

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 Post-hearing Submission

**Jones Swanson Huddell &
Daschbach LLC**
Gladstone N. Jones, III
Lynn E. Swanson
Svetlana Evliya

Fishman Haygood L.L.P.
James R. Swanson
Benjamin D. Reichard
Molly L. Wells
C. Hogan Paschal

Ilhan & Yavuzturk Attorneys at Law
Dr. Huseyin Afsin Ilhan
Duygu Yavuzturk Ilhan

Verrill Advocacy, LLC
Charles Owen Verrill, Jr

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Table of Contents

1. INTRODUCTION.....	1
2. POLICE POWERS DOCTRINE AND EXPROPRIATION – QUESTION 2.1	1
A. Police Powers Doctrine in General	1
B. The Application of Police Powers Doctrine to the Facts of the Dispute.....	5
(i) Ethiopia Violated Akgun’s Legitimate Expectations	7
(ii) Ethiopia Discriminated Against Akgun	7
(iii) Ethiopia Lacked Good Faith	9
(iv) Ethiopia’s Actions Lacked Due Process	9
(v) Ethiopia’s Actions Lacked Proportionality	10
C. The Sole Effects and Police Powers Doctrines	10
3. ‘IMPORTATION’ OF UMBRELLA CLAUSES – QUESTION 2.2	14
A. Analysis of the <i>Ickale</i> Tribunal’s Interpretation of the MFN Clause in the Turkey-Turkmenistan BIT	15
(i) The <i>Ickale</i> Tribunal Erred in Ascertaining the “Ordinary Meaning” of the Term “Treatment Accorded in Similar Situations”	17
(ii) The <i>Ickale</i> Tribunal Misapplied the Principle of <i>Effet Utile</i>	21
(iii) The <i>Ickale</i> Tribunal’s Finding Is Contrary to the Principle of Good Faith as well as the Object and Purpose of the BIT	22
B. Conclusion.....	25
4. LEASEHOLDS UNDER ETHIOPIAN LAW – QUESTION 2.3	25
5. MITIGATION OF DAMAGES – QUESTION 2.4	29
A. The Duty to Mitigate Damages Under International Law.....	29
B. Effect of the Duty to Mitigate Damages on Quantum.....	39
6. COSTS – QUESTION 2.5.....	43
A. The Applicable Standard.....	43
(i) The Principal Rule Must Be Followed if Claimant Prevails	44

(ii)	Respondent’s Conduct Further Justifies Allocation of Costs in Favor of Claimant	46
(iii)	Costs Shall be Shared Evenly in Case Respondent Prevails.....	53
B.	Interest	56
C.	Conclusion.....	56
7.	RESERVATION OF RIGHTS.....	57

1. INTRODUCTION

- 1.1. Pursuant to Procedural Order No. 4 dated 19 October 2022, Claimant, Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., respectfully submits its Post-Hearing Submission on the Tribunal's five post-hearing questions to the Parties.¹

2. POLICE POWERS DOCTRINE AND EXPROPRIATION – QUESTION 2.1

A. Police Powers Doctrine in General

- 2.1. There is no absolute rule concerning the scope of the police powers doctrine. Broadly applied, it acts as an absolute defense to avoid claims of expropriation; applied with greater particularity, however, one relies on the relevant treaty's expropriation provision to determine the doctrine's potential application to an expropriation claim. As discussed below, the Tribunal should adopt the more particularized approach to the police powers doctrine here, but even under a broader approach, Akgun still prevails.
- 2.2. Under customary international law, states enjoy sovereignty within their territory, meaning they are entitled to make and apply laws and resolve disputes accordingly.² States' right to regulate the matters within their territory is a component of their sovereignty. The rules of international law, however, may limit states' sovereignty.³ For instance, depending on its content, an international treaty may limit state sovereignty.⁴

¹ Procedural Order No. 4 dated 19 October 2022 ("PO4").

² **CLA-153**, S Besson, *Sovereignty* (last updated April 2011) in A Peters and R Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008–) <www.mpepil.com> (accessed 8 November 2022) ¶ 2 and 56.

³ *Id.*, ¶ 96. See also **CLA-013**, UNCTAD Series on Issues in International Investment Agreements, II, Most Favored Nation, United Nations Publication, 2010 ("UNCTAD on MFN"), p. 23 (noting that "[t]he fact that States have the sovereign right to discriminate and regulate the entry and operation of aliens within their territory does not mean that such discretion is unlimited and not subject to international law.").

⁴ **CLA-154**, *S.S. Wimbledon (Britain et al. v. Germany)*, Judgement, 19 August 1923, PCIJ Rep. Series A. – No. 01, p.25 ("No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.")

- 2.3. Investment treaties, in fulfilling the goal of protecting foreign investors, limit states' sovereignty, including their police powers. Accordingly, states may regulate matters within their territory to the extent that such regulations do not violate their international undertakings towards investments of foreign investors that the investment treaty protects.⁵
- 2.4. Most investment treaties define states' power to expropriate foreign investment and command that states may utilize this power only if certain criteria are met. Most investment treaties reflect that a state's expropriation of foreign investment is "lawful" if the act is done for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and against payment of compensation.⁶ These conditions do not eliminate states' police power; rather they reflect states' consent to limit their use of such power.
- 2.5. Proponents of the broad application of police power doctrine, however, apply it as an absolute defense, regardless of treaty language. They suggest that when a state utilizes its police powers with *bona fide* intent to protect the general welfare, this does not constitute expropriation, and *ipso facto*, investment treaty protection against expropriation is not triggered.⁷ These proponents further assert that customary international law coexists with international treaties, and treaty provisions may not supplant or eliminate principles of customary international law; therefore, under this view,

⁵ **CLA-155**, R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008) ("Dolzer and Schreuer"), p. 10 ("Thus, investment law embodies and represents the nature and the effects of economic globalization, with the potential advantage of economic efficiency and of a higher living standard coupled with a reduced legal power of the national authorities to regulate such areas that have an impact upon foreign investment.") (internal citation omitted).

⁶ 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. III(1); **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(1); **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. 4(1); **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. III(1); **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. 5(1); **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 ("1995 Turkey-Pakistan BIT"), Art. III(1).

⁷ **CLA-031**, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, United Nations Publication, 2012 ("UNCTAD on Expropriation"), pp. 85-86, 92.

investment treaties cannot limit states' police powers under customary international law.⁸

- 2.6. Proponents of the doctrine's broad applicability generally refer to *Saluka*,⁹ which provides:

it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.¹⁰

- 2.7. Likewise, *Methanex* provides:

[...] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.¹¹

- 2.8. UNCTAD also provides that an act of a state is expropriatory rather than non-compensable regulation only if the regulation lacks genuine public purpose, proportionality, and due process, violates fair and equitable treatment, is discriminatory, constitutes an abuse of power, and provides direct benefit to the state.¹²
- 2.9. This Tribunal should not follow this broad approach to the police powers doctrine because its unduly expansive nature permits States to circumvent their treaty obligations. Rather, the scope of police powers must be defined

⁸ See **CLA-156**, A. Rajput, *Regulatory Freedom and Indirect Expropriation in Investment Arbitration* (2018) ("Rajput"), pp. 133- 149.

⁹ **CLA-048**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("*Saluka v. Czech Republic*").

¹⁰ *Id.*, ¶ 255.

¹¹ **CLA-157**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV - Chapter D – p. 4, ¶ 7.

¹² **CLA-031**, UNCTAD on Expropriation, p. 94.

with reference to the terms of the treaty at issue. States may voluntarily limit their sovereignty by international treaties, and non-compliance with those limits violates the principle of *pacta sunt servanda*. *ADC v. Hungary* is instructive on this point. In *ADC*,¹³ the tribunal rejected the host state's invocation of its police powers to avoid its treaty obligations:

The Tribunal cannot accept the Respondent's position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, **when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honored rather than be ignored by a later argument of the State's right to regulate.**¹⁴

- 2.10. The same reasoning applies here. Indeed, recognizing the plain fact that treaties limit state sovereignty and bind state conduct, some states have included a specific police powers exception in their treaties.¹⁵ There is no such exception in the Turkey-Ethiopia BIT defining a broad scope of permissible exercise of police powers. Absent such explicit wording, giving broad effect to the police power doctrine may undermine the protection of foreign investment because, in the words of the *Pope & Talbot* tribunal, "much creeping expropriation [or indirect expropriation] could be conducted by regulation and a blanket exception for regulatory measures would create a gaping loophole

¹³ **CLA-029**, *ADC Affiliate Ltd. And ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ("*ADC v. Hungary*").

¹⁴ *Id.*, ¶ 423 (emphasis added).

¹⁵ See, e.g., **CLA-158**, 2012 United States Model Bilateral Investment Treaty, Annex B 4(b) (which establishes that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.")

in international protections against expropriation.”¹⁶ Thus, this Tribunal should assess the scope of the police powers doctrine with reference to the specific obligations that Respondent undertook in the Treaty and not as a separate, free-floating absolute standard.

B. The Application of Police Powers Doctrine to the Facts of the Dispute

2.11. Treaty Article IV provides:

Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in the Article III of this Agreement.¹⁷

2.12. Article IV is triggered whenever a measure has expropriatory effect. This feature requires application of the sole effects doctrine, as discussed in Section 2.C. However, Article IV also specifies the conditions for expropriation and mandates that the state pay compensation for an expropriatory act, even if done for a public purpose and in a non-discriminatory way. This language operates as a strict limitation on the “police powers” defense.

2.13. Thus, even a *bona fide* and non-discriminatory state act aimed at public purpose requires payment of prompt, adequate, and effective compensation if the act has an expropriatory effect. Article IV’s expropriation “factors” show that the Treaty contemplates Ethiopia’s police powers and nevertheless mandates payment if its acts create an expropriatory effect. To further expand Ethiopia’s ability to use its police powers would undermine the carefully calibrated balance of protections that the parties to the Treaty negotiated and agreed upon. Here, because Ethiopia failed to pay Akgun prompt, adequate

¹⁶ **CLA-159**, *Pope & Talbot, Inc v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 (“*Pope & Talbot v. Canada*”), ¶ 99.

¹⁷ **CLA-001**, Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, signed 16 November 2000 (“Turkey-Ethiopia BIT”), Art. IV (emphasis added).

and effective compensation, it is liable for expropriation and no further inquiry into its use of police powers is required.¹⁸

- 2.14. The *Saluka* analysis separately examines whether the use of police powers occurs in a non-discriminatory manner, in good faith, and is aimed at the general welfare.¹⁹ But as seen above, the Treaty language already specifies that expropriation must be non-discriminatory and for a public purpose, leaving only the “good faith” requirement as a separate element. That Article IV lacks a “good faith” factor, however, is irrelevant since a bad faith act would independently violate the Treaty’s FET Standard.²⁰ In sum, because the Treaty already contains “police power” elements, importing an extrinsic, absolute standard for the police powers doctrine into the expropriation analysis adds a duplicative analytical step that diminishes investor protections. This dispute should be resolved according to the plain terms of the Treaty, which already affords room for the exercise of police powers, and under which Ethiopia cannot prevail.
- 2.15. As discussed below, Akgun prevails even under a broader reading of the police powers doctrine’s scope and application because Respondent i) violated Akgun’s legitimate expectations; ii) treated Akgun in a discriminatory fashion; iii) failed to act in good faith towards Akgun; iv) failed to afford Akgun due process; and v) used its police powers out of proportion to the harm Akgun suffered.

¹⁸ See **CLA-045**, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (“*Pezold v. Zimbabwe*”), ¶¶ 496-498 (“In relation to deciding whether the expropriation was lawful under the BITs, **the Tribunal notes that all of the conditions set out in the relevant BITs must be met.** As set out above, this would require payment of compensation, that the taking be for a public purpose, and that there be access to due process. ... As no compensation was paid, there is no need to decide whether the acquisition was for a public purpose, whether there was access to due process or, in the case of the Swiss BIT, whether the acquisition was non-discriminatory.”) (emphasis added). See also **CLA-036**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 716-717; **CLA-044**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 433-435.

¹⁹ *Supra* ¶ 2.6.

²⁰ Claimant’s Statement of Reply and Defense to Respondent’s Jurisdictional Objections and Counterclaims dated 22 October 2021 (“Statement of Reply”), ¶ 5.16.

(i) Ethiopia Violated Akgun's Legitimate Expectations

2.16. Under the broad reading, using police powers is unjustified if it violates investors' legitimate expectations.²¹ Ethiopia's violation of legitimate expectation is one of Akgun's main claims.²² Akgun refers to its previous arguments but, briefly put, Ethiopia failed to fulfill Akgun's expectation that it could implement ETIZ by selecting a site that Ethiopia later deemed unsuitable for an industrial zone, and it failed to correct its error. Ethiopia further created an expectation that Akgun would be provided an alternative site for ETIZ; however, Ethiopia frustrated Akgun's expectations by informally showing it lands that were unsuitable, ignoring Akgun's pleas for a genuine offer, and then later proposing that if ETIZ moved forward, it would be a different project of much narrower scope.²³

(ii) Ethiopia Discriminated Against Akgun

2.17. To avoid Akgun's FET claims, Ethiopia argued that Akgun should have known that it had to prepare an EIA and get the relevant authorities' permission to

²¹ See **CLA-031**, UNCTAD on Expropriation, pp.100-101. **CLA-029**, *ADC v. Hungary*, ¶ 424 ("It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise"). *Supra* ¶¶ 2.7 and 2.8.

²² Claimant's Statement of Claim dated 20 November 2021 ("Statement of Claim"), Section 5.C.ii.a; Statement of Reply, Section 5.A.iii.a.

²³ Statement of Reply, ¶ 5.59; **C-089**, Handwritten notes of meeting with Ethiopian State Minister Tadesse Haile dated 20 August 2015; **C-140**, Video taken on 21 August 2015 during a site visit in Ethiopia; **C-141**; Transcription of the video taken on 21 August 2015 during a site visit in Ethiopia; Witness Statement of Yusuf Akgun dated 19 November 2020 ("Yusuf Akgun 1st Statement"), ¶ 5.25. See also Claimant's Statement of Rejoinder on Jurisdictional Objections and Counterclaims ("Claimant's Rejoinder"), ¶¶ 2.53-2.54; Claimant's Closing Presentation, at 59-61; Hearing Tr., Day 5, 23:5-24:12, 27:19-27:25; **C-149**, Letter from Akgun Construction to Ministry of Industry and President of the Oromia Regional State dated 7 September 2015; **C-088**, Letter from Akgun Construction to President Dr. Mulatu Teshome et al. dated 2 November 2015; Hearing Tr., Day 3, 95:16-96:24; Day 5, 23:5-23:18; 31:22-32:19; Day 6, 97:20-98:12; Yusuf Akgun 1st Statement, ¶ 5.26; Witness Statement of Yusuf Akgun dated 17 October 2021 ("Yusuf Akgun 2nd Statement"), ¶¶ 5.1-5.3; **YUS-19**, Email thread from 19 December 2016 through 30 March 2017 between Anwar K. Yahia and Yusuf Akgun; **YUS-20**, Email thread from 7 February between Anwar K. Yahia and Yusuf Akgun; **YUS-21**, Email from Anwar K. Yahia to Yusuf Akgun dated 7 June 2017; Hearing Tr., Day 4, 125:16-22.

begin the project.²⁴ Akgun refuted this argument in its pleadings.²⁵ The evidence showed that Ethiopian law did not require Akgun to prepare an EIA and Ethiopia applied the EIA requirement to Akgun in a discriminatory and arbitrary fashion.

- 2.18. According to Ethiopia, Directive No.1/2008 required Akgun to prepare an EIA.²⁶ Claimant explained that Directive No.1/2008 never became effective.²⁷ But even assuming its effectiveness, Respondent had to apply it consistently vis-à-vis any projects within its scope. Industrial zone establishment and condominium project construction both fall within the Directive's scope.²⁸ Ethiopia admitted in these proceedings that it did not require EIAs for Bole Arabsa and Yeka Abado condominium projects,²⁹ nor did it perform a comprehensive EIA for the gigantic industrial park it referenced at trial.³⁰ Moreover, Akgun showed that its EIA for ETIZ was in many respects superior to the EIA for the Kilinto Industrial Park, which Respondent approved.³¹
- 2.19. It is insufficient under the police powers doctrine that a regulatory measure is facially non-discriminatory; if the regulation is enforced in a discriminatory manner, a non-compensable regulatory measure becomes an indirect expropriation.³² In this dispute, even if Directive No.1/2008 were formally effective in Ethiopia (it was not), it was applied in a discriminatory manner. Hence, the directive lost its non-compensable regulatory status, if any.

²⁴ Statement of Defense, Objections to Jurisdiction, and Counterclaims dated 12 March 2021, Section VI.B.i.

²⁵ Statement of Reply, Section 2.C.ii.

²⁶ *Id.*, ¶¶ 6 and 7.

²⁷ Expert Report of Prof. Mekete Bekele Tekle dated 18 October 2021 ("Tekle Report"), ¶¶ 2.8-2.10; Statement of Reply, Section 2.C.ii.a.

²⁸ **RLA-2**, A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority.

²⁹ **See** Tribunal Communication No. 28 dated 2 August 2021, Annex A, Claimant's Stern Schedule (Final Decision), Document Request 9; **C-100**, Respondent's Responses to Claimant's Stern Schedule dated 3 September 2021 (as re-submitted on 4 October 2021), Response to Request 9; Hearing Tr., Day 6, 44:15-45:8.

³⁰ Hearing Tr., Day 5, 41:15-42:19; Claimant's Closing Presentation, at 32-37.

³¹ Expert Report of Prof. Dale Whittington dated 18 October 2021, ¶ 6.39; Hearing Tr., Day 4, 39:14-40:4.

³² **CLA-031**, UNCTAD on Expropriation, p. 96.

(iii) Ethiopia Lacked Good Faith

- 2.20. Although Ethiopia claimed that its measures aimed to protect the environment, the evidence showed that the water resources were insufficient for both Bole Arabsa and Yeka Abado condominium developments and ETIZ, and Ethiopia chose to allocate its water resources to the condominiums.³³ Thus, Ethiopia preferred national projects over Akgun's foreign investment.³⁴ Ethiopia's motive behind the measures was discriminatory, and a discriminatory motive combined with the attempt to conceal that motive indicates that the measure was tainted with bad faith. Bad faith measures are not protected under the police powers doctrine.³⁵

(iv) Ethiopia's Actions Lacked Due Process

- 2.21. A regulatory measure fails to meet due process if it is "adopted with serious procedural violations."³⁶ It was established that the EPA never approved Directive No.1/2008, leaving it as a draft document without legal effect.³⁷ Further, at trial, Ethiopia affirmed the Directive and associated guidelines' procedural infirmities:

We do not dispute that these regulations and directives have not been signed. We do not dispute that scholars have said that they should have been. And in fact, [Prof. Damtie] himself had at some point held that opinion.³⁸

- 2.22. Thus, the Directive and relevant environmental guidelines were never adopted commensurate with Ethiopian law. Since the Directive never gained legal effect, any measure based on it is illegal, precluding Ethiopia from claiming the police powers doctrine's protection.

³³ Statement of Reply, ¶ 5.64; see Hearing Tr. Day 6, 57:20-58:7; Hearing Tr. Day 2, 125:6-125:12.

³⁴ Statement of Reply, ¶ 5.64.

³⁵ **CLA-156**, Rajput, p. 168 ("If a State acts with bad faith (absent good faith), it will result into violation of treaty obligations, i.e., an unlawful act. It thus becomes necessary to investigate whether the regulatory measure is adopted in good faith.") (footnotes omitted)

³⁶ **CLA-031**, UNCTAD on Expropriation, p. 96.

³⁷ Tekle Report, ¶¶ 2.8-2.10, Statement of Reply, Section 2.C.ii.a.

³⁸ Hearing Tr., Day 8, 72:5-9.

(v) Ethiopia's Actions Lacked Proportionality

- 2.23. Under the reasoning in *Tecmed*, valid utilization of police powers requires a showing of proportionality:

There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.³⁹

- 2.24. Akgun previously underlined the disproportional character of Ethiopia's acts.⁴⁰ In sum, Akgun bore the weight of the complete destruction of its investment because Ethiopia prevented Akgun from developing the project on the site Ethiopia allocated and failed to show Akgun suitable alternative land or offer a genuine solution. On the other hand, Ethiopia sought to shift its water resources to national condominium projects. Ethiopia did not try to balance the needs of both projects; it shut down ETIZ completely. Therefore, Ethiopia's measures lacked proportionality and cannot be protected under the police powers doctrine.

C. The Sole Effects and Police Powers Doctrines

- 2.25. The relationship between the sole effects and police powers doctrines is beset by tension. Although both provide a theoretical basis for assessing the compensability of state conduct for expropriatory conduct, they approach the issue from differing perspectives. The former allows claimants to make a *prima*

³⁹ **CLA-006**, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003, ¶ 122 (internal citations omitted). See also *id.*, ¶ 147 ("The actions undertaken by the authorities to face these socio-political difficulties, where these difficulties do not have serious emergency or public hardship connotations, or wide-ranging and serious consequences, may not be considered from the standpoint of the Agreement or international law to be sufficient justification to deprive the foreign investor of its investment with no compensation ..."); **CLA-160**, *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, ¶ 90 (concluding that "the condition of proportionality must be included in the test for a valid exercise of the police powers doctrine. Proportionality has become an important factor in international investment law and the substantive protections that it provides for investors. It is bound up in the concepts of fairness and equity which are commonly reflected in the substantive standards included in investment treaties.").

⁴⁰ Statement of Reply, ¶¶ 5.63-5.71.

facie case to establish expropriation, while the latter operates as a defense that states invoke to avoid liability for expropriation.

2.26. As previously explained,⁴¹ the police powers doctrine defines certain state acts as non-compensable expropriation based on the state's intent. The sole effects doctrine, however, defines a state act as expropriatory based on its effect, regardless of state intent.⁴² Thus, the two doctrines conflict with one another, in principle, where state conduct's effect is expropriatory but the state can demonstrate that its conduct may be excused under the broad reading of the police powers doctrine. Notably, if the Tribunal adopts the *ADC* tribunal's view of the police powers doctrine,⁴³ there is no genuine conflict under this case's facts. Regardless, the sole effects test should apply here under the Treaty's plain text and because the measures at issue were not generally applicable but rather were specific to Akgun and worked a substantial deprivation of Akgun's investment. This leads to a clear finding of expropriation.⁴⁴

2.27. Per Dolzer and Schreurer:

The effect of the measure upon the economic benefit and value as well as upon the control over the investment will be the key question when it comes to deciding whether an indirect expropriation has taken place. Whenever this effect is substantial and lasts for a significant period of time, it will be assumed *prima facie* that a taking of the property has occurred.⁴⁵

2.28. The Tribunal should first examine the applicable provision of the Treaty for guidance on using the state's intent versus the effects of its conduct, as in *Siemens v. Argentina*:

The Tribunal recalls that Article 4(2) refers to measures that "a sus efectos" (in its Spanish original) would be equivalent

⁴¹ *Supra* ¶ 2.5.

⁴² Statement of Reply, ¶ 5.156.

⁴³ *Supra* ¶ 2.9.

⁴⁴ See **CLA-161**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶ 396 ("...[w]hen assessing the evidence of an expropriation, international tribunals have generally applied the sole effect and focused on substantial deprivation").

⁴⁵ **CLA-155**, Dolzer and Schreurer, p. 101 (internal citation omitted).

to expropriation or nationalization. **The Treaty refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate.**⁴⁶

- 2.29. Similarly, here, Treaty Article IV establishes that “[i]nvestment shall not be expropriated, nationalized or **subject, directly or indirectly, to measures of similar effects....**”⁴⁷ Thus, Article IV focuses on the effect of the state’s act, without any reference to the state’s intent. Accordingly, Ethiopia’s refusal to allow Akgun to develop ETIZ on the land it had allocated and its failure to allocate alternative land violate Treaty Article IV because Ethiopia’s acts, regardless of intent, had an expropriatory effect that obliterated Akgun’s investment.
- 2.30. Further, the measures at issue here were specific to Akgun, a factor that has militated in favor of tribunals’ use of the sole effects test. In *Santa Elena*, for instance, the tribunal used the sole effects doctrine to conclude that the state had to compensate the investor, without regard to the state’s intent to preserve the environment in employing the measures in question, where the measures were specific to the claimant’s property:

Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.⁴⁸

⁴⁶ **CLA-118**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, ¶ 270 (emphasis added); *compare with* **CLA-162**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 10 September 2021, ¶¶ 623-629 (where the claimant sued over a mining concession it obtained, the tribunal found the loss “capable of being considered to be a substantial deprivation, such as to amount to an indirect expropriation” but the tribunal was bounded by the terms of the Annex to the Canada-Colombia FTA, which it characterized as providing an “exception” to actions that would otherwise have constituted an indirect expropriation).

⁴⁷ **CLA-001**, Turkey-Ethiopia BIT, Art. IV (emphasis added).

⁴⁸ **CLA-066**, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶¶ 71-72. *See also* **CLA-005**, *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 August 2007, ¶¶ 7.5.8, 7.5.11-7.5.17, 7.5.3 (where a specific water concession was the subject of numerous actions by local authorities that destroyed the claimants’ ability to run the concession, resulting in a finding of expropriation, applying the sole effects test); **CLA-033**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 102-112

- 2.31. Regulation may also cross the line from acceptable to expropriatory depending on the severity of the effects of the measure. According to the *Pope & Talbot* tribunal:

[W]hile it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner.⁴⁹

- 2.32. Likewise, in *Telenor*:

Though different tribunals have formulated the test in different ways, they are all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment.⁵⁰

- 2.33. Accordingly, a minor loss of investment might not reach the level of a treaty violation, but, once the impact of the regulation becomes significant enough that it causes the investment's total destruction, the measure constitutes an expropriation. This "substantial deprivation test" aims to balance states' need for freedom to regulate their public affairs and foreign investors' need for protection from the destruction of their investments under the cloak of regulatory measures.
- 2.34. Here, Treaty Article IV's text requires the Tribunal to strictly apply the sole effects doctrine to this dispute, but the outcome is the same if the Tribunal requires a substantial deprivation. As Akgun detailed in its earlier submissions, Ethiopia's measures effected a substantial – indeed, complete – deprivation of Akgun's investments.⁵¹ Therefore, Akgun also succeeds under the substantial deprivation analysis because its investment was destroyed. In sum, Ethiopia finds no safe harbor from its actions here by relying on its intent;

(where claimant received a federal permit to construct a landfill and began construction, and local authorities later required a municipal building permit, which they denied after construction was finished).

⁴⁹ **CLA-159**, *Pope & Talbot v. Canada*, ¶ 102. See also **RLA-11**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, ¶ 282 ("expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference").

⁵⁰ **CLA-163**, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 65.

⁵¹ Statement of Reply, ¶¶ 5.159-5.166.

its actions effectively destroyed Akgun's investment, mandating liability for expropriation.

3. 'IMPORTATION' OF UMBRELLA CLAUSES – QUESTION 2.2

- 3.1. Claimant has addressed at length in the course of these proceedings why the umbrella clause protection should be imported into the Turkey-Ethiopia BIT from the Denmark-Ethiopia BIT through the Treaty's MFN clause and respectfully refers this Tribunal to its submissions on this question.⁵² This section will solely address the specific issue as to whether or not, and if so, to what extent, this Tribunal should adopt the findings of the *Ickale* tribunal in paragraphs 326-329 of the *Ickale* award regarding the interpretation of MFN clauses.⁵³
- 3.2. In paragraphs 326-329 of the award, the *Ickale* tribunal analysed the MFN clause of the Turkey-Turkmenistan BIT, which is worded similarly to the MFN clause in the Turkey-Ethiopia BIT. The *Ickale* tribunal concluded that because the MFN clause includes a reference to treatment "in similar situations" it extends to cases of *de facto* discrimination only, which requires comparison of the *actual* treatment provided to investment of investors of the home state and that of investments of the investors of third countries, and cannot be read to refer to cases of *de jure* discrimination, i.e. situations where investors invoke standards of investment protection found in BITs concluded between the host state and third states.⁵⁴
- 3.3. Claimant has already explained in its Rejoinder why the *Ickale* tribunal's reading of the MFN clause is erroneous and this Tribunal should not adopt it.⁵⁵ Claimant notes that Respondent did not address Claimant's criticism at the hearing, although it had an opportunity to do so in its opening and/or closing remarks.⁵⁶ Below Claimant will further elaborate on whether and to what

⁵² Statement of Claim, ¶¶ 3.11-3.22; Statement of Reply, ¶¶ 3.83-3.147; Claimant's Rejoinder, ¶¶ 3.64-3.110; Hearing Tr., Day 1, 85:24-95:6.

⁵³ PO4, Question 2.2.1.

⁵⁴ **RLA-49**, *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016 ("*Ickale v. Turkmenistan*"), ¶¶ 326-329.

⁵⁵ Claimant's Rejoinder, ¶¶ 3.77-3.103.

⁵⁶ See *generally* Hearing Tr., Day 1, 168:24-195:25; Day 9, 193:23-199:11.

extent this Tribunal should adopt the specific reasoning of the *Ickale* tribunal found in paragraphs 326-329.

A. Analysis of the *Ickale* Tribunal's Interpretation of the MFN Clause in the Turkey-Turkmenistan BIT

3.4. The *Ickale* tribunal starts its analysis by quoting the MFN provision of the Turkey-Turkmenistan BIT, which is worded quite similarly⁵⁷ to the MFN provision of the Turkey-Ethiopia BIT.⁵⁸ The tribunal then rightfully points out that the provisions of any treaty, including an MFN clause, must be interpreted by reference to the Vienna Convention on the Laws of Treaties ("VCLT"), and in particular its Art. 31.⁵⁹

3.5. By utilizing the general rule of interpretation set out in Art. 31(1)⁶⁰ the tribunal rightfully states that

[t]he ordinary meaning of the terms of the MFN clause, when read in their context and in light of the object and purpose of the Treaty, suggests that each State party to the Treaty agreed to treat investments made in its territory by investors of the other State party in a manner that is no less favorable than the treatment they accord in similar situations to investments by investors of any third State.⁶¹

3.6. The tribunal then continues:

⁵⁷ **CLA-164**, Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, signed 2 May 1992 ("Turkey-Turkmenistan BIT"), Art. II(2) (stating "Each Party shall accord to these investments, once established, 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 most favorable"). *Compare with* **CLA-001**, Turkey-Ethiopia BIT, Art. III(2) (stating "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.").

⁵⁸ **RLA-49**, *Ickale v. Turkmenistan*, ¶¶ 326-327.

⁵⁹ *Id.*, ¶ 328.

⁶⁰ VCLT's Art. 31(1) states that "[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." See **CLA-047**, Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force on 27 January 1980), United Nations Treaty Series, vol. 1155, p. 331 ("VCLT"), Art. 31(1). See also **CLA-013**, UNCTAD on MFN, pp. 30-33; **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*"), ¶ 1200; **CLA-165**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020 ("*Strabag v. Libya*"), ¶ 160.

⁶¹ **RLA-49**, *Ickale v. Turkmenistan*, ¶ 328.

Thus the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State. However, this obligation exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in “a similar situation.” Conversely, the MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a “similar situation” to that of the investments of investors of third States [...]⁶²

- 3.7. Claimant agrees with the cited paragraph from the *Ickale* award. Indeed, as Claimant explained in its prior submissions, prohibition of discrimination is at the heart of the MFN standard.⁶³ The MFN standard is a relative standard and always requires an element of comparison. However, the comparison and hence discrimination may be either actual and concrete (*de facto*) or may be in the abstract at the level of comparing standards of protection granted to investors (*de jure*). Notably, an element of comparison exists irrespective of whether the MFN clause contains the phrase “in similar situations.”⁶⁴ As will be further explained below,⁶⁵ this phrase emphasizes the underlying principle of the MFN treatment, known as *ejusdem generis*, which requires a showing of “similarity” or “likeness” in the positioning of the investments at issue.
- 3.8. Following its correct observations set out in paragraph 328 as to the means of the treaty interpretation and the legal effect of the MFN clause in the Turkey-Turkmenistan BIT, the *Ickale* tribunal jumped, without providing any reasonable explanation, to its conclusion in paragraph 329 that the only way the phrase “in similar situations” can be understood is to refer to *de facto*

⁶² **RLA-49**, *Ickale v. Turkmenistan*, ¶ 328.

⁶³ Statement of Claim, ¶¶ 3.13-3.16; Statement of Reply, ¶¶ 3.95-3.96; Claimant's Rejoinder, ¶¶ 3.79-3.80; **CLA-013**, UNCTAD on MFN, pp. 13-14, 23-24, 26-27; **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, ¶¶ 162-163; **CLA-020**, *EDF International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (“*EDF v. Argentina*”), ¶ 932.

⁶⁴ Claimant's Rejoinder, ¶¶ 3.79-3.81.

⁶⁵ *Infra* ¶¶ 3.11-3.13.

discrimination, and to expressly exclude *de jure* discrimination. The tribunal seems to base its conclusion on two reasons. It suggests that (i) the *ordinary meaning* of the term “treatment accorded in similar situation” excludes *de jure* discrimination, and (ii) the principle of effective interpretation (*effet utile*) mandates such a reading.⁶⁶ As explained below, both justifications do not hold water.

(i) The *Ickale* Tribunal Erred in Ascertaining the “Ordinary Meaning” of the Term “Treatment Accorded in Similar Situations”

- 3.9. First, it is established law that “[t]he natural, ordinary meaning of the terms “treatment accorded” in [MFN clauses] encompasses not only treatment that has in fact been accorded [i.e. *de facto* discrimination] but also treatment that is legally required to be accorded [i.e. *de jure* discrimination].”⁶⁷ The International Law Commission explained this in the following terms:

[The MFN clause] begins to operate, i.e. a claim can be raised under the clause 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) has actually been extended the favours that constitute the treatment. It is not necessary for the beginning of the operation of the clause that the treatment actually extended to the third State, with respect to itself or the persons or things concerned, be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. **However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the**

⁶⁶ **RLA-49**, *Ickale v. Turkmenistan*, ¶ 329.

⁶⁷ **CLA-166**, *Gürış Construction and Engineering Inc et al. v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2021 (“*Guris v. Syria*”), ¶ 252. See also **CLA-046**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (“*MTD v. Chile*”), ¶¶ 103-104; **CLA-013**, UNCTAD on MFN, pp. 26 (noting that “[t]he MFN treatment clause requires that the host State does not discriminate – *de jure* or *de facto* – on the basis of nationality.” (internal citation omitted)).

third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause.⁶⁸

- 3.10. Thus, the ILC Articles on MFN are clear that there need not be a concrete “comparator” act in which a state accords more favourable treatment for a party to invoke the benefits of the MFN clause.
- 3.11. Under the MFN clause’s plain text, the phrase “in similar situations” calls for an assessment of similarity between investors or investments. The comparative element of this phrase reflects the well-known *ejusdem generis* principle, according to which an MFN clause “can only attract matters belonging to the same category of subject as that to which the clause itself relates.”⁶⁹ This is supported by the case law of international tribunals.⁷⁰
- 3.12. For example, in the recent award *Guris v. Syria*, which post-dated the *Ickale* award and in which the tribunal analyzed a similarly worded MFN clause⁷¹ and expressly addressed the *Ickale* award, it was observed:

[T]he natural reading of the “similar situations” test in Article III(2) is that it requires a showing of likeness; that is to say, that an investment of an investor of a third State, positioned in like circumstances as an investment under the Treaty would be entitled to or has received more-favourable treatment. This analysis is of course unremarkable and consistent with the *ejusdem generis* principle, addressed

⁶⁸ **CLA-167**, Draft Articles on Most-Favoured-Nation Clauses with Commentaries (Report of the International Law Commission on the Work of its Thirtieth session, 8 May – 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10, UN Doc. A/33/10), (“Draft Articles on MFN”), Commentary to Art. 5, ¶ 6. 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”), pp. 518-521.

⁶⁹ **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. 565 (quoting p. 107 from Ambatielos Claim (Greece v. UK). See also **CLA-167**, Draft Articles on MFN, Arts. 9 and 10; **CLA-137**, Schill on MFN, 2009, ¶¶ 515-516, 522-523; Statement of Claim, ¶¶ 3.14-3.22; Claimant’s Rejoinder, ¶ 3.87.

⁷⁰ See, e.g., **CLA-018**, *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶ 551; **CLA-166**, *Guris v. Syria*, ¶ 278; **CLA-013**, UNCTAD on MFN, pp. 24-26.

⁷¹ **CLA-168**, Agreement Between the Republic of Turkey and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments, signed 6 January 2004, Art. III(2) (stating “Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.”).

below. It calls for an assessment of similarities and dissimilarities between investors or investments, in order to identify whether differential treatment would be warranted as a matter of international law. It is altogether different matter to say that there is a further requirement of identifying an actual investment by an actual investor that has received more-favorable treatment in actual fact.⁷²

- 3.13. Therefore, the *Ickale* tribunal's narrow reading of "in similar situations," limiting it to circumstances where claimant points to an "actual investment by an actual investor," unduly constricts the ordinary meaning of the phrase and cannot be correct.⁷³ According to the VCLT, such a special reading cannot be read into a Treaty provision unless "it is established that the parties so intended."⁷⁴ The *Ickale* tribunal did not even attempt to establish the parties' intent; yet, even exploring intent, it is evident that the parties intended the MFN clause to cover both *de facto* and *de jure* discrimination.
- 3.14. The VCLT calls for the use of the supplementary means of interpretation where the interpretation of the term leads to a result which is either unreasonable, and/or manifestly absurd, or ambiguous and/or obscure.⁷⁵ Turkey's treaty practice may be resorted to as such supplementary means. As Claimant previously explained, the same MFN clause is found in many BITs Turkey concluded with other states.⁷⁶ It is nonsensical to conclude that Turkey

⁷² **CLA-166**, *Guris v. Syria*, ¶ 255 (internal citation omitted). See also *id.* (further noting that "it is difficult to endorse a reading that would allow the States Parties altogether to defeat their Article III(2) MFN obligations by failing in fact to accord to third-State nationals the treatment to which they are legally entitled" and that indeed that would be "antithetical to the core idea of MFN treatment"); **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. 932 (concluding that a more natural and "convincing" reading of the phrase "in similar situations" would be "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.") (emphasis added).

⁷³ Interestingly, the *Ickale* tribunal's discussion of the legal effect of the MFN clause in paragraph 328 of the award is consistent with the stated ordinary meaning of the phrase "treatment accorded in similar situation." See **RLA-49**, *Ickale v. Turkmenistan*, ¶ 328. It is the surprising conclusion at paragraph 329 which does not make sense. See also **CLA-138**, Schill on MFN, 2017, pp. 931-932 (discussing this disparity between paragraphs 328 and 329 in the *Ickale* award).

⁷⁴ **CLA-047**, VCLT, Art. 31(4) (stating that "[a] special meaning shall be given to a term if it is established that the parties so intended").

⁷⁵ *Id.*, Art. 32.

⁷⁶ Claimant's Rejoinder, ¶¶ 3.98-3.99.

intended to limit the protection to be offered to its own investors operating in these countries by including “in similar situations” wording in MFN clauses in these BITs with the intent that its investors would need to clear the higher bar of *de facto* discrimination to enjoy the MFN clause’s protections.⁷⁷ A more reasonable explanation is that Turkey did not attribute any special meaning to the words “in similar situations” in the MFN clauses, let alone contemplate any limitation by using them.

- 3.15. The background of Turkey’s BIT with Pakistan is instructive on this point. The Turkey-Pakistan BIT of 1995 was at issue in the *Bayindir v. Pakistan* arbitration.⁷⁸ In *Bayindir*, the tribunal – without requiring a showing of *de facto* discrimination – incorporated an FET standard into the BIT with Pakistan based on the MFN clause which was worded nearly identically to the MFN clause in the Turkey-Turkmenistan BIT.⁷⁹ In 2012, following the *Bayindir* award, Turkey and Pakistan signed a new BIT, at which point the parties had the chance to amend the BIT to correct any misinterpretations of their intent.⁸⁰ The 2012 Turkey-Pakistan BIT’s MFN clause maintained the phrase requiring similar circumstances,⁸¹ but was revised to *inter alia* supply a clear limitation

⁷⁷ Indeed, *de facto* discrimination based on an analysis of local “similar situations” will be an extraordinarily difficult barrier as a practical matter. This contrasts with the objective *de jure* test based on comparison of treaty provisions. In other words, the *Ickale* rationale is hardly what the treaty drafters could have intended.

⁷⁸ **CLA-88**, *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; **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”); **CLA-146**, 1995 Turkey-Pakistan BIT.

⁷⁹ Compare **CLA-146**, 1995 Turkey-Pakistan BIT, Art. II(2) (stating “Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable”) with **CLA-164**, Turkey-Turkmenistan BIT, Art. II(2) (stating “Each Party shall accord to these investments, once established, 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 most favorable”). See also **CLA-139**, *Bayindir v. Pakistan*, Award, ¶¶ 153-160; **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, ¶¶ 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 the “in similar situations” wording).

⁸⁰ **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.

⁸¹ *Id.*, Art. 4(2) (stating “Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to investments of investors of any third State, whichever is the most favourable, as regards the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of the investment”).

to the scope of the MFN clause by stating that it does not apply to dispute settlement provisions in BITs with third states.⁸² The clarification made in the the MFN clause of the 2012 Turkey-Pakistan BIT indicates 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. Notably, they did not alter the treaty to require *de facto* discrimination. Turkey's subsequent practice 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 *de facto* discrimination and was understood by the parties to include *de jure* discrimination – i.e. importation of more favorable standards of treatment from BITs with third states, including favorable dispute settlement provisions.

(ii) The *Ickale* Tribunal Misapplied the Principle of *Effet Utile*

- 3.16. The *Ickale* tribunal's reasoning is also at odds with the principle of *effet utile*. The principle of *effet utile* calls for an effective interpretation of treaty language, giving it meaning rather than treating it as mere surplusage.⁸³ Taking a term to have a special or exceptional meaning, however, exceeds the bounds of the principle. Indeed, as scholars point out, the phrase "in similar situations" may have different meanings, and the principle of *effet utile* is either i) of no assistance to the analysis of whether or not the phrase "treatment accorded in similar situations" covers only *de facto* or both *de facto* and *de jure* discrimination,⁸⁴ or ii) further supports Claimant's interpretation.
- 3.17. Indeed, as explained above, the interpretation of any MFN clause starts with ascertaining the ordinary meaning of its terms, and the ordinary meaning of the MFN clause at issue covers both *de facto* and *de jure* discrimination.⁸⁵ This is also supported by the supplementary means of interpretation such as Turkey's practice in signing BITs which contain similarly worded MFN clauses.⁸⁶

⁸² *Id.*, Art. 4(4)(c).

⁸³ See **RLA-49**, *Ickale v. Turkmenistan*, ¶ 329.

⁸⁴ **CLA-138**, Schill on MFN, 2017, pp. 932-933.

⁸⁵ *Supra* Section 3.A.i.

⁸⁶ *Supra* ¶¶ 3.14-3.15.

3.18. Furthermore, if one were to interpret the clause as a whole, it is impossible to marry the interpretation provided by the *Ickale* tribunal with the exceptions from the application of the MFN clause set out in Art. II(4) of the Turkey-Turkmenistan BIT in light of the principle of *effet utile*. Indeed, states are open to exclude from the treatment accorded under an MFN clause any treatment that may be accorded under other international treaties.⁸⁷ The Turkey-Turkmenistan BIT contains such exceptions from the application of the MFN clause in its Article II(4), indicating that the MFN clause shall have no effect with respect to customs unions, regional economic organization or other similar international agreements as well as taxation agreements.⁸⁸ The very existence of these specific exceptions in Article II suggests that the clause covers that which is not excepted, specifically, *de jure* discrimination where investors attempt to import more favorable standards of protection from bilateral investment treaties with third states. Indeed, the MFN clause would lose meaning and become less effective (contrary to *effet utile*) if it were limited to cases of *de facto* discrimination.⁸⁹

(iii) The *Ickale* Tribunal's Finding Is Contrary to the Principle of Good Faith as well as the Object and Purpose of the BIT

3.19. As discussed, 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.”⁹⁰ Yet, the *Ickale* tribunal's proffered interpretation defies the principle of good faith and is contrary to the object and purpose of the Turkey-Turkmenistan BIT.

3.20. The principle of good faith mandates an approach to the interpretation of a treaty provision which is consistent with the available law and practice of international tribunals.⁹¹ As Prof. Thomas Walde observes:

⁸⁷ See **CLA-137**, Schill on MFN, 2009, pp. 524-525. See also **CLA-013**, UNCTAD on MFN, pp. 45-46.

⁸⁸ **CLA-164**, Turkey-Turkmenistan BIT, Art. II(4).

⁸⁹ See also **CLA-166**, *Guris v. Syria*, ¶ 255 (third bullet point).

⁹⁰ **CLA-047**, VCLT, Art. 31(1). See also **CLA-013**, UNCTAD on MFN, pp. 30-33.

⁹¹ This understanding is further reinforced by VCLT's Art. 31 requiring the tribunals to take into account “any relevant rules of international law applicable in the relations between the parties” in interpretation of treaties. See **CLA-047**, VCLT, Art. 31(3)(c).

It is not two equal parties who agreed specifically to submit a dispute to confidential resolution, but it is the investor only which raises a matter usually involving public policy and administrative misconduct (as measured under a treaty's obligations) against the host state. Investment arbitration is in substance a special form of international quasi-judicial review of governmental conduct using as a default the methods of commercial arbitration [...]. As a result of this primarily international and public-law character of investment arbitration, with transparency and public debate, **the principles and practices of international law with respect to precedent become more relevant...** [...] In international and international economic law – to which investment arbitration properly belongs – there may not be a formal “stare decisis” rule as in common law countries, **but precedent plays an important role.** Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but **it is hard to maintain that they can and should not respect well-established jurisprudence.**⁹²

- 3.21. Claimant explained in its pleadings that there is a well-established jurisprudence on MFN clauses' scope of application.⁹³ The *Ickale* tribunal simply disregarded that body of jurisprudence and interpreted the MFN clause in a manner completely detached both from the nature and object of MFN clauses and approaches to the application of such clauses set out in arbitral awards of international tribunals. Besides, it did so without providing the reasons behind its novel approach and failed to explain why its reasoning should prevail against the weight of contrary decisions in investor-state

⁹² **CLA-169**, *International Thunderbird Gaming Corporation. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, 1 December 2005 (“Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*”), ¶ 129 (internal citation omitted). See also **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”); **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)).

⁹³ Statement of Claim, ¶¶ 3.14-3.21; Statement of Reply, ¶¶ 3.94-3.99; Claimant's Rejoinder, ¶¶ 3.69-3.74, 3.79-3.87. See also **CLA-138**, Schill on MFN, 2017, pp. 923-926.

arbitrations. Yet, it is only natural to expect that the tribunal which deviates from the established jurisprudence would do so.⁹⁴

- 3.22. The *Ickale* tribunal did not even analyze the MFN clause jurisprudence, let alone distinguish its novel reasoning from the reasoning of authorities on the same issue. Indeed, as one scholar rightfully pointed out:

MFN clauses are to be interpreted against a multilateral background. Moreover, their wording permitting, they apply to more favorable treatment that the granting state extends to third states and their subjects, including investors, in international agreements. This practice backs the prevailing interpretation of MFN clauses in traditional IIAs and the resulting multilateralization of bilateral treaty commitments.⁹⁵

- 3.23. Furthermore, the *Ickale* tribunal's reasoning is also contrary to the object and purpose of the BIT. As follows from the Preamble of the Turkey-Turkmenistan BIT, which requires express consideration under the VCLT,⁹⁶ its object and purpose are to promote and protect investments and create conditions favorable to investments.⁹⁷ Any interpretation of a treaty provision should therefore accord with such promotion and protection. Clearly, narrowly interpreting a treaty to exclude the protection of covered investments (rather than adhering to the plain language favoring such protection) is not in line with such object and purpose.⁹⁸

⁹⁴ See **CLA-169**, Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*, ¶ 130 (stating that a tribunal which chooses to adopt a novel approach in a question that has been extensively addressed by other authorities "is under an obligation to provide the parties with an opportunity of a full debate [...] and to provide extensive reasoning which shows that the tribunal is both familiar with established jurisprudence and is prepared to justify its departure from such jurisprudence with in-depth reasoning.").

⁹⁵ **CLA-138**, Schill on MFN, 2017, p. 916. See also *id.*, pp. 921-926 (discussing application of MFN clauses to better treatment granted under BITs with third states and concluding that "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").

⁹⁶ **CLA-047**, VCLT, Art. 31(2) (indicating that the "context for the purpose of the interpretation of a treaty" shall include the treaty's preamble).

⁹⁷ **CLA-164**, Turkey-Turkmenistan BIT, Preamble. See also **CLA-001**, Turkey-Ethiopia BIT, Preamble.

⁹⁸ See **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, ¶ 116; **RLA-55**, *Urbaser v. Argentina*, ¶ 1200; **CLA-165**, *Strabag v. Libya*, ¶ 160; **CLA-046**, *MTD v. Chile*, ¶¶ 103-104.

B. Conclusion

- 3.24. In light of the foregoing, this Tribunal should reject the *Ickale* tribunal's conclusion that the phrase "treatment accorded under similar situations" narrows an MFN clause's scope of application to protect investors only in cases of *de facto* discrimination. Rather, the Tribunal should follow the weight of the authority holding that investors may also invoke an MFN clause to enjoy substantive protections in cases of *de jure* discrimination.

4. LEASEHOLDS UNDER ETHIOPIAN LAW – QUESTION 2.3

- 4.1. Ethiopian law relies upon a leasehold and right of use system for allocating rights in both urban and rural land to its citizens and to investors. A leasehold right holder acquires part of the owner's bundle of property rights—*i.e.*, the rights of use and enjoyment. Ethiopian law protects against third-party interference in such holder's rights, including governmental interference, by mandating compensation for expropriation of a leaseholder's right. Thus, Ethiopian law recognizes a leasehold as a property right, as further explained below.
- 4.2. The Ethiopian Constitution establishes property rights.⁹⁹ It specifies that the "right to ownership of rural and urban land" "is exclusively vested in the State

⁹⁹ **C-152**, Constitution of the Federal Democratic Republic of Ethiopia dated 21 August 1995 ("Ethiopian Constitution"), Art. 40. In Ethiopia, the private ownership of land has been the subject of political upheaval:

Land had been, as any object of property, subject to private ownership and had been governed under the Civil Code prior to 1975 when the Derg, the military and communist regime, enacted laws nationalizing rural and urban land and abolished private ownership of land. However, individuals were given a right to use land for farming and construction of residential or business buildings against payment of taxes on income from agricultural activities or land tax.

After the fall of the Derg in 1991 and the ratification of the FDRE Constitution in 1994, land remained public property, however, private ownership of land as become, once again, one of the most important political economic and social issues in the country.

Under Art 40 of the FDRE Constitution land/both rural and urban/is declared to be the property of the state of Ethiopia and its peoples. [...] However, the constitution entitles Ethiopian farmers and pastoralists to obtain farmland/pastureland free of charge and a right of use of such land. It also provides that investors in the agriculture sector may also obtain land in accordance with land use laws to be issued by the regions. The land use/holding rights recognized by the constitution and the federal land administration law shall be implemented and administered by

and in the peoples of Ethiopia” and prohibits the “sale” or “other means of exchange” of land.¹⁰⁰ It nevertheless grants certain land use rights to Ethiopians and obligates the government to “ensure the right of private investors to the use of land on the basis of payment arrangements established by law.”¹⁰¹ The Constitution provides that the implementation or particulars of such use rights shall be provided by law.¹⁰² In Ethiopia, “[o]nly personal property can be owned absolutely, where as real property [i.e., land] could be split up in to successive interests—tenancy, lease[,] usufruct. . . etc.”¹⁰³

- 4.3. The “[r]ight of ownership is the widest and the ultimate property right that may be had in relation to things or objects.”¹⁰⁴ An owner’s rights include the rights of use and enjoyment, possession, transfer, and abandonment.¹⁰⁵ “[A]n owner may not possess or exercise all [such] rights [or] his rights may be restricted by law or by an agreement he has made with another person[, as where he] transfer[s] some of his rights to another through a contract of usufruct or hire or lease.”¹⁰⁶

- 4.4. Under the Ethiopian Civil Code:

The lease of an immovable is a contract whereby one of the parties, the lessor, undertakes to ensure to the other party, the lessee, the use and enjoyment of an immovable,

the states/regions of the federation, which shall issue specific laws for the implementation of these rights.

C-153, Law of Property, Teaching Material prepared by F. Alemayehu (2009) (“Property Law”), pp. 60-61.

¹⁰⁰ **C-152**, Ethiopian Constitution, Art. 40(3).

¹⁰¹ *Id.*, Art. 40(6).

¹⁰² *Id.*, Arts. 40(4)-(6); *see also* **C-154**, Land Law, Teaching Material prepared by D.W. Gebriel and M. Belachew (2009) (“Land Law”), p. 88 (“The FDRE Constitution, under Art. 40(6), gives an opportunity for investors to get land in rural areas. Accordingly the government is obliged to ‘ensure the right of private investors to the use of land on the basis of payment arrangements established by law.’ [T]he Federal and Regional rural land legislations have also upheld this principle. The leased land may be for the purpose of agriculture, like big commercial agricultural lands, or for any other investment purposes (mining, quarry, industry.) The common type of such investment activity in Ethiopia is the horticulture investment wherein investors heavily lease rural land for the growing and collection of flowers and commercial fruits. As we shall see it later on, such investment is possible to mortgage.”).

¹⁰³ **C-153**, Property Law, p. 32.

¹⁰⁴ *Id.*, p. 55.

¹⁰⁵ *Id.*, p. 56.

¹⁰⁶ *Id.*, pp. 56-57.

for a specified time and for a consideration fixed in kind or otherwise.¹⁰⁷

- 4.5. Leasehold “means the interest held by the lessee . . . through a lease transferring the rights of use and occupancy for a stated term under certain conditions.”¹⁰⁸ A lessee's rights are broad and varied. For instance, Urban Lands Lease Holding Proclamation No. 721/2011 entitles a lessee to transfer his leasehold right or use it as collateral or capital contribution to the extent of the lease amount already paid.¹⁰⁹ Re-Enactment of Urban Lands Lease Holding Proc. No 272/2002 also provides for similar rights.¹¹⁰ As one scholar explains, the term property includes rights

... which are both proprietary and in rem. The law of property is the law of proprietary rights in rem, the law of proprietary rights in personam being distinguished from it as the law of obligations. **According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property**, but a debt or benefit or a contract is not.¹¹¹

- 4.6. Indeed, Ethiopian land rights rely upon a system of leasehold rights. Relevant here, per the Constitution¹¹² the Federal and Oromia Regional State governments issued proclamations to address rights in rural land—*i.e.*, use rights conveyed via lease or otherwise.¹¹³ The Rural Land Administration and Land Use Proclamation No. 456/2005 applies to “any rural land in Ethiopia,” identifies leasehold rights as one of the means by which rural land may be

¹⁰⁷ **CLA-152**, Ethiopian Civil Code (1960), Art. 2896(1).

¹⁰⁸ **C-154**, Land Law, p. 74.

¹⁰⁹ **C-155**, Urban Land Lease Holding Proclamation No 721/2011, Arts. 24 (1)-(2).

¹¹⁰ **C-156**, Re-Enactment of Urban Lands Lease Holding Proclamation No. 272/2002, Art. 13.

¹¹¹ **CLA-170**, Muradu Abdo, *Ethiopian Property Law: Text Book*, School of Law Addis Ababa University (2012), p. 20 (emphasis added).

¹¹² **C-152**, Ethiopian Constitution, Art. 40(4) (“The implementation of this provision shall be specified by law.”), Art. 40(5) (“The implementation shall be specified by law.”), Art. 40(6) (“Particulars shall be determined by law.”).

¹¹³ See **C-157**, Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005 (“Proclamation No. 456/2005”); **C-158**, Proclamation No. 130/2007: Proclamation to amend the proclamation No. 56/2002, 70/2003, 103/2005 of the Oromia Rural Land Use and Administration (“Proclamation No. 130/2007”); **C-154**, Land Law, p. 86 (“Lease is one form of land holding rights recognized by rural land proclamation. The Federal land administration and use proclamation No. 456/2006 in its definition of ‘holding rights’, among others, include lease as one form of right.”).

held, affords compensation to the holder of a leasehold right over rural land subject to expropriation, permits an “investor who has leased rural land [to] present his use right as collateral” or transfer such right “through inheritance to members of his family.”¹¹⁴ Proclamation (No. 130/2007) of the Oromia Rural Land Use and Administration applies to “any rural land in the Oromia Regional State,” confirms the right of “private investors” to obtain rural land, provides for compensation to the holder of the use right where it is terminated “for more important public uses,” permits the government to rent out land not held by peasants, pastoralists, or semi pastoralists, confirms availability of “investment land,” and obligates rural land held by lease to be registered with the Oromia Agricultural and Rural Development Bureau and requires the latter to issue a holding certificate to the leaseholder.¹¹⁵ Recall that Akgun was to develop ETIZ on rural land, as reflected by the fact that the Oromia Bureau of Rural Land and Environmental Protection issued Akgun’s formally registered lease certificate.¹¹⁶

- 4.7. Ethiopian law affords leasehold interests protection against third-party interference. “[A] contract of lease may be set up against a third party who acquires the ownership or usufruct of the immovable given on lease after the delivery of the immovable to the lessee.”¹¹⁷ A registered lease protects the holder of the leasehold interest’s rights in the immovable against third-party interference for a period of up to five years.¹¹⁸ Moreover, a lessee may institute action in his own name against a third party who interferes with his peaceful possession of the leased immovable provided that interference does not challenge the ownership of the immovable.¹¹⁹

¹¹⁴ **C-157**, Proclamation No. 456/2005, Arts. 4, 6(6), 7(3), 8(4)-(5).

¹¹⁵ **C-158**, Proclamation No. 130/2007, Arts. 4, 5(3), 6(10)-(11), 11, 12, 15(4)-(5).

¹¹⁶ See **C-012**, Land Lease Certificate issued by Oromia Bureau of Rural Land and Environmental Protection dated 2 January 2013 (issued in accordance with proclamation No. 170/2012, entitled “A Proclamation Enacted to Revise the Powers and Duties of Oromia National Regional State Executive Organs,” and which establishes in Arts. 2(2) and 2(3) the Bureau and mandates issuance of certificates to investors, among other duties). See **C-159**, Proclamation No. 170/2012: A Proclamation Enacted to revise the Powers and Duties of Oromia National Regional State Executive Organs Amendment Proclamation No. 163/2011, Arts. 2(2) and 2(3).

¹¹⁷ **C-154**, Land Law, p. 77 (citing Civil Code Art. 2932). See also **C-152**, Ethiopian Civil Code (1960), Art. 2934.

¹¹⁸ See **C-152**, Ethiopian Civil Code (1960), Arts. 2899, 2932. See also *id.*, Art. 3007.

¹¹⁹ **C-152**, Ethiopian Civil Code (1960), Art. 2914.

- 4.8. “The only exception [to the general rule that a leaseholder’s right may be ‘set up against a third party who [later] acquires [an interest in] the immovable given on lease’] is in case of expropriation where the state may take away the property for reasons of public benefits.”¹²⁰ The Constitution permits the government to “expropriate private property for public purposes” upon “payment in advance of compensation commensurate to the value of the property.”¹²¹ Yet, even Ethiopia’s expropriation laws recognize leasehold rights. Although the Civil Code generally provides that expropriation proceedings are brought against “an owner to surrender the ownership of an immovable,”¹²² its statement of “[o]ther purposes of expropriation” includes extinguishing rights in rem over an immovable other than absolute ownership and “terminating prior to the agreed term a contract of lease relating to an immovable the property of the public authorities.”¹²³
- 4.9. In sum, Akgun’s leasehold interest is considered a property right under Ethiopian law.

5. MITIGATION OF DAMAGES – QUESTION 2.4

A. The Duty to Mitigate Damages Under International Law

- 5.1. Akgun will discuss the concept of mitigation in the following sections. One salient fact, however, overshadows this discussion: Akgun twice appealed to Respondent by letter, seeking a firm offer of an alternative site for ETIZ, but Respondent never supplied such an offer.¹²⁴ Respondent’s failure to respond forestalled further mitigation efforts and in effect waived any mitigation-based defense. Even if the Tribunal does not consider the defense waived, the

¹²⁰ **C-154**, Land Law, p. 77 (citing Civil Code Art. 2932).

¹²¹ **C-152**, Ethiopian Constitution, Art. 40(8).

¹²² **CLA-152**, Ethiopian Civil Code (1960), Art. 1460.

¹²³ *Id.*, Art. 1461(1)-(2). See also **C-154**, Land Law, p. 227 (“Expropriation is a process whereby the state may take privately owned or leasehold land without the consent of the owner/possessor for a public purpose accompanied by payment of fair compensation.”); **C-160**, Federal Democratic Republic of Ethiopia Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People Proclamation No. 1161/2019, Arts. 2(5) and 14(1) (recognizing “economic loss” as compensable as a result of expropriation).

¹²⁴ **C-149**, Letter from Akgun Construction to Ministry of Industry and President of the Oromia Regional State dated 7 September 2015; **C-088**, Letter from Akgun Construction to President Dr. Mulatu Teshome Wirtu et al. dated 2 November 2015; Yusuf Akgun 1st Statement, ¶ 5.26; Hearing Tr., Day 3, 91:19-92:3; 92:21-94:21; 95:16-96:24; Hearing Tr., Day 5, 31:22-32:1; Hearing Tr., Day 6, 98:7-98:24.

following paragraphs demonstrate why that salient fact nevertheless destroys the defense that Akgun failed to mitigate its damages.

- 5.2. A consensus has emerged under international law that a claimant's failure to mitigate damages may reduce its recovery.¹²⁵ The commentary to ILC Article 31 states:

Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.¹²⁶

- 5.3. Most tribunals analyzing the issue have accepted that an investor's duty to mitigate its damages, permitting a state to raise the defense that the investor failed to mitigate its damages.¹²⁷ The duty is a general principle of law that need not be specified in the BIT.¹²⁸

¹²⁵ **CLA-171**, Irmgard Marboe, *Compensation and Damages in International Arbitration*, ¶ 25.44, in *Arbitration Under International Investment Agreements, A Guide to the Key Issues*, 2d Ed., Katia Yannaca-Small ("Marboe"); **CLA-172**, C. Miles and D. Weiss, *Overview of Principles Reducing Damages* in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION, (4th. ed., GAR Guide, 2021) ("Miles and Weiss").

¹²⁶ **CLA-042**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, 2001, Commentary to ILC Article 31, ¶ 11.

¹²⁷ See, e.g., **CLA-020**, *EDF v. Argentina*, ¶ 1302 (citing Commentary to Article 31 of the ILC Articles on State Responsibility for International Wrongful Acts) ("The duty to mitigate damages is a well-established principle in investment arbitration."); **CLA-173**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 ("*Unión Fenosa Gas v. Egypt*"), ¶ 10.124 ("The Claimant cannot claim compensation from the Respondent to the extent that the Claimant has failed unreasonably to mitigate its loss in accordance with international law."); **CLA-174**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 ("*CME v. Czech Republic*"), ¶ 482 ("One of the established general principles in arbitral case law is the duty of the party to mitigate its losses."); **CLA-076**, *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("*Bilcon v. Canada*, Award on Damages"), ¶ 200 (citing authorities) (noting that "various investment law tribunals have affirmed that a duty to mitigate exists"); see also **CLA-175**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015 ("*HEP v. Slovenia*"), ¶ 215 (stating that "general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses."); but see **CLA-035**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 ("*AIG v. Kazakhstan*"), ¶ 10.6.4(5) (stating "the rule as to mitigating avoidable loss in an action for damages is not at all applicable, in principle or in law, to a foreign investor in a host State, especially where their relationship [is] governed by a bilateral investment treaty").

¹²⁸ See, e.g., **CLA-176**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 ("*Middle East Cement v. Egypt*"), ¶ 167 ("The duty to

- 5.4. The duty to mitigate damages implies an obligation for an aggrieved party to “take steps to minimize his loss, on the one hand, and [abstain] from doing anything to increase his loss on the other.”¹²⁹ Thus, the duty may apply where either “a claimant is unreasonably inactive following a breach of treaty” by failing to act to reduce its damages; or “a claimant engages in unreasonable conduct following a breach of treaty” by incurring expenses that increase the size of its claim.¹³⁰
- 5.5. Respondent has not argued here that Akgun unreasonably incurred expenses that increased the size of its claim. Rather, Respondent has focused on the alternative lands that it showed — but never offered — to Akgun.¹³¹ Akgun will therefore center its arguments on the contention that it failed to minimize its loss following Respondent’s treaty breach.
- 5.6. There are four critical principles that guide the mitigation analysis. First, the mitigation rule is one of reasonableness. As Ripinsky notes, “The principle of mitigation refers to situations where the injured party reasonably can, but fails, to take measures to reduce the damage.”¹³² Arbitral tribunals and scholarly commentators have elaborated on the rule of reasonableness, concluding that “the legal test is based upon a reasonable and not an absolute standard”¹³³ and “[w]hether the aggrieved party has taken reasonable steps to reduce the

mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute.”); **CLA-076**, *Bilcon v. Canada*, Award on Damages, ¶ 202 (“NAFTA contains no express *lex specialis* with respect to the duty to mitigate. As a result, the general rules of State responsibility apply.”) A similar concept exists under Ethiopian Civil Code Obligations Article 1802, denoted as a “[d]uty to limit the extent of the damage.” See **CLA-152**, Ethiopian Civil Code (1960), Art. 1802 (“(1) The party who invokes non-performance shall take all reasonable measures not involving inconvenience or heavy expenses to limit the extent of the damage caused. (2) Where he fails to take such measures, the other party may invoke such failure to require that the amount of damages be reduced.”).

¹²⁹ **CLA-177**, A. S. Komarov, *Mitigation of Damages in Dossier of the ICC Institute of World Business Law: Evaluation of Damages in International Arbitration*, ICC Publication (2006) (“Komarov”).

¹³⁰ **CLA-076**, *Bilcon v. Canada*, Award on Damages, ¶¶ 204-205.

¹³¹ See Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims dated 21 January 2022 (“Ethiopia’s Rejoinder”), ¶¶ 186-196; Claimant’s Rejoinder, ¶¶ 2.48-2.59.

¹³² **CLA-178**, S. Ripinsky, *Assessing Damages in Investment Disputes: Practice in Search of Perfect*, Journal of World Investment and Trade, Vol. 10, No. 1 (2009) (“Ripinsky”), §III.B.

¹³³ **CLA-173**, *Unión Fenosa Gas v. Egypt*, ¶ 10.124; see **CLA-179**, *Stabil et al. v. The Russian Federation*, PCA Case No. 2015-35, Final Award, 12 April 2019, ¶ 251 (“Indeed, the injured party’s duty to mitigate its losses, to the extent such a duty derives from the general principles of law, is a reasonable one: evidently futile attempts at mitigation are not required.”).

loss is a question of fact, not law. What is reasonable depends largely upon the facts of the individual case.”¹³⁴

- 5.7. Second, “the reasonableness of the Claimants’ conduct must be assessed by the information and data that was available to them when they allegedly failed to mitigate their loss”¹³⁵ and it may not involve “a multitude of second-guesses made years [after,] applying an absolute standard to the Claimant’s conduct with the benefit of hindsight.”¹³⁶
- 5.8. Third and relatedly, tribunals have applied a “business judgment rule” to the mitigation defense, under which they decline to second-guess claimants’ business judgment.¹³⁷
- 5.9. Finally, it is unquestionably Respondent’s burden to prove the facts that support the defense:

¹³⁴ **CLA-020**, *EDF v. Argentina*, ¶ 1306; see also **CLA-035**, *AIG v. Kazakhstan*, ¶ 10.6.4(4) (citing *The Soholt* 1983 (1) Lloyds Reports 605 CA; Macgregor on Damages 16th Edition paragraphs 299–300) (“The question of mitigation of damages is always a question of fact: as to whether the loss was avoidable by reasonable action that could have been taken by a Claimant is also a question of fact, not of law.”); **CLA-171**, *Marboe*, ¶ 25.44 (“[The duty to mitigate damages] implies that the injured party must take **reasonable steps** to reduce its losses. **Depending on the facts of the case**, it may include selling products, stopping the delivery of services, trying to renegotiate contracts, or even giving up unprofitable projects.”) (emphasis added); **CLA-172**, *Miles and Weiss* (“The proper test for mitigation is whether it was unreasonable for the claimant to forgo a particular opportunity; it is not whether the forgone opportunity was better than the steps the claimant actually took.”).

¹³⁵ **CLA-180**, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 (“*Cairn v. Indonesia*”), ¶ 1894; see **CLA-181**, *Magyar Farming Company Ltd et al. v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (“*Magyar v. Hungary*”), ¶ 422 (“The Tribunal considers that the Claimants’ mitigation efforts after the date of valuation are not relevant. As explained above, a valuation cannot take into account facts that occurred after the valuation date, which a hypothetical buyer could not have considered.”).

¹³⁶ **CLA-173**, *Unión Fenosa Gas v. Egypt*, ¶ 10.132; **CLA-172**, *Miles and Weiss* (“Further, the ‘reasonableness’ quality of this duty means that the claimant’s conduct should be judged based on the information that was available to the claimant at the relevant time, not with the benefit of hindsight.”).

¹³⁷ **CLA-076**, *Bilcon v. Canada*, Award on Damages, ¶ 217 (“The Tribunal also considers that it was not unreasonable for the Investors to conclude, as they did, that a do-over of the environmental assessment would have been costly.”); **CLA-175**, *HEP v. Slovenia*, ¶ 216 (“The Tribunal finds that HEP generally acted reasonably in its dispatch decisions and the Tribunal will not, therefore, second guess those decisions.”); **CLA-182**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008 (“*National Grid v. Argentina*”), ¶ 273 (where Claimant sold its business in order to mitigate its damages, which respondent characterized as a “self-inflicted wound” that increased the damages, the tribunal rejected that proposition, concluding that it “does not intend to interpose its business judgment for that of the owners at the time”); **CLA-181**, *Magyar v. Hungary*, ¶ 427 (“Absent compelling evidence to the contrary, the Tribunal is not prepared to speculate whether the Claimants should have exercised a better business judgment ...”).

Arbitration practice unequivocally shows that, from a procedural point of view, reference to mitigation is ordinarily made by the respondent on whom rests the burden of proving that the claimant failed to mitigate avoidable damages by reasonable measures.¹³⁸

- 5.10. For these reasons, the *Cairn* tribunal explained that respondents must overcome an exceedingly high hurdle to establish the defense:

A mitigation defence is difficult to prove, given that it is in a claimant's own best interest to minimise its loss. As a rule, it will require sufficient evidence to show that a claimant's conduct (action or inaction) following the Respondent's breach was unreasonable, abusive or against its own economic interests. For this reason, tribunals are seldom persuaded by speculative options of mitigation that are proposed in hindsight.¹³⁹

- 5.11. Applying these principles to the facts here shows that the mitigation defense fails. There is no basis for the Tribunal here to second-guess Akgun's decision to depart Ethiopia when Akgun had spent many months pursuing opportunities to mitigate its damages, but Respondent failed to offer any firm commitment for an alternative site.
- 5.12. The Tribunal may be guided by *Magyar Farming Co.*, an analogous case involving the claimants' leasehold right to 760 hectares of State-owned land that it alleged was unlawfully expropriated through regulatory measures.¹⁴⁰ Claimants prevailed on the merits and the tribunal confronted the respondent's defense that the claimant failed to mitigate its damages by rejecting alternative

¹³⁸ **CLA-177**, Komarov; see **CLA-178**, Ripinsky, §III.B; **CLA-176**, *Middle East Cement v. Egypt*, ¶ 170 ("... the Respondent has the burden of proof for the facts establishing such a duty [to mitigate] and the failure of Claimant to carry it out."); **CLA-173**, *Unión Fenosa Gas v. Egypt*, ¶ 10.126 ("The legal burden of proving such unreasonableness in this arbitration rests upon the Respondent."); **CLA-035**, *AIG v. Kazakhstan*, ¶ 10.6.4(4) ("The onus of proof on the issue of mitigation is always on the person pleading it – if he fails to show that the Claimant or Plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply."); **CLA-180**, *Cairn v. India*, ¶ 1887 (citing *AIG v. Kazakhstan*, ¶ 10.6.4.4.) ("...it is for the Respondent to prove the assertions or defences that it pleads, such as its mitigation defence. To discharge that burden, the Respondent must show that the Claimants could reasonably have avoided the loss.").

¹³⁹ **CLA-180**, *Cairn v. India*, ¶ 1888 (citing *Magyar v. Hungary*, ¶ 427); see **CLA-171**, *Marboe*, ¶ 25.44 (noting that "this principle [of the duty to mitigate] should not be applied too strictly, as this could unjustly favour the wrongdoer.").

¹⁴⁰ **CLA-181**, *Magyar v. Hungary*, ¶ 5.

land proposals for the expropriated property.¹⁴¹ The tribunal rejected the defense because “the record contains ample evidence of the Claimants’ multiple efforts to mitigate the consequences of the loss of access to the land.”¹⁴² The tribunal relied on the claimants’ communications with the respondent to secure replacement land, resulting in respondent offering only a smaller parcel located over 50km from the expropriated site.¹⁴³ The tribunal did not second-guess the claimants’ business judgment declining that offer since mitigation was in its own interests, and therefore declined to “reduce the amount of compensation on the basis of the alleged lack of mitigation.”¹⁴⁴

- 5.13. Similarly, here, Akgun repeatedly sought to have Respondent offer it a suitable alternative site for ETIZ. The issue was first discussed in the meetings that Akgun held with the President and the Prime Minister’s advisor in December 2014 when those officials admitted their land allocation “mistake” to Akgun.¹⁴⁵ Akgun again raised the issue in follow-up correspondence over the subsequent several months in 2015.¹⁴⁶ Akgun’s sincerity in this regard was manifest from Mr. Yusuf Akgun’s visit to Ethiopia in August 2015 to meet with Ethiopian authorities and visit potential alternative sites.¹⁴⁷ Following that visit, Akgun twice wrote to Respondent asking for a formal offer of a new site and the business terms for such an offer, but Respondent failed to provide such

¹⁴¹ *Id.*

¹⁴² *Id.*, ¶¶ 377, 427.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, ¶¶ 427-428.

¹⁴⁵ **C-084**, Details of the Meeting with President Dr. Mulatu Teshome dated 9 December 2014; **C-085**, Details of the Meeting with the Special Advisor to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014; **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014; Yusuf Akgun 1st Statement, ¶¶ 5.20-5.21; Witness Statement of Yunus Akgun dated 19 November 2020 (“Yunus Akgun 1st Statement”), ¶¶ 7.6-7.15; Ufuk Akgun Witness Statement dated 17 October 2021 (“Ufuk Akgun Statement”), ¶ 3.9.

¹⁴⁶ **YUN-013**, Letter from Akgun Construction to Prime Minister dated 24 March 2015, p. 5 (“... we still preserve our good willing [sic] for current location of project’s land movement to another land which is close to the main artery roads and railways, in case that all of our expenses for the current land will be repaid.”); **C-138**, Letter from Akgun Construction to Ministry of Industry dated 16 April 2015 (“... it has been accepted that there was a mistake at selection of allocated land for Industrial Zone project ... we kindly would like to request your Ministry ... to respond to our stated letter or submit us a written decision letter regarding this issue”); **C-139**, Letter from Akgun Construction to Ministry of Industry dated 30 April 2015.

¹⁴⁷ **C-089**, Handwritten notes of meeting with Ethiopian State Minister Tadesse Haile dated 20 August 2015; **C-140**, Video taken on 21 August 2015 during a site visit in Ethiopia; **C-141**; Transcription of the video taken on 21 August 2015 during a site visit in Ethiopia; Yusuf Akgun 1st Statement, ¶ 5.25.

an offer or even a skeletal set of terms.¹⁴⁸ The alternative sites Respondent speculates that it showed to Akgun were at a far greater distance from Addis Ababa (77 km, 92 km, and 279 km, respectively)¹⁴⁹ than the original site (30 km), and the original site's proximity to Addis Ababa was one of the factors that Akgun viewed as primary to its success.¹⁵⁰ Against these factors, the best evidence Respondent mustered was a video clip of Mr. Yusuf Akgun remarking that one of the sites he visited potentially "could do," provided there were some additions.¹⁵¹ The Tribunal rightly observed that Respondent failed to provide "any direct evidence ... about the circumstances of the sites which were offered to Akgun."¹⁵² Identifying the principle infirmity with Respondent's defense, the Tribunal President observed:

So what I don't see in the record of any substance is on--the Ethiopian government side saying, "You can't use the site that we have originally signed up--you originally signed up for. And we offer you three, five" --whatever number of sites there are-- "Here is a description of each of them." All we have is the Akguns evidence by way of witness statement of a day's drive, almost as a tourist, rather than anyone who actually accompanied them with either knowledge or authority to say, "Look, we are going to show you these sites as alternatives, and let us explain to you the advantages of these sites and why it would be an adequate substitute."¹⁵³

- 5.14. That is the state of the evidence; indeed, it became clear during the hearing that not only was Respondent's evidence scant concerning the alternative sites that it showed Akgun,¹⁵⁴ Respondent never actually offered any of the

¹⁴⁸ **C-149**, Letter from Akgun Construction to Ministry of Industry and President of the Oromia Regional State dated 7 September 2015; **C-088**, Letter from Akgun Construction to President Dr. Mulatu Teshome et al. dated 2 November 2015; Yusuf Akgun 1st Statement, ¶ 5.26.

¹⁴⁹ See Claimant's Rejoinder, ¶¶ 2.53-2.54; Claimant's Closing Presentation, at 59-61; Hearing Tr., Day 5, 23:5-24:12, 27:19-27:25.

¹⁵⁰ Yusuf Akgun 1st Statement, ¶¶ 4.6-4.8; Hearing Tr., Day 3, 92:21-96:21; Claimant's Rejoinder, ¶ 2.52.

¹⁵¹ See Hearing Tr., Day 1, 226:23-228:12.

¹⁵² Hearing Tr., Day 3, 97:9-97:11; see *id.*, 106:11-20.

¹⁵³ Hearing Tr., Day 3, 101:18-102:5.

¹⁵⁴ See *supra* notes 152-153.

sites to Akgun.¹⁵⁵ Thus, Respondent is unable to fulfil its duty to prove facts to support a mitigation defense. Simply referring to Mr. Akgun's recorded statement that one of the sites he visited "could do" is not enough because the duty to mitigate is not judged by an "absolute" standard. This is underscored by the fact that Akgun twice wrote to Respondent *after* the date of the cited video (21 August 2015) to request a formal offer so that it could evaluate the terms and make an informed business decision but received no response.¹⁵⁶

- 5.15. Under such facts, the mitigation defense must fail. Unlike *Magyar Farming*, where claimants received an offer for alternative land, Akgun was not even given the chance to evaluate and choose among mitigation opportunities. Under a mitigation analysis, Akgun must at least have had data in hand that would have permitted it to make a reasoned business decision. Without such data – or offer – there are no facts by which this Tribunal may anchor an opinion that Akgun unreasonably failed to mitigate.
- 5.16. To the extent Respondent points to subsequent industrial developments in the region of the alternative sites,¹⁵⁷ that evidence is irrelevant since mitigation "must be assessed by the information and data that was available to [claimants] when they allegedly failed to mitigate their loss."¹⁵⁸
- 5.17. The Tribunal may likewise be guided here by the analysis in *A/G*. Although the *A/G* tribunal concluded that the duty to mitigate should not apply in the investor-state context, it nevertheless analyzed the applicable principles in circumstances like Akgun's. The claimant in *A/G* claimed that the respondent

¹⁵⁵ See Hearing Tr., Day 3, 95:16-96:24; Hearing Tr., Day 5, 23:5-23:18; 31:22-32:19; Hearing Tr., Day 6, 98:7-98:24.

¹⁵⁶ **C-149**, Letter from Akgun Construction to Ministry of Industry and President of the Oromia Regional State dated 7 September 2015; **C-088**, Letter from Akgun Construction to President Dr. Mulatu Teshome et al. dated 2 November 2015; Yusuf Akgun 1st Statement, ¶ 5.26; Hearing Tr. Day 3, 109:1-113:17.

¹⁵⁷ See Hearing Tr., Day 5, 19:9-19:20; 41:1-43:16.

¹⁵⁸ **CLA-180**, *Cairn v. India*, ¶ 1894; *Dunkeld v. Belize* suggests a different form of mitigation related to failure to exhaust administrative remedies. **CLA-183**, *Dunkeld International Investment Limited v. The Government of Belize*, PCA Case No. 2010-13, Award, 28 June 2016 ("*Dunkeld v. Belize*"), ¶¶ 195-199. But *Dunkeld* is not applicable for the reasons stated in **CLA-076**, *Bilcon v. Canada*, Award on Damages, ¶¶ 210-212, 217 ("... in the Tribunal's view it cannot be said that judicial review followed by a new [environmental assessment] would have restored to the Investors the same opportunity that they have lost. Judicial review would have offered a different remedy, with its own advantages and disadvantages, but it could not have fully mitigated the specific injury caused in this case.").

had expropriated its development project by re-appropriating the land during the design phase and re-assigning it.¹⁵⁹ The state told the investor that the project site originally allocated was no longer permitted and that the investor must use an alternative site.¹⁶⁰ The respondent's authorities admitted that they had "made a mistake" in the initial land allocation.¹⁶¹ The respondent orally offered a specific alternative site and to pay some of claimant's expenses, claimant's refusal of which, respondent argued, constituted a failure to mitigate because the alternative site was virtually identical and less than one kilometer away.¹⁶² For the claimants, moving to an alternative site involved new studies and a project re-design.¹⁶³ The tribunal rejected the defense, concluding that the claimant's reluctance to accept an alternative was reasonable, explaining that "[o]ne could not expect the Claimants to place much reliance on an oral offer made by the same authority ... who had breached written commitments."¹⁶⁴ The tribunal further cited to the fact that the respondent made "no authoritative statement" to the claimant that it would reimburse its wasted expenses.¹⁶⁵ The tribunal further looked to fact that the property had been specified in the parties' contract and the *sui generis* nature of real estate, noting that "[t]he project site had been deliberately chosen as a strongly preferred site; it had been duly fixed and determined by necessary certificates and permits."¹⁶⁶ Each of these factors contributed to the tribunal's rejection of the mitigation defense.

- 5.18. The Tribunal should reject the defense here for the same reasons. Because the right expropriated here was the right to develop the ETIZ project as the parties had agreed, Akgun was not obligated to accept an alternative site,

¹⁵⁹ **CLA-035**, *AIG v. Kazakhstan*, ¶¶ 1.1, 3.2.

¹⁶⁰ *Id.*, ¶ 10.6.2.

¹⁶¹ *Id.*

¹⁶² *Id.*, ¶¶ 10.6.2-10.6.3

¹⁶³ *Id.*, ¶ 10.6.2.

¹⁶⁴ *Id.*, ¶¶ 10.6.4(7), 10.6.5; *see also* **CLA-176**, *Middle East Cement v. Egypt*, ¶ 169 (rejecting defense of mitigation and concluding that "[a]n investor who has been subjected to a revocation of the essential license for its investment activity, three years earlier, has good reason to decide that, after that experience, it shall not continue with the investment activity, after the activity is again permitted.").

¹⁶⁵ **CLA-035**, *AIG v. Kazakhstan*, ¶¶ 10.6.4(7).

¹⁶⁶ *Id.*, ¶ 10.6.4; 10.6.5(1).

regardless of suitability.¹⁶⁷ There was no provision in the contract that compelled selection of an alternative site; to the contrary, the contract specified Respondent's liability for direct and indirect damages in the event an adverse decision caused the project to halt.¹⁶⁸ Further, the project site was linked with the project itself, as Respondent's site selection, in coordination with the characteristics Akgun needed for ETIZ's success, was a pre-condition to the lease agreement and subsequent project implementation.¹⁶⁹ Finally, Akgun nevertheless engaged with Respondent on selecting an alternative site that would meet the project's needs and not be encumbered by competing demands for the necessary resources, but, just as in *A/G*, Respondent never gave Akgun a firm commitment on either the site or the reimbursement of costs.¹⁷⁰ As the *A/G* tribunal observed, it could be considered neither "neglect[ful]" nor "unreasonable[]"¹⁷¹ for Akgun to be wary of embracing informal suggestions for resolution from a counterpart that had already abused Akgun's trust and admitted its mistake in wasting several years of Akgun's time and money.¹⁷² For these additional reasons, the defense of failure to mitigate must be rejected.¹⁷³

¹⁶⁷ See generally **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 ("2012 ETIZ Agreement").

¹⁶⁸ **C-009**, 2012 ETIZ Agreement, Art. 11.11.

¹⁶⁹ See **C-009**, 2012 ETIZ Agreement, Art. 1 (defining "IZ" and "Land"), Art. 3.1 (setting forth purpose of lease), Art. 4 (setting forth location of land); Yusuf Akgun 1st Statement, ¶ 4.6 ("Because the location of ETIZ was critical to its success, I told President Gemedo and his team that the land must have specific characteristics: it must be located near a major population center like Addis Ababa, be connected to major transportation links, and have adequate water and energy resources.")

¹⁷⁰ *Supra* notes 145-148.

¹⁷¹ **CLA-035**, *A/G v. Kazakhstan*, ¶ 10.6.5(3).

¹⁷² **C-084**, Details of the Meeting with President Dr. Mulatu Teshome dated 9 December 2014; **C-085**, Details of the Meeting with the Special Advisor to the Prime Minister Dr. Arkebe Oqubay dated 11 December 2014; **C-017**, Letter from Akgun Construction to Ministry of Industry dated 19 December 2014; Yusuf Akgun 1st Statement, ¶¶ 5.20-5.21; Yunus Akgun 1st Statement, ¶¶ 7.6-7.15; Ufuk Akgun Statement, ¶ 3.9.

¹⁷³ For good measure, Akgun notes here Respondent's attempt nearly two years later, in 2017, suggesting that Akgun engage in a project of a smaller scale focused on the highly pollutive textile industry using the same site in the Legedadi watershed that it forbade Akgun in 2014 purportedly due to environmental concerns. Yusuf Akgun 2nd Witness Statement, ¶¶ 5.1-5.3; **YUS-19**, Email thread from 19 December 2016 through 30 March 2017 between Anwar K. Yahia and Yusuf Akgun; **YUS-20**, Email thread from 19 December 2016 through 30 March 2017 between Anwar K. Yahia and Yusuf Akgun; **YUS-21**, Email from Anwar K. Yahia to Yusuf Akgun dated 7 June 2017; Hearing Tr., Day 4, 125:17-125:23 (testimony of Respondent's expert, Prof. Susan Murcott, admitting the highly hazardous nature

5.19. Ultimately, Respondent cannot summon facts sufficient to discharge its burden of proof. Akgun petitioned Respondent to provide an alternative site; followed up multiple times on the issue; travelled to Ethiopia and visited alternative sites; and made two written requests to Ethiopia to provide Akgun with terms and specific locations that it deemed suitable for ETIZ, but Ethiopia never did so.¹⁷⁴ Akgun was unable to force Ethiopia to present it with the terms for an alternative site. Short of blindly agreeing to place an industrial zone of indeterminate composition and size in an indeterminate location without any promise of compensation for its wasted costs, Akgun did all that a reasonable investor could do to mitigate its damages. There is no principled basis upon which to reduce Akgun's compensation under a "failure to mitigate" theory. For good order, however, Akgun in the next section will discuss how tribunals have used the "failure to mitigate" to affect quantum.

B. Effect of the Duty to Mitigate Damages on Quantum

5.20. The *Chorzów* full reparation principle is not varied by the failure to mitigate damages; rather, a finding of failure to mitigate reduces the amount of damages to reflect the "actual loss" suffered at respondent's hands under the theory that the respondent should not be liable for amounts by which the claimant's unreasonable conduct increases its damages.¹⁷⁵ Thus, the "failure to comply with [the duty to mitigate damages], if upheld by a tribunal, will have a limiting effect on the amount of recoverable damages."¹⁷⁶ Very few tribunals, however, have actually applied this principle to reduce a claimant's

of the textile industry). It cannot be said that Akgun was unreasonable in viewing this suggestion with great skepticism after the extraordinary controversy it had endured concerning that same site.

¹⁷⁴ *Supra* ¶¶ 5.13-5.14.

¹⁷⁵ See **CLA-184**, B. Sabahi et al., *Principles Limiting the Amount of Compensation*, in C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*.

¹⁷⁶ **CLA-178**, Ripinsky, §III.B; see **CLA-076**, *Bilcon v. Canada*, Award on Damages, ¶ 207 ("The Tribunal has doubts, however, that the Investors' duty to mitigate extends so far as to undo the injury (rather than limiting the consequent financial damages)."); **CLA-185**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, ¶ 1603 (admonishing that "the legal concept of contributory fault must not be confused with the investor's duty to mitigate its losses."); see also **CLA-046**, *MTD v. Chile*, ¶¶ 242, 246 (reducing damages by 50% under contributory fault theory due to investor's unwise business decision); **CLA-055**, *Occidental Petroleum v. Ecuador*, ¶¶ 662-687 (reducing damages under contributory fault theory due to claimant's failure to inform the state of a transfer of rights to a third party); **CLA-186**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, ¶ 1604.

damages;¹⁷⁷ indeed, the tribunals that have recognized the duty to mitigate damages have almost universally found that there was no basis to deem a claimant's conduct unreasonable and therefore rejected the defense.¹⁷⁸

- 5.21. The few cases that have reduced a claimant's damages for failure to mitigate pointed to specific facts in support. For instance, in *BRIDAS v. Turkmenistan*, the tribunal recognized a duty to mitigate and held that claimants failed in that duty by continuing to incur costs in operating their venture after the export ban at issue in the case came into effect and despite the tribunal's invitation to the parties to jointly operate the venture and place the proceeds in escrow during the pendency of the litigation — an offer that claimant refused.¹⁷⁹ Thus, the

¹⁷⁷ See **CLA-187**, *Bridas S.A.P.I.C et al. v. Government of Turkmenistan et al.*, ICC Case No. 9058/FMS/KGA, Final Award, 26 January 2001 ("*Bridas v. Turkmenistan*"); **CLA-188**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020 ("*Bridgestone v. Panama*"); **CLA-183**, *Dunkeld v. Belize*; **CLA-020**, *EDF v. Argentina*.

¹⁷⁸ See **CLA-181**, *Magyar v. Hungary*, *supra* note 144; **CLA-189**, *Achmea B.V. (formerly known as Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 320 (the tribunal held that the suspension of operations was "a reasonable defensive measure, intended to minimize the risk of further losses," and accordingly rejected the respondent's argument that the claimant failed to mitigate loss); **CLA-173**, *Unión Fenosa Gas v. Egypt*, ¶ 10.132 ("The Tribunal has considered the other matters raised by the Respondent to support its allegation that the Claimant's compensation should be reduced for its unreasonable failure to mitigate its losses. The Tribunal rejects them all. ... Moreover, it cannot be forgotten that the Claimant's predicament requiring such mitigatory conduct was caused by the Respondent's international wrong under the Treaty."); **CLA-176**, *Middle East Cement v. Egypt*, ¶¶ 168-169, 171 (rejecting failure to mitigate, noting the burden of proof and accepting claimant's explanation that alternatives were not economically feasible and rejecting respondent's argument that claimant should have resumed its activities once the law at issue had been repealed); **CLA-174**, *CME v. Czech Republic*, ¶¶ 482-483 (rejecting respondent's claim that claimant failed to mitigate its losses where claimant made multiple attempts through practical and political means to redress the consequences of respondent's conduct in breach of the treaty); **CLA-072**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 ("*SPP v. Egypt*"), ¶ 172 (assuming, *obiter dictum*, that "[w]hile the Claimants may have been under an obligation to mitigate the damages incurred as a result of the cancellation of the Pyramids Oasis Project, such an obligation is not so broad and all encompassing as to require the Claimants to accept an unsuitable alternative site that was never contemplated by the Parties' agreement"); **CLA-076**, *Bilcon v. Canada*, Award on Damages ¶ 217 ("The Tribunal also considers that it was not unreasonable for the Investors to conclude, as they did, that a do-over of the environmental assessment would have been costly."); **CLA-175**, *HEP v. Slovenia*, ¶ 216 ("The Tribunal finds that HEP generally acted reasonably in its dispatch decisions and the Tribunal will not, therefore, second guess those decisions."); **CLA-182**, *National Grid v. Argentina*, ¶ 273 (where Claimant sold its business in order to mitigate its damages, which respondent characterized as a "self-inflicted wound" that increased the damages, the tribunal rejected that proposition, concluding that it "does not intend to interpose its business judgment for that of the owners at the time."); **CLA-180**, *Cairn v. India*, ¶ 1896-1897 ("In the circumstances, the Tribunal finds that the Claimants reasonably attempted to mitigate their losses, and should not be blamed for the failure of these efforts."); **CLA-190**, *Amco Asia Corporation et al. v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 31 May 1990, ¶¶ 167-169; see **CLA-035**, *AIG v. Kazakhstan*, *supra* notes 164-166.

¹⁷⁹ **CLA-187**, *Bridas v. Turkmenistan*, p. 10.

panel deducted approximately 10% from the value of claimant's lost profits to account for that failure, which related to the additional costs that the claimants incurred by virtue of continuing to operate their investment after the state's wrongful conduct.¹⁸⁰

- 5.22. Here, Akgun's primary claim for damages is lost profits in an amount which is reduced to present value as of July 2014.¹⁸¹ Thus, it is questionable whether there is any theoretical basis for further reducing lost profits by the amount of costs later incurred, such as in *BRIDAS*, because the lost profits calculation does not include the sunk costs that Akgun incurred after the date of harm. In any event, if this Tribunal were to follow *BRIDAS* and reduce lost profits by expenses incurred after the date of harm, that amount is small here because Akgun incurred the bulk of its expenses from 2009 until July 2014.¹⁸² Thus, even broadly applying *BRIDAS* here, the largest sum that the Tribunal could deduct is USD 54,814 – *i.e.*, the amount of costs Akgun incurred after July 2014.¹⁸³ Akgun's costs after the date of harm, however, relate largely to the mitigation of damages – *i.e.*, attempting futilely to address Respondent's EIA concerns and maintaining staff in Ethiopia in hopes of resuming the project.¹⁸⁴ Expenses incurred in pursuit of damage mitigation should not be considered in calculating a reduction in compensation due to a failure to mitigate.¹⁸⁵ The Tribunal should also note that Akgun actively mitigated its damages by over USD 760,000 by selling some of its equipment.¹⁸⁶

¹⁸⁰ *Id.*

¹⁸¹ Expert Report of Laura Hardin dated 19 November 2020 ("A&M Report"), ¶¶ 61, 76-78, 107-111, 152; Appendix 4.

¹⁸² A&M Report, AM-Appendix 5.5 (detailing "sunk" incurred totaling USD 54,814 after July 2014 out of total sunk costs of USD 4,955,131) *see also* **AM-297** (re-submitted with Claimant's Rejoinder) (for the sake of clarity, Akgun notes that the amount of USD 688,019 reflected in AM-Appendix 5.5 for the ETIZ master plan development was incurred in 2009-2013, although the vendor's document attesting to the amounts paid is dated 2020).

¹⁸³ *See* A&M Report, AM-Appendix 5.5.

¹⁸⁴ *See id.*

¹⁸⁵ *See* **CLA-077**, UNIDROIT Principles Art. 7.4.8 (2) ("The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.").

¹⁸⁶ A&M Report, AM-Appendix 5.4 (reducing costs by USD 760,794 to account for later sale of equipment).

- 5.23. The tribunals in *EDF* and *Bridgestone v. Panama* also took a highly fact-based approach to reducing damages, but those cases tend to demonstrate by contrast why such a reduction is not warranted here. The *EDF* tribunal reduced the claimant's damages because it had entered into a share purchase agreement related to its investment that conferred on the buyer any benefits from a change in the domestic law that gave rise to claimant's claim.¹⁸⁷ The tribunal deemed unreasonable claimant's failure to include provisions in the agreement that would have allowed it to recoup its losses.¹⁸⁸ The tribunal then imputed to claimant a 50% interest in the foregone benefits in the agreement and applied that percentage to specific later transactions that inured to the buyer's benefit, discounted to the date of harm that the claimant used for its damages.¹⁸⁹ In *Bridgestone*, although it ultimately rejected liability, the tribunal, in *dictum*, accepted in principle the argument that claimant's damages could be reduced because it had a contractual right to call on its joint venture partner to cover 50 percent of its losses and it could have called on that right but instead sought the full amount of loss from the respondent.¹⁹⁰
- 5.24. Here, there is no similar contractual mechanism whereby Akgun could have recouped its losses in favor of seeking damages from Respondent. Moreover, the *EDF* tribunal had contemporaneous data and facts regarding actual transactions to arrive at its calculation; here, by contrast, there are no facts or data that would permit this Tribunal to make the sort of principled calculation that the *EDF* tribunal made nor a clear contractual mechanism for third-party recoupment such as in *Bridgestone*. Respondent here is solely answerable to Akgun for its damages.
- 5.25. In sum, should the Tribunal conclude that some amount should be subtracted from Akgun's quantum of damages for failure to mitigate, Akgun submits that such amount may not exceed the USD 54,814 in costs Akgun incurred after July 2014.

¹⁸⁷ **CLA-020**, *EDF v. Argentina*, ¶¶ 1307-1309.

¹⁸⁸ *Id.*, ¶¶ 1310-1311.

¹⁸⁹ *Id.*, ¶ 1311.

¹⁹⁰ **CLA-188**, *Bridgestone v. Panama*, ¶ 565.

6. COSTS – QUESTION 2.5

A. The Applicable Standard

- 6.1. The UNCITRAL Arbitration Rules¹⁹¹ Art. 42 establishes a principal rule that the losing party pays the costs of the prevailing party:

The costs of the arbitration **shall in principle be borne by the unsuccessful party or parties**. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.¹⁹²

- 6.2. Art. 42 reflects a general and preferred approach in investor-state arbitrations that shifts costs in the prevailing party's favor.¹⁹³ The Queen Mary University of London and White and Case survey on preferred practices in arbitration indicates that "[t]ribunals allocate costs according to the result in 80% of arbitrations, and leave parties to bear their own costs and half the arbitration costs in 20%."¹⁹⁴ In arbitrations conducted under the UNCITRAL Rules,

¹⁹¹ See Procedural Order No.1 dated 4 December 2020 ("PO1"), ¶ 4.1 (setting the 2013 version of the Rules as applicable to this dispute).

¹⁹² UNCITRAL Arbitration Rules 2010 (with new article 1, paragraph 4, as adopted in 2013), Art. 42(1) (emphasis added).

¹⁹³ See, e.g., **CLA-045**, *Pezold v. Zimbabwe*, ¶ 1002; **CLA-004**, *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award dated 19 August 2005 ("*Eureko v. Poland*"), ¶ 261; **CLA-029**, *ADC v. Hungary*, ¶¶ 531-533; **CLA-032**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 ("*Gemplus v. Mexico*"), ¶¶ 17-22 to 17-24. See also **CLA-191**, M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, TDM 1 (2014) ("Hodgson"), p. 7 (pointing out that the costs-follow-the-event approach reflects the general trend of tribunals in recent years and shall indeed be preferred); **CLA-192**, J.R. Profaizer et. al., *The Guide to Damages in International Arbitration- Costs*, GAR (4th ed, 1 February 2021) ("Profaizer"), p. 3 (noting that the costs-follow-the-event approach "has become the prevailing approach in international arbitrations in recent years"); **CLA-193**, J.P. Hugues Arthur, *Where do we Stand? Where Should we go? An Assessment of Recent Costs Allocation Trends in International Commercial and Investment Arbitration*, TDM 6 (2015), p. 10 (observing that "by comparing the results of prior studies to the most recent, it appears that investor-State arbitration case law on costs allocation is currently evolving towards shifting the costs to a losing party whilst taking into account particular circumstances of each case that may distort this allocation") and p. 22 (concluding that "investment arbitration is currently evolving towards the endorsement of the English system taking into account particular circumstances.").

¹⁹⁴ **CLA-194**, Queen Mary University and White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* ("Queen Mary University Survey"), p. 38 (also noting that "only 5% prefer this latter approach, which shows there is a desire for tribunals to allocate costs according to the result more frequently than they are currently doing").

tribunals followed the principal rule in the majority of cases, and reversed the rule only in exceptional cases.¹⁹⁵

- 6.3. Consequently, as will be discussed in Section i below, should Claimant prevail, Respondent shall bear Claimant's costs and expenses in connection with this arbitration. Furthermore, as will be addressed in Section ii, several circumstances associated with Respondent's conduct in this case additionally call for the Tribunal to order Respondent to cover Claimant's costs. Finally, Claimant will explain in Section iii below how the costs shall be allocated should Respondent prevail.

(i) The Principal Rule Must Be Followed if Claimant Prevails

- 6.4. The principal rule requiring apportionment of costs in favor of the prevailing party provides that a tribunal should assess whether a party's case was successful on the whole.¹⁹⁶ Furthermore, "the important question is not whether every substantive argument or procedural application by the winning party was ultimately successful but whether it was reasonably made."¹⁹⁷ Consequently, if the Tribunal finds that Claimant has proved an accurate version of events, successfully overcome Ethiopia's jurisdictional objections, established valid and reasonable claims under the Treaty, and obtained an award for damages, it must order Respondent to cover Claimant's costs associated with this arbitration.
- 6.5. There are no circumstances mandating a different finding under UNCITRAL Rules Art. 42. Claimant commenced this arbitration in good faith, its claim is not frivolous, and it presented its case in an efficient manner and in compliance

¹⁹⁵ See **CLA-191**, Hodgson, p. 2 (noting that in arbitrations conducted under the UNCITRAL rules, tribunals followed the principal approach in more than two thirds of cases).

¹⁹⁶ See, e.g., **CLA-030**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 ("*Gold Reserve v. Venezuela*"), ¶ 862 (shifting the claimant's costs to the respondent in light of the fact that the outcome of the case was "substantially" in favor of claimant); **CLA-068**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 ("*Tethyan v. Pakistan*, Award"), ¶ 1852 (shifting the claimant's costs to the respondent in light of claimant's "on balance" success); **CLA-045**, *Pezold v. Zimbabwe*, ¶¶ 1002-1003 (noting that that costs shall be borne by the respondent since claimants have "clearly" prevailed in respect of both jurisdiction and merits); **CLA-192**, Profaizer, p. 3-4 (referring to consideration of "parties' ultimate success" for the purpose of cost allocation).

¹⁹⁷ **CLA-191**, Hodgson, p. 5. See also **CLA-065**, THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (3rd ed., Law Business Research, 2018) ("GAR GUIDE ON DAMAGES, 2018"), p. 323 (noting that "where the tribunals found that the prevailing claimant acted reasonably in pursuing its claim in arbitration and was left with no choice other than to enter into arbitration, given the unreasonable position adopted by the other side, such circumstances were considered in support of allocating legal fees.")

with the Tribunal's instructions, from timely submitting its pleadings to adhering to the Tribunal's preferred paragraph numbering in its submissions.¹⁹⁸

6.6. Furthermore, Claimant's costs are reasonable and proportionate to the amount in dispute and complexity of the issues raised (including because of Respondent's unfounded assertions¹⁹⁹). Claimant's costs total to USD 7,249,242.08 and are set out in Annex A to this submission.²⁰⁰

6.7. Notably, the fact that Claimant's costs may be higher²⁰¹ than Respondent's costs shall not preclude the Tribunal from finding them reasonable and payable. The *Gemplus* tribunal explained:

It is well-known that legal costs incurred by respondent state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different [...]²⁰²

6.8. Recall, too, that Claimant presented a quantum expert²⁰³ whose report and trial work forms a significant cost while Respondent chose not to retain such an expert and therefore did not incur such costs.

¹⁹⁸ See PO1, ¶ 10.6.

¹⁹⁹ See *infra* Section 6.A.ii.

²⁰⁰ Annex A, Breakdown of Claimant's Costs. These costs have been calculated through 19 October 2022 and do not include costs associated with the preparation of this post-hearing submission. Claimant reserves its right to update its costs calculation at a later stage of these proceedings.

²⁰¹ A potential point of criticism as to Claimant's legal fees may come from the fact that Claimant engaged four law firms to represent its case in this arbitration. Claimant submits that it was reasonable as Akgun did it to handle individual aspects of its case, as its matter involved evidence collection and review in Turkish, English and Amharic, and the particular duties of brief writing and trial presentation were divided among the firms.

²⁰² **CLA-032**, *Gemplus v. Mexico*, ¶ 17-25 (also indicating Claimant's costs to be recoverable by Respondent to be around USD 5.4 million notwithstanding them being 45% higher than that of Respondent's). See also **CLA-029**, *ADC v. Hungary*, ¶¶ 533, 535 (observing that "[i]t is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof"); **CLA-192**, *Profaizer*, p. 5 (noting that claimants generally "spend more pursuing their claims than respondents").

²⁰³ See generally A&M Report.

(ii) Respondent's Conduct Further Justifies Allocation of Costs in Favor of Claimant

- 6.9. Claimant submits that Respondent's conduct in these proceedings further justifies Claimant's position as to the apportionment of the costs in Claimant's favour.
- 6.10. Many investment tribunals have ordered a party to pay the costs of arbitration where the party engaged in unreasonable and improper behaviour that thereby unnecessarily increased arbitration costs.²⁰⁴ PO1 also requires the Tribunal to take into account the Parties' conduct of the arbitration when allocating the costs.²⁰⁵
- 6.11. In this case, Respondent, *inter alia*,
- i. raised frivolous and superfluous claims, including unfounded and belated jurisdictional objections and baseless counterclaims lacking in detail;
 - ii. employed disingenuous tactics in its case presentation; and
 - iii. failed to comply with its procedural obligations.
- 6.12. Respondent's failures are discussed in more detailed below.

a. Ethiopia Presented Unfounded and Superfluous Jurisdictional Objections and Counterclaims

- 6.13. Respondent submitted unfounded and preposterous objections to the jurisdiction of this Tribunal.²⁰⁶ In particular, Respondent's objections as to the

²⁰⁴ See **CLA-132**, *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 ("*Oxus v. Uzbekistan*"), ¶ 1038. See also **CLA-192**, Profaizer, p. 4; **CLA-065**, GAR GUIDE ON DAMAGES, 2018, p. 322; **CLA-194**, Queen Mary University Survey, p. 41.

²⁰⁵ See PO1, ¶ 19. The relevant provision entitled "Conduct of the Parties" states:

19.1. Parties shall conduct themselves in a manner consistent with the efficient use of time and resources. The Tribunal shall take into account when using its discretion to allocate costs any unreasonable behaviour by a Party.

19.2. Unreasonable behaviour could include, but is not limited to, (i) excessive document requests; (ii) excessive legal argument; (iii) excessive cross-examination; (iv) dilatory tactics; (v) exaggerated claims; (vi) failure to comply with procedural orders and directions; (vii) unjustified interim applications; and (viii) unjustified failure to meet the deadlines contained in this, or any other, order.

²⁰⁶ See Statement of Reply, Section 3; Claimant's Rejoinder, Section 3.

existence of Claimant's investment, the nature of the Claimant's claims, the operation of the dispute resolution provision in the ETIZ Agreement and its objections to the operation of the umbrella clause were frivolous, completely lacking in support, and contradicted investment tribunals' prevailing case law.

- 6.14. Furthermore, Respondent failed to bring all its objections at once. For example, Respondent did not initially object that the Treaty's MFN clause may incorporate umbrella clause protection.²⁰⁷ Yet, it advanced such defence in its Rejoinder,²⁰⁸ and the related issue is now on the Tribunal's list of issues to be addressed in this post-hearing submission.²⁰⁹ Had Respondent raised its objection timely,²¹⁰ the Parties would have already exchanged their views on the issue thereby avoiding the additional time and cost of addressing it here.
- 6.15. In addition, Respondent's counterclaims case completely lacks detail, substantiation, and merit. It also flouted the requirements set out in the UNCITRAL Arbitration Rules.²¹¹ First, Ethiopia invented unfounded and ill-reasoned concepts to establish jurisdiction in disregard of the most basic principles of arbitration and public international law for the protection of foreign investments.²¹² Second, Ethiopia failed to (i) establish a clear case with an adequately identifiable dispute, (ii) substantiate its counterclaims, and (iii) show that Akgun has committed any breach of the 2012 ETIZ Agreement.²¹³ It also came up with an absurd way to calculate its proffered damages.²¹⁴
- 6.16. Because Respondent's counterclaim submission lacked the requisite support, Claimant was left to articulate Respondent's arguments for it and then supply lengthy submissions to address any possible aspect of the counterclaim.²¹⁵

²⁰⁷ Statement of Reply, ¶ 3.84.

²⁰⁸ Ethiopia's Rejoinder, ¶¶ 270-281; Claimant's Rejoinder, ¶ 3.78.

²⁰⁹ PO4, Question 2.2.1.

²¹⁰ Claimant further notes that Respondent failed to address Claimant's criticism of its position set out in Respondent's Rejoinder at the hearing.

²¹¹ Statement of Reply, ¶¶ 7.72-7.73.

²¹² *Id.*, ¶¶ 7.8-7.69; Hearing Tr., Day 2, 39:12-56:13.

²¹³ Statement of Reply, ¶¶ 7.72-7.99; Hearing Tr., Day 2, 56:14-65:15.

²¹⁴ Statement of Reply, ¶¶ 7.100-7.113; Hearing Tr., Day 2, 56:16-67:24.

²¹⁵ Statement of Reply, ¶¶ 7.74-7.99. *See also id.*, ¶¶ 5.113-5.121, 5.189 (discussing similar procedural failures in Respondent's case on the merits).

b. Ethiopia Employed Disingenuous Tactics in Presenting Its Case

- 6.17. Ethiopia conducted these proceedings disingenuously, with the intent to escape liability for its unlawful actions. As discussed in Claimant's Statement of Reply, Ethiopia ignored numerous facts inconvenient to its Defense,²¹⁶ based its case on demonstrably wrong contentions and made numerous contradictory statements.²¹⁷ Ethiopia based its defence on the EIA process, but as Claimant has shown²¹⁸ Ethiopia's EIA-related arguments bear little resemblance to the contemporaneous reality on the ground in Ethiopia and the parties' actual course of dealing.
- 6.18. Ethiopia also made its arguments a difficult-to-discern moving target. Ethiopia filed its Preliminary List of Issues and two memorials. However, the Final List of Issues it submitted after the written submissions stage was detached from its formulation of issues in its Preliminary List of Issues and how it pled the case in its written submissions.²¹⁹ Respondent's oral submissions at the hearing suffered from the same defect as they conflicted with Respondent's written pleadings.

c. Failure to comply with procedural obligations

- 6.19. Respondent dishonored several procedural obligations. It failed to comply with the Tribunal's orders on document production (Section 1); it violated PO1 in other respects (Section 2) and it delayed its payment of the advance (Section 3).

1) Document Production Related Violations

- 6.20. Paragraph 11.8 of PO1 provides:

Documents which are ordered by the Tribunal to be produced must be so produced promptly and in accordance with the Tribunal's instructions. Parties should

²¹⁶ *Id.*, ¶¶ 1.5-1.6.

²¹⁷ *Id.*, ¶ 1.7.

²¹⁸ *Id.*, Section 2; Claimant's Rejoinder, Section 2; Hearing Tr., Day 1, 3:18-66:9; Day 9, 2:15-61:11.

²¹⁹ *Compare* Respondent's Final List of Issues dated 22 April 2022 *with* Respondent's Preliminary List of Issues dated 31 March 2021.

endeavour to ensure that the disclosure process is orderly and not disruptive.

- 6.21. As explained below, Respondent disrespected this provision and unilaterally relaxed its document production obligations, forcing Claimant to draft and submit numerous lengthy emails and applications pointing to various deficiencies in Respondent's document production in an attempt to make Respondent comply with the Tribunal's Order on document production.²²⁰ This severely disrupted the preparation of Claimant's Reply, unnecessarily increased Claimant's costs, and complicated the dispute's resolution.
- 6.22. Further to the Tribunal's Order on Parties' document production requests,²²¹ Respondent failed to i) produce documents that it identified existed, ii) produce documents which the Tribunal expressly ordered Respondent to produce, and iii) respond to numerous document requests altogether.²²² Even after Claimant identified numerous deficiencies in Respondent's response, Respondent ignored most of Claimant's comments, therefore leaving its document production deficient and its related obligations unperformed.²²³
- 6.23. Importantly, Respondent eventually admitted that it did not have possession, custody or control over some of the documents ordered to be produced.²²⁴ Respondent's admission that it lacks any information or documents to show, e.g., the proportion of projects falling within the categories of projects outlined in its Directive No. 1/2008 for which it required EIA²²⁵ is itself powerful evidence of Respondent's arbitrary application to Claimant of its so-called EIA

²²⁰ **C-161**, Emails between Molly Wells, Counsel for Claimant and Jackson Shaw Kern, Counsel for Respondent dated 8-22 September 2021 ("Document Production Related Correspondence"), Ms. Wells' email of 8 September 2021. *See also* Tribunal Communication No. 28 dated 2 August 2021, Annex A, Claimant's Stern Schedule (Final Decision).

²²¹ Tribunal Communication No. 28 dated 2 August 2021, Annex A, Claimant's Stern Schedule (Final Decision).

²²² **C-161**, Document Production Related Correspondence, Ms. Wells' email of 8 September 2021.

²²³ *Id.*, Mr. Kern's email of 10 September 2021 and Ms. Wells' email of 13 September 2021.

²²⁴ *Id.*, Mr. Kern's email of 10 September 2021 and Mr. Kern's email of 15 September 2021.

²²⁵ *See* Tribunal Communication No. 28 dated 2 August 2021, Annex A, Final Decision on Claimant's Stern Schedule Request 12; **C-161**, Document Production Related Correspondence, Mr. Kern's email of 15 September 2021 (confirming Respondent lacks responsive information or documents to Claimant's request number 12, among others).

requirement. Claimant is therefore requesting the Tribunal to draw adverse inferences from Respondent's failure to produce such evidence.

- 6.24. Furthermore, in finally agreeing to produce one document that it identified as responsive in its Response to Claimant's request (*i.e.*, the Kilinto Industrial Zone EIA, or "Kilinto EIA"), Respondent sought to redact part of the document allegedly because it "combines matters beyond the scope of the request and contains confidential information and irrelevancies unrelated to the matters before this Tribunal which the Respondent cannot disclose."²²⁶ It further added that "the EIA concerns matters unrelated to the Kilinto Industrial Park itself, such as information about other past projects" which is "unrelated and extraneous information ... uncovered by the order."²²⁷
- 6.25. Claimant disagreed that the document's content is "beyond the scope" of Claimant's request, because it apparently exists within the Kilinto EIA that this Tribunal ordered Respondent to produce.²²⁸ Claimant opposed Respondent's unsubstantiated request and made a formal application to the Tribunal requesting it to direct Respondent to comply with the Tribunal's order on document production²²⁹ and produce the outstanding responsive documents, including an unredacted version of Kilinto EIA.²³⁰
- 6.26. The Tribunal issued an order directing Respondent to produce the outstanding documents.²³¹ As for the Kilinto EIA, the Tribunal allowed Respondent to produce the Kilinto EIA in the redacted form.²³² Claimant notes that Respondent submitted the Kilinto EIA on the day of Claimant's filing of its

²²⁶ **C-161**, Document Production Related Correspondence, Mr. Kern's email of 15 September 2021.

²²⁷ *Id.*, Mr. Kern's email of 21 September 2021. Respondent repeated its representation in its email to the Tribunal dated 7 October. See Email from Jackson Shaw Kern, Counsel for Respondent to the Tribunal dated 7 October 2021 (stating "Respondent confirms that the passages intended to be redacted are completely and entirely unrelated to the Kilinto Industrial Park in any way, shape, or form, so as to fall outside of the Tribunal's narrow order.").

²²⁸ **C-161**, Document Production Related Correspondence, Ms. Wells' email of 22 September 2021.

²²⁹ At the time, Respondent still had not produced other outstanding responsive documents, such as the letter through which the Kilinto EIA was approved by the Ethiopian government.

²³⁰ Claimant's application to the Tribunal dated 22 September 2021, pp. 2-5.

²³¹ Tribunal Communication No. 33 dated 30 September 2021, ¶ 16.

²³² Procedural Order No. 2 dated 18 October 2021.

Statement of Reply thereby depriving Claimant of the right to incorporate it in its submission.²³³

- 6.27. As it turned out, Respondent's allegations with respect to the Kilinto EIA were untrue. Claimant located an unredacted copy of the EIA while preparing its Statement of Reply and submitted it into the record as C-107.²³⁴ The unredacted version of the Kilinto EIA revealed that the material redacted by Respondent was indeed within the scope of the requests to produce, but was detrimental to Respondent's case, which is why it insisted on redaction.
- 6.28. In its letter to the Tribunal dated 3 December 2021, Claimant brought the contents of the redacted material and Respondent's malicious behavior to the Tribunal's attention.²³⁵ In particular, it noted that the text redacted by Respondent is not "unrelated to Kilinto" or "confidential." Rather, it provided important baseline information regarding the area in which the Kilinto Industrial Park was to be situated.²³⁶ Claimant also demonstrated that the version of the Kilinto EIA that Respondent submitted in response to Claimant's Document Production Request was not the final version. As Respondent later confirmed,²³⁷ the version **Claimant independently located** was final rather than Respondent's produced document. Respondent thus completely failed to discharge its document production obligation *vis-à-vis* Claimant regarding the Kilinto EIA.
- 6.29. In addition to taking Respondent's procedural misconduct into consideration in its allocation of costs, Claimant requests that this Tribunal draw adverse inferences from Respondent's violations of its document production obligations concerning the Kilinto EIA. Respondent rests its defense on the alleged EIA requirement as well as Claimant's alleged failure to fulfill the same in providing what Respondent asserts was an inadequate EIA. Yet, comparing the Kilinto EIA, which Respondent approved, with Claimant's EIA, which

²³³ **C-162**, Email from Jackson Shaw Kern, Counsel for Respondent to Counsel for Claimant dated 22 October 2021.

²³⁴ **C-107**, Updated Environmental and Social Impact Assessment for Kilinto Industrial Park dated March 2017.

²³⁵ Claimant's application to the Tribunal dated 3 December 2021, pp 3-6.

²³⁶ *Id.*, p. 5.

²³⁷ Respondent's email to Claimant and Tribunal dated 5 December 2021 (confirming C-107 was the responsive version and NOT the version Respondent produced as responsive).

Respondent rejected, reveals that Respondent's stated reason for rejecting Claimant's EIA was pretextual. In particular, the redacted text reveals that Respondent's complaints regarding the water treatment plan in Claimant's EIA were pretextual because it confirms that almost all the industries in and around Addis Ababa lacked any wastewater treatment system whatsoever.²³⁸ That Respondent's stated reason for thwarting Claimant's investment was pretextual supports almost all of Claimant's claims and the Tribunal is requested to accept Claimant's contention as proved.²³⁹

2) Violations of PO1

- 6.30. PO1 required that "[e]ach Party will be confined to one expert per discipline unless permission is granted by the Tribunal for additional experts."²⁴⁰ In this case, Respondent has violated this provision.
- 6.31. Respondent, without seeking leave to do so, appointed two experts – Dr. Anabo and Dr. Dantie – to opine on the same discipline of the environmental laws of Ethiopia, while Claimant has appointed only one – Prof. Tekle. Besides the fact that this caused Claimant unfair prejudice in having to combat two experts opining on the same discipline, this also added to the costs of this arbitration. In particular, Respondent incurred costs associated with both experts' travel to and accommodation at the Hague as well as their preparation for the hearing, and Claimant incurred additional costs associated with sorting out the disparity in the hearing schedule with the Tribunal,²⁴¹ and having to prepare for multiple experts on the same issue.

²³⁸ See **C-107**, Updated Environmental and Social Impact Assessment for Kilinto Industrial Park dated March 2017, pp. 43-47, 88-90 (discussing existing water pollution problem and linking the same to industries' failure to include any wastewater treatment facility at all).

²³⁹ See Claimant's Statement of Reply and Defense to Respondent's Jurisdictional Objections and Counterclaims, ¶¶ 5.64, 5.78, 5.85-5.86, 5.105 (regarding Claimant's FET claim and how Respondent's pretextual assertion that Claimant's allegedly inadequate EIA doomed its investment contributes to such claim); ¶¶ 5.129, 5.147.5, 5.152, (regarding Claimant's expropriation claim and how Respondent's pretextual assertion that Claimant's allegedly inadequate EIA doomed its investment contributes to such claim); ¶¶ 5.209-5.210 (regarding Claimant's umbrella clause claim related to Respondent's contractual duty not to expropriate, the breach of which involved Respondent's pretextual assertion that Claimant's allegedly inadequate EIA doomed its investment).

²⁴⁰ PO1, ¶ 13.1.

²⁴¹ Email from Ben Reichard, Counsel for Claimant to the Tribunal dated 22 April 2022.

3) **Advance Payment Related Violations**

- 6.32. Respondent did not discharge its duty to pay the advance on costs within the required deadlines. Respondent delayed both the payment of the initial advance,²⁴² and, most importantly, the payment of the main advance on costs.
- 6.33. By its letter of 7 March 2022, the PCA conveyed the instruction from the Tribunal to the Parties to make a supplementary deposit of USD 750,000 (*i.e.*, USD 375,000 per Party).²⁴³ The payment was “to ensure sufficient funds for the preparation of the upcoming hearing” and was to be made no later than 6 April 2022.²⁴⁴ Claimant complied with the Tribunal’s instruction.²⁴⁵ Yet, Respondent’s share remained outstanding throughout the duration of the hearing. Hence, the Tribunal’s and PCA’s expenses related to the preparation of the hearing were entirely made from the Claimant’s portion of the advance.
- 6.34. At the hearing, the Tribunal brought up the issue directly with Respondent, and Respondent promised to make the payment.²⁴⁶ The Respondent only paid its share on 6 June 2022.²⁴⁷

(iii) Costs Shall be Shared Evenly in Case Respondent Prevails

- 6.35. Although UNCITRAL Arbitration Rules Art. 42 mandates allocation of costs in the prevailing party’s favor, the general approach in investor-state arbitrations shifts costs in favor of the *prevailing investor*.²⁴⁸ This means that only the

²⁴² Letter from PCA to Parties dated 23 July 2020 (setting out the deadline of 24 August 2020); Letter from PCA to Parties dated 10 September 2020 (confirming the payment of the Respondent’s share beyond the deadline on 9 September 2020); Letter from PCA to Parties dated 24 August 2020 (confirming receipt of Claimant’s share).

²⁴³ Letter from PCA to Parties dated 7 March 2022.

²⁴⁴ *Id.*

²⁴⁵ Letter from PCA to Parties dated 1 April 2022 (confirming receipt of Claimant’s share).

²⁴⁶ Hearing Tr., Day 9, 258:1-258:12. Notably, Respondent refrained from explaining why its payment was greatly delayed and merely stated that the reason was “obvious.”

²⁴⁷ Letter from PCA to Parties dated 7 June 2022.

²⁴⁸ See, e.g., **CLA-045**, *Pezold v. Zimbabwe*, ¶ 1002; **CLA-004**, *Eureko v. Poland*, ¶ 261; **CLA-029**, *ADC v. Hungary*, ¶¶ 531-533; **CLA-032**, *Gemplus v. Mexico*, ¶¶ 17-22 to 17-24. See also **CLA-195**, Stephan W. Schill, *Arbitration Risk and Effective Compliance Cost-Shifting in Investment Treaty Arbitration*, TDM 1 (2010) (“Schill on Costs”), p. 669; **CLA-192**, *Profaizer*, p. 8 (noting that “it has been seen that successful States are less likely to recover their costs than successful investors.”) See also *infra* note 253.

prevailing investor's costs are shifted to the State while the costs of the prevailing State are usually not shifted but rather evenly split between the parties. Professor Walde observed that there are almost no ICSID and NAFTA cases where losing claimants had to pay the prevailing host State's cost, except in the cases of "spurious claims or bad-faith litigation."²⁴⁹

6.36. As another scholar summarizes:

The survey of awards discussed above supports the conclusion that investment treaty arbitration is developing an increasingly uniform treatment of the allocation of costs. Overall, the practice of allocating costs by investment tribunals can be described as a one-way, **pro-investor cost-shifting approach**. Apart from using cost-shifting as a tool to punish procedural misconduct, tribunals attribute different consequences in terms of costs to the success and the failure of an investor in investment treaty arbitration. **In case the investor is not successful in regard to its claims, arbitral tribunals generally do not shift costs of the proceedings or legal expenses from the respondent government to the losing investor. [...]**

Conversely, whenever the investor successfully invokes the violation of a bilateral or multilateral investment treaty, in practice arbitral tribunals tend to view the investor's success as a decisive factor for shifting the costs of the proceedings²⁵⁰

6.37. Shifting costs in favor of the prevailing investor is justified for several reasons.²⁵¹ Most importantly, an investor's costs result from the host State's violation of the investor's rights under an investment treaty and are thus a consequence of the host State's unlawful conduct. Therefore, the costs shall

²⁴⁹ **CLA-169**, Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*, ¶¶ 132-139.

²⁵⁰ **CLA-195**, Schill on Costs, pp. 672-673 (emphasis added).

²⁵¹ *Id.*, pp. 681-694 (explaining that the "pro-investor cost-shifting approach" is justified due to at least five different reasons.) See also **CLA-169**, Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*, ¶¶ 139-143 (noting, *inter alia*, that "[i]mposing the risk of government attorney costs on losing investors in effect undermines the very purpose of [investment] treaties.")

be and are indeed viewed by international tribunals as part of the investor's damages.²⁵²

- 6.38. Indeed, it is extremely rare in investment treaty arbitration for an unsuccessful claimant to be directed to pay for more than half of the arbitration costs or any portion of the host State's legal fees.²⁵³ The common exceptions are cases where the claimants filed claims which were manifestly without merit or where claimants or their counsel engaged in procedural misconduct.²⁵⁴
- 6.39. Claimant submits that the primary rule under UNCITRAL Arbitration Rules Art. 42 that mandates cost-shifting to a losing party must be approached in light of the "pro-investor cost-shifting approach" developed by investment tribunals.²⁵⁵

²⁵² **CLA-061**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 ("*Noble Ventures v. Romania*"), ¶ 234; **CLA-029**, *ADC v. Hungary*, ¶ 533; **CLA-072**, *SPP v. Egypt*, ¶ 207; **CLA-030**, *Gold Reserve v. Venezuela*, ¶ 860 (indicating that "[c]ompensating Claimant for the cost of bringing this proceeding is required to wipe out the consequences of Respondent's breach of the BIT"); **RLA-56**, *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018 ("*Aven et al. v. Costa Rica*"), ¶ 756 (concluding that "[t]o deny the successful party recovery of costs incurred pursuing its case would have the effect of denying that party's 'full reparation' as required by international law"); **CLA-191**, Hodgson, p. 7 (noting that the cost-follow-the-event approach "is consistent with the broad aim of damages in international law which is to wipe out the consequences of the unlawful act."); **CLA-065**, GAR GUIDE ON DAMAGES, 2018, Buhler's article on costs, p. 313 (noting that "[f]rom the parties perspective, cost recovery builds part of the total compensation they are seeking as damages"), **CLA-195**, Schill on Costs, pp. 684-685. See also **CLA-192**, Profaizer, p. 3 ("[t]he rationale behind allocating costs to the successful party is that the party 'should not be out of pocket as a result of having to seek adjudication to enforce or vindicate its legal rights'").

²⁵³ **CLA-132**, *Oxus v. Uzbekistan*, ¶¶ 1040-1046; **CLA-109**, *Mondev Intl. Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 159; **CLA-061**, *Noble Ventures v. Romania*, ¶¶ 235-236; **RLA-19**, *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, ¶¶ 15.3.3, 16.1(b&c); **RLA-46**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, ¶ 229; **RLA-56**, *Aven et al. v. Costa Rica*, ¶ 765. See also **CLA-169**, Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*, ¶¶ 8, 126 (noting that "[t]he tribunal's decision to order the losing investor-claimant to pay most of the costs of legal representation of the winning state respondent is a significant departure from established jurisprudence" and that "[o]nly – successful – claimants can reasonably argue that attorney costs form part of their damages claim; respondent governments can only argue procedural law principles"), and Annex (listing 25 awards in investor-state arbitrations lost by the investors and demonstrating that only in 6 of those awards some costs of the prevailing state were shifted to the investor); **CLA-195**, Schill on Costs, pp. 660-661, 665 (concluding that "investment tribunals applying either ICSID or UNCITRAL arbitration rules have not clearly endorsed a 'loser pays' approach in order to shift costs in favor of the prevailing government unless the claims brought were spurious or otherwise frivolous" and that "the lack of success of the investor was, therefore, not taken as a relevant factor for the allocation of costs in investment treaty arbitration.").

²⁵⁴ **CLA-195**, Schill on Costs, pp. 660-665 (providing an overview of such exceptional awards). See also **CLA-169**, Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*, ¶¶ 135-138.

²⁵⁵ See **CLA-169**, Separate Opinion of Thomas Wälde in *Thunderbird v. Mexico*, ¶¶ 125-126 (pointing to the necessity to observe established jurisprudence by investor-state tribunals, in particular *vis-à-vis*

Consequently, should Respondent prevail, in light of this approach as well as Respondent's conduct of these proceedings discussed in Section 6.A.ii above, the Tribunal should order that each party bear its own costs and that the arbitral costs be divided evenly between the parties.

B. Interest

- 6.40. As discussed above, a cost award represents indemnification of the prevailing party's damages associated with the arbitration.²⁵⁶ As such, post-award interest must be due on the amount of costs in case they are not timely paid by the losing party.²⁵⁷
- 6.41. Claimant submits that the pre-award interest as calculated by Claimant's quantum expert,²⁵⁸ compounded annually, or any higher rate to be determined by the tribunal must be awarded on the amount of costs.²⁵⁹ Indeed, many tribunals awarded such interest on costs.²⁶⁰

C. Conclusion

- 6.42. Considering the foregoing, Claimant requests that, should Claimant prevail, the Tribunal order Respondent to bear all the costs Claimant incurred in relation to this arbitration and include any further costs that Claimant may incur in the future in relation to this arbitration. In addition, Claimant requests that the Tribunal award Claimant compound interest on its costs in this arbitration.
- 6.43. Should Respondent prevail, Claimant requests the Tribunal to order that each party bear its own costs and that the arbitral costs be divided evenly between the parties.

the application of the costs-follow-the-event rule set out in the UNCITRAL Rules). *See also* **CLA-138**, Schill on *MFN*, 2017, p. 916 (noting the importance of following *jurisprudence constante* by investment tribunals) and p. 930, note 74 (criticizing a tribunal's finding based on the fact that it contradicts the way in which other tribunals have approached the issue).

²⁵⁶ *Supra* ¶ 6.37.

²⁵⁷ *See, e.g.*, **CLA-065**, GAR GUIDE ON DAMAGES, 2018, pp. 302-303, 330.

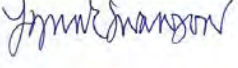
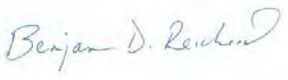
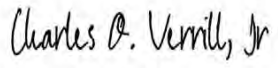
²⁵⁸ A&M Report, ¶ 150.

²⁵⁹ *See* **CLA-065**, GAR GUIDE ON DAMAGES, 2018, pp. 302-303 (suggesting that post-award interest must be awarded at the same rate as the pre-award interest or at some higher rate).

²⁶⁰ *See, e.g.*, **CLA-068**, *Tethyan v. Pakistan*, Award, ¶¶ 1856-1857; **CLA-045**, *Pezold v. Zimbabwe*, ¶ 1011; **CLA-029**, *ADC v. Hungary*, ¶ 543(3).

7. RESERVATION OF RIGHTS

- 7.1. 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.
- 7.2. Claimant also hereby expressly reserves the right to further amend, supplement, and augment its post-hearing submission, and in particular its cost submission, 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.

Annex A: Breakdown of Claimant's Costs

Code	Expense Category	Amount
1	LEGAL FEES ⁽¹⁾	\$5.617.896,26
	1.1 Jones Swanson Huddell & Daschbach LLC	\$3.412.137,50
	1.2 Fishman Haygood L.L.P	\$1.828.615,00
	1.3 İlhan & Yavuztürk Attorneys at Law	\$330.143,76
	1.4 Verrill Advocacy, LLC	\$47.000,00
2	EXPERT FEES & COSTS ⁽²⁾	\$856.683,74
	2.1 Alvarez & Marsal	\$589.819,14
	2.2 Dale Whittington	\$238.956,00
	2.3 Mekete Bekele Tekle	\$27.908,60
3	ARBITRATION RELATED COSTS ⁽³⁾	\$324.662,08
4	PCA FEES AND EXPENSES ⁽⁴⁾	\$450.000,00
	GRAND TOTAL	\$7.249.242,08
	⁽¹⁾ LEGAL FEES include the fees of the primary legal team for Claimant, which consisted of lawyers from four law firms: Jones Swanson Huddell & Daschbach LLC; Fishman Haygood L.L.P; İlhan & Yavuztürk Attorneys at Law and Verrill Advocacy, LLC.	
	⁽²⁾ EXPERT FEES & COSTS include the fees and costs arising from the Expert Report of Alvarez & Marsal, Expert Report of Dale Whittington and Expert Report of Mekete Bekele Tekle.	
	⁽³⁾ ARBITRATION RELATED COSTS include travel, accommodation, meals, document management, translation, printing, courier services, etc. expenses incurred in connection with this arbitration.	
	⁽⁴⁾ PCA FEES AND EXPENSES include initial advance on costs in the amount of \$75,000.00 and supplementary advance on costs in the amount of \$375,000.00.	