰ [CLA-011](#), *Salini v. Morocco*, ¶¶ 55-56.

²²¹ [Statement of Rejoinder](#), ¶ 258.

²²² [CLA-009](#), *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶¶ 136-137 (citing *Salini v. Morocco*, ¶¶ 55-56).

the decisions Respondent cites in its Statement of Defense. For example, in *Muhammet v. Turkmenistan*, the tribunal determined that the claimants had made a contribution in the host country because “[t]hey made a commitment which they honored for around nine years” during which time the claimants entered into contracts with “State-owned or -controlled entities” that were valued at millions of dollars and engaged the resources to satisfy their obligations under those contracts.²²³ Akgun similarly made a commitment which it honored for just under nine years, entered into contracts with State-owned or -controlled entities in furtherance of its investments, and engaged the resources required to develop and operate the ETIZ for 80 years.²²⁴

- 3.59.3. As to Respondent’s claim that the BIT’s protection is limited to investments valued at USD 100 million or more, Respondent overlooks, first, that the BIT’s plain language imposes no such requirement, and second, “whether an investment has been made . . . does not turn on the precise value of the [contribution], but rather on whether the Claimant made a [] contribution to the venture in question.”²²⁵ Either way, the monetary value of Akgun’s investments is significant—Akgun’s expert, A&M, values Akgun’s sunk costs in the Project at about USD 5 million in total.²²⁶ Akgun’s investments plainly satisfy the contribution and risk requirements, including as characterized by the *Beijing Urban Construction* tribunal.
- 3.59.4. *Garanti Koza LLP v. Turkmenistan* is similarly inapposite. Respondent relies on *Garanti Koza* to argue that contribution requires that “actual performance under the contracts in question . . . had been made” and “palpable contributions [are] left behind in the host State.”²²⁷ But Akgun *did* begin construction of the Project before Respondent’s treaty violations put an end to it and, as such, again satisfies Respondent’s own characterization of the rule.²²⁸ Moreover, nothing in the BIT, and nothing in *Salini* or its progeny,

²²³ [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*, ¶ 681.

²²⁴ See [CLA-011](#), *Salini v. Morocco*, ¶¶ 55-56.

²²⁵ [RLA-49](#), *Ickale v. Turkmenistan*, ¶ 292.

²²⁶ [A&M Report](#), ¶¶ 153-154; [AM-Appendix 5](#).

²²⁷ [Statement of Rejoinder](#), ¶¶ 259, 261.

²²⁸ See, e.g., [Statement of Reply](#), ¶¶ 2.109-2.114.

requires that “palpable contributions [be] left behind in the host State” in order to constitute a protected investment under international law.²²⁹ Instead:

[It is the] obligation to make major contributions in the future [that] constitutes the investment; it entails the promise to make contributions in the future for the performance of which that party is henceforth contractually bound. In other words, the protection here extends to deprivation of the revenue the investor had a right to expect in consideration for contributions that it had not yet made, but which it had contractually committed to make subsequently.²³⁰

- 3.59.5. Akgun committed to developing and operating the ETIZ for 80 years and invested significant resources to construct and complete the Project. The extent to which Akgun was able to actually construct the Project is irrelevant to the question of jurisdiction. Akgun’s investments satisfy the contribution prong of the *Salini* analysis.
- 3.59.6. Respondent next cites to *White Industries Australia Ltd. v. India* and *Bayindir v. Pakistan*, to argue that a contribution must involve “high-value bonds to guarantee” Akgun’s performance.²³¹ But countless tribunals have found that no such requirement exists under *Salini*, including *Ickale v. Turkmenistan*, *Muhammet v. Turkmenistan*, or *El Paso v. Argentina*, each cited by Respondent in its Statement of Defense and Statement of Rejoinder.²³²

²²⁹ [Statement of Rejoinder](#), ¶ 261.

²³⁰ [CLA-135](#), *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 113.

²³¹ [Statement of Rejoinder](#), ¶¶ 260, 261 (citing [CLA-085](#), *White Industries v. India*, ¶ 7.4.16 and [CLA-088](#), *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶ 135).

²³² See [RLA-49](#), *Ickale v. Turkmenistan*, ¶¶ 292-293 (noting that the tribunal’s “determination of whether an investment had been made . . . does not turn on the precise value of the [c]ontracts or the amount of the [c]laimant’s expenditures” and finding that an investment within the meaning of the applicable treaty had been made with no reference to or requirement of any “high value bonds” or “guarantees”); [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*, ¶¶ 671-682 (finding that a construction project to be carried out over several years and that requires manpower, expertise and commitment was an investment within the meaning of the applicable treaty, with no reference to or requirement of any “high value bonds” or “guarantees”); [RLA-50](#), *El Paso v. Argentina*, ¶¶ 93, 100 (accepting claimant’s arguments that shareholding interests in operating companies, capital contributions, legal and contractual rights and “other legal rights” relating to oil and gas supply agreements are investments with the meaning of the applicable treaty, without no reference to or requirement of “high value bonds” or “guarantees”).

3.59.7. Finally, Respondent's reliance on *KT Asia v. Kazakhstan* again falls short. The claimant in *KT Asia v. Kazakhstan* was, again, a shell company with no employees, funds, premises or business activities and which had purchased shares (which it financed through a loan, rather than purchase with its own money) in a Kazakh bank for nominal value from an interested affiliate in order to conceal his identity and to avoid adverse tax consequences for those shares.²³³ Because the claimant had not, in effect, made any contribution of real economic value in purchasing the shares, the tribunal determined it had incurred no risk.²³⁴ Akgun, on the other hand, invested millions of dollars in personnel, equipment, know-how and other resources in the Project. That is exactly the type of risk that satisfies the *Salini* test.²³⁵

3.60. Respondent has offered no evidence, and no legal authority, to support its argument that Akgun's investments do not satisfy the contribution and risk prongs of the *Salini* test.

b. Duration

3.61. Respondent concedes that Akgun has satisfied the duration prong of the *Salini* test, arguing instead that duration, alone, is insufficient to satisfy the *Salini* test.²³⁶

3.62. To be sure, Akgun did, as Respondent claims it must, "dedicate[] significant resources in actual performance of the Agreement and assumed a degree of risk" during the duration of the investment, detailed above.²³⁷

3.63. In sum, the *Salini* test, though not required, is satisfied, Akgun's assets are "investments" thereunder, and the Tribunal has jurisdiction over Akgun's claims.

²³³ See *supra* fn. 164.

²³⁴ [RLA-46](#), *KT v. Kazakhstan*, ¶ 219.

²³⁵ See, e.g., [CLA-011](#), *Salini v. Morocco*, ¶ 55.

²³⁶ [Statement of Rejoinder](#), ¶ 262.

²³⁷ *Id.*, ¶ 264.

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

- 3.64. In its Rejoinder, Respondent continues to argue that Akgun is not entitled to import the umbrella clause from the Denmark-Ethiopia BIT.²³⁸ Yet, Respondent fails to address most of Claimant's responses to Respondent's prior arguments on jurisdiction over the umbrella clause claim. Instead, it advances new arguments. As Claimant will show, these arguments fail.
- 3.65. In its Statement of Defense, Respondent accepted that umbrella clause protection can in principle be imported via the Turkey-Ethiopia BIT's Art. III(2) MFN clause. It only objected to the application of the umbrella clause based on the following four grounds, which do not relate to the MFN clause's operation: (i) lack of privity of contract; (ii) differences in definitions of "investment" between the Turkey-Ethiopia BIT and Denmark-Ethiopia BIT; (iii) availability of contractual remedies and lack of exhaustion of such remedies; and (iv) inconsistency with the intent of the Parties and the object and purpose of the BIT.²³⁹ All of these objections fail as discussed in Claimant's Reply.²⁴⁰
- 3.66. Respondent has not addressed Claimant's arguments in response to points (i) to (iii), therefore they stand unrebutted. Respondent elaborated on Claimant's reply to point (iv) in its Rejoinder and continued to argue that the parties to the Turkey-Ethiopia BIT consciously elected against including the umbrella clause among the BIT's protections and its application would therefore be against the intent of the parties.²⁴¹ Claimant addresses this argument in Section 3.D.i below.
- 3.67. Furthermore, Respondent advances two new arguments against a finding that the BIT offers umbrella clause protection. First, it now alleges – contrary to its prior position – that the Turkey-Ethiopia BIT's MFN clause cannot be used to import the Denmark-Ethiopia BIT's umbrella clause protection to benefit Turkish investors such as Akgun. In particular, Respondent argues that to benefit from the MFN provision in Art. III(2) of the Turkey-Ethiopia BIT,

²³⁸ *Id.*, Section III.D.

²³⁹ [Statement of Defense](#), ¶ 228.

²⁴⁰ [Statement of Reply](#), Section 3.D.

²⁴¹ [Statement of Rejoinder](#), ¶¶ 265, 268-269.

Claimant must show that Ethiopia treated Akgun discriminatorily as contrasted with any investor in a “similar situation,” and that Claimant has not done so.²⁴² Besides the fact that this argument is belated, it is also erroneous as will be discussed in Section 3.D.ii.

- 3.68. Finally, Respondent argues that even if the Claimant were permitted to invoke the Denmark-Ethiopia BIT’s umbrella clause protections, the umbrella clause, without more, does not and cannot transform the Claimant’s claims involving contractual obligations into treaty claims.²⁴³ Claimant will show why Respondent is wrong in Section 3.D.iii below.

(i) Importing the Umbrella Clause Protection through a Treaty’s MFN Clause Is Consistent with the Object and Purpose of the Treaty

- 3.69. Respondent continues to argue that the fact that Turkey and Ethiopia did not include the umbrella clause in the Treaty means that the parties consciously intended to exclude it from the Treaty.²⁴⁴ Respondent’s argument is flawed.

- 3.70. It is undisputed that the Turkey-Ethiopia BIT’s Art. III(2) contains an MFN clause:

Once the investment is accepted, each Party shall accord to this investment, treatment no less favorable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favorable.²⁴⁵

- 3.71. As Claimant already explained, the “purpose of an MFN clause is to ensure that treatment accorded to investors under one BIT will be no less

²⁴² *Id.*, ¶¶ 266, 270-281.

²⁴³ *Id.*, ¶¶ 267, 282-284.

²⁴⁴ [Statement of Defense](#), ¶ 269. Claimant addressed this argument at length in its Reply. See [Statement of Reply](#), ¶¶ 3.94-3.99.

²⁴⁵ [CLA-001](#), Turkey-Ethiopia BIT, Art. III(2); [Statement of Claim](#), ¶¶ 3.11-3.12; [Statement of Reply](#), ¶ 3.83; [Statement of Defense](#), ¶ 227; [Statement of Rejoinder](#), ¶ 266 (referring to Art. III(2) of the BIT as “the MFN vehicle”), ¶¶ 270-272.

advantageous than treatment accorded to investors under another BIT.”²⁴⁶

Tony Cole elaborates:

An MFN clause in an investment treaty is fundamentally a promise between the two states party to the treaty that neither state will give to investors from any third state more favorable treatment than that given to investors from the other state party to the treaty. If more favorable treatment is provided to investors from a third state, an obligation arises to provide equivalent treatment to those investors benefiting from the MFN clause.²⁴⁷

- 3.72. The fact that the MFN clause allows for incorporation of more favorable substantive protections “does not ‘subvert’ the negotiated balance of the BIT.”²⁴⁸ To the contrary, incorporating more favorable substantive protections is its very purpose. Indeed, as the *White Industries* tribunal found, “it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.”²⁴⁹

²⁴⁶ [Statement of Reply](#), ¶¶ 3.95-3.96. See also [CLA-014](#), *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016 (“*UP v. Hungary*”), ¶¶ 162-163; [CLA-020](#), *EDF International S.A. et al. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (“*EDF v. Argentina*”), ¶ 932; [CLA-085](#), *White Industries v. India*, ¶¶ 11.2.3-11.2.4.

²⁴⁷ [CLA-136](#), Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, Michigan Journal of International Law (Vol. 33(3), 2012), p. 539 (internal citations omitted). See also [CLA-137](#), Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, Berkeley Journal of International Law (Vol. 27(2), 2009) (“Schill on MFN, 2009”), p. 502 (“MFN clauses oblige the State granting MFN treatment to extend to the beneficiary State the treatment accorded to third States in case this treatment is more favorable than the treatment under the treaty between the granting State and the beneficiary State.” (internal citation omitted)), p. 504 (“An investor covered by a BIT with an MFN clause can therefore invoke the benefits granted to third-party nationals by another BIT of the host State and import them into its relationship with the host State.” (internal citation omitted)), p. 519 (“The use of MFN clauses to import more favorable conditions from third-country BITs is largely uncontested.” (internal citation omitted)); [CLA-138](#), Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, American Journal of International Law (Vol. 111(4), 2017) (“Schill on MFN, 2017”), p. 926 (“[T]he general international law background governing the application and interpretation of MFN clauses confirms the prevailing practice of investment tribunals to allow reliance on better standards of treatment granted in the host state’s third-country IIAs.”).

²⁴⁸ [CLA-085](#), *White Industries v. India*, ¶ 11.2.4.

²⁴⁹ *Id.*

- 3.73. The umbrella clause obligation is universally considered to be one of the substantive protections provided to investors in BITs, and therefore falls within the scope of the treatment provided to investors in the MFN clause.²⁵⁰
- 3.74. As discussed in Akgun’s Statement of Claim and Reply, many tribunals have interpreted MFN clauses to incorporate umbrella clauses and other standards of protection into the treaty applicable to the case at hand from source treaties that contain broader or more favorable protections.²⁵¹
- 3.75. Respondent relies on the fact that Ethiopia entered into Treaties with other countries which contained an umbrella clause both before (such as Switzerland-Ethiopia BIT) and after (the Denmark-Ethiopia BIT) the BIT at issue here.²⁵² It posits that this chronology indicates that Ethiopia had no intention of affording Turkish investors umbrella clause protection. The argument is misleading.
- 3.76. Ethiopia offers no direct evidence of its supposed intent. The most that could be drawn from these comparisons is that one or more of the drafters involved in the Switzerland-Ethiopia and Denmark-Ethiopia BITs preferred to specify umbrella clause protection. It says nothing about the intentions of the drafters of the Ethiopia-Turkey BIT, who in any event expressly agreed to include an MFN clause that would act as a backstop to ensure that Turkish and Ethiopian investors would enjoy the same protections either country afforded to other foreign investors. In sum, the fact that Ethiopia agreed to umbrella clauses in investment treaties with other States before and/or after the Turkey-Ethiopia BIT has no relevance to ascertaining the intention of the State parties.²⁵³

²⁵⁰ See, e.g., [CLA-020](#), *EDF v. Argentina*, ¶ 936; [CLA-019](#), *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 395-396.

²⁵¹ [Statement of Claim](#), ¶¶ 3.16-3.21; [Statement of Reply](#), ¶¶ 3.95-3.98.

²⁵² [Statement of Rejoinder](#), ¶¶ 268-269.

²⁵³ See, e.g., [CLA-139](#), *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (“*Bayindir v. Pakistan*, Award”), ¶¶ 160, 163-167; [CLA-085](#), *White Industries v. India*, ¶¶ 11.2.1-11.2.4.

(ii) Claimant Does Not Need to Establish *De-facto* Discriminatory Treatment by Ethiopia to Benefit from the Treaty’s MFN Clause, and in Any Case, Claimant Has Established Discriminatory Treatment

- 3.77. Ethiopia points out that the MFN clause found in Art. III(2) of the Treaty refers to treatment “in similar situations.” To Ethiopia, the inclusion of the phrase “in similar situations” in the text of Art. III(2) indicates that the parties to the BIT expressly limited the scope of the MFN clause in such a way that it precludes Claimant from importing substantive protections from another BIT. Rather, Ethiopia argues, to benefit from the MFN clause containing the phrase “in similar situations,” Claimant must show *de facto* discrimination relative to a national or foreign investor in similar circumstances.²⁵⁴
- 3.78. As a preliminary note, Respondent raised this argument for the first time in its Rejoinder. Indeed, in its Statement of Defense, Respondent implicitly accepted that the MFN clause in the BIT is capable of importing an umbrella clause obligation.²⁵⁵ Respondent’s argument should therefore be dismissed as belated. In any event, Respondent is wrong as explained below.
- 3.79. It is common ground that MFN is a relative standard and requires comparison:
- MFN treatment . . . requires the host State to accord a covered foreign investor treatment that is no less favourable than that it accords to a third foreign investor. It requires a comparison between two foreign investors in like circumstances, being therefore a comparative test not contingent to any arbitrariness or seriousness threshold.
- [...]
- MFN treatment operates in the same conditions as NT and it requires a comparison as well as the finding of more favourable treatment granted to investors of a given

²⁵⁴ [Statement of Rejoinder](#), ¶¶ 270-272.

²⁵⁵ The arguments Respondent advanced in its Statement of Defense against the jurisdiction over the umbrella clause claim had nothing to do with the operation of the MFN clause. See [Statement of Defense](#), ¶¶ 226-240.

nationality as opposed to the investors covered by the basic treaty.²⁵⁶

- 3.80. The comparison is an objective one, and irrespective of whether the words “in similar situations” or the like are included in the MFN clause, the effect of the MFN clause is the same:

Irrespective of the precise wording, the proper interpretation of a relative standard requires that the treatment afforded by a host State to foreign investors can only be appropriately compared if they are in **objectively similar situations**. However, it is important to note that **by not making a specific reference to “like circumstances” or any other criteria for comparison, the Contracting Parties do not intend to dispense with the comparative context**, as it would distort the entire sense and nature of the MFN treatment clause.²⁵⁷

- 3.81. Consequently, the very existence of the phrase “in similar situations” in Art. III(2) the Turkey-Ethiopia BIT does not introduce any additional criteria let alone limit the scope of the MFN clause as Respondent suggests. Scholars who have studied the operation of MFN treatment clauses agree:

Although not all MFN clauses are worded identically, existing differences do not affect the clauses’ overall efficacy. Unless the contracting parties made clear that they intended to give an MFN clause in their investment treaty a special and particular meaning, it is widely accepted that slight differences in the wording of the clauses do not alter their function. Rather, MFN treatment emerges as an overarching principle of international investment law by means of the MFN clauses included in the treaties.²⁵⁸

- 3.82. Mr. Schill further explains in his recent paper on MFN clauses:

MFN clauses—in particular those that refer simply to “better” treatment or “all” treatment, but possibly also those

²⁵⁶ [CLA-013](#), *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, Most-Favoured-Nation Treatment, United Nations Publication, 2010 (“UNCTAD on MFN, 2010”), at 23.

²⁵⁷ *Id.*, at 26 (emphasis added).

²⁵⁸ [CLA-137](#), Schill on MFN, 2009, p. 503 (internal citations omitted).

applying to “treatment related to the management, maintenance, use, or disposal of investment” with or without a qualifier clarifying that investors must be “in similar situations”—can faithfully be interpreted as allowing covered investors to rely on better substantive standards of treatment granted in one of the host state’s third-country IIAs.²⁵⁹

- 3.83. It follows that an investor covered by a treaty with an MFN clause can therefore invoke the benefits granted to investors of third States by *similar* treaties with the host State (e.g., a bilateral treaty on investment protection) and import them into its own relationship with the host State. Therefore, the existence of more favorable treatment provided to investors of a third State in a BIT is sufficient to invoke the MFN clause available to an investor under the basic BIT with the host State. The OECD Working Paper on International Investment makes this clear:

The MFN clause may be invoked if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) have been extended the favours that constitute the MFN treatment foreseen in the clause. **The mere fact of a more favourable treatment is what is required to set in motion the operation of the clause.**²⁶⁰

- 3.84. The review of the case law of investment tribunals suggests that in cases where claimants have invoked the MFN clause to attract substantive protection provisions, such as the umbrella clause protection, from third treaties, “tribunals have been satisfied with the mere fact that the claimant qualifies as an ‘investor’ under the basic treaty and have not gone into actually comparing the investor with another foreign investor from a third country.”²⁶¹

²⁵⁹ [CLA-138](#), Schill on MFN, 2017, p. 921 (internal citation omitted).

²⁶⁰ [CLA-140](#), OECD (2004), *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment 2004/02, p. 9 (emphasis added). See also *id.*, pp. 3-8 (discussing various versions of MFN clauses, including those with the “in like circumstances” wording, as well as various exceptions and restrictions and not suggesting that such wording amounts to any limitation); [CLA-014](#), *UP v. Hungary*, Decision on Preliminary Issues of Jurisdiction, ¶ 194 (“The MFN clause is engaged by the fact that qualifying investors are denied treatment afforded to comparable investors under another BIT.”)

²⁶¹ [CLA-013](#), UNCTAD on MFN, 2010, pp. 63-64 (“The comparison test has in practice worked differently depending on what claimants were seeking from the MFN clause. When claimants were

Thus, when an investor invokes the MFN treatment clause to rely on a substantive protection provision from a BIT between the host State and the third State, as Akgun does in this case, it shall be sufficient to establish that such protection is available to investors from the third State investing in the host State under a BIT between the host State and the third State.

- 3.85. Akgun has established that there is another BIT between Ethiopia and Denmark which provides additional protection to Danish investors that is not existent in the Turkey-Ethiopia BIT – *i.e.*, the umbrella clause protection. Hence, the MFN treatment clause permits Akgun to invoke that protection as if it were provided directly under the Turkey-Ethiopia BIT.²⁶²
- 3.86. To sum up, the words “in similar situations” contained in Art. III(2) of the BIT shall not be regarded as posing any additional limitation on the scope of the MFN clause, such as by pointing to specific host country treatment of specific investors. By virtue of the MFN clause in the BIT Claimant may benefit from the umbrella clause protection available to Danish investors under the Denmark-Ethiopia BIT.
- 3.87. If the Tribunal were to disagree with this conclusion and to attribute any particular meaning to the phrase “in similar situations,” at best the phrase should be understood as referring to the requirement of sameness -- *i.e.*, the

seeking better treatment, whether material or effective, such as in the cases referred to above, tribunals have compared treatment amongst two foreign investors who are in identical circumstances. But when claimants have invoked the MFN treatment clause in order to attract the benefits of ISDS or substantive protection provisions from third treaties, tribunals have been satisfied with the mere fact that the claimant qualifies as an ‘investor’ under the basic treaty and have not gone into actually comparing the investor with another foreign investor from a third country.”). See also [CLA-139](#), *Bayindir v. Pakistan*, Award, ¶¶ 153-160 (incorporating the FET standard from a third party BIT on the basis of a clause containing “in similar situation” wording); [CLA-016](#), *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (“*Rumeli v. Kazakhstan*”), ¶¶ 558, 575 (incorporating the FET, FPS, and unreasonable treatment standards as well as denial of justice standard from a third party BIT on the basis of a clause containing “in similar situation” wording). The only possible scenario in which a comparison with an investor in similar circumstances may be required is when investors rely on the MFN treatment clause to benefit from better treatment that was *actually* provided to competitor investors. [CLA-013](#), UNCTAD on MFN, 2010, pp. 63-66 (discussing in particular the *Parkerings v. Lithuania* case in which the investor invoked the MFN clause to benefit from a better treatment allegedly provided to a competitor investor); [CLA-139](#), *Bayindir v. Pakistan*, Award, ¶¶ 386-390, 412-416 (in which the investor invoked the MFN treatment clause to benefit from a better treatment allegedly provided to the contractors in other projects). Yet, this is not the case here. Akgun invokes the MFN clause to merely rely on the umbrella clause protection provided to a third state’s investors in another BIT.

²⁶² See [Statement of Claim](#), ¶¶ 3.11-3.22; [Statement of Reply](#), ¶¶ 3.83-147.

ejusdem generis principle which requires common subject matter between the treaties under analysis. This means that substantive protection provisions can be imported into the base treaty at issue from another treaty with a third State, provided that the comparator treaty has a common subject-matter with the base treaty containing the MFN treatment clause.²⁶³ Indeed, the Turkey-Ethiopia BIT and Denmark-Ethiopia BIT have the same subject matter, which is the protection of foreign investment. Hence the *ejusdem generis* principle is satisfied.²⁶⁴

- 3.88. Respondent relies on *Ickale v. Turkmenistan* and *Muhammet v. Turkmenistan* to establish that the MFN clause in the Treaty cannot extend the scope of the MFN clause to import substantive protections and applies only to cases of *de facto* discrimination.²⁶⁵ It follows from the foregoing that the cases relied upon by Respondent are outliers which do not conform to the overwhelming authority on the interpretation of MFN treatment clauses. A closer look at the awards in these cases further confirms this.
- 3.89. To begin with, both *Ickale* and *Muhammet* are based on the same BIT between Turkey and Turkmenistan. Thus, the *Muhammet* tribunal naturally followed the findings of the *Ickale* tribunal, which was the first of the two tribunals to interpret the MFN clause in the Turkey-Turkmenistan BIT.²⁶⁶
- 3.90. Most importantly, the analysis of the MFN clause of the Turkey-Turkmenistan BIT that the *Ickale* and *Muhammet* tribunals offered is not in line with the

²⁶³ See [Statement of Claim](#), ¶¶ 3.14-3.15; [CLA-013](#), UNCTAD on MFN, 2010, at 24-25; [CLA-014](#), *UP v. Hungary*, Decision on Preliminary Issues of Jurisdiction, ¶¶ 179-180. This is further confirmed by the findings of the *Rumeli* and *Bayindir* tribunals who did not find any limitation in the formulation of an MFN clause containing “in similar situation” wording when importing substantive standards of protection from the BITs with third States. [CLA-139](#), *Bayindir v. Pakistan*, Award, ¶¶ 156-157; [CLA-016](#), *Rumeli v. Kazakhstan*, ¶¶ 558, 575.

²⁶⁴ [Statement of Claim](#), ¶¶ 3.14-3.15.

²⁶⁵ [Statement of Rejoinder](#), ¶¶ 273-277.

²⁶⁶ While the award in *Ickale v. Turkmenistan* was issued on 8 March 2016, the award in *Muhammet Cap & Sehil v. Turkmenistan* was issued on 4 May 2021. See [RLA-49](#), *Ickale v. Turkmenistan*; [RLA-47](#), *Muhammet Cap & Sehil v. Turkmenistan*.

widely accepted principles and rules as discussed above,²⁶⁷ therefore the correctness of the awards on this issue is highly questionable.²⁶⁸

3.91. Mr. Schill, who carefully studied the *Ickale* award, notes:

[The Ickale tribunal's] reasoning on the MFN clause is entirely sealed off (1) from how other tribunals, hitherto consistently, have approached the application of MFN clauses to better substantive standards of treatment, (2) from how the parties framed their arguments in reliance on precedent, and (3) from how other authorities have discussed the interpretation of MFN clauses. Instead, the Tribunal treats the issue as concerning a singular MFN clause in a singular IIA.²⁶⁹

3.92. When criticizing the *Ickale* tribunal's analysis and the resulting finding that the scope of the MFN clause in the Turkey-Turkmenistan BIT should be limited to cases of *de facto* expropriation, Mr. Schill states:

Instead [of the analysis it employed in the award], the Tribunal should have asked, and then provided reasons for or against, whether Article II(2) of the BIT covers only concrete discriminations of foreign investors, that is, requiring, as argued by the respondent, the existence of a concrete third-country investor in a similar situation who received more favorable treatment than the claimant, **or whether Article II(2) also applies when the host state accords more favorable treatment in the abstract by concluding IIAs with third countries that include more favorable substantive standards of treatment. The latter is the conclusion suggested by the general international law framework on the interpretation and application of MFN clauses.** Absent any specific circumstances surrounding the Turkey-Turkmenistan BIT,

²⁶⁷ *Supra* Section 3.D.ii. See also [CLA-138](#), Schill on MFN, 2017, p. 923 (“[T]he interpretation of MFN clauses in IIAs is never isolated from general international law and IIA practice more generally. Instead, interpretation of MFN clauses is based on multilateral rules, includes multilaterally accepted interpretative presumptions, and cannot be limited to an analysis of the singular clause in question” (internal citation omitted)); [RLA-55](#), *Urbaser v. Argentina*, ¶ 1200 (“The BIT has to be construed in harmony with other rules of international law of which it forms part . . .”).

²⁶⁸ [CLA-138](#), Schill on MFN, 2017, pp. 926-927, 929-933.

²⁶⁹ *Id.*, p. 930 (internal citations omitted).

it seems likely that this conclusion should have been adopted by the Tribunal as well.²⁷⁰

- 3.93. More specifically, the author notes that the *Ickale* tribunal committed at least two errors in the interpretation of the MFN clause, “creating doubt about the correctness of the result reached and invalidating it as a good decision that queries the ‘conventional wisdom’ on the application of MFN clauses to substantive standards of treatment.”²⁷¹ Claimant completely agrees.
- 3.94. First, there is a logical error in the *Ickale* tribunal’s analysis of the wording of the MFN clause in the Turkey-Turkmenistan BIT and resulting conclusion that the MFN clause applies only to *de facto* discriminations. In particular, the tribunal’s conclusion in paragraph 329 does not follow from the preceding paragraph 328: while stating in paragraph 328 that an MFN clause will not be breached if the investors are not in “similar situations” because there will be no discrimination in this case, it jumps to conclude at paragraph 329 that comparing similar situations requires only *factual* discrimination.²⁷² Mr. Schill explains the tribunal’s logical inconsistency:

However, while it is correct to conclude that Article II(2) of the BIT is not violated in a case where *de facto* no discrimination exists, this does not mean that the treaty provision in question only protects against *de facto* discriminations. This conclusion is an impermissible *non sequitur*. It builds not only on an equation of two grammatically fundamentally different constructions (“*de facto* no discrimination” versus “no *de facto* discrimination”), it is also logically defective to derive the positive scope of application of a legal norm—here Article II(2) of the BIT—from a situation in which that legal norm has not been breached. Yet, the Tribunal in *Ickale* does exactly that.

Instead, the Tribunal should have asked, and then provided reasons for or against, whether Article II(2) of the BIT covers only concrete discriminations of foreign investors, that is, requiring, as argued by the respondent, the existence of a concrete third-country investor in a similar

²⁷⁰ *Id.*, pp. 931-932 (emphasis added) (internal citation omitted).

²⁷¹ *Id.*, p. 931.

²⁷² [RLA-49](#), *Ickale v. Turkmenistan*, ¶¶ 328-329.

situation who received more favorable treatment than the claimant, or whether Article II(2) also applies when the host state accords more favorable treatment in the abstract by concluding IIAs with third countries that include more favorable substantive standards of treatment. The latter is the conclusion suggested by the general international law framework on the interpretation and application of MFN clauses. Absent any specific circumstances surrounding the Turkey-Turkmenistan BIT, it seems likely that this conclusion should have been adopted by the Tribunal as well. What one would have expected, at a minimum, however, is a reading of Article II(2) of the Turkey-Turkmenistan BIT that does not violate the rules of grammar and the laws of logic.²⁷³

- 3.95. Second, the *Ickale* tribunal misapplied the concept of *effet utile* when it concluded that the only way to interpret the clause *effectively* would be to *exclude* the application of the MFN clause to more favorable substantive standards of treatment.²⁷⁴ While it is one of the possible readings of the clause, it is not the only possible reading, especially given the practice of international law tribunals on the interpretation of MFN clauses.²⁷⁵ Indeed:

A more convincing reading would have been to understand the qualifier (“in similar situations”) to indicate that better treatment could only be relied on if, and only if, the (concrete **or hypothetical**) third-country investor were to enjoy the benefits under its IIA in question if “in a similar situation” to the investor under the basic treaty.²⁷⁶

- 3.96. The author concludes—and Claimant agrees with that conclusion—that for all these reasons, the *Ickale* award

is highly problematic and should not be used to query the effect of MFN clauses in IIAs as commitments to multilateralize benefits granted under IIAs to third-countries and to harmonize investment protection in a given host state. Instead, the general international law background, which supports the application of MFN clauses in IIAs to

²⁷³ [CLA-138](#), Schill on MFN, 2017, pp. 931-932 (internal citation omitted).

²⁷⁴ [RLA-49](#), *Ickale v. Turkmenistan*, ¶ 329.

²⁷⁵ See *supra* Section 3.D.ii; [CLA-138](#), Schill on MFN, 2017, p. 932.

²⁷⁶ [CLA-138](#), Schill on MFN, 2017, p. 932 (emphasis added).

substantive standards of treatment, should be given preference in applying IIAs, as long as the clauses' wording and other relevant context so permit.²⁷⁷

- 3.97. The analysis of the MFN clause in Turkey-Turkmenistan BIT by the *Muhammet* tribunal followed the *Ickale* tribunal's analysis and therefore fails for the same reasons.
- 3.98. It is worth further noting that many BITs that Turkey signed with countries, which represent the prospective states in which Turkish investors invest, contain the phrase "in similar situations" or like wording in the text of their respective MFN clauses. Such countries include Kazakhstan, Turkmenistan, Afghanistan, Tajikistan, Pakistan, Yemen, Egypt, Senegal and many others.²⁷⁸
- 3.99. It would be nonsensical to conclude that by including "in similar situations" wording in these BITs Turkey intended to limit the protection to be offered to its own investors operating in these countries by refusing to extend the scope of the MFN treatment clauses to import substantive protections and by instead requiring the establishment of *de facto* discrimination. A more reasonable explanation is that Turkey did not attribute any particular relevance to the words "in similar situations" in the MFN clauses, let alone contemplate any limitation by using them. Indeed, the *Rumeli* and *Bayindir* cases, which were based on the Turkey-Pakistan and Turkey-Kazakhstan BITs, and in which the tribunals incorporated various standards of protection through an MFN clause

²⁷⁷ *Id.*, p. 933.

²⁷⁸ See, e.g., [CLA-141](#), Agreement Between the Republic of Turkey and the Republic of Tajikistan Concerning the Reciprocal Promotion and Protection of Investments, signed 6 May 1996, Art. II(2); [CLA-142](#), Agreement Between the Republic of Turkey and the Republic of Yemen Concerning the Reciprocal Promotion and Protection of Investments, signed 7 September 2000, Art. II(2); [CLA-143](#), Agreement Between the Republic of Turkey and the Transitional Islamic State of Afghanistan Concerning the Reciprocal Promotion and Protection of Investments, signed 10 July 2004, Art. 3(2); [CLA-144](#), Agreement Between the Republic of Turkey and the Arab Republic of Egypt Concerning the Reciprocal Promotion and Protection of Investments, signed 4 October 1996, Art. II(2); [CLA-145](#), Agreement Between the Republic of Turkey and the Government of the Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments, signed 15 June 2010, Art. 3(2); [CLA-017](#) Agreement Between the Republic of Turkey and The Republic of Kazakhstan Concerning the Reciprocal Promotion and Protection of Investments, signed 1 May 1992 (in force on 10 August 1995), Art. II(2); [CLA-146](#), Agreement Between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, signed 16 March 1995, Art. II(2); [RLA-49](#), *Ickale v. Turkmenistan*, ¶ 326 (quoting Article II(2) of the Turkey-Turkmenistan BIT).

containing “in similar situation” wording are further evidence of this understanding.²⁷⁹

- 3.100. In any event, even if one were to assume that there is uncertainty in the interpretation of the MFN clause set forth in Art. III(2) of the Turkey-Ethiopia BIT, one should keep in mind that the purpose of the BIT is the promotion and reciprocal protection of investments. Therefore, it is “legitimate” to resolve uncertainties in the interpretation of the clause to favour rather than exclude the protection of covered investments.²⁸⁰
- 3.101. In light of the foregoing, Respondent’s argument to the effect that Akgun has to establish *de facto* discrimination to benefit from the Treaty’s MFN clause fails.
- 3.102. In case the Tribunal were to adopt Respondent’s restrictive interpretation of the MFN clause as requiring a showing of *de facto* discrimination, Claimant has established that it was discriminated against. As has been shown throughout Claimant’s submissions, the Condominium Project that was developed around the same time received preferential treatment and became the priority over ETIZ which eventually stalled ETIZ’s development.²⁸¹ More

²⁷⁹ [CLA-139](#), *Bayindir v. Pakistan*, Award, ¶¶ 153-160, 163-167; [CLA-016](#), *Rumeli v. Kazakhstan*, ¶¶ 558, 575. Claimant notes that in 2012 following the *Bayindir* Award, Turkey and Pakistan signed a new BIT. See [CLA-147](#), Agreement Between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, signed 22 May 2012. The 2012 BIT’s MFN clause was revised to *inter alia* supply a clear limitation to the scope of the MFN clause by stating that it does not apply to dispute settlement. *Id.*, Art. 4(4)(c). This clarification suggests that under the wording of the MFN clause in the 1995 Turkey-Pakistan BIT the parties allowed for such a reading, and that they agreed to re-sign the treaty to expressly exclude it. This subsequent practice on the part of Turkey further confirms that the 1995 Turkey-Pakistan BIT’s MFN clause which includes the phrase “in similar situations” was not intended to limit the application of the MFN clause to the cases of *de facto* discrimination. See [CLA-047](#), Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, (entered into force on 27 January 1980) (“VCLT”), Art. 31 (3)(b). Claimant further notes that a similar wording (i.e., “in like circumstances”) is maintained in the new version of the Turkey-Pakistan BIT’s MFN clause. *Id.*, Art. 4(2).

²⁸⁰ See, e.g., [CLA-096](#), *SGS v. Philippines*, ¶ 116; [CLA-004](#), *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005 (“*Eureko v. Poland*”), ¶ 255; [RLA-55](#), *Urbaser v. Argentina*, ¶ 1200. See also [CLA-047](#), VCLT, Art. 31 (1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context **and in the light of its object and purpose**”).

²⁸¹ See [Statement of Reply](#), ¶ 5.107; [Statement of Claim](#), ¶¶ 2.128-2.129, 5.50-5.58. Claimant notes that it is likely that the Condominium Project was developed by Ethiopia itself rather than by a foreign investor. This, however, is irrelevant for the purpose of the present discussion since same rules as discussed in this section vis-à-vis the standard of most-favoured nation treatment apply to the standard of national treatment.

specifically, no EIA was ever commissioned by or submitted to any government ministry/agency of the Respondent in connection with the Condominium Project.²⁸² Furthermore, Ethiopia relaxed its alleged EIA-related concerns *vis-à-vis* industrial zone projects implemented by the Chinese and other foreign investors in Ethiopia.²⁸³

- 3.103. Accordingly, Claimant respectfully submits that this Tribunal must dismiss Respondent's artful interpretation of the BIT's MFN clause and incorporate the umbrella clause protection from the Denmark-Ethiopia BIT into the Turkey-Ethiopia BIT by virtue of its Art. III(2).

(iii) Claimant's Umbrella Claim Elevates Respondent's Specific Commitments to the International Level

- 3.104. Respondent argues that even if the Tribunal were to import the umbrella clause protection from the Denmark-Ethiopia BIT into the Turkey-Ethiopia BIT, an umbrella clause cannot transform "any municipal obligation into a treaty obligation."²⁸⁴ Respondent misrepresents the scope of the umbrella clause protection. As Claimant already discussed in its prior submission and as will be further addressed below, it is the very purpose of an umbrella clause to elevate specific commitments of States to the plane of international law.²⁸⁵

²⁸² Tribunal's Communication No. 28 dated 2 August 2021, Annex A, Claimant's Stern Schedule, Request 9; [C-150](#), Respondent's Responses to Claimant's Stern Schedule of Requests for Production of Documents dated 21 October 2021, Response to Request 9.

²⁸³ [C-084](#), Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014, p. 3 (capturing Akgun's complaints of better treatment provided to Chinese investors); [C-107](#), Updated Environmental and Social Impact Assessment for Kilinto Industrial Park dated March 2017, p. 89 (noting in particular that "90% of all industries lack facilities for some degree of onsite treatment plant, and subsequently discharge any effluents into adjacent streams" and that "among the industries located in Addis Ababa, 90 to 96 percent discharge their waste without any form of treatment to nearby water bodies and open spaces"); [CLA-148](#), E. W. Azmach, *Regulating Industrial Parks Development in Ethiopia: A Critical Analysis*, Beijing Law Review (Vol. 10, 2019), pp. 51-52. Claimant notes that most of private industrial park developments near Addis Ababa are owned by Chinese investors. See, e.g., [C-091](#), UNIDO, Industrial Park Development in Ethiopia – Case Study Report, 2018, <https://www.unido.org/api/opentext/documents/download/10694802/unido-file-10694802>, p. 21.

²⁸⁴ [Respondent's Rejoinder](#), ¶ 282.

²⁸⁵ [Statement of Reply](#), ¶¶ 3.134-3.135. See also [CLA-106](#), J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14(1) George Mason Law Rev. 137 ("Wong"), pp. 144-151, 166 (reviewing the history of umbrella clauses and coming to a conclusion that "wide-ranging surveys of BITs generally affirm that umbrella clauses allow breaches of investor-State contracts to be characterized as BIT violations so as to trigger dispute resolution procedures provided under the BIT" and that "the extended history of the umbrella clause demonstrates that it was specifically

3.105. It is well established in the case law of investment tribunals that a commitment to be protected by an umbrella clause must be specific to a particular investment or investor.²⁸⁶ It is also undisputed that agreements granted to foreign investors for their specific investments, such as the one at issue in this arbitration, fall within the protection of an umbrella clause. The tribunal in *Noble Ventures v. Romania* stated:

[I]n addition to the BIT, what are often concluded concerning investments are so-called investment contracts between investors and the host State. Such agreements describe specific rights and duties of the parties concerning a specific investment. Against this background, and considering the wording of Art. II (2)(c) which speaks of “any obligation [a party] may have entered into with regard to investments”, it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been “entered into” by a host State with regard to an investment. The employment of the notion “entered into” indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts.²⁸⁷

3.106. Many tribunals agreed that contracts between an investor and a state give rise to a specific undertaking protected by the umbrella clause.²⁸⁸

intended to apply to investor-State contracts, and was designed to overcome the presumption that a breach of contract did not engage international responsibility”).

²⁸⁶ See, e.g., [CLA-092](#), *SGS v. Paraguay*, ¶¶ 167-168; [CLA-096](#), *SGS v. Philippines*, ¶¶ 115, 117; [CLA-100](#), *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 274; [CLA-099](#), S. Schill, *Enabling Private Ordering - Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, TDM 1 (2010) (Schill on Umbrella Clauses, 2010), p. 71.

²⁸⁷ [CLA-61](#), *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 51. See also *id.*, ¶ 53 (“It may be further added that, inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State”); ¶¶ 60-61.

²⁸⁸ [CLA-020](#), *EDF v. Argentina*, ¶¶ 936, 939; [CLA-004](#), *Eureko v. Poland*, ¶¶ 246, 251-260. See also [CLA-106](#), Wong, p. 151 (“The umbrella clause applies to obligations arising under investor-State contracts so as to allow for their breach to be resolved as BIT violations”).

3.107. This was also confirmed in *El Paso v. Argentina* and *Pan American v. Argentina*, the very cases Respondent relies upon to establish the contrary.²⁸⁹ While the *El Paso* and *Pan American* tribunals were cautious about interpreting the umbrella clauses broadly – *i.e.*, as encompassing “any” contractual law claims – they nonetheless stated that umbrella clauses may protect contractual undertakings.²⁹⁰

3.108. More specifically, the *El Paso* and *Pan American* tribunals stated that if a case in which a violation of the contract, like in this case, involves an exercise of sovereign authority, the umbrella clause protection must be entertained by a tribunal:

[T]here is no doubt that if the State interferes with contractual rights by a unilateral act, whether these rights stem from a contract entered into by a foreign investor with a private party, a State autonomous entity or the State itself, in such a way that the State’s action can be analysed as a violation of the standards of protection embodied in a BIT, the treaty-based arbitration tribunal has jurisdiction over all the claims of the foreign investor, including the claims arising from a violation of its contractual rights.²⁹¹

3.109. While Claimant does not agree with the conclusion of the *El Paso* and *Pan American* tribunals that umbrella clauses only protect against breaches in an exercise of sovereign authority,²⁹² it is clear that this Tribunal must entertain jurisdiction over Akgun’s umbrella clause claim even if it chooses to follow the reasoning of these tribunals. The claim involves obligations under an investment agreement signed with the State represented by the Ministry of Industry and Oromia Regional State – *i.e.*, the 2012 ETIZ Agreement. There are multiple references to the BIT and international arbitration in the text of the agreement which makes it evident that the agreement is not a mere commercial contract. Claimant has also established that Respondent’s

²⁸⁹ Claimant notes that the findings of the two tribunals are identical.

²⁹⁰ [RLA-50](#), *El Paso v. Argentina*, ¶¶ 77-81; [RLA-51](#), *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 (“*Pan American v. Argentina*”), ¶¶ 106-108.

²⁹¹ [RLA-50](#), *El Paso v. Argentina*, ¶ 84; [RLA-51](#), *Pan American v. Argentina*, ¶ 112.

²⁹² See, e.g., [CLA-099](#), Schill on Umbrella Clauses, 2010, pp. 27-35; [CLA-104](#), Crawford, pp. 356-357. See also [Statement of Reply](#), ¶¶ 3.103-3.113.

treatment of the 2012 ETIZ Agreement was far from that of a commercial party and rather in exercise of sovereign power.²⁹³ It further established that Respondent's treatment of the agreement resulted in multiple violations of the BIT.²⁹⁴ In any event, Akgun's umbrella clause claim is not confined to the breach of contractual undertakings and also includes violation of other specific commitments that Ethiopia provided with respect to Akgun's investment.²⁹⁵

- 3.110. Based on the foregoing, Claimant respectfully requests this Tribunal to dismiss Respondent's arguments and exercise jurisdiction over Claimant's umbrella clause claim.

4. COUNTERCLAIMS

- 4.1. Below, Akgun addresses once again the infirmities in Ethiopia's counterclaim submission. In Section 4.A, Akgun will show that the counterclaims fail at inception for lack of jurisdiction under the Turkey-Ethiopia BIT. Ethiopia fails to establish the requisite *ratione personae* jurisdiction for its counterclaim submission. As Akgun shows, the plain language of the Treaty provides that only the investor may invoke claims under the Turkey-Ethiopia BIT. Akgun further shows that the "close connection" analysis that Ethiopia invokes to justify its counterclaims does not apply where the Treaty does not otherwise grant jurisdiction, and that in any event such "close connection" between Akgun's BIT claims and Ethiopia's contractual counterclaims is lacking. Finally, Akgun shows that Ethiopia's appeal to procedural efficiency and economy also falls short because those concepts cannot override the Tribunal's jurisdictional limits set forth in the Treaty.
- 4.2. In Section 4.B, Akgun addresses Ethiopia's substantive claims. Although these claims are not well articulated and their bases are unsubstantiated, Akgun attempts to specify the nature of these claims and shows that they are unmeritorious. In particular, Akgun shows that it did not violate the environmental obligations that Ethiopia argues were part of Akgun's

²⁹³ [Statement of Reply](#), ¶¶ 3.122-3.133.

²⁹⁴ [Statement of Claim](#), Section 5; [Statement of Reply](#), Section 5.

²⁹⁵ [Statement of Reply](#), ¶¶ 5.216-5.218.

contractual obligations, nor, in this connection, could Akgun be charged with failure to develop an industrial zone project that Ethiopia itself halted. Akgun also shows that Ethiopia's arguments concerning Akgun's supposed financing obligations are incorrect. Akgun did not possess the obligations that Ethiopia asserts, nor did it violate any such obligations. The evidence Ethiopia adduces on this point is demonstrably wrong. Finally, Akgun shows that Ethiopia's narrative concerning its offer of alternative lands is incomplete and incorrect, having only shown Akgun unsuitable sites that it never officially offered to Akgun.

- 4.3. Finally, in Section 4.C, Akgun addresses Ethiopia's claim for damages, showing that the figures Ethiopia claims lack specificity, lack legal basis, and are unjustifiably inflated.

A. Jurisdiction

(i) This Tribunal Lacks *Ratione Personae* Jurisdiction over Ethiopia's Counterclaims

- 4.4. In its Statement of Reply, Akgun elaborated on the narrow wording of Art. VII of the Treaty and its restrictive effect on this Tribunal's jurisdiction.²⁹⁶ In short, this Tribunal does not have the jurisdiction to hear Ethiopia's counterclaims. The Treaty clearly limits *locus standi* – and hence the Tribunal's jurisdiction *ratione personae* – to investors in two respects. First, it is the investor alone who possesses the right to initiate a dispute under the Treaty; the host state possesses no such correlative right.²⁹⁷ Second, the investor alone may elect the forum for the dispute.²⁹⁸ The clear wording of these provisions shows that it is beyond the purview of the Treaty for the host state to advance a claim against the investor. Against these arguments, Ethiopia offers only nonsensical interpretations of the Treaty and incomplete analyses of the relevant legal authorities, as discussed in the succeeding sections.

²⁹⁶ See *id.*, Section 7.C.ii.

²⁹⁷ [CLA-001](#), Turkey-Ethiopia BIT, Art. VII(1); [Statement of Reply](#), ¶ 7.11.

²⁹⁸ [CLA-001](#), Turkey-Ethiopia BIT, Art. VII(2); [Statement of Reply](#), ¶ 7.11.

a. The Treaty's Plain Language Defeats Ethiopia's Claims

- 4.5. Ethiopia seeks to have this Tribunal disregard the unambiguous wording of the Treaty, which allows only investors to initiate arbitration by sending a dispute notice and choosing the forum. It does not make sense to think that two sovereigns, Turkey and Ethiopia, decided to draft Art. VII this way for no reason. In its Statement of Reply, Akgun invited Ethiopia, one of the drafters of the BIT, to explain why the Treaty's Art. VII employed such restrictive language on the host states' *locus standi*.²⁹⁹ However, Ethiopia ignored Akgun's call.
- 4.6. The Treaty was executed between two sovereign states, and it is a part of the public international law framework. When it comes to the interpretation of international treaties, the Vienna Convention on the Law of Treaties ("VCLT") is a valuable tool. VCLT's provisions regarding treaty interpretation are deemed to be a part of international customary law.³⁰⁰ Therefore, Akgun submits an interpretation of Art. VII of the Treaty under the principles laid down by VCLT.
- 4.7. Art. 31 of VCLT lays down the fundamental method for interpreting treaties, and Art. 32 identifies the preparatory work of the treaty and the circumstances of its conclusion as supplementary tools to a treaty's interpretation. Akgun is not a party to the Treaty; it lacks information as to the preparatory work of the treaty and the circumstances of its conclusion. Therefore, Akgun's analysis must be limited to Art. 31.
- 4.8. Art. 31 of VCLT states:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

²⁹⁹ [Statement of Reply](#), ¶ 7.35.

³⁰⁰ [CLA-097](#), *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction dated, 21 October 2005, ¶ 88.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.³⁰¹

4.9. The application of Art. 31 of VCLT to Art. VII of the Treaty leads to the following results:

4.9.1. When the ordinary meaning of the text of Art. VII is considered, there is no doubt that the parties intended to limit *locus standi* to the investors. Indeed, it does violence to the plain language of Art. VII to ignore the fact that it specifically limits disputes to those initiated by the investor.

4.9.2. The Treaty's Preamble section reflects the parties' intention to create a legal framework designed to impose obligations solely upon the host states to encourage and protect investments. The Treaty did not intend to create a "two-way system" that equally imposes obligations on investors and host states or protects host states'

³⁰¹ [CLA-047](#), VCLT, Art. 31.

rights toward the investors. The Preamble section of the Treaty is as follows:

The Republic of Turkey and the Federal Democratic Republic of Ethiopia hereinafter called the Parties:

Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party.

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Parties.

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources,

and

Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments³⁰²

- 4.9.3. That the Treaty's object and purpose is plainly stated in its Preamble as "[d]esiring to promote greater economic cooperation between [Turkey and Ethiopia], **particularly with respect to investment by investors of one Party in the territory of the other Party**" and "[h]aving resolved to conclude an agreement concerning the encouragement and reciprocal **protection of investments**"³⁰³ shows that it is squarely focused on investor protection. Providing investors with special dispute resolution recourse is consistent with that object and purpose.
- 4.9.4. Thus, the Preamble section shows that parties wanted to attract foreign investment by providing rights to the investors to gain economic benefit. The same understanding dominates the rest of the Treaty. There is no single word in the Treaty that imposes obligations on investors or raises the investors' contractual obligations to the international law level.

³⁰² [CLA-001](#), Turkey-Ethiopia BIT, Preamble.

³⁰³ *Id.*, (emphasis added).

- 4.10. While the wording of the Treaty and its interpretation are clear as to Ethiopia and Turkey's intention to create a "one-way" dispute resolution system, Ethiopia argues that this system is unfair and inequitable.³⁰⁴ It is an undisputed fact that the arbitration mechanisms found in dispute resolution clauses are public international law tools for the protection of foreign investment. Thus, bilateral investment treaties are regarded as reflecting the states' standing offer to arbitrate, which the investors accept by dispatching a request for arbitration.³⁰⁵ Investors, whose interests BITs are intended to protect, do not participate in the negotiation or drafting of the BIT's dispute resolution clauses. States lay down the parameters for investment protection and dispute resolution long before investors opt in.
- 4.11. What Ethiopia is trying to do in this dispute is to change the rules of the game long after it has started. Akgun did not negotiate Art. VII of the Treaty, nor did it force Ethiopia to sign the Treaty. Art. VII of the Treaty was already among the set of Ethiopia's enforceable obligations when Akgun decided to invest in Ethiopia, and Akgun accepted Ethiopia's standing offer to arbitrate without altering it when it dispatched its Notice of Arbitration.³⁰⁶ Ethiopia, in its pleadings, did not bother to explain why it chose to sign a treaty that limited *locus standi* to initiate arbitration to investors. Regardless of its reasons, however, the plain text of the Treaty binds Ethiopia. Yet despite the text of the Treaty it signed, Ethiopia nevertheless alleges that any denial of its right to raise counterclaims based on its very own offer to arbitrate would be unfair and inequitable.³⁰⁷
- 4.12. If Ethiopia believes that the dispute resolution system in Art. VII of the Treaty is biased and unfair, its recourse is to renegotiate the Treaty with Turkey (and its other treaty partners) to reflect what it believes is more "equitable" and "unbiased." It cannot, however, ask this Tribunal to essentially re-write the Treaty by ignoring its terms for the expediency of Ethiopia's arguments in this case. This is especially so where, as here, UNCITRAL Rules Art. 35.2 requires

³⁰⁴ [Statement of Rejoinder](#), ¶ 444.

³⁰⁵ [CLA-104](#), Crawford, p. 360.

³⁰⁶ [Notice of Arbitration](#), dated 19 June 2019.

³⁰⁷ [Statement of Rejoinder](#), ¶¶ 444-447. Akgun further discusses Ethiopia's equity and fairness-based arguments in Section 4.A.i.b *infra*.

that the Parties make explicit their intention to have the Tribunal decide the case *ex aequo et bono*, but neither Party opted to proceed in that fashion when designating the applicable rules in the Procedural Order 1.³⁰⁸

b. Ethiopia Ignores the Treaty and Misconstrues the Relevant Authorities

- 4.13. Ethiopia attempts to blink away the Treaty's constraints on the Tribunal's *ratione personae* jurisdiction, claiming that Art. VII(1)'s definition of disputes is broad enough to cover counterclaims and relying on a fragment of the first sentence of Art. VII(1), which reads:

[d]isputes between one of the Parties and an investor of the other Party, in connection with his investment.³⁰⁹

- 4.14. Ethiopia mysteriously refrains from quoting or analyzing the first sentence in full. Indeed, the remainder of the sentence defeats Ethiopia's jurisdictional argument. The complete first sentence of Art. VII(1) is as follows:

Disputes between one of the Parties and an investor of the other Party, in connection with his investment, **shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment.**³¹⁰

- 4.15. Respondent cites only the portion of Art. VII(1) that refers to the Tribunal's jurisdiction *ratione materiae* – *i.e.*, the substantive legal matters that are properly within the scope of the Tribunal's remit to resolve. Ethiopia, however, in addition to *ratione materiae* jurisdiction further needs to prove *ratione personae* jurisdiction, which relates to whether Ethiopia is entitled in the first instance to lodge a claim against Akgun – *i.e.*, whether the Treaty permits the Tribunal to hear claims that a host state brings against an investor. It does not, as reflected in the second part of the first sentence of Art. VII(1) that Ethiopia omits from its submission and as further reflected in Art. VII(2), which limits forum selection to the investor.

³⁰⁸ See Procedural Order No. 1, dated 4 December 2020, Art. 4.1. Notably, the Procedural Order No. 1 does **not** contain an express authorization for the Tribunal to decide the case as *amiable compositeur* or *ex aequo et bono* called for in Art. 35.2 of the UNCITRAL Arbitration Rules.

³⁰⁹ [Statement of Rejoinder](#), ¶ 434.

³¹⁰ [CLA-001](#), Turkey-Ethiopia BIT, Art. VII (emphasis added).

- 4.16. Ethiopia's treatment of *ratione personae* jurisdiction is parsimonious at best. Indeed, Ethiopia offers no affirmative argument in support of the Tribunal's *ratione personae* jurisdiction over its counterclaims. Instead, it conflates such jurisdiction with *ratione materiae* jurisdiction by arguing that Akgun's right to select the forum does not foreclose Respondent's counterclaims.³¹¹ As noted above, however, the Tribunal's *ratione personae* jurisdiction is not solely constrained by Akgun's right to choose the forum. The Treaty also empowers investors – and investors alone – to initiate the dispute resolution process by dispatching a dispute notice. This feature, combined with the forum selection clause, shows that only investors may assert claims under Art. VII of the Treaty.
- 4.17. Any jurisdictional analysis solely based on *ratione materiae* jurisdiction, to the exclusion of *ratione personae* jurisdiction, like Ethiopia's analysis here, is incomplete. *Urbaser v. Argentina*, one of Ethiopia's principal authorities, illustrates this point. In *Urbaser*, the tribunal first determined *ratione personae* jurisdiction before analyzing *ratione materiae* jurisdiction.³¹² The tribunal referred to certain relevant paragraphs of the dispute resolution clause in Art. X of the Argentine–Spain BIT:
- 1- Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.
 - 2- Where a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute instigated it, it shall, at the request of either party, be submitted to the competent tribunals of the Party in whose territory the investment was made.
 - 3- The dispute may be submitted to an international arbitral tribunal in any of the following circumstances:
 - a) At the request of either party to the dispute, when no decision has been reached 18 months after of the initiation

³¹¹ [Statement of Rejoinder](#), ¶ 435.

³¹² [RLA-55](#), *Urbaser v. Argentina*, ¶ 1143.

of the judicial proceeding provided for in paragraph 2 of this article began, or

When such a decision has been reached, but the dispute between the parties persists;

b) When both parties to the dispute have so agreed. [...] ³¹³

- 4.18. First analyzing whether it had jurisdiction *ratione personae* over Argentina's counterclaims, the tribunal looked to the wording of the dispute resolution clause at issue and found that it did:

This provision [of Art. X(1)] is completely neutral as to the identity of the claimant or respondent in an investment dispute arising "between the parties." It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment. Article X(2) further states that when no settlement had been reached within six months from the date "on which one of the parties to the dispute" instigated it, "it shall, at the request of either party," be submitted to the competent tribunals of the host State - again without making any distinction depending on whether the investor or the host State may be "one of the parties" or "either party." This view is confirmed in Article X(3), stating that in certain circumstances the dispute may be submitted to an international arbitral tribunal "at the request of either party to the dispute." It results clearly from these provisions that either the investor or the host State can be a party submitting a dispute in connection with an investment to arbitration. ³¹⁴

- 4.19. Contrary to the Treaty at issue here, because the BIT dispute resolution clause at issue in *Urbaser* did not limit dispute notification to one party or the other and specifically permitted either one of the parties to initiate legal proceedings, the claimants there had to admit that the broad wording of the dispute resolution clause before the tribunal allowed the states to raise counterclaims:

Claimants admit that the Spain-Argentina BIT does not lay down *ratione personae* restrictions on who may bring a claim or expressly limit such claims to a violation of the BIT's own provisions. This only means

³¹³ [CLA-149](#), Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, signed 3 October 1991, Art. X.

³¹⁴ [RLA-55](#), *Urbaser v. Argentina*, ¶ 1143.

that the State parties did not restrict their offer to arbitrate.³¹⁵

4.20. Claimant reiterates that the BIT in this proceeding *does* lay down a *ratione personae* restriction which is decisive and disposes with the arguments based on *Urbaser*.

4.21. *Urbaser*, the very first award Ethiopia cites to support its arguments,³¹⁶ clearly establishes that a tribunal must satisfy itself as to *ratione personae* jurisdiction before asserting jurisdiction over counterclaims. Directly relevant here, *Urbaser* also recognizes that the drafters of dispute resolution clauses in bilateral investment treaties are the states, and if those clauses are restrictive as to who may initiate a claim under the BIT, it is because states draft them so:

Claimants admit that the Spain-Argentina BIT does not lay down *ratione personae* restrictions on who may bring a claim or expressly limit such claims to a violation of the BIT's own provisions. **This only means that the State parties did not restrict their offer to arbitrate.**³¹⁷

4.22. To further support its claims, Ethiopia improperly relies on *Saluka v. Czech Republic*, wrongly arguing that the *Saluka* tribunal allowed the host state's counterclaims solely based on a broad dispute resolution clause similar to Art. VII of the Treaty.³¹⁸

4.23. Ethiopia's analysis and arguments based on *Saluka* are misplaced for two reasons:

4.23.1. First, Akgun analyzed *Saluka* in its Statement of Reply and clearly recognized the broad wording of the dispute resolution clause before the *Saluka* tribunal, which allowed it to establish both *ratione personae* and *ratione materiae* jurisdiction over the host state's

³¹⁵ *Id.*, ¶ 1145 (emphasis added).

³¹⁶ [Statement of Rejoinder](#), ¶ 436.

³¹⁷ [RLA-55](#), *Urbaser v. Argentina*, ¶ 1145 (emphasis added).

³¹⁸ [Statement of Rejoinder](#), ¶ 441.

counterclaims, distinguishing it from the more restrictive clause at issue here.³¹⁹

4.23.2. Second, despite Akgun’s precise analysis in its Statement of Reply, Ethiopia deliberately ignores the fact that the *Saluka* tribunal initially analyzed the text of the dispute resolution clause to determine if its scope of *ratione personae* jurisdiction was broad enough to allow the host states to initiate arbitration.³²⁰

4.24. *Saluka* undoubtedly supports Akgun’s position that tribunals first look to the specific text of the dispute resolution clause to evaluate their *ratione personae* jurisdiction over purported counterclaims before deciding on whether they have subject matter jurisdiction to hear counterclaims. This is evident in the very same paragraph from the *Saluka* award that Ethiopia quotes in its submissions:

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**.³²¹

4.25. The *Saluka* tribunal’s analytical methodology was sound but yields a different result here because unlike Art. 8 of Czech Republic–Netherlands BIT at issue in *Saluka*, Art. VII of the Treaty at issue here limits disputes to those initiated “by the investor” and “as the investor may choose.”³²² Thus, the Treaty’s limiting language precludes Ethiopia from initiating arbitration and consequently from raising counterclaims against the investors.

4.26. Ethiopia further refers to *Rusoro* and *Roussalis*, but it limits its discussion to those tribunals’ analysis on *ratione materiae* jurisdiction and ignores their findings on *ratione personae* jurisdiction.³²³ The dispute resolution clauses in *Rusoro* and *Roussalis* contained restrictive language, similar to the Treaty language at issue here, allowing only investors to submit the disputes to

³¹⁹ [Statement of Reply](#), ¶ 7.17.

³²⁰ *Id.*

³²¹ [CLA-022](#), *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 39 (emphasis added).

³²² [CLA-001](#), Turkey-Ethiopia BIT, Art. VII (1)-(2).

³²³ [Statement of Rejoinder](#), ¶¶ 437-440.

arbitration. The tribunals considered the restrictive nature of those dispute resolution clauses before rejecting the host states' claims for lack of jurisdiction.³²⁴ Specifically, in its Statement of Reply, Akgun pointed to the strong resemblance between the dispute resolution clause before the *Rusoro* tribunal and Art. VII of the Treaty in terms of *ratione personae* jurisdiction.³²⁵ To reiterate, similar to the dispute resolution clause before this Tribunal, the dispute resolution clause before the *Rusoro* tribunal allows only investors to dispatch a dispute notice, initiate an amicable dispute resolution period, and submit disputes to arbitration.

- 4.27. Ethiopia also cites *Gavazzi* but mistakenly claims that the issue in *Gavazzi* as to the counterclaims was the lack of a close link between the investor's primary claims and the counterclaims.³²⁶ As reflected in Akgun's detailed analysis of this case provided in its Statement of Reply,³²⁷ the *Gavazzi* tribunal refused to hear the counterclaims for lack of *ratione personae* jurisdiction even though the dispute resolution clause employed a broad definition for the disputes:

[I]n Article 8(1), the BIT refers to “[a]ny dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party.” Such language may seem to indicate that also the claims of the Host State against the investor should be covered by the BIT. **However, whereas Article 8(1) of the BIT suggests amicable consultation and negotiations with respect to “[a]ny dispute between one Contracting Party and an investor,” Article 8(2) of the BIT only grants the investor the right to claim against the Host State.**³²⁸

- 4.28. The *Gavazzi* award is particularly instructive concerning the lack of jurisdiction over Ethiopia's counterclaims here because the dispute resolution clause before the *Gavazzi* tribunal was almost identical to Art. VII of the Treaty in

³²⁴ [Statement of Reply](#), ¶¶ 7.18-7.20, 7.26-7.28.

³²⁵ *Id.*, ¶ 7.32.

³²⁶ [Statement of Rejoinder](#), ¶ 442.

³²⁷ [Statement of Reply](#), ¶¶ 7.21-7.25.

³²⁸ [CLA-128](#), *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 151 (emphasis added).

terms of *ratione materiae* and *ratione personae* jurisdiction. Given the Treaty language, the same result should obtain here.

(ii) The Close Connection between the Primary Claims and the Counterclaims Is Irrelevant When the Tribunal Lacks *Ratione Personae* Jurisdiction over the Counterclaims as per the Treaty

- 4.29. Ethiopia disregards the clear wording of the Treaty and relies on equity, fairness, and procedural economy to support its jurisdictional arguments.³²⁹ As a part of its equity-based analysis, it contends that tribunals assert jurisdiction over a counterclaim where the primary claims and counterclaims are directly related, or they arise from the same contractual instrument.³³⁰ This argument is deficient. The tribunals which employed the “close connection” analysis first analyzed the jurisdiction granted to them by the applicable dispute resolution clauses before discussing the link between the primary claims and the counterclaims. In other words, the “close connection” or “direct link” analysis is the second step of the “two-step test,” the first step of which is to analyze the scope of the parties’ consent to arbitration. Here, the first step precludes moving to the second step. But even if Ethiopia’s failure on the first step were ignored, it nonetheless fails on the second step, as further discussed in Section 4.A.iii.
- 4.30. “The two-step test” is usually attributed to *Saluka*. The *Saluka* tribunal first analyzed the relevant dispute resolution clause in the applicable BIT to see if it had *ratione materiae* and *ratione personae* jurisdiction over the counterclaims.³³¹ Once it found that nothing in the applicable BIT and UNCITRAL Rules limited its jurisdiction over the counterclaims, the tribunal proceeded to the second step of its analysis, which was to analyze the connection between the primary claims and the counterclaims.³³² Therefore, *Saluka* is distinguishable from the current dispute because the dispute resolution clause under analysis in *Saluka* did not restrict the tribunal’s *ratione*

³²⁹ [Statement of Rejoinder](#), Section VII.b.ii. As noted above, the parties did not agree that this matter would proceed based on *ex aequo et bono* decision-making, and UNCITRAL Rules Art. 35.2 requires explicit consent for such a rendering. Ethiopia’s equity and fairness-based arguments are a surreptitious attempt to reverse the parties’ prior agreement. *Supra* ¶ 4.12.

³³⁰ [Statement of Rejoinder](#), ¶ 450.

³³¹ [Statement of Reply](#), ¶ 7.65; [CLA-022](#) *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 39.

³³² [Statement of Reply](#), ¶ 7.65; [CLA-022](#) *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 61.

personae jurisdiction over the counterclaims. In contrast, the dispute resolution before this Tribunal unquestionably reserves the right to trigger the dispute resolution mechanisms to the investors only, as discussed in Section 4.A.i above.

4.31. Further, Ethiopia argues that according to *Saluka*, primary claims and counterclaims bear a sufficiently close link to permit jurisdiction over the counterclaim if both claims arise out of the same transaction.³³³ Ethiopia intentionally miscasts Akgun's claims so that Akgun's claims and Ethiopia's counterclaims arise out of the same transaction.³³⁴ As Akgun extensively explained in its earlier submissions and above in Section 3, Akgun's legal claims arise out of the BIT itself, not from the 2012 ETIZ Agreement, and the fact that Akgun's claims involve the 2012 ETIZ Agreement does not transform its treaty-based claims into contractual claims.³³⁵

4.32. Finally, when it referred to *Saluka*, Ethiopia also omitted "the cardinal principle" the *Saluka* tribunal employed. Akgun explained *Saluka*'s cardinal principle at length in its Statement of Reply.³³⁶ In short, *Saluka*'s cardinal principle is the following:

It is a cardinal principle relating to the bringing of counterclaims, however, that the necessary parties to the counterclaim must be the same as the parties to the primary claim.³³⁷

4.33. Ethiopia seeks to violate *Saluka*'s "cardinal principle" by trying to enforce rights in a contract to which it is not a party. Indeed, Ethiopia does not dispute that it is not a party to the 2012 ETIZ Agreement.³³⁸ Nor does it dispute that the Mol and Oromia Regional State are entities separate from Ethiopia.³³⁹ Nor does it

³³³ [Statement of Rejoinder](#), ¶ 450, fn. 619.

³³⁴ *Id.*, ¶¶ 448-450.

³³⁵ [Statement of Reply](#), ¶ 7.9.

³³⁶ *Id.*, ¶¶ 7.52, 7.53.

³³⁷ [CLA-022 *Saluka v. Czech Republic*](#), Decision on Jurisdiction, ¶ 49.

³³⁸ [Statement of Rejoinder](#), ¶ 213 ("It is of course true that Ethiopia is not itself a party to the Agreement.").

³³⁹ [Expert Report of Dr. Mellese Damtie Dandi dated 20 January 2022](#), ¶ 2.3; [Statement of Defense](#), ¶ 229; [Statement of Reply](#), ¶ 7.95.

dispute that Oromia Regional State is an indispensable party to a dispute that arises out of the 2012 ETIZ Agreement.³⁴⁰ Although Oromia Regional State's and Mol's actions that violate international law may be attributed to Ethiopia for the purposes of Akgun's Treaty-based claims,³⁴¹ this rule of attribution does not apply to the contract-based claims of the Mol and Oromia Regional State, thereby allowing Ethiopia to assert them against Akgun as it seeks to do here.³⁴²

4.34. Apart from *Saluka*, the other awards Ethiopia cites³⁴³ are easily distinguishable from this dispute.

4.35. Ethiopia cites *Klöckner v. Cameroon* but omits to elaborate on the subject matter of the dispute or analyze the dispute resolution clause before the *Klöckner* tribunal.³⁴⁴

4.35.1. Unlike Art. VII of the Treaty, the dispute resolution clause before the *Klöckner* tribunal was completely neutral as to the identity of the party who could initiate arbitration:

The settlement of disputes relating to the validity, interpretation or application of the clauses of this protocol will be made by agreement of the parties and failing that, in accordance with the procedure arbitration provided for by the International Convention for the Settlement of Disputes relating to investments of the International Bank for Reconstruction and Development (I.B.R.D).³⁴⁵

³⁴⁰ [Statement of Defense](#), ¶ 231 ("The [2012 ETIZ] Agreement out of which this dispute arises is an agreement as between and amongst the Ministry of Industry of the Federal Democratic Republic of Ethiopia; the Regional State of Oromia; and the Claimant, Akgun. It is a tripartite Agreement. **The Oromia Regional State is an indispensable party to the Agreement as administrator of the land, and hence an indispensable party to any dispute that might arise out of it. ... Indeed, many of the contractual rights and obligations were directly undertaken by the Oromia Regional State.**") (emphasis added); [Statement of Reply](#), ¶ 7.110.

³⁴¹ See [Statement of Reply](#), ¶¶ 3.115-3.121.

³⁴² *Id.*, ¶ 7.55.

³⁴³ [Statement of Rejoinder](#), ¶¶ 452-456.

³⁴⁴ *Id.*, ¶ 453.

³⁴⁵ [RLA-57](#), *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Award of 21 October 1983, 2 ICSID Rep. 9 (1994), ¶ 1 (unofficial translation from French) ("Le demandeur a saisi le Tribunal arbitral sur la base de l'article 18 du Contrat de Livraison de l'usine d'engrais signé le 4 mars 1972 entre la République Fédérale du Cameroun et Klöckner. Cet article du Contrat établit que « Le règlement des litiges relatifs à la validité, à l'interprétation ou l'application des

- 4.35.2. Further, the dispute in *Klöckner* arose out of commercial contracts between the investor and the host state, rather than a BIT, that imposed obligations on both sides. In contrast, the dispute at issue here is based on the Treaty and Art. VII of the Treaty covers only the disputes that arose out of the Treaty, and the Treaty does not impose any substantive obligations on Akgun.
- 4.36. Similarly, in *Urbaser*, as discussed earlier in this submission, the dispute resolution clause was not restrictive as to the tribunal's *ratione personae* jurisdiction over the host state's counterclaims.³⁴⁶ The tribunal analyzed the link between the primary claims and counterclaims after it concluded that nothing in the dispute resolution clause restricted the host state's right to initiate arbitration or raise counterclaims.³⁴⁷
- 4.37. *David Aven v. Costa Rica* also falls short of supporting Ethiopia's arguments for the following reasons:
- 4.37.1. The *Aven* tribunal first observed that DR-CAFTA imposed obligations on both investors and the host states that could be subject to an arbitration conducted under DR-CAFTA:
- Thus, if it could be interpreted that [Art. 10.1 and 10.11 of DR-CAFTA] impose affirmative obligations on investors, it is not impossible either *de facto* or *de jure*, that a foreign investor could be found to breach an obligation under Section A, by the violation [of] the environmental domestic laws and regulations.³⁴⁸
- 4.37.2. As the second step, the *Aven* tribunal analyzed the dispute resolution clause in DR-CAFTA to see if the clause allowed the host states to be “a claimant”:
- Moreover, Article 10.15 is referred in general to “an investment dispute” while Article 10.16 is applicable when an “investment dispute cannot be settle[d] by consultation or negotiation”, which covers the disputes giving rise to

clauses du présent protocole sera fait d'accord parties et à défaut, conformément à la procédure d'arbitrage prévue par la Convention internationale de règlement des différends relatifs aux investissements de la Banque Internationale pour la Reconstruction et le Développement (B.I.R.D.).”.

³⁴⁶ *Supra* Section 4.A.i.b.

³⁴⁷ *Id.*

³⁴⁸ [RLA-56](#), *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018 (“*Aven and others v. Costa Rica*”), ¶ 735.

counterclaims. The language of Articles 10.15 and 10.16 of DR-CAFTA is in principle wide enough to encompass counterclaims and **that Article 10.16 does not imply that it applies only to disputes in which it is an investor which initiates claims.**³⁴⁹

- 4.37.3. Therefore, the dispute resolution clause before the *Aven* tribunal did not restrict the host states' right to initiate arbitration, and DR-CAFTA imposed obligations on investors as well as the host states. In contrast, the dispute resolution before this Tribunal clearly restricts the right to be "*a claimant*" to investors and the Treaty itself does not contain any language that imposes obligations on Akgun that could be subject to arbitration under the Treaty.³⁵⁰
- 4.37.4. Finally, it is true that the *Aven* tribunal concurred with *Urbaser* and concluded that the investors could also be subject to international law.³⁵¹ However, this statement offers no clear support to Ethiopia's arguments. The *Aven* tribunal made "being subject to international law" very clear: "**What about the investor's obligations arising [out] of the investment according to international law?**"³⁵² Here, none of Akgun's supposed obligations to Ethiopia under the 2012 ETIZ Agreement arises under international law. Ethiopia's counterclaims are purely commercial and rely on Akgun's alleged breaches of the 2012 ETIZ Agreement, not on any international law obligations of Akgun. Nothing in Ethiopia's counterclaims suggest that Akgun had obligations towards Ethiopia under international law and breached them.
- 4.38. Later in its submissions, Ethiopia isolates one paragraph in the late Judge James Crawford's essay and implies that Mr. Crawford solely relies on policy considerations and suggests that the tribunals should disregard *ratione materiae* and *ratione personae* jurisdiction granted to them by the applicable dispute resolution clauses and hear every closely connected investment-related counterclaims.³⁵³ This is not a correct analysis of Mr. Crawford's

³⁴⁹ *Id.*, ¶ 740 (emphasis added).

³⁵⁰ *Supra* Section 4.A.i.a.

³⁵¹ [Statement of Rejoinder](#), ¶ 455.

³⁵² [RLA-56](#), *Aven and others v. Costa Rica*, ¶ 738 (emphasis added).

³⁵³ [Statement of Rejoinder](#), ¶ 457.

essay. On the very same page, Mr. Crawford sets forth that the treaty language supplies the predicate for any such analysis:

[C]ontractual claims and counterclaims may be brought under appropriately worded BITs.³⁵⁴

- 4.39. Here, the Treaty was not “appropriately worded” so as to allow Ethiopia to initiate arbitration or raise counterclaims against Akgun.³⁵⁵
- 4.40. In a final attempt to justify its case, Ethiopia cites the tribunal’s procedural order in *SGS v. Pakistan*.³⁵⁶ Yet, Ethiopia does so without regard to the facts surrounding the order. In *SGS*, Pakistan submitted its contractual disputes with the investor to local arbitration as per the investment agreement between the investor and Pakistan.³⁵⁷ Later, the investor initiated an ICSID arbitration pursuant to the Pakistan–Switzerland BIT.³⁵⁸ The tribunal issued a procedural order, *inter alia*, to address the claimant’s interim measure application, under which the claimant requested the stay of the local arbitration initiated by Pakistan.³⁵⁹ In support of its request, the claimant argued, *inter alia*, that Pakistan could raise the claims it brought in the local arbitration as counterclaims in the ICSID proceedings.³⁶⁰ In response to the claimant’s request, the tribunal said the words which Ethiopia partially quoted in its submissions:³⁶¹

It would be inequitable if, by reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the Respondent from pursuing its own claim for damages by obtaining a stay of those proceedings for the pendency of the international

³⁵⁴ [CLA-104](#), Crawford, p. 366.

³⁵⁵ *Supra* Section 4.A.i.

³⁵⁶ [Statement of Rejoinder](#), ¶ 458.

³⁵⁷ [RLA-59](#), *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 (“*SGS v. Pakistan*”), p. 295.

³⁵⁸ *Id.*, p. 296.

³⁵⁹ *Id.*, pp. 302-305.

³⁶⁰ *Id.*

³⁶¹ [Statement of Rejoinder](#), ¶ 458.

proceedings, if such international proceedings could not encompass the Respondent's claim.³⁶²

- 4.41. Ethiopia relies on the tribunal's above finding in *SGS* to show that it would be inequitable if this Tribunal refuses to hear its counterclaims.³⁶³ But the *SGS* procedural order has to do with whether it is appropriate to compel a state to stay counterclaims it has already asserted in a contractually agreed fashion, not whether it is appropriate to compel an investor to face counterclaims that fall outside a BIT's jurisdictional ambit. Thus, the *SGS* procedural order does not stand for what Ethiopia implies in its submissions. To the tribunal, the fact that the claimant initiated international arbitration at ICSID cannot preclude the host state from pursuing its contractual claims at the contractually designated forum and force it to raise those claims as counterclaims in the ICSID arbitration. It is apparent from the facts that nothing in the *SGS* tribunal's procedural order supports Ethiopia's alleged right to raise counterclaims in the present arbitration.
- 4.42. Therefore, none of the authorities Ethiopia presented to support its close connection analysis are sufficient to eliminate the clear wording of Art. VII of the Treaty that limits *locus standi* to investors only. To reiterate, a close connection between primary claims and counterclaims cannot be the sole basis for a tribunal's jurisdiction on counterclaims in the absence of precise wording in the applicable dispute resolution clause that allows host states to raise counterclaims.

(iii) There Is No Close Connection Between the Primary Claims and the Counterclaims

- 4.43. Ethiopia asserts that there is a close connection between the primary claims that Akgun advances in this arbitration and Ethiopia's counterclaims and that this is sufficient for the Tribunal to find jurisdiction over Ethiopia's counterclaims.³⁶⁴ As explained in Sections 4.A.i-ii, this argument is wrong: before the Tribunal can assess whether there is a close connection between the primary claims and counterclaims, it shall ensure that there is *ratione*

³⁶² [RLA-59](#), *SGS v. Pakistan*, p. 302.

³⁶³ [Statement of Rejoinder](#), ¶ 458.

³⁶⁴ *Id.*, ¶ 450.

personae and *ratione materiae* jurisdiction over the counterclaims. The requisite jurisdiction is lacking here.

- 4.44. However, even if the Tribunal were to follow Ethiopia's argument and employ the close connection analysis without analyzing the parties' consent to arbitration as embodied in the text of Art. VII of the Treaty, this would be insufficient to establish this Tribunal's jurisdiction over the counterclaims. This is because, contrary to Ethiopia's argument, there is not a sufficiently close connection between Akgun's primary claims and Ethiopia's counterclaims.
- 4.45. A proper "close connection" analysis begins with correctly characterizing the primary claims and counterclaims. This is the point where Ethiopia commits its fatal mistake. According to Ethiopia, Akgun's primary claim is that "it was not required to submit an EIA and that it was not in breach of any obligation to that effect."³⁶⁵ These assertions, while true, are not legally actionable claims but rather contentions of fact. Nowhere in its submissions does Akgun make such assertions the basis of its primary claims under the Treaty.
- 4.46. As Akgun repeatedly stresses in its pleading, the Treaty is the source of the claims it is asserting:
- 4.46.1. Akgun claims that Ethiopia breached Art. II of the Treaty by failing to observe its FET and non-impairment obligations.³⁶⁶ Akgun legitimately expected that Ethiopia would allow it to develop ETIZ on suitable land but Ethiopia frustrated this expectation.³⁶⁷ Furthermore, Ethiopia treated Akgun inconsistently by starting and stopping ETIZ unreasonably and thus created confusion on Akgun's part about the fate of ETIZ.³⁶⁸ Ethiopia also acted in an inconsistent manner by subjecting Akgun to a legal regime whose interpretation and enforcement is questionable.³⁶⁹ Last but not least, Ethiopia arbitrarily encouraged Akgun to implement ETIZ on a site it

³⁶⁵ *Id.*, ¶ 449.

³⁶⁶ [Statement of Reply](#), ¶ 1.11.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

designated, but later destroyed ETIZ after it decided to develop residential condominiums instead.³⁷⁰

4.46.2. Akgun further claims that Ethiopia expropriated its investment in violation of Art. IV of the Treaty through unlawful measures under the pretext of an alleged lack of an acceptable EIA.³⁷¹

4.46.3. Akgun further invoked the umbrella clause in the Denmark-Ethiopia BIT through the MFN clause in the Treaty.³⁷² Through an umbrella clause claim, Mol's and Oromia Regional State's contractual obligations under the 2012 ETIZ Agreement are transformed into Ethiopia's treaty obligations.³⁷³ Therefore, Akgun claims that Ethiopia breached its umbrella clause obligation under the Treaty by failing to observe its contractual commitments set out in the 2012 ETIZ Agreement, *inter alia*, the obligation to allocate a suitable land for ETIZ, to allow Akgun to use the land for 80 years to develop ETIZ, to pay direct and indirect losses in case the project was suspended through no fault of Akgun, as well as other non-contractual commitments.³⁷⁴

4.47. On the other hand, Ethiopia counterclaims that Akgun breached the 2012 ETIZ Agreement by failing to develop an industrial zone and finance the project. Contrary to Ethiopia's arguments,³⁷⁵ Akgun's primary claims and the counterclaims do not share the same factual context and legal issues.

4.48. First of all, Akgun does not precisely know the factual context of Ethiopia's counterclaims because Ethiopia's submissions on the counterclaims do not lay down any concrete facts other than claiming that Akgun failed to develop an industrial zone or finance the ETIZ project.³⁷⁶

³⁷⁰ *Id.*

³⁷¹ *Id.*, ¶ 1.12.

³⁷² *Id.*, ¶ 1.13.

³⁷³ [CLA-060](#), K. Hober, *State Responsibility and Attribution*, in P. Muchlins et al. (eds.), *International Investment Law* (2008), p. 575. See [Statement of Reply](#), Section 3.D and ¶ 7.36. See also *supra* Section 3.D.iii.

³⁷⁴ [Statement of Reply](#), ¶ 1.13.

³⁷⁵ [Statement of Rejoinder](#), ¶¶ 469-480.

³⁷⁶ [Statement of Reply](#), ¶¶ 7.73.1-7.73.5.

- 4.49. To support its claim about Akgun’s alleged failure to develop an industrial zone, the only factual basis Ethiopia presents is this: “The ETIZ project stalled because of Akgun’s failure to discharge its environmental obligations.”³⁷⁷ Ethiopia does not elaborate on how this fact is connected to the facts presented by Akgun, for example, to the fact that Ethiopia decided not to proceed with ETIZ on the same location because it decided to develop a Condominium Project. The facts presented by Akgun are of a wholly broader scope than the obscure facts Ethiopia presents. Indeed, in its submission, Ethiopia regards as irrelevant the numerous facts from 2008 through the execution of the 2012 ETIZ Agreement, which facts form an important part of Akgun’s Treaty claims. Moreover, in its submissions, Ethiopia does not substantiate its counterclaims or explain what specific facts it submits overlap with the specific facts Akgun presents. Neither the Tribunal nor Akgun is in the position to guess Ethiopia’s factual basis for its counterclaims, and consequently assess its close connection with the facts presented by Akgun. Nevertheless, the case materials submitted by Ethiopia are not sufficient to show that the primary claims and the counterclaims are closely connected.
- 4.50. Second, the legal issues surrounding the primary claims and the counterclaims are not the same. For example, an issue presented by Akgun is whether Ethiopia “treated Akgun in [an] unfair and arbitrary manner by designating the site for ETIZ and encouraging Akgun to develop ETIZ on that site before reversing course and deciding instead to develop residential condominiums.”³⁷⁸ How this issue overlaps with whether Akgun failed to prepare the necessary studies to protect the environment is not clear.
- 4.51. Another legal issue that hampers Ethiopia’s efforts to establish the close connection between the primary claims and the counterclaims is that Ethiopia does not have the standing to rely on the 2012 ETIZ Agreement because it is not a party to it. Akgun elaborated on this legal issue at length in its Statement of Reply,³⁷⁹ and Ethiopia’s only comment on this solid legal argument is that it is “*disingenuous*.”³⁸⁰ Adjectives do not suffice for analysis. In any event, the

³⁷⁷ [Statement of Rejoinder](#), ¶ 470 (internal citation omitted).

³⁷⁸ [Statement of Reply](#), ¶ 1.11.

³⁷⁹ *Id.*, ¶¶ 7.52-7.61.

³⁸⁰ [Statement of Rejoinder](#), ¶ 445.

argument is genuine because Ethiopia advances purely contractual counterclaims, yet it is not a party to that contract and does not explain how Ethiopian law allows it to rely on the contractual rights that belong to the Ministry of Industry and the Oromia Regional State. Ethiopia also does not explain how claims based on a contract to which it is not a party could be closely connected to treaty-based claims that are appropriately directed towards it under the Treaty and principles of international investment law.

- 4.52. Therefore, Ethiopia has failed to establish a close connection between the primary claims and the counterclaims, and this represents another valid ground for this Tribunal to reject the counterclaims for lack of jurisdiction.

(iv) Procedural Economy and Efficiency Considerations Cannot Prevail Where Jurisdiction Is Lacking

- 4.53. Ethiopia further argues that adjudication of the primary claims and counterclaims together in this arbitration would serve procedural economy and efficiency due to the alleged similarities between the claims.³⁸¹ This contention is wrong. As a matter of principle, arbitration tribunals' efforts to maintain procedural economy and efficiency are welcomed, but in so doing tribunals cannot disregard their jurisdictional limits.
- 4.54. Whether Ethiopia is allowed to raise a counterclaim is a matter of the Tribunal's jurisdiction, and the limits of the Tribunal's *ratione materiae* and *ratione personae* jurisdiction are set forth in Art. VII of the Treaty. Concerning *ratione personae* jurisdiction in Art. VII, only the investor can initiate arbitration, as discussed above.³⁸² If Ethiopia is not entitled to initiate arbitration, this equally means that it cannot raise counterclaims because counterclaims are considered as standalone claims separate from primary claims.³⁸³ When a tribunal decides to hear counterclaims, it is deemed to adjudicate two different disputes, although they are combined in one. That is why a party that is not allowed to initiate arbitration cannot raise counterclaims as well. This Tribunal

³⁸¹ *Id.*, ¶ 460.

³⁸² *Supra* Sections 4.A.i and 4.A.ii.

³⁸³ See, e.g., [CLA-150](#), D. Caron and L. Caplan, *Part III The Initiation of the Arbitration and the Identification and Clarification of the Issues Presented*, Ch.13 *Statements of Claim and Defence*, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), p. 424.

cannot depart from this clear rule for the sake of procedural economy and efficiency.

- 4.55. While Ethiopia refers to *Urbaser* to support its argument,³⁸⁴ it fails to recognize that the *Urbaser* tribunal first considered the issue of whether the applicable BIT allowed the host state to be “a claimant” in arbitration proceedings, in other words whether it had *ratione personae* jurisdiction over the host state’s counterclaims.³⁸⁵
- 4.56. Further, Ethiopia cites *Aven*,³⁸⁶ but it again fails to identify the key points that drove the tribunal to find jurisdiction over the counterclaims in that case. The *Aven* tribunal agreed to hear the host state’s environmental counterclaims mainly because, unlike the Treaty at issue here, the relevant provisions of DR-CAFTA imposed environmental obligations on investors and the dispute resolution clause was neutral as to the claimant’s identity.³⁸⁷ Consequently, the *Aven* tribunal found that it had *ratione personae* jurisdiction over the host state’s counterclaims.³⁸⁸
- 4.57. The *Saluka* tribunal also recognized that a need for procedural economy and efficiency could not override the parties’ consent to arbitration:
- Policy considerations concerning the alleged advantages of economy and efficiency being best served by allowing the Respondent’s counterclaim are insufficient to override the principle that the scope of the Tribunal’s jurisdiction is determined by the scope of the parties’ consent.³⁸⁹
- 4.58. Ethiopia also cites Prof. Michael Reisman’s dissent in *Roussalis*, but again misses the critical point that Prof. Reisman’s dissent was based on the fact that the ICSID rules applied in that matter, which is not the case here. In his dissent, Prof. Reisman relies on Art. 46 of the ICSID Convention and argues that “the consent component” of Art. 46 is imported into any ICSID Arbitration:

³⁸⁴ [Statement of Rejoinder](#), ¶ 460.

³⁸⁵ *Supra* Sections 4.A.i and 4.A.ii.

³⁸⁶ [Statement of Rejoinder](#), ¶ 461.

³⁸⁷ *Supra* Section 4.A.ii.

³⁸⁸ [RLA-56](#), *Aven and others v. Costa Rica*, ¶ 740.

³⁸⁹ [CLA-022](#), *Saluka v. Czech Republic*, Decision on Jurisdiction, ¶ 27.

I understand the line of their analysis but, in my view, when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue.³⁹⁰

- 4.59. Art. 46 of the ICSID Convention indeed provides a radical provision alien to the UNCITRAL Rules that apply to this arbitration. It states:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.³⁹¹

- 4.60. According to Art. 46, counterclaims arising out of the subject matter of the dispute can be heard by ICSID tribunals if they are covered within the scope of consent or fall within the “jurisdiction of the Centre.” The “jurisdiction of the Centre” is defined in the first paragraph of Art. 25 of the ICSID Convention:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.³⁹²

- 4.61. Thus, Art. 46 of the ICSID Convention treats Art. 25 as an alternative tool that encompasses the parties’ consent to arbitration. Because Art. 25 grants a broad *ratione materiae* jurisdiction to tribunals without any limitation as to *ratione personae* jurisdiction, Prof. Reisman opined that ICSID tribunals should refer to the broad jurisdictional powers in Art. 25 when they face narrowly worded dispute resolution clauses in BITs. Prof. Reisman is

³⁹⁰ [RLA-60](#), *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, dated 28 November 2011.

³⁹¹ [CLA-151](#), ICSID Convention, Regulations and Rules, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID/15, April 2006), Art. 46.

³⁹² *Id.*, Art. 25.

straightforward on this issue: when an investor chooses a state's offer to arbitrate as per the ICSID Convention, it is deemed to have consented to the broad "jurisdiction of the Centre" provided in Art. 25 of the ICSID Convention.

- 4.62. Prof. Reisman's dissent can be criticized for several reasons. None of the criticisms, however, would be applicable here because the dissent itself may only be relevant in the context of an ICSID arbitration proceeding. This arbitration is conducted under the UNCITRAL Rules 2010 (with new article 1, paragraph 4, as adopted in 2013),³⁹³ and Art. 21.3 of the Rules explicitly leaves the admissibility of the host state's counterclaims to the tribunal's jurisdiction, which in turn leaves that issue up to the wording of the applicable arbitration clause. UNCITRAL Rules Art. 21.3 states:

In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off **provided that the arbitral tribunal has jurisdiction over it.**³⁹⁴

- 4.63. Consequently, the basis for Prof. Reisman's dissent in *Roussalis* is inapplicable to an arbitration conducted under UNCITRAL Rules, and in particular in a case where, like here, an arbitration clause expressly limits the tribunal's *ratione personae* or *ratione materiae* jurisdiction over counterclaims.
- 4.64. *Goetz v. Burundi* is among the few tribunals that have followed Prof. Reisman's problematic approach. However, the *Goetz* tribunal first looked for the investor's consent to the counterclaims and then found it using the formula offered by Prof. Reisman:

The parties further agreed that the Goetz claim would be submitted to ICSID in accordance with the procedure frequently adopted for this purpose: for Burundi, by concluding the BIT. But by concluding the BIT, Burundi also accepted that the disputes that would be submitted to ICSID arbitration would be settled under the conditions and according to the procedures set out in the Washington Convention. In particular, it accepted that incidental,

³⁹³ Procedural Order No. 1, ¶ 4.1.

³⁹⁴ UNCITRAL Arbitration Rules (2010), Art. 21.3 (emphasis added).

additional or counterclaims presented during the proceedings would be examined by the Tribunal under the conditions laid down in Article 46 of the Convention and Article 40 of the Arbitration Rules. By accepting the offer contained in the BIT, the Goetz have in turn accepted that this be done. This double consent gives the Tribunal jurisdiction to hear the counterclaims.³⁹⁵

- 4.65. Therefore, the *Goetz* tribunal looked for the parties' consent to arbitration regarding the counterclaims and found it in Art. 25 of the ICSID Convention,³⁹⁶ through the application of Art. 46.³⁹⁷ Ethiopia refers to both Prof. Reisman and the *Goetz* tribunal's findings as if they disregarded the scope of the consent to arbitration embodied in the applicable Treaty and solely relied on policy-based concerns or the link between the primary claims and counterclaims.³⁹⁸ This argument severely mischaracterizes those opinions and their underlying reasoning, which they based explicitly on the ICSID Convention. Both Prof. Reisman and the *Goetz* tribunal first searched for the parties' consent to arbitrate the counterclaims and found it in Arts. 25 and 46 of the ICSID Convention. Only after establishing the parties' consent to counterclaims did the *Goetz* tribunal and Prof. Reisman support their respective positions with policy-related arguments.
- 4.66. Art. VII of the Treaty allows the investors to choose among three options for the settlement of their disputes with the host states: (i) ICSID arbitration, (ii) UNCITRAL Arbitration, and (iii) litigation before the Ethiopian Courts. If Akgun had chosen to submit its disputes to ICSID, the parties and the Tribunal might discuss the applicability of Art. 46 to the counterclaims. On the other hand, if

³⁹⁵ [RLA-58](#), *Antoine Goetz and others v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award of 21 June 2012 ("*Goetz and others v. Burundi (II)*"), ¶ 278 (unofficial translation from French) ("Les parties ont par ailleurs consenti à ce que la demande des consorts Goetz soit soumise au CIRDI selon la procédure fréquemment adoptée à cet effet : pour le Burundi, en concluant le TPI. Mais en concluant le TPI, le Burundi a par là même accepté que les différends qui seraient soumis à arbitrage dans le cadre du CIRDI soient réglés dans les conditions et selon les procédures fixées par la Convention de Washington. Il a notamment accepté que les demandes incidentes, additionnelles ou reconventionnelles présentées en cours d'instance soient examinées par le Tribunal dans les conditions fixées par l'article 46 de la Convention et l'article 40 du Règlement d'arbitrage. En acceptant l'offre contenue dans le TPI, les consorts Goetz ont à leur tour accepté qu'il en soit ainsi. Ce double consentement donne compétence au Tribunal pour connaître des demandes reconventionnelles.").

³⁹⁶ *Id.*, ¶ 276.

³⁹⁷ *Id.*, ¶ 278.

³⁹⁸ [Statement of Rejoinder](#), ¶¶ 456, 462.

Akgun had chosen to litigate its disputes before the Ethiopian Courts, whether Ethiopia could raise counterclaims would be subject to the Ethiopian procedural law. However, Akgun chose to refer its disputes to UNCITRAL arbitration, and under UNCITRAL Rules, the Tribunal's jurisdiction over the counterclaims is subject to Art. VII of the Treaty. Nothing less, nothing more.

- 4.67. Moreover, this Tribunal already confirmed, in Procedural Order No. 1 dated 4 December 2020, that this Tribunal's sole source of jurisdiction is the arbitration agreement, which is Art. VII of the Treaty. According to Section 10.3 of Procedural Order No. 1, "a claim or counterclaim may not be amended in such a manner that the amended claim or counterclaim falls outside the scope of the arbitration agreement." This provision clearly presupposes that any counterclaims must fall within the scope of Art. VII of the Treaty. And Art. VII limits *locus standi* to Akgun only.
- 4.68. Finally, if the Tribunal denies jurisdiction over the counterclaims, the parties to the 2012 ETIZ Agreement – *i.e.*, the Ministry of Industry, or the Oromia Regional State – have other options to pursue their claims. In its Rejoinder, Ethiopia has acknowledged that it possesses recourse to alternative proceedings if it wishes to press its claims.³⁹⁹
- 4.69. On the other hand, this Tribunal's decision to hear the counterclaims despite the explicit restriction on its *ratione personae* jurisdiction over the counterclaims in Art. VII of the Treaty will amount to an excess of power, which would endanger the validity, recognition, and enforcement of the resulting award. As far as Akgun is concerned, that is the real threat against this arbitration's procedural economy and efficiency.

B. Substantive Claims

- 4.70. In its Statement of Reply, Akgun argued that Ethiopia's counterclaims submissions did not comply with Arts. 20(2), 20(4), and 21(4) of the UNCITRAL Rules because the submissions were far from being substantiated

³⁹⁹ [Statement of Rejoinder](#), ¶ 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.")

and clear enough to enable Akgun to comprehend all the claims and defend itself with a fair chance.⁴⁰⁰

4.71. Ethiopia's Rejoinder on the counterclaims suffers from the same problem:

4.71.1. At the very beginning of its submissions on substantive claims, Ethiopia introduces its substantive claims:

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.⁴⁰¹

4.71.2. According to this paragraph, Ethiopia seems to advance four separate heads of substantive claims:

- Akgun's alleged failure to comply with its environmental obligations,
- Akgun's alleged failure to finance the project,
- Akgun's alleged failure to consider alternative lands, and
- Akgun's alleged failure to perform all of its obligations.

4.71.3. Aside from Akgun's alleged failure to finance the project, Ethiopia did not raise the other three heads of claims in its Statement of Defense. Looking at the section titles of Ethiopia's Rejoinder on the counterclaims, it appears that Ethiopia advances only two heads of claim:

- Akgun's alleged breach of its obligation to develop an industrial zone,⁴⁰² and
- Akgun's alleged breach of its obligation to finance the project.⁴⁰³

⁴⁰⁰ [Statement of Reply](#), ¶¶ 7.72-7.73.

⁴⁰¹ [Statement of Rejoinder](#), ¶ 467 (emphasis in original).

⁴⁰² *Id.*, Section VII.D.i.

⁴⁰³ *Id.*, Section VII.D.ii.

- 4.71.4. This appearance however does not correspond to what Ethiopia discusses under these sections. Under the section entitled “Akgun Breached its Obligation to Develop an Industrial Zone,” Ethiopia solely discusses Akgun’s alleged failure to comply with its environmental obligations and does not elaborate on how and why Akgun failed to develop an industrial zone.⁴⁰⁴
- 4.72. Ethiopia’s failure to elucidate its substantive counterclaims forces Akgun to guess at the points at issue:
- Whether Akgun failed to comply with its environmental obligations,
 - Whether Akgun failed to develop an industrial zone,
 - Whether Akgun failed to finance the project,
 - Whether Akgun failed to consider alternative lands, and
 - Whether Akgun failed to perform **all** of its obligations in the 2012 ETIZ Agreement.
- 4.73. Akgun will respond to all *potential* heads of claims Ethiopia asserted in its Rejoinder, except the claim for Akgun’s alleged failure to perform **all** of its obligations in the 2012 ETIZ Agreement because this claim is too broad and unsubstantiated to permit Akgun to formulate a response. In any event, Akgun’s responses to Ethiopia’s slightly more particularized claims shows that Akgun did indeed perform its obligations under the 2012 ETIZ Agreement, rendering moot the charge that Akgun failed to perform “all of its obligations.”
- 4.74. In any case, Akgun maintains its argument that Ethiopia’s failure to elucidate and substantiate its substantive claims creates an undue burden on Akgun. Therefore, this Tribunal must entirely reject the counterclaims due to Ethiopia’s failure to comply with Arts. 20(2), 20(4), and 21(4) of the UNCITRAL Rules. For good order, however, Akgun responds below to Ethiopia’s counterclaims and demonstrates that they are without merit.

⁴⁰⁴ *Id.*, ¶¶ 469-475.

(i) Akgun Did Not Fail to Comply with Its Environmental Obligations or an Obligation to Develop an Industrial Zone

- 4.75. Subsection VII.D.i of Ethiopia's Rejoinder is titled "*Akgun Breached its Obligation to Develop an Industrial Zone*," but the gist of the subsection is Akgun's alleged failure to comply with its environmental obligations⁴⁰⁵ and it otherwise does not specifically address Akgun's alleged failure to develop an industrial zone.
- 4.76. In its Statement of Defense, Ethiopia alleged that Akgun failed to develop an industrial zone because it breached Art. 10 of the 2012 ETIZ Agreement.⁴⁰⁶ However, in its Rejoinder, there is no reference to Art. 10. Instead, Ethiopia argues that Akgun failed to develop an industrial zone by breaching Art. 8(10) of the agreement.⁴⁰⁷ Therefore, Ethiopia's basis for its claim that "Akgun failed to develop an industrial zone" is unclear. Nevertheless, this claim is absurd because, to reiterate, it was Ethiopia who suspended the project for reasons that are not attributable to Akgun, and Ethiopia's affirmative actions in preventing Akgun from developing the industrial zone are the very source of Akgun's claims.⁴⁰⁸
- 4.77. Ethiopia's counterclaim for Akgun's alleged failure to comply with its environmental obligations also constitutes Ethiopia's only defense against Akgun's treaty claims. In response, Akgun maintains that Ethiopia unduly expands the scope of Art. 8(10) of the Agreement to include obligations that the parties clearly did not intend or expect of Akgun:

Akgun had only obligated itself to conduct some limited "studies" to ensure effective protection of the Legedadi watershed from pollution but not a full-blown EIA. The contract provisions upon which Respondent relies relate to pollution control measures to be implemented after ETIZ became operational, not to a study of whether ETIZ would be a suitable project for the site selected. To be sure, those provisions do not presuppose that Akgun must perform an EIA. Much later, when the Mol requested an EIA, Akgun

⁴⁰⁵ *Id.*, ¶¶ 470-475.

⁴⁰⁶ [Statement of Defense](#), ¶ 422.

⁴⁰⁷ [Statement of Rejoinder](#), ¶ 471.

⁴⁰⁸ [Statement of Reply](#), Section 2; *see also supra* Sections 2.B.i and iii.

volunteered to conduct the EIA only to keep the project moving but never believed that it was inviting the risk of a negative outcome by volunteering.⁴⁰⁹

4.78. In reality, Akgun's obligation under Art. 8(10) was limited to conducting necessary environmental studies to protect "Legedadi and Dire Dams underground water basin" from pollution using appropriate methods and technologies.⁴¹⁰ On the other hand, an EIA requires more voluminous work since it requires analyses of a wide array of subjects, including but not limited to air pollution, soil contamination, social impacts, population issues, project alternatives, energy requirements, and transregional impacts.⁴¹¹ Therefore, Akgun's obligation to prepare necessary environmental studies in Art. 8(10) of the ETIZ Agreement cannot mean that Akgun was obligated to prepare a full-scale EIA.

4.79. On the contrary, Ethiopia's promise and duty was to allocate suitable land for the project. Claimant summarized its position in its Reply and stands by that position here:

Respondent contends that Akgun was subject to Ethiopian law under the 2012 ETIZ Agreement and was therefore obligated to perform an EIA that assessed both the environmental effects of ETIZ and whether it was a development that was suitable for siting in the Legedadi watershed. It is apparent, however, that it was Respondent's responsibility to assess whether its environmental aims for the Legedadi watershed allowed for industrial development because it had initiated the project, which implicated broad questions of Respondent's natural resource and economic development policies.⁴¹²

4.80. Finally, the project did not go forward due to Ethiopia's mistakes and acts contrary to its obligations arising out of the Treaty. Ethiopian authorities, *inter alia*, did not observe their obligations in environmental laws that, according to Ethiopia, were in force and applicable, did not communicate their real intention

⁴⁰⁹ *Id.*, ¶ 1.5.9.

⁴¹⁰ *Supra* ¶ 2.29.

⁴¹¹ *Supra* ¶ 2.29.

⁴¹² [Statement of Reply](#), ¶ 1.7.1.

to move ETIZ to another site, but instead made Akgun believe that it could develop ETIZ on the designated site if it would elaborate on its water treatment plans further, and later promised Akgun to offer alternate lands, but never made any concrete offer.⁴¹³

- 4.81. Ethiopia relies on Mr. Sisay Gemechu Edo's witness statement⁴¹⁴ in which Mr. Sisay indicates that Akgun did not work with an international consultant because the construction of a water treatment plant would be very costly.⁴¹⁵ However, this statement is mistaken. At the very beginning, Akgun underlined its intent to construct a water treatment plant. As summarized in Akgun's Statement of Reply:

The feasibility study further devoted a section to water resources and ETIZ's water management plans. The study averred that the "Industrial Zone would operate a water treatment plant in accordance with Federal and State potable water standards and requirement." It also provided ETIZ's anticipated water usage, which was estimated at 42,000 m³ per day and specified that there would be "separate treatment for cyanides, heavy metals."⁴¹⁶

- 4.82. And in numerous instances, Akgun communicated its water treatment plans to Ethiopia:

- 4.82.1. Akgun provided details to the Mol concerning its wastewater treatment plans, with particular emphasis on the constituents that the Mol identified as pollutants of concern in its suspension letter.⁴¹⁷
- 4.82.2. Akgun communicated its corroboration with a company specialized in wastewater treatment technologies to the Prime Minister's office and its efforts to attract investors at the site in anticipation of resolving the water treatment concerns.⁴¹⁸
- 4.82.3. Akgun submitted a supplement to the EIA, which offered more detail concerning the treatment processes it planned to put into place,

⁴¹³ *Id.*, ¶ 1.7.4.

⁴¹⁴ [Statement of Rejoinder](#), ¶ 474.

⁴¹⁵ [Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021](#), ¶ 19.

⁴¹⁶ [Statement of Reply](#), ¶ 2.24 (internal citations omitted).

⁴¹⁷ [C-025](#), Letter from Akgun Construction to Ministry of Industry dated 19 August 2014.

⁴¹⁸ [C-028](#), Letter from Akgun Construction to Prime Minister dated 21 August 2014.

along with a proposal it had received from a water treatment engineering firm, supplying the supplement to both the Mol and the President's offices.⁴¹⁹

4.83. Claimant's expert, A&M, reviewed Akgun's financial plans about water treatment:

4.83.1. A&M concluded that a wastewater treatment facility was not required during the early stages of Phase 1 because early tenants could dispose of their wastewater by trucks.⁴²⁰ Therefore, Akgun was not required to bear the high cost of establishing a wastewater treatment plant until the operating industrialists occupy 50 hectares of land.⁴²¹

4.83.2. A&M further opines that the wastewater treatment investment for Phase I of the investment covering 660 ha would cost USD 35,000,000, but it would be expended over four quarters.⁴²²

4.83.3. Finally, A&M concluded that Akgun would need to invest an additional USD 22,000,000 in wastewater treatment plant for Stage II of the investment, covering the remaining 800 ha.⁴²³ Again, according to A&M, Akgun would expend this cost equally across four quarters.⁴²⁴

4.83.4. Therefore, Mr. Gemechu's contention that Akgun was unwilling to work with an international consultant because a wastewater treatment plant investment would be very costly is ill-advised. Akgun had a sound plan for financing and implementing a wastewater treatment facility.

4.84. However, Akgun later realized that no water treatment plan would help it continue the project. Its proposals for water pollution treatment were futile

⁴¹⁹ [C-023](#), Report on Organized Industrial Zone Waste Water Purification Plant/Ethiopia Technical Approach File from Akgun Construction to Ministry of Industry dated January 2014; [C-078](#), Ethio-Turkish Industry City Environmental Study dated 10 October 2014 prepared by Istanbul Technical University; [C-079](#), Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu dated 14 October 2014; [C-080](#), Letter from Akgun Construction to Ministry of Industry dated 17 October 2014.

⁴²⁰ [A&M Report](#), ¶ 128.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*, ¶ 129.

⁴²⁴ *Id.*

because Ethiopia had already determined that there was not enough water in the Legedadi watershed to support ETIZ and Ethiopia's other projects.⁴²⁵

- 4.85. Therefore, Ethiopia's allegation that Akgun failed to comply with its environmental obligations in the 2012 ETIZ Agreement is false and a pretext to cover its decision not to proceed with the project. For this reason, it is only Ethiopia who is to be blamed for the failure of the project.

(ii) Akgun Did Not Fail to Finance the Project

- 4.86. Ethiopia argues that Akgun could not find financing under the 2010 ETIZ Agreement and asked to fulfill the project in smaller sizes and phase by phase to secure financing and abolish all time limitations and penalties in the Agreement.⁴²⁶ Ethiopia relies on one of Akgun's letters⁴²⁷ to reach this conclusion.⁴²⁸ However, it is plain that the letter says something quite different from what Ethiopia asserts. In relevant part, it provides:

The difficulties in finding finance for the project due to the events occurred with Arab Spring in the region had been explained to H.E. Prime Minister. Accordingly, H.E. [Prime Minister Meles Zenawi] confirmed the situation, **and requested to fulfill the project in smaller sizes and phase by phase to be able to get finance and to abolish all time limitations and penalties in the Agreement.**⁴²⁹

- 4.87. According to the second sentence of the paragraph, H.E. Prime Minister recognized that Arab Spring made Akgun's financing efforts impossible at that time, and he himself requested Akgun to plan the project in smaller sizes and realize the project phase by phase.⁴³⁰ Moreover, His Excellency himself decided that the parties should abolish all the time limitations and penalties in the 2010 ETIZ Agreement. Accordingly, Ethiopia's reading of the letter is untenable.

⁴²⁵ [Statement of Reply](#), ¶ 2.176.

⁴²⁶ [Statement of Rejoinder](#), ¶ 477.

⁴²⁷ [C-046](#), Letter from Akgun Construction to the Ministry of Industry dated 19 December 2011.

⁴²⁸ [Statement of Rejoinder](#), ¶ 477.

⁴²⁹ [C-046](#), Letter from Akgun Construction to the Ministry of Industry dated 19 December 2011 (emphasis added).

⁴³⁰ See [Yusuf Akgun 1st Statement](#), ¶¶ 4.17-4.19; [Yunus Akgun 1st Statement](#), ¶ 4.2.

- 4.88. Ethiopia further refers to a draft letter of Akgun⁴³¹ and contorts the language of that draft to claim that even in August 2014, Akgun was unable to finance the project.⁴³² Besides the fact that this letter is a draft, in that letter, Akgun referred to its inability to secure financing as envisaged in the 2010 ETIZ Agreement due to Arab Spring and its intention to tell Ethiopia that it used its own money to do what it had done up to that date. Two paragraphs of that letter must be read together to understand the true meaning of the words of Yusuf Akgun:

In 2010, a partnership agreement, providing for 30% grant investment of the Ethiopian Ministry of Industry in infrastructure, was concluded. Later, in 2012, the state has withdrawn from (this agreement) the partnership at the request of the late Prime Minister Meles ZENAWI. The works were left to the authority and responsibility of Akgun company entirely.

Funding was sought from financial institutions for the zone. The efforts were inconclusive. As Akgun Insaat, we have reached the current position with our own resources.⁴³³

- 4.89. Art. 12 of the 2012 ETIZ Agreement essentially states that Akgun could seek funding for the project from “any other sources with interest to invest in and/or finance the Project in accordance to [sic] the rules and regulations of Ethiopia.”⁴³⁴ In the draft letter, Yusuf Akgun confirms that Akgun had financed the project using its own resources. It is not clear from Ethiopia’s submissions whether it is criticizing Akgun for using its own resources instead of finding outside financing. In any case, Ethiopia’s evidence shows that Akgun had the financial means to continue the project in the absence of outside financing.
- 4.90. It is important to recall that apart from the start-up costs, which were among Akgun’s documented out of pocket expenses,⁴³⁵ the project under the 2012 ETIZ Agreement was a self-funding cost-plus model:

⁴³¹ [R-68](#), Draft Letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014.

⁴³² [Statement of Rejoinder](#), ¶ 479.

⁴³³ [R-68](#), Draft Letter from Yusuf Akgun to Dr. Arkebe Oqubay, dated 8 August 2014.

⁴³⁴ [C-009](#), The ETIZ 2012 Agreement, Art. 12.

⁴³⁵ [A&M Report](#), ¶¶ 153-154; [AM-Appendix 5](#).

- 4.90.1. In 2010 Akgun and Ethiopia agreed that Akgun would implement ETIZ in a self-funded fashion.⁴³⁶ Accordingly, the parties executed the 2012 ETIZ Agreement, and in Art. 12, the parties agreed that Akgun would finance ETIZ using any source.⁴³⁷
- 4.90.2. The self-funding method devised by Akgun is not contrary to Art. 12. Under this method, the industrialists, meaning the investors or the factory-owners, would be the source of financing.⁴³⁸ In fact, Ethiopia was aware of this plan and authorized this financing model.⁴³⁹
- 4.90.3. Akgun's financing model was sound and promising,⁴⁴⁰ and absent Ethiopia's suspension, this financing model would have allowed Akgun to finance ETIZ.⁴⁴¹
- 4.91. Furthermore, as mentioned earlier in this submission, Art. 12 of the ETIZ Agreement is not a provision that creates a contractual obligation for Akgun.⁴⁴² It is rather structured to allow Akgun to finance ETIZ using outside sources such as private equity or venture capital funds, international banks, and financial institutions.⁴⁴³ Art. 12(2) further allows Akgun to independently find investors and enter into partnership agreements. In line with Art. 12, Akgun decided to finance start-up costs using its own sources and finance the rest through investor-industrialists under its "cost-plus" model.⁴⁴⁴ Therefore, Ethiopia's claim as to Akgun's alleged failure to finance ETIZ must fail.
- 4.92. At this point, Akgun reiterates that, like its other substantive claims, Ethiopia's allegation that Akgun failed to finance the project is vague and unsubstantiated. Ethiopia does not say what part of the project remained unfinanced until its suspension. Ethiopia's allegations under this claim are

⁴³⁶ [Statement of Reply](#), ¶ 7.86.

⁴³⁷ *Id.*, ¶ 7.87.

⁴³⁸ [A&M Report](#), ¶¶ 21(iii) and 103.

⁴³⁹ [C-046](#), Letter from Akgun Construction to Ministry of Industry dated 19 December 2011.

⁴⁴⁰ [A&M Report](#), ¶¶ 21(iii) and 103.

⁴⁴¹ [Statement of Reply](#), ¶ 7.89.

⁴⁴² *Supra* ¶ 2.39.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

nothing more than its unfounded assumption that Akgun did not have the financial means to finance the project.

(iii) Akgun Did Not Fail to Consider Alternative Lands

- 4.93. Akgun's alleged failure to consider alternative lands cannot be a basis for a counterclaim in this arbitration because, under the 2012 ETIZ Agreement, there is no obligation for Akgun to consider alternative lands proposed by the Mol or the Oromia Regional State when the land turns out to be improper for ETIZ. By contrast, the 2012 ETIZ Agreement is a lease agreement, and, as the lessor, the Oromia Regional State is liable under the Ethiopian Law to Akgun for damages for the defects in the land:

Art. 2904. - Defect of thing. - 1. Rescission of contract.

(1) Where, at the time of delivery, the thing has defects of such nature that its normal use is appreciably diminished, the lessee may demand the rescission of the contract.

(2) The lessee shall have the same right where the defect occurs or is discovered after the immovable has been delivered to him.

(3) A special use to the lessee shall not be taken into consideration unless the lessor knew or should have known thereof on the making of the contract.

Art. 2905. - 2. Damages.

(1) Where the lessor knew or should have known of the defect of the thing at the time of delivery and failed to inform the lessee thereof, he shall be liable for the damage thereby caused to the lessee.

(2) The lessor shall also be liable for the damage caused to the lessee during the currency of the contract through the fault of the former.⁴⁴⁵

- 4.94. The Oromia Regional State and the Mol knew Akgun's specific purpose for leasing the land. It was mandated in the agreement.⁴⁴⁶ Therefore, under the 2012 ETIZ Agreement and Ethiopian Law, Akgun was not obligated to

⁴⁴⁵ [CLA-152](#), Ethiopian Civil Code (1960), Arts. 2904 and 2905.

⁴⁴⁶ [C-009](#), The 2012 ETIZ Agreement, Preamble, (specifying development of industrial zone), Art.1 (defining "IZ" and "Project"); Arts. 8(5), 8(13), 8(14), 10(1), 10(6).

consider alternative lands, but the Oromia Regional State was obligated to allocate land fit for the specific purpose Akgun pursued under the 2012 ETIZ Agreement.

- 4.95. Furthermore, Ethiopia never “**officially**” offered alternative lands to Akgun. Here, Akgun assumes that Ethiopia’s reference to the alternative lands is to the lands shown to Akgun on 21 August 2015⁴⁴⁷ during Akgun’s visit to Ethiopia after the Mol’s invitation by the letter dated 17 June 2015.⁴⁴⁸
- 4.96. Apart from the fact that those lands were not suitable for developing an industrial zone and did not constitute a genuine alternative to the Land,⁴⁴⁹ Ethiopia never actually offered or proposed an alternative site despite Akgun’s request:

At this meeting, which was held together with Ministry of Industry and Presidency of Oromia State, You have mentioned that the Ministry of Industry and the Oromia State would suggest some solutions to the dispute, about which You are already put on notice by our letter (a) dated 27.03.2015 and letter (b) dated 16.07.2015. Without prejudice to our rights and privileges, we are looking forward to receiving your suggestions and proposals.⁴⁵⁰

- 4.97. Ethiopia did not respond to Akgun’s request. Therefore, Akgun sent another letter to Ethiopia and reiterated that it had not yet received any formal offer:

Upon receiving the invitation of His Excellency Tadesse HAILE on 13.08.2015, in order to discuss the fate of the project, we attend [sic] a meeting organized at the Ministry of Industry on 20.08.2015, to which Vice President of Oromia State Deribu JAMAL participated. We have not received a reasonable offer on or after the meeting. Therefore we sent a new letter to the Ministry of Industry and the Office of President of Oromia State on 07.09.2015

⁴⁴⁷ [Statement of Rejoinder](#), ¶¶ 187-196.

⁴⁴⁸ [Statement of Reply](#), ¶ 2.188.

⁴⁴⁹ *Id.*, ¶¶ 2.188-2.195.

⁴⁵⁰ [C-149](#), Letter from Akgun Construction to Ministry of Industry and President of the Oromia Regional State dated 7 September 2015. See *supra* ¶ 2.55.

and told them that we were expecting a new offer. However we have not received any response yet.⁴⁵¹

- 4.98. In the same letter, Akgun reaffirmed its intention to accept an alternative land if the offer met certain conditions:

As we have mentioned before, we are suffering from financial and moral damages day by day. Therefore, without prejudice to our rights, we are expecting your offer for a new land, not further away than 30 km to Addis Ababa City and adjacent to a railroad and a highway, and for the reimbursement of the expenses we have incurred on the current land. We are kindly waiting for your decision.⁴⁵²

- 4.99. Therefore, Akgun's potential acceptance of an alternative land was predicated upon the meeting of the following conditions by Ethiopia:

- 4.99.1. The new land had to be suitable for an industrial zone development, located approximately 30 km to Addis Ababa City and adjacent to a railroad and a highway. As recounted earlier in this submission, the lands shown or verbally offered to Akgun were either unacceptably distant from Addis Ababa compared to the land in Sendafa or too steep, making the development of an industrial zone unfeasible.⁴⁵³
- 4.99.2. Ethiopia had to reimburse the expenses Akgun had already incurred for the land in Sendafa, including the farmers' compensation Akgun paid to the Oromia Regional State. At the very least, Akgun had to know whether it would be required to pay another farmers' compensation if it had accepted a proposal for new land.
- 4.99.3. Moreover, there had to be an official offer from the relevant authorities of Ethiopia, to begin with. Such an official offer would be expected to reflect Ethiopia's prior promises to make recompense to Akgun for its wasted expenditures,⁴⁵⁴ its intent to compromise in

⁴⁵¹ [C-088](#), Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu *et al.* dated 2 November 2015. See *supra* ¶¶ 2.56-2.57.

⁴⁵² [C-088](#), Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu *et al.* dated 2 November 2015. See *supra* ¶ 2.58.

⁴⁵³ *Supra* ¶¶ 2.51-2.54.

⁴⁵⁴ [Statement of Reply](#), ¶¶ 2.180, 2.84-2.86; [C-084](#), Details of the Meeting with President Dr. Mulatu Teshome Wirtu dated 9 December 2014; [C-085](#), Details of the Meeting with Special Adviser to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014. See also [C-017](#), Letter from Akgun

response to Akgun's dispute notice⁴⁵⁵ and materialize Ethiopia's offer by sufficiently describing the proposed lands accompanied with its responses, if any, to Akgun's other requests. However, despite its call for an official offer, Akgun did not receive one from Ethiopia. Without an official follow-up offer to Akgun, the field trip in August 2015 meant nothing more than going to a picnic.

- 4.100. Since Ethiopia's so-called offer did not comply with any of the above, Ethiopia cannot credibly criticize Akgun for failing to consider alternative lands, even if it were allowed to make such a contractual counterclaim which finds no basis in the contract itself.

(iv) Since There Is No Failure to Perform, No Justification Is Needed

- 4.101. Ethiopia maintains that Akgun has no justification for its alleged breaches of the 2012 ETIZ Agreement.⁴⁵⁶ That Ethiopia's counterclaims constitute nothing more than a cynical strategy that it conceived for the purpose of this arbitration is made plain by the fact that it never raised such claims until Akgun initiated this arbitration. Further rendering Ethiopia's claims infirm is the fact that it never notified Akgun before of its claims as per Art. 1772 of the Ethiopian Civil Code:

A party may only invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract.⁴⁵⁷

- 4.102. Furthermore, Ethiopia contends that "Akgun failed to perform nothing less than **all** of its obligations under the 2012 ETIZ Agreement."⁴⁵⁸ Assuming *arguendo* that Akgun indeed breached almost all of its obligations in the 2012 ETIZ Agreement, such breach would constitute a material breach of the Agreement. Art. 18(3) of the 2012 ETIZ Agreement provides guidance on what to do in case of a material breach:

Construction to Ministry of Industry dated 19 December 2014; **C-105**, Memorandum dated 3 April 2014, p. 10; **C-131**, Letter from Prime Minister to Ministry of Industry dated 22 July 2014, p. 2.

⁴⁵⁵ **C-036**, Notice from Akgun Construction to Ministry of Industry dated 27 March 2015.

⁴⁵⁶ **Statement of Rejoinder**, ¶ 481.

⁴⁵⁷ **RLA-38**, Ethiopian Civil Code, Art. 1772.

⁴⁵⁸ **Statement of Rejoinder**, ¶ 467 (emphasis in original).

3. Without prejudice to the rights to recover los[s]es, expenses and costs incurred as a result of non-performance, either Party may immediately terminate the Agreement if there has been a material breach of any provision of this Agreement and the non-breaching Party gives a written notice of 90 (ninety) days to the breaching Party and such material breach remains un-rectified during such notice period.⁴⁵⁹

- 4.103. Art. 18 of the 2012 ETIZ Agreement is a notice and cure provision, and under Art. 18, the party who believes that the other party committed a material breach of the agreement is obligated to dispatch a written notice to the breaching party and trigger a ninety-day cure period for the breach. As a consequence of Ethiopia's failure to notify Akgun as per both Art. 18(3) of the 2012 ETIZ Agreement and Art. 1772 of the Ethiopian Civil Code, Ethiopia must be prevented from raising its contractual counterclaims in this arbitration. Nevertheless, Ethiopia's failure to notify Akgun of its contractual claims about the alleged breach of the 2012 ETIZ Agreement shows that Ethiopia's claims about Akgun's alleged breach are nothing more than an invention for the purpose of defending itself in these proceedings. Claimant also notes that the 2012 ETIZ Agreement requires all notices to be delivered in English, which Respondent failed to do when it issued the 24 July 2014 suspension letter.
- 4.104. According to Ethiopia, Akgun performed none of its obligations, and this was (at least in part) because Akgun supposedly did not comply with its environmental obligations and was unable to finance the project without any justification.⁴⁶⁰ Akgun, however, does not need to show any justification because, as discussed earlier in these submissions, Akgun did not breach its environmental obligations and was never unable to finance the project, as Ethiopia erroneously suggests.⁴⁶¹
- 4.105. Akgun has consistently contended that it began developing the project, and it was Ethiopia that suspended the project and made its implementation

⁴⁵⁹ [C-009](#), The 2012 ETIZ Agreement, Art. 18(3).

⁴⁶⁰ [Statement of Rejoinder](#), ¶ 485.

⁴⁶¹ *Supra* Sections 2.B.i and 2.B.ii.

impossible.⁴⁶² In response to that, Ethiopia argues that Akgun did not have the right to begin the project in the first place because it did not get environmental clearance.⁴⁶³ However, the reality is the opposite. Under the 2012 ETIZ Agreement, Akgun had to comply with various deadlines triggered upon the handover of the land and noncompliance with those deadlines carried an implication that Akgun could lose the project.⁴⁶⁴ In various instances, Ethiopia acknowledged the provisions in the agreement that required Akgun to initiate the project immediately.⁴⁶⁵ These provisions show that an EIA approval was not a precondition for Akgun to initiate the project, and Akgun was not subject to any law that prohibited it from commencing work on the site until an EIA was prepared and approved.⁴⁶⁶

- 4.106. Ethiopia contends that Akgun cannot invoke a *force majeure* defence under Art. 1793(b) of Ethiopian Civil Code because Ethiopia did not commit an “unforeseeable act” or “official prohibition.”⁴⁶⁷ Yet, Ethiopia did indeed suspend the project by an “official prohibition,” which is reflected in the letter dated 24 July 2014.⁴⁶⁸ Moreover, as discussed in the preceding paragraph, after having already initiated the project, Akgun could not have been expected to anticipate Ethiopia’s demand for an EIA of the scope it now asserts was required. Therefore, Akgun reiterates that Ethiopia’s suspension of ETIZ qualifies as *force majeure*.⁴⁶⁹
- 4.107. Aside from the facts of this dispute, common sense requires one to think that it would be more reasonable and consistent for Ethiopia to request an EIA – whether the law required one or Ethiopia simply expected one – from Akgun long before collecting the lease, evicting the farmers, and registering the land under Akgun’s name. This was not the case in this dispute. For example, in

⁴⁶² [Statement of Reply](#), ¶ 7.96.

⁴⁶³ [Statement of Rejoinder](#), ¶ 486.

⁴⁶⁴ [C-009](#), The 2012 ETIZ Agreement, Arts. 5(4), 5(6), 7(5), 8(6), 9(2), 9(5), 10(12) and 10(13); [Statement of Reply](#), ¶ 2.39.

⁴⁶⁵ [C-051](#), Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012; [C-012](#), Land Lease Certificate; [Statement of Reply](#), ¶ 2.39.

⁴⁶⁶ [Statement of Reply](#), ¶ 2.39.

⁴⁶⁷ [Statement of Rejoinder](#), ¶ 487.

⁴⁶⁸ [C-016](#), Letter from Ministry of Industry to Akgun Construction dated 24 July 2014.

⁴⁶⁹ [Statement of Reply](#), ¶ 7.97.

2012, the main focus of the Oromia Regional State was on collecting money from Akgun and urging Akgun to “commence the work of the project[]....,” not getting an EIA.⁴⁷⁰ The relevant part of the letter dated 18 September 2012, in which Finfine Area Oromia Special Zone Investment Office of Oromia threatens Akgun with terminating the 2012 ETIZ Agreement, reads:

Further, we notify the company to settle the due farmers compensation payment, make effect lease advance payment and commence the work of the project[] within a period of six months for otherwise we are mandated to terminate the agreement without any precondition and snatch the land and thereby transfer it to other investors.⁴⁷¹

- 4.108. While Ethiopia tags this letter as an “administrative error,” it clearly shows that no one at the Oromia Regional State nor the officials at the environmental bureaus copied to the correspondence suggested that Akgun needed to submit an EIA before it “commence[d] the work” they urged Akgun to undertake under threat of termination.
- 4.109. Also in January 2013, Oromia Bureau of Rural Land and Environmental Protection issued the land certificate and “strongly urge[d]” Akgun to implement the project, copying both the certificate and its cover letter to multiple other authorities, including the Oromia Investment Commission, the Oromia Special Zone Land Use and Environmental Protection Office, and the Bereh Woreda Land Use and Environmental Protection Office.⁴⁷² Again, none of those authorities raised an objection and pointed Akgun to the alleged EIA requirement before commencing the work.⁴⁷³
- 4.110. In conclusion, Ethiopia made Akgun initiate the implementation of the project, and later, due to the reasons not attributable to Akgun, it suspended the project. Therefore, it is Ethiopia, not Akgun, who should show a genuine justification for the project’s failure.

⁴⁷⁰ *Supra* ¶¶ 2.13-2.14.

⁴⁷¹ **C-051**, Letter from Investment Office of Oromia to Bereh Woreda Administration Office dated 18 September 2012. *Supra* ¶ 2.14.

⁴⁷² **C-012**, Land Lease Certificate. *Supra* ¶ 2.16.

⁴⁷³ *Supra* ¶ 2.16.

C. Damages

- 4.111. Ethiopia's arguments in its Rejoinder in support of its damages claim are scant. They are not responsive to Akgun's objections set out in its Reply. Particularly, Ethiopia is silent on what legal basis it is subrogated to the right to collect rent that belongs to the Oromia Regional State both as per the 2012 ETIZ Agreement and Ethiopian law.⁴⁷⁴
- 4.112. On the other hand, Ethiopia's primary basis for its damages claim is Akgun's alleged failure to develop an industrial zone. Under this theory, **the correct formulation would be how much the Oromia Regional State would earn but for Akgun's alleged failure to develop an industrial zone.** But the Oromia Regional State already earned the money it was due; under the 2012 ETIZ Agreement, Akgun paid the lease amount to the Oromia Regional State on 31 July 2012 in the amount of ETB 14.717.476,15⁴⁷⁵ (USD 825.058,51), and this lease amount covered the lease of the first 100 ha for 80 years.⁴⁷⁶ Because no further land was allocated, there would be no basis for Ethiopia to argue that Akgun would owe for anything beyond that leased plot. And as to that leased plot, the payment has already been made. So, to the extent Respondent has a claim (which it does not), it has already received the compensation it was due.
- 4.113. Contrary to Respondent's suggestion, nothing in the 2012 ETIZ Agreement indicates an obligation on Akgun's part to pay the Oromia Regional State USD 1 per square meter annually. Indeed, the amount actually paid per the 2012 ETIZ Agreement – as calculated by Respondent at the time – was much lower. Using the compensation that Akgun paid Ethiopia for the first 100 ha translates to USD 0,01031/sqm/year (USD 825.058,51/1.000.000 sqm/80 years). While the value of the land was USD 0,01031/sqm/year in 2012 and this amount was already paid to the Oromia Regional State for 80 years, Ethiopia wants to be compensated for a second time. In making its calculation, however, it pays no regard to the actual valuation figures it set for this very land. Instead, it sets

⁴⁷⁴ [Statement of Reply](#), ¶¶ 7.109-7.113.

⁴⁷⁵ [C-010](#), Receipt issued by Cooperative Bank of Oromia dated 31 July 2012; [Yunus Akgun 1st Statement](#), ¶ 4.8; [Statement of Claim](#), ¶ 2.55.

⁴⁷⁶ [Statement of Claim](#), ¶ 2.55.

that valuation at nearly one hundred times greater than the amount it actually received, without any analysis of why it should be entitled to such an inflated damages figure. Ethiopia's quantification of its damages is clearly absurd.

4.114. In an effort to justify its absurd claim for USD 1 per sqm, Ethiopia argued in its Statement of Defense that this amount constituted **“the fair market value of the land.”**⁴⁷⁷ Akgun explained in its Statement of Reply why Ethiopia's formulation of its alleged damages is incorrect and cannot mean to show the fair market value of the land.⁴⁷⁸ Thereafter, Ethiopia changed its mind, and now it calls USD 1 per sqm **“a fair measure of the damage”** Akgun allegedly inflicted on Ethiopia.⁴⁷⁹

4.115. Akgun reiterates that Ethiopia's calculation of damages based on USD 1 per sqm means that Ethiopia is trying to employ the income-based approach to calculate damages.⁴⁸⁰ The fact that Ethiopia later calls USD 1 per sqm the “rental value of the land”⁴⁸¹ does not change the fact that it is still an income-based valuation, and this valuation method assumes that a willing lessee would lease the land from a willing lessor:

Market Rent is the estimated amount for which an interest in real property should be leased on the valuation date between a willing lessor and a willing lessee on appropriate lease terms in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.⁴⁸²

4.116. Ethiopia relies on the lease amount in the Afro Oil lease and claims that it is the fair rental value of the land.⁴⁸³ Therefore, to Ethiopia, the lease amount in

⁴⁷⁷ [Statement of Defense](#), ¶ 440 (emphasis added).

⁴⁷⁸ [Statement of Reply](#), ¶¶ 7.105-7.108.

⁴⁷⁹ [Statement of Rejoinder](#), ¶ 493 (emphasis added).

⁴⁸⁰ [Statement of Reply](#), ¶ 7.108.

⁴⁸¹ [Statement of Rejoinder](#), ¶ 494.

⁴⁸² **C-151**, IVSC, International Valuation Standards, Effective 31 January 2020, <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/valuation/international-valuation-standards-rics2.pdf> (last accessed 20 February 2022) (“International Valuation Standards”), p. 21, ¶ 40.1.

⁴⁸³ [Statement of Rejoinder](#), ¶ 494.

the Afro Oil agreement is the market rent of the land.⁴⁸⁴ According to the International Valuation Standards Council (“IVSC”), the valuer must consider the following when determining the market rent:

(a) in regard to a Market Rent subject to a lease, the terms and conditions of that lease are the appropriate lease terms unless those terms and conditions are illegal or contrary to overarching legislation, and

(b) in regard to a Market Rent that is not subject to a lease, the assumed terms and conditions are the terms of a notional lease that would typically be agreed in a market for the type of property on the valuation date between market participants.⁴⁸⁵

- 4.117. Since Ethiopia relies on the Afro Oil lease agreement to establish the market rent,⁴⁸⁶ according to IVSC, the terms and conditions of that agreement are the appropriate lease terms and, therefore, must be taken into account:

Article 1 - Scope of Application.

The provisions of this Agreement shall apply to the sub-lease of the establishment plot no. BI Block / Parcel 01, 02 and 03/ for the establishment and development of Oil and Grease Manufacturing and Packing Solutions for the Factory and Construction of the factory/commercial building/premises of BI Block / Parcel 01, 02 and 03/ with a total area of 46,793 m2 (Forty Six Thousand Nine Hundred Seventy Three square meter.)

The related documentary is attached to this Agreement.

Article 2 - Purpose of this Agreement.

2.1. It is hereby concluded between the sub-lessor and the sub-lessee to sub lease land for establishment and/or development of Oil and Grease Manufacturing and Packing Solutions for the Factory and construction of factory/commercial building/premises of BI Block / Parcel 01, 02 and 03 with a total area of 46,793 m2 (Forty Six

⁴⁸⁴ *Id.*, ¶¶ 493-494.

⁴⁸⁵ **C-151**, International Valuation Standards, p. 21, ¶ 40.6 (emphasis omitted).

⁴⁸⁶ [Statement of Rejoinder](#), ¶ 495 (“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.”).

Thousand Nine Hundred Seventy Three square meter) with the terms and conditions stipulated hereunder.

2.2. The leased land to the Sub-Lessee by The Sub-Lessor shall not be used for the investment purposes other than agreed by this Agreement.

2.3. The project expressed under sub-article 1 above, shall only be changed with written consent of the Sub-Lessor.

Article 3- Location and Area of the Land

3.1. The land sub-leased is located in Sendafa Town Industrial Zone which the Sub-Lessor is developing according to the Master Lease Agreement dated 08 June 2012.⁴⁸⁷

4.118. As follows from these provisions, Afro Oil leased 4.6 ha out of 100 ha of the land within ETIZ for a very specific purpose – *i.e.*, construction and operation of an oil and grease manufacturing factory that was going to be part of a large industrial zone. Ethiopia cannot take the lease amount as per the Afro Oil lease but disregard the lease's terms that point to the specific purpose of Afro Oil for renting the land. Consequently, the following questions beg to be answered by Ethiopia:

4.118.1. Would Afro Oil agree to pay USD 1 per sqm for 100 ha (1,000,000 sqm) of land even though it only agreed to pay that lease for 46.793 sqm in the lease agreement?

4.118.2. Would Afro Oil agree to pay USD 1 per sqm for empty land knowing that Ethiopia would not allow it to establish an oil and grease manufacturing and packing plant?

4.118.3. Would Afro Oil agree to lease the land and pay USD 1 per sqm knowing that its factory would not be a part of an organized industrial zone that is intended to offer its occupants various benefits such as better security and infrastructure?

4.119. Ethiopia's submissions do not answer the above questions. Instead, Ethiopia argues that "[w]hether or not the industrial zone development proceeded is irrelevant because ... Afro Oil agreed to pay this price for a right to rent and

⁴⁸⁷ **C-015**, Sub-lease of parcel of land/building contractual agreement made between Akgun Construction and Afro Oil Manufacturing P.L.C. dated 25 October 2013, Arts. 1-3.1.

build on the land only.”⁴⁸⁸ Art. 3.1. of the lease agreement shows that Afro Oil intended to lease land within the industrial zone Akgun intended to develop under the 2012 ETIZ Agreement. There is no evidence that Afro Oil would have agreed to pay USD 1 per sqm only for empty land knowing that there would not be industrial zone development on the land, or that it would not be allowed to build and operate an oil and grease manufacturing and packing plant on the land.

4.120. In light of the above, Ethiopia’s counterclaim for damages suffers from two fatal flaws:

4.120.1. Ethiopia steps into the shoes of the Oromia Regional State and claims damages without explaining its legal basis.

4.120.2. Ethiopia’s damages calculation violates internationally accepted valuation standards and is illogical, if not ridiculous.

4.121. Therefore, this Tribunal is bound to reject Ethiopia’s claim for damages.

5. CLAIMS FOR RELIEF

5.1. Claimant, accordingly, reiterates its claims for relief as set out in its Statement of Reply and requests that the Arbitral Tribunal grant the following relief in favor of Claimant:

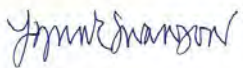
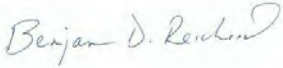
- i. FIND and DECLARE that this Tribunal has jurisdiction over Claimant’s claims under the Turkey-Ethiopia BIT;
- ii. FIND and DECLARE that Respondent has violated Art. 2(2) of the Turkey-Ethiopia BIT by failing to provide fair and equitable treatment to Claimant’s investments and impairing by unreasonable and discriminatory measures the use and enjoyment of such investments;
- iii. FIND and DECLARE that Respondent has violated Art. 4 of the Turkey-Ethiopia BIT by expropriating Claimant’s investments;
- iv. FIND and DECLARE that Respondent has violated the umbrella clause obligation, incorporated into the Turkey-Ethiopia BIT through Art. 3 of the Treaty, by breaching its contractual obligations and other commitments;
- v. ORDER Respondent to pay Claimant damages:
 - a. in an amount of USD 241,515,079 (excluding pre-award interest) as compensation for its aforementioned violations related to the

⁴⁸⁸ [Statement of Rejoinder](#), ¶ 495 (internal citation omitted).

- Claimant's investments in ETIZ, as set out in Section 6.C.iv of Claimant's Statement of Claim dated 20 November 2020; and
- b. in an amount to be determined by the Tribunal for the loss of opportunity to expand ETIZ into the additional area of 2,000ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020.
- vi. Or alternatively ORDER Respondent to pay Claimant damages in the amounts for loss of opportunity to establish ETIZ in the original area of 1460ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020 and the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;
 - vii. Or alternatively ORDER Respondent to pay Claimant damages in the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;
 - viii. ORDER Respondent to pay Claimant pre-award interest as set out in Section 6.F of Claimant's Statement of Claim;
 - ix. ORDER Respondent to pay Claimant all costs and fees incurred in connection with this Arbitration;
 - x. ORDER Respondent to pay Claimant post-award interest at a rate to be compounded;
 - xi. AWARD Claimant any other relief to which it may be entitled in law or equity; and
 - xii. DISMISS Respondent's counterclaims in their entirety.

6. RESERVATION OF RIGHTS AND FUTURE SUBMISSIONS

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

			
_____ Lynn Swanson Jones, Swanson, Huddell & Daschbach, LLC	_____ Benjamin Reichard Fishman Haygood, L.L.P	_____ Dr. Hüseyin Afşın İlhan İlhan & Yavuztürk Attorneys at Law	_____ Charles Owen Verrill, Jr. Verrill Advocacy, LLC

For and on behalf of Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti.